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'Part of the Future': Family Law, Children's Interests and Remote Proceedings in Australia during COVID-19

Felicity Bell*

In March 2020, the family law courts, like other Australian courts, moved to hearing proceedings 'remotely', by phone, audio-visual link or software platform. This article examines the particular circumstances of family law cases that likely impact on whether it is appropriate for remote procedures to be used. Giving context to these themes, the article reports on a survey of Australian federal judicial officers about their experiences of conducting family law proceedings remotely.

I Introduction

The rapid expansion of 'remote' proceedings to family law matters during the COVID-19 pandemic[1] was met with reactions both hopeful and disapproving.[2] As essential services,[3] the family law courts, like all Australian courts, remained operational but transitioned to remote hearings (those conducted by telephone or audio-visual communication platforms) in March/April 2020. The Family Court of Australia and the Federal Circuit Court of Australia — collectively 'the family law courts' — hear 'private' family law disputes pursuant to the *Family Law Act 1975* (Cth) ('*FLA*'). The state-based Children's Courts, which exercise jurisdiction

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1 See World Health Organisation, 'Coronavirus Disease (COVID-19) Pandemic' <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>.

2 For example, an order made by telephone to remove a two-day-old baby from its mother was referred to as 'horribly cruel': Anna Khoo, 'Remote Hearings for Family Courts "Horribly Cruel"', *BBC News* (online, 4 June 2020) <https://www.bbc.com/news/uk-england-52854168>; cf Kate Allman, 'Lunch with Registrar Brett McGrath', *Law Society Journal* (online, 10 June 2020) <https://lsj.com.au/articles/skype-with-family-court-national-covid-19-registrar-brett-mcgrath/> (referring to the 'opportunity' presented by the pandemic).

3 Michael Legg, 'The COVID-19 Pandemic and Courts as Essential Services' (2020) 94(7) *Australian Law Journal* 479.

over care and protection matters, also moved to limit face-to-face hearings.[4] Typically, this was in line with procedures adopted by the Magistrates Courts (or Local Courts in New South Wales), of which the Children's Courts form a part.[5]

In a statement made on 26 March, the Chief Justice of the Family Court announced:

> Judges, Registrars and staff are committed to providing access to justice when called upon to do so. This includes conducting hearings both via videoconferencing through the use of Microsoft Teams or other platforms, or by telephone. The Courts are also conducting mediations electronically and through other safe means.[6]

Michael Legg has explained that '[t]he use of video conferencing [by courts] can be traced back to at least 1997 and is now used extensively in Australian courts, although usually referred to as an audio visual link'.[7] Originally, audio-visual link ('AVL') technology was developed specifically for the courts,[8] and was predominantly used to connect one participant in a remote location to the courtroom, where the main proceedings were occurring face-to-face.[9] With the onset of the pandemic, the family law courts turned also to the use of third-party software platforms such as Zoom and Microsoft Teams.[10] It was later reported that more than 80 per cent of the family law courts' work was conducted by electronic means during the period from March to May 2020.[11] Similar changes, in terms of a rapid move to entirely electronic hearings, occurred in comparable jurisdictions such as England and Wales and the United States of America. In mid-

4 See, eg, Children's Court of New South Wales, 'Public Notice of Response to Covid-19 Pandemic No 6' (9 July 2020); Jacqueline So, 'COVID-19 and Australian Courts and Legal Bodies Updates: 27 April', *Australasian Lawyer* (26 April 2020) <https://www.thelawyermag.com/au/news/general/covid-19-and-australian-courts-and-legal-bodies-updates-27-april/220698>.

5 Children's Court of New South Wales (n 4).

6 Family Court of Australia and Federal Circuit Court of Australia, 'Statement from the Hon Will Alstergren — Parenting Orders and COVID-19' (26 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260320>.

7 Michael Legg, 'The COVID-19 Pandemic, the Courts and Online Hearings: Maintaining Open Justice, Procedural Fairness and Impartiality' (2021) 49 *Federal Law Review* (forthcoming); available at SSRN <https://ssrn.com/abstract=3681165> 4.

8 Ibid, citing, eg, Supreme Court of New South Wales, *The Virtual Courtroom — Practitioner's Fact Sheet* (Version 1, 23 March 2020).

9 Bruce M Smyth et al, 'COVID-19 in Australia: Impacts on Separated Families, Family Law Professionals, and Family Courts' (2020) 58(4) *Family Court Review* 1022, 1036 n 9.

10 Zoom <https://zoom.us/>; Microsoft Teams <https://www.microsoft.com/en-au/microsoft-365/microsoft-teams/group-chat-software>.

11 Family Court of Australia, 'Gradual Resumption of Face-to-Face Hearings in the Courts' (Media Release, 12 June 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/mr120620>.

June, the Australian family law courts announced a gradual resumption of face-to-face hearings for matters that could not be conducted electronically.[12]

Sharply differing views have been expressed about the benefits and detriments associated with remote hearings for family law matters. Perhaps more significantly, there are varied views about the types of family law case where electronic hearings are of especial benefit or detriment, and how these might be best identified and managed by the courts. In Australia, where the spread of COVID-19 has been relatively contained by comparison with other countries, there is nevertheless interest in the continuation of remote proceedings for some family law matters.[13] This is especially so given a general backdrop of concern about the cost of access to family law legal services, particularly if litigating.[14] Australia's large size means that some populations are geographically remote, and rural and regional areas are typically serviced by family law circuits. Indeed, given the scale of the continent, an early motivation for the use of AVL in Australian courts was to connect those living in remote areas.[15]

This article reports on a small survey of judicial officers in the Family Court and Federal Circuit Court ('FCC') about their views on conducting remote proceedings during COVID-19. These survey findings, described in Part IV, are contextualised by discussion about some of the broader issues that have arisen both in Australia and overseas about the use of remote procedures for family law matters, which are considered in Part III. In conclusion, the article suggests that remote procedures are an additional way of entering the 'multidoor courthouse' — a useful means of access but one which is only appropriate to certain types of disputes.[16]

Before embarking on this discussion, some additional background on the process by which the Australian family law courts came to take up remote proceedings in the pandemic context is provided.

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12 Ibid. With the onset of a 'second wave' in Victoria, this resumption was slowed and stopped in some locations: Smyth et al (n 9) 1033.

13 Carmella Ben-Simon and Annette Charak, 'Interview with the Honourable Chief Justice Alstergren' [2019] (166) *Victorian Bar News* 34.

14 See, eg, Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, vol 2, 2014) 846–70; Australian Law Reform Commission, *Family Law for the Future* (Report No 135, March 2019) 44 [1.41].

15 Anne Wallace, '"Virtual Justice in the Bush": The Use of Court Technology in Remote and Regional Australia' (2008) 19 *Journal of Law and Information Science* 1.

16 Frank EA Sander, 'The Multi-Door Courthouse' (1976) 3(3) *Barrister* 18; Frank EA Sander and Stephen B Goldberg, 'Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure' (1994) 10(1) *Negotiation Journal* 49.

II Backdrop: The Pandemic and the Family Law Courts' Response

In a notice to the legal profession on 19 March 2020, the family law courts indicated that matters would be dealt with 'by telephone, and *when it becomes possible*, by videoconferencing', unless a face-to-face hearing was urgently required.[17] At that time, the courts had no capacity for remote hearings by videoconference.[18] As of 24 March, registry services were provided remotely.[19] By early April, the courts reported:

> Microsoft Teams has been rolled out to each Judge, Registrar and Family Consultant. Each Judge and Registrar is now able to conduct hearings electronically from each Registry. Whilst urgent matters will be given priority, Judges now have the ability to continue to hear defended applications, trials and appeals.
>
> This technology was rolled out at great speed to 101 judges, 35 Registrars and servicing up to 40 different locations.[20]

At the same time, the courts moved extremely quickly to the use of digital court files to complement this move to electronic hearings.[21]

In April 2020, the courts announced the creation of a 'COVID-19 List' to deal with an increase in urgent applications being made to the court, apparently as a result of the pandemic.[22] In a statement given in March, the Chief Justice provided guidance about how parents or carers might, if needed, ideally work together to modify arrangements for care of children that had been disrupted or rendered inappropriate by the pandemic:

> Parents are naturally deeply concerned about the safety of their children and how the COVID-19 virus will affect their lives. Part of that concern in family law proceedings

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17 Family Court of Australia, 'Notice to the Profession — COVID-19 Measures and Listing Arrangements' (19 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/covid-notice> (emphasis added).

18 Smyth et al (n 9).

19 Family Court of Australia, 'Changes to Registry Services' (Media Release, 23 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/covid19-230320>.

20 Family Court of Australia, 'Notice to the Profession — 9 April 2020' (Media Release, 14 April 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/covid-notice-090420>.

21 Ibid. This is remarkable, given that in a December 2019 interview the Chief Justice commented that he was 'anticipating that we will have an electronic court filing system up and running soon, but it will probably take six months to roll out': Ben-Simon and Charak (n 13) 38–9.

22 Family Court of Australia, 'The Courts Launch COVID-19 List to Deal with Urgent Parenting Disputes' (Media Release, 26 April 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/covid/covid-profession/mr260420> ('The Courts Launch COVID-19 List').

> can extend to a parent's or carer's ability to comply with parenting orders and what should be properly expected of them by the Courts in these unprecedented times.[23]

The COVID-19 List announcement, and subsequent Practice Directions outlined the type of matters suitable for filing in the List, including those with allegations of family violence, supervised contact arrangements, where border restrictions were creating difficulties for parents or children traveling,[24] or where a child or parent had contracted COVID-19.[25]

The shift from face-to-face to electronic or virtual proceedings may raise, generally, issues of procedural fairness and court access.[26] In family law matters there are additional issues around open justice (already, to a degree, contentious in the family law space), the safety of participants, and a more nebulous sense of what 'may be lost' with the loss of the physical courtroom.[27] This may include whether, in some cases, a virtual hearing is not appropriate due to the serious issues involved, such as where the making of an order for no contact between a parent and child is a possibility. Gráinne McKeever commented, in relation to reviews undertaken in the United Kingdom, that '[t]he overall finding … suggests that those courts dealing with questions of law rather than contestations of fact are better suited to remote hearings',[28] but family law trials inevitably involve contested issues of fact. Further, family law disputes over children and parenting inherently involve vulnerable non-participants (children) whose best interests must be considered, and indeed are paramount in substantive decision-making.[29] Delay may be antithetical to children's interests, which must also be borne in mind when the options are to either proceed via remote hearing or to postpone. In terms of the paperwork that attends family law proceedings, modifications to the usual procedure to enable a virtual hearing may create risks. For example,

> documents that are produced on subpoena are often of a sensitive and highly personal nature and cannot ordinarily be copied. To conduct a "virtual trial" it may be necessary to allow records such as Police and Child Welfare records, personal medical records,

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23 Family Court of Australia and Federal Circuit Court of Australia, 'Statement from the Hon Will Alstergren — Parenting Orders and COVID-19' (26 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr260320>.

24 In recognition that interstate travel had become highly restricted during the pandemic, as had overseas travel.

25 Family Court of Australia, 'The Courts Launch COVID-19 List' (n 22). See *Kocak v Fahri* [2020] FamCA 652 (noting that the case should not have been filed in the COVID-19 List).

26 Legg (n 7); *Sayid v Alam* [2020] FamCA 400, [2] ('*Sayid*').

27 Emma Rowden, 'Distributed Courts and Legitimacy: What Do We Lose When We Lose the Courthouse?' (2018) 14(2) *Law, Culture and the Humanities* 263.

28 Gráinne McKeever, 'Remote Justice? Litigants in Person and Participation in Court Processes during Covid-19' [2020] *MLRForum* 005 <http://www.modernlawreview.co.uk/mckeever-remote-justice>.

29 *FLA* s 60CA.

> (including counselling and psychologists' records) or records of sexual assault investigations, to be copied, scanned and emailed to and between parties and/or their legal representatives.[30]

In the rapidly unfolding environment of the times the Australian family law courts offered no specific guidance on managing these competing issues. This is to a large degree unsurprising, given the autonomy afforded individual judicial officers in managing their own work and courtroom practices. The Family Court's statement of 9 April explained:

> Practitioners should consider carefully whether there is any reason why trials of particular matters cannot properly be heard via Microsoft Teams. While it is new for us all, when a proper analysis is undertaken of the real issues in an upcoming trial that require factual determination, very often those can be dealt with entirely appropriately in a video hearing. If there is a dispute about whether a trial should proceed via video, the docketed Judge will determine that dispute. Practitioners should not assume that resistance to a video trial will automatically be successful.[31]

This meant that it largely came down to individual parties, lawyers and judges as to the considerations that would be factored in when it came to remote hearings. In terms of guidance from superior court level, and in terms of research, more has emerged from the United Kingdom. In that jurisdiction, too, however, the case law available to date has emphasised the wide ambit of judicial discretion when it comes to determining whether remote proceedings are, or are not, appropriate in family law proceedings.[32]

There has been little chance yet for sustained research into the use of remote proceedings in Australian family law matters.[33] In the United Kingdom, the Family Division of the Court Service undertook a two-week 'rapid consultation' in April 2020 on the use of remote hearings in family law, conducted by the Nuffield Family Justice Observatory ('FJO').[34] The FJO has now published the findings of its follow-up consultation.[35] Some small-scale research has also now

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30 Smyth et al (n 12) 1032.

31 Family Court of Australia, 'Notice to the Profession — 9 April 2020' (n 20).

32 See, eg, *Re A (Children) (Remote Hearing: Care and Placement Orders)* [2020] EWCA Civ 583 ('*Re A (Children)*') (discussed below Part III(A)).

33 The Australian Centre for Justice Innovation ('ACJI') at Monash University, Melbourne, is undertaking research related to remote hearings by interviewing barristers: ACJI Blog (27 August 2020) <https://acjiblog.wordpress.com/2020/08/27/have-you-appeared-in-a-remote-or-online-hearing-we-want-to-hear-from-you/>.

34 Mary Ryan, Lisa Harker and Sarah Rothera, *Remote Hearings in the Family Justice System: A Rapid Consultation* (Nuffield Family Justice Observatory, 2020) ('*Rapid Consultation*').

35 Mary Ryan, Lisa Harker and Sarah Rothera, *Remote Hearings in the Family Justice System: Reflections and Experiences: Follow-Up Consultation* (Nuffield Family Justice Observatory, September 2020) ('*Follow-Up Consultation*').

been conducted elsewhere — for instance, of family law proceedings undertaken remotely in Texas.[36]

It was against this backdrop that ethics approval was sought and obtained by the author in June 2020 to conduct a survey of Australian federal judicial officers about their experiences of conducting proceedings remotely.[37] The survey contained a mixture of multiple-choice questions, sliding-scale questions and comments boxes, and could be completed in 10–15 minutes. An invitation to participate in the survey was sent to all judges of the three federal courts — the Federal Court of Australia, the Family Court and the FCC — approximately 150 judges in total. Forty responses were received. Of these, 29 were judges of the Family Court or the FCC. The Family Court undertakes exclusively family law work, while the FCC's workload is approximately 90 per cent family law,[38] though it also has a general federal law jurisdiction. The results from these 29 participants, particularly those comments that refer specifically to family law proceedings, are reported in Part IV, to give context to the discussion that follows.

III Remote Proceedings — Issues for Family Law

Parties to parenting disputes have few substantive 'rights' under the *FLA*, with most rights being held by children.[39] However, the limited rights that parties to all kinds of family law disputes do possess relate to having the dispute determined by means of a fair procedure. Issues of procedural fairness arise when considering whether parties may be disadvantaged through being required to use technology. There is a separate, additional question of whether the 'humanity' of family law decisions may necessitate, in some circumstances, a face-to-face hearing. These issues must also be balanced against the benefits that remote hearings could confer on those who are in need of protection, who would prefer to avoid travel, or who would be intimidated by the physical courtroom or presence of the other party. The Nuffield FJO found that 'in some cases where domestic abuse is an issue, some parties have welcomed a remote hearing'.[40] However, the FJO also found many other communication problems, both during hearings and between parties and their lawyers, and noted that those with a disability or who required

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36 Elizabeth Thornburg, 'Observing Online Courts: Lessons from the Pandemic' (Research Paper No 486, SMU Dedman School of Law, September 2021).

37 University of New South Wales Ethics Approval HC200454.

38 Explanatory Memorandum, Federal Circuit and Family Court of Australia Bill 2018 (Cth) 15, [54].

39 See, eg, *FLA* ss 43(1)(c), 60B(2)–(4), 66C.

40 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 17.

an interpreter experienced particular difficulties.[41] This Part outlines some key issues that chiefly affect family law proceedings conducted remotely.

A *Safety and Vulnerable Parties*

The use of remote technology in Australia originated with the taking of evidence from vulnerable witnesses, such as children and victims of sexual assault, to protect them from physical appearance in the same courtroom space as the alleged perpetrator.[42] There have been a number of studies undertaken as to the effect of using such procedures in these cases.[43] The use of technology has since broadened. Prior to COVID-19, technology was used to overcome issues of geographic remoteness, and frequently to connect people held in correctional facilities to the courts.[44] Somewhat ironically, however, video technology was reportedly under-used in family law matters where one party's safety or wellbeing is in issue, at least prior to the pandemic. Concerns about under-utilisation were ventilated in relation to the *Family Law Amendment (Family Violence and Cross-examination of Parties) Act 2018* (Cth), which was the subject of an inquiry by the Senate Legal and Constitutional Affairs Committee.[45] The Law Council of Australia, the national representative body of state and territory law societies, submitted that while video link and other methods, such as the use of a screen, were legally available options,

> the reason these options are not more often used by the family courts is a lack of resources to provide such alternatives. In the majority of cases, video link facilities, alternative court rooms or screens are simply not available to the Judge.[46]

A 2017 report from the United Kingdom's Ministry of Justice found a similar lack of consistency in the availability of protective mechanisms for vulnerable witnesses — for example, that 'arrangements for video link were not always

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41 Ryan, Harker and Rothera, *Follow-Up consultation* (n 35) 2.

42 Wallace (n 15) 3.

43 Judith Cashmore and Lily Trimboli, *An Evaluation of the New South Wales Child Sexual Assault Specialist Jurisdiction Pilot* (New South Wales Bureau of Crime Statistics and Research, 2006); Natalie Taylor and Jacqueline Joudo Larsen, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (Research and Public Policy Series No 68, Australian Institute of Criminology, 2005).

44 Carolyn McKay, *The Pixelated Prisoner: Prison Video Links, Court 'Appearance' and the Justice Matrix* (Routledge, 2018) 19.

45 The legislation enacted a prohibition on a self-represented party engaging in cross-examination of the other party in instances where allegations of family violence are raised.

46 Law Council of Australia, 'Family Law Amendment (Family Violence and Cross-examination of Parties) Bill 2018, Submission 26' (16 July 2018) 11.

honoured'.[47] Generally, both Australia and the United Kingdom appear to have been (at least prior to the pandemic) afflicted by a cultural problem in terms of a lack of proactivity on the part of individual lawyers and judges when it comes to considering video links as an option,[48] and also from under-resourcing. In a submission to the Productivity Commission in 2014, the Executive Director of Court Services for the FCC explained:

> An issue that requires further consideration is the lack of suitable telephone or video equipment on occasions. In some rural and regional locations there are no suitable video facilities and telephone reception for people relying on mobiles can be poor. The poor facilities can on occasions limit the Courts' capacity to extend these services.[49]

Unsurprisingly, then, some characterised the move to remote hearings, especially without necessitating any travel to a physical court, as potentially beneficial for participants, particularly in terms of safety and security.[50] A hearing in which all participants are remote from one another also avoids the issue of one party or witness being remote and therefore in a different position to others. On the other hand, there may be disadvantages, such as the person being separated from supports and/or legal representatives, feeling isolated,[51] and the intrusion of court proceedings into one's home:

> This breach of the border between home and the court has also been a difficulty for parties and for children. The [Nuffield] report cited victims of domestic violence feeling distressed by hearings effectively taking place in their homes. With the schools closed due to the COVID-19 pandemic there have also been significant issues with the presence of children during proceedings and the risk, for example, of parents' distress at the end of hearings being immediately evident to their children.[52]

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47 NE Corbett and A Summerfield, *Alleged Perpetrators of Abuse as Litigants in Person in Private Family Law: The Cross-Examination of Vulnerable and Intimidated Witnesses* (Ministry of Justice, 2017) 24–5, cited by Rachel Carson et al, *Direct Cross-Examination in Family Law Matters: Incidence and Context of Direct Cross-Examination Involving Self-Represented Litigants* (Australian Institute of Family Studies, 2018) 46.

48 See, eg, Tracey Booth, 'Family Violence and Judicial Empathy: Managing Personal Cross Examination in Australian Family Law Proceedings' (2019) 9(5) *Oñati Socio-Legal Series* 702 <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1037>; Joyce Plotnikoff and Richard Woolfson, '"Measuring Up?" Evaluating Implementation of Government Commitments to Young Witnesses in Criminal Proceedings' (Research Report, National Society for the Prevention of Cruelty to Children, 2009).

49 Steve Agnew, 'Submission 258 on Productivity Commission Draft Report — Access to Justice Arrangements of April 2014' (26 May 2014) 4–5.

50 Allman (n 2).

51 JUSTICE, *Understanding Courts* (Research Report, 2019) 54.

52 Mr Justice MacDonald, 'The Remote Access Family Court — What Have We Learnt So Far in England and Wales?' (Paper for the International Academy of Family Lawyers Webinar, 21 May 2020) <https://www.judiciary.uk/wp-content/uploads/2020/05/The-Remote-Access-Family-Court-What-Have-We-Learnt-So-Far-IAFL-21.05.20-Final-1.pdf>.

Identifying, however, whether appearing remotely is likely to be a positive or negative experience for a vulnerable witness is predominantly a subjective exercise. So too is the determination as to whether a party will be disadvantaged by, or unable to properly participate in, remote proceedings. It has been suggested previously that remoteness makes it more challenging for the judicial officer to identify whether a person is having difficulties in participating.[53] This may be compounded in a situation where all participants are taking part remotely, including the judge, rather than selected witnesses only being remote.

This issue was considered in an England and Wales Court of Appeal decision, *Re A (Children) (Remote Hearing: Care and Placement Orders)* ('*Re A (Children)*').[54] That case concerned four children living at that time in foster care. The Local Authority[55] wished to place the elder two in long-term foster care and the younger two into adoption placements.[56] An appeal against an order that the matter be heard on a 'hybrid' basis (with one party in court but others remote) was successful. The Court of Appeal noted that '[f]inal hearings in contested Public Law care or placement for adoption applications are not hearings which are *as a category* deemed to be suitable for remote hearing; it is, however, possible that a particular final care or placement for adoption case may be heard remotely.'[57] The Court also listed factors to consider when deciding whether it was appropriate to hear a case remotely, or not.[58] This guidance has salience for Australian private family law cases, too.

In *Re A (Children)*, the Court described a number of factors affecting Mr A, the father of the children, related to lack of access to technology, disability, and the physical environment and circumstances under which he would be participating:

> It was accepted before the judge that Mr A did not have any technology available personally to him at home to enable him to connect with a remote video hearing. At most he would be able to do so by joining with his wife via her iPad.
>
> Mr A has limited abilities, and some disabilities, which render him less able to take part in a remote hearing. He has been diagnosed as dyslexic. He is unused to reading. He has a short attention span, is emotionally fragile and brittle and quickly becomes exasperated.

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53 Magistrates Association, 'Magistrates Association Response to Judicial Ways of Working 2022: Crime Consultation' (2018) 5 <https://www.magistrates-association.org.uk/Portals/0/20%20Judicial%20Ways%20of%20Working%20FAMILY%20response%20June%202018.pdf>.

54 *Re A (Children)* (n 32).

55 The Local Authority is the relevant welfare department. In Australia, this is typically a state department such as the Department of Family and Community Services in New South Wales or the Department of Health and Human Services in Victoria.

56 *Re A (Children)* (n 32) [13].

57 Ibid [8] (emphasis in original).

58 Ibid.

> The process of joining the hearing from their home would be undertaken by Mr and Mrs A with his 15-year-old son in residence, who would be locked-down with them throughout the days of the remote hearing.
>
> It is not clear how Mr A would be able to communicate with his legal team during the remote part of the hearing, but it is likely that any such communication would fall well short of that which normally applies to a lay party who is personally attended at court by a solicitor and counsel.[59]

This last point — concerning interactions with legal practitioners — has been noted elsewhere,[60] including in regard to how it might limit interactions between an accused in criminal proceedings and their legal counsel.[61] It was raised obliquely in an Australian decision, *Harlen v Hellyar [No 3]*,[62] in which Wilson J allowed late adjournment of a trial based on, inter alia, Ms Harlen's inability to be physically present with her solicitor during the trial, due to her reliance on public transport from a regional area and reluctance to travel on public transport during the pandemic; and the fact that she did not own a computer and required an interpreter.[63] Wilson J noted:

> I asked for … submissions about the approach adopted by Perram J in *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [('*Capic*')] where his Honour rejected an adjournment application in the face of COVID-19 pandemic conditions. [Ms Harlen's counsel] said that the case involved an adjournment application made six weeks prior to the trial involving sophisticated parties whereas this case did not involve those circumstances with the consequence that the case was immediately distinguishable.[64]

Lack of 'sophistication' as a barrier to a party's participation is also apparent in other decisions. In *Sayid v Alam* ('*Sayid*'), Harper J held that the self-represented mother would be too disadvantaged by undertaking a six-day trial remotely.[65] In an FCC case the judge listed several factors that militated against undertaking the hearing remotely, including that the respondent was under a disability and represented by a litigation guardian.[66] In another case, there was considerable sensitive material that would need to be tendered and put to witnesses, as well as

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59 Ibid [50]–[53].

60 Ryan, Harker and Rothera, *Follow-Up consultation* (n 35); JUSTICE (n 51) 54; IV Eagly, 'Remote Adjudication in Immigration' (2015) 109(4) *Northwestern University Law Review* 89.

61 McKay (n 44) 172; Susan Kluss, 'Virtual Justice: The Problems with Audiovisual Appearances in Criminal Courts' (2008) 46(4) *Law Society Journal* 49, 50: 'concern has been expressed by practitioners that the blanket use of the technology … has the potential to alienate the accused prisoner from the court, inhibit the relationships between legal practitioner and client, and reduce the quality of justice in general'.

62 [2020] FamCA 560.

63 Ibid [27].

64 Ibid [24], referring to *Capic v Ford Motor Company of Australia Ltd (Adjournment)* [2020] FCA 486 ('*Capic*').

65 *Sayid* (n 26).

66 *Walders v McAuliffe* [2020] FCCA 1541.

multiple parties, as an Independent Children's Lawyer was representing the child's interests.[67]

B *Children's Interests*

Family law children's matters differ from other civil proceedings because of the focus on a child or children. While it is very rare for minor children to be parties to family law proceedings, they are central to parenting disputes, which typically revolve around the child's best interests.[68] Yet scholar Noel Semple has commented that, at least in the Canadian context, although substantive family law distinctively upholds a 'non-party's interests', its procedures are 'fundamentally akin to other civil litigation'.[69] Semple observes that while the child's best interests are paramount (as is the case in Australia), the process by which best interests are determined does not prioritise those same interests. Semple examines, particularly, parents who litigate over many years and vexatious litigants as examples of a child's inability to control proceedings.[70] In the limited case law on remote procedures that is available to date, parents or parties' rights to procedural fairness may clash in other ways with children's rights or interests, notably for matters involving the child to be determined expeditiously.

In commercial litigation taking place in Australia during the pandemic, such as *Capic*, the courts have now had occasion to weigh the potential disadvantages of a remote hearing against those engendered by delay.[71] In family law matters, however, delay tends to take on a greater significance, as the uncertainty it represents is already recognised as being typically inimical to children's wellbeing. Moreover, children generally have no choice about litigation commencing or continuing — they are most unlikely to be instigators of the dispute. These issues predate the pandemic, particularly that of delay, which has been widely remarked upon, including in the Australian Law Reform

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67 *Lainhart v Ellinson* [2020] FCCA 1877.

68 See, eg, *FLA* ss 60B(1), 60CA and 60CC.

69 Noel Semple, 'Whose Best Interests — Custody and Access Law and Procedure' (2010) 48(2) *Osgoode Hall Law Journal* 287, 302.

70 Ibid.

71 *Capic* (n 64); *JKC Australia LNG Pty Ltd v CH2M Hill Companies Ltd* [2020] WASCA 38. In *Seven Sisters Vineyard Pty Ltd v Konigs Pty Ltd* [2020] VSC 161 it was held that 'extending latitude' to parties, lawyers and witnesses by allowing adjournment in the face of COVID-19 conditions was not inconsistent with the overarching purpose of the *Civil Procedure Act 2010* (Vic). See Michael Legg and Anthony Song, 'Commercial Litigation and COVID-19 — the Role and Limits of Technology' (2020) 48(2) *Australian Business Law Review* 159, 167.

Commission's 2019 report into the family law system.[72] The family law courts were already engaged in various endeavours to try and clear a backlog of cases,[73] and so the prospect of further adding to that backlog is of concern.[74]

In England and Wales, several family law cases have considered the issue of delay. This may be, in part, due to a larger population and because the family law jurisdiction there encompasses both private and public law proceedings, while in Australia these are (as noted) separate jurisdictions.[75] In England and Wales, COVID-19 and the associated move to electronic hearings brought to light, in several judgments, the possibility of a clash between according fairness to the parties and the best interests of the child the subject of the dispute.

In April 2020, the President of the Family Division of the High Court of England and Wales considered the issue in a case reported as *Re P (A Child: Remote Hearing)* ('*Re P*').[76] The case concerned a seven-year-old girl who, the Local Authority alleged, had been occasioned significant harm by her mother as a result of fabricated or induced illness. The complexity of those allegations, and the evidence supporting them, was noted. The Local Authority wished the case to proceed by way of video. Delaying the case would not be in the child's best interests, it was submitted, given that she was already experiencing 'significant emotional harm by being held in limbo',[77] not knowing whether she would be returned to her mother's care. The mother submitted that fairness and justice would be compromised were the proceedings to be heard remotely.[78] The situation was complicated by the fact that the mother was unwell, having herself possibly contracted COVID-19. As the President noted, this meant that it would not be possible for her solicitors or a member of their staff to be present with her

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72 Australian Law Reform Commission (n 14) [3.84]–[3.86].

73 Family Court of Australia, 'Hundreds of NSW Families Encouraged to Resolve Lengthy Family Law Disputes during the Court's Summer Campaign' (Media Release, 2 March 2020) <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/news/mr020310>. The campaign was postponed due to the pandemic.

74 This is a focus of the current inquiry by the United Kingdom Parliament's House of Commons Justice Committee into court capacity: 'Court Capacity', *UK Parliament* (Webpage) <https://committees.parliament.uk/work/481/court-capacity/>; Natalie Croxon, 'COVID-19 Leads to Concerns about Court Delays and Backlog', *Bendigo Advertiser* (21 March 2020).

75 There has been some limited reportage in Australia of issues arising in the care and protection jurisdiction, primarily related to the relevant government department suspending all face-to-face contact between children in out-of-home care and their parents: *Secretary of the Department of Health and Human Services v Children's Court of Victoria* [2020] VSC 144, [33]–[34]; Jewel Topsfield, 'Magistrate Orders Children's Visits with Parents to Continue during Pandemic', *The Age* (online, 22 April 2020) <https://www.theage.com.au/national/victoria/magistrate-orders-children-s-visits-with-parents-to-continue-during-pandemic-20200421-p54lvc.html>; Ella Archibald-Binge, '"Progress Will be Lost": Funding Cuts to Hit Aboriginal Child Protection', *The Sydney Morning Herald* (online, 29 May 2020).

76 [2020] EWFC 32.

77 Ibid [15].

78 Ibid [19].

during the hearing. The mother also required an interpreter. Ultimately, the President, noting the particular challenges of determining whether a remote hearing was appropriate in a case involving a child's welfare, explained:

> A range of factors are likely to be in play, each potentially compelling but also potentially at odds with each other. The need to maintain a hearing in order to avoid delay and to resolve issues for a child in order for her life to move forward is likely to be a most powerful consideration in many cases, but it may be at odds with the need for the very resolution of that issue to be undertaken in a thorough, forensically sound, fair, just and proportionate manner.[79]

Moreover, the President noted that the unique nature of each individual case was a compelling reason as to why individual judges or magistrates must make the decision as to whether remote proceedings are appropriate, tending against the imposition of any blanket rules. The type of case or 'seriousness of the decision' to be made might be relevant, but the President noted that 'other factors that are idiosyncratic of the particular case itself, such as the local facilities, the available technology, the personalities and expectations of the key family members and, in these early days, the experience of the judge or magistrates in remote working' would also be important.[80] *Re P* therefore almost offers 'non-guidance' as to the balancing of the child's interests and procedural fairness to one or more parties. Its unusual facts — allegations of fabricated or induced illness perpetrated by a parent being very rare — also make it ill-suited as a precedent in that regard.

To date, there are few reported judgments from the Australian family law jurisdiction where the specific issue of delay in a children's case has needed to be weighed against the prospect of engaging in a remote hearing. The issue was considered in an FCC decision where the judge found that, with reference to *Re A (Children)* and *Re B (Children) (Remote Hearing: Interim Care Order)*,[81] it would not be appropriate to hear the matter remotely:[82]

> [I]n this case, I am satisfied that the hearing cannot proceed remotely, in light of the content of the proceedings. What is at stake in these proceedings are the children's best interests. Those interests are served by expeditious hearing but potentially prejudiced by the mode of remote hearing available.[83]

In *Sayid*, the judge likewise found that the need for the court to be satisfied as to what would be in the children's best interests militated against proceeding with a final hearing:

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79 Ibid [24].
80 Ibid.
81 [2020] EWCA Civ 584.
82 *Macalvin v Harricks* [2020] FCCA 1590.
83 Ibid [23].

> The very fact that the proceedings have been in the court for now 5 years indicates the level of complexity which exists in this case. … Whilst a final hearing would be, in an ideal world, the best way of finalising the matter, I am not satisfied that in the current circumstances of the COVID-19 pandemic and the limitations that are placed upon the conduct of a hearing by electronic means, and especially where one litigant is self-represented, that the best interests of the children are necessarily going to be properly served by the conduct of a final hearing.[84]

The intertwining[85] of procedural fairness for parents and children's best interests means that the decision to adjourn or disallow a remote hearing can also be characterised as in the interest of children, as the Court of Appeal explained in *Re A (Children)*:

> Finally, in addition to the need for there to be a fair and just process for all parties, there is a separate need, particularly where the plan is for adoption, for the child to be able to know and understand in later years that such a life-changing decision was only made after a thorough, regular and fair hearing.[86]

In other words, procedural fairness may be important not only for the parties, but also for the children the subject of the decision.

At the start of May 2020, the President of the England and Wales Court of Appeal handed down another decision concerning family law and remote proceedings, *Re Q*.[87] That case was an appeal from a judge's decision to vacate a hearing that had been set down to be heard remotely, concerning a six-year-old girl who was, at the time, spending week-about time with each parent. The father's application was for the child to be in his sole care.

The history of litigation in the child's life was long, and the trial judge had found that she needed 'finality': 'she has been the subject of litigation for a considerable period of her life. She is displaying evidence of emotional harm as a consequence and this needs to come to an end.'[88] However, two days later, the trial judge reached a different decision on the question of adjournment, allowing the adjournment and finding that Q's welfare would not be compromised. The trial judge had explained, in the second judgment:

> The root of the tension in this case is a timely resolution of the matter for the sake of the child, Q, as against the need for fairness in this case. I have to balance those two

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84 *Sayid* (n 26) [13].

85 Lucinda Ferguson, 'Not Merely Rights for Children but Children's Rights: The Theory Gap and the Assumption of the Importance of Children's Rights' (2013) 21(2) *International Journal of Children's Rights* 177, 189.

86 *Re A (Children)* (n 32) [12].

87 [2020] EWHC 1109 (Fam).

88 Ibid [12], quoting the trial judge's decision of 20 April 2020.

> interests while making it absolutely clear that my paramount concern must be the welfare of Q.[89]

This change of mind about the child's welfare was one basis on which the appeal was allowed,[90] given the earlier finding that Q would suffer harm as a result of further delay.

C *Empathy and Humanity*

The Nuffield FJO reported that '[m]any respondents noted that it is extremely difficult to conduct the hearings with the level of empathy and humanity that a majority of those responding thought was an essential element of the family justice system.'[91] Similarly, a judicial officer writing anonymously on the Transparency Project website explained:

> As a judge operating remotely — whether by phone, Skype or other digital platform — you are deprived of all the means you usually use to create an atmosphere of trust, fairness and compassion from the outset. You cannot smile reassuringly at a party, cannot make any realistic assessment of their level of anxiety and nerves, cannot put them at ease by showing them you are listening intently and carefully to what they say.[92]

The reference to a reduction in trust has been noted in studies of the use of remote technologies in courts.[93]

Rowden has explained that face-to-face communication is viewed as a 'more complete' form of communication.[94] It is difficult to generalise from the research in this area — as studies have been of differing jurisdictions, using different types of media — as to whether there are tangible disadvantages in terms of outcomes for people taking part remotely.[95] Moreover, in private family law proceedings, where all parties are typically individuals (rather than corporate entities, or the state), and all are appearing remotely, these disadvantages may cancel each other

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89 Ibid [14].
90 Ibid [32].
91 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 10.
92 See Anonymous, 'Remote Justice: A Judge's perspective', *Transperency Project* (Webpage, 7 April 2020) <http://www.transparencyproject.org.uk/remote-justice-a-judges-perspective/>.
93 See, eg, Mark Federman, 'On the Media Effects of Immigration and Refugee Board Hearings via Videoconference' (2006) 19(4) *Journal of Refugee Studies* 433.
94 Rowden (n 27) 272–3.
95 See, eg, Eagly (n 60) (litigants who appeared by AVL in immigration proceedings in the United States were more likely to be deported, as they were less able to engage with the hearing or retain legal representation); Gail S Goodman et al, 'Face-to-Face Confrontation: Effects of Closed-Circuit Technology on Children's Eyewitness Testimony and Jurors' Decisions' (1998) 22(2) *Law and Human Behavior* 165.

out. However, some limitations can be documented more readily: a reduction in non-verbal cues and inability to fully observe gestures, loss of eye contact or opportunity for eye contact — particularly given incongruence between the placement of a camera and placement of a screen — and general communication difficulties.[96]

In a blog for the Transparency Project, Celia Kitzinger describes the experience of 'Sarah', for whom Kitzinger acted as a support person in a medical treatment case involving a decision as to whether to cease clinically assisted nutrition and hydration of a patient (Sarah's father).[97] Kitzinger explains that communication difficulties made the hearing challenging (primarily delays in sound transmission leading to 'interruptions'), and also that Sarah did not feel 'heard' — for most of the hearing, she was also not 'seen', as the judge requested cameras be turned off.[98] This also meant that her distress was not visible to anyone except those physically present with her, 'so they didn't modify their behaviour'.[99] Kitzinger explains that while the traditional courtroom 'can feel intimidating … it is also reassuring evidence of the seriousness attached to the case and the ceremonial impartiality of justice'.[100] She comments on the loss of 'gravitas' occasioned by seeing into people's homes, and notes that 'what we found in practice was that a preoccupation with the technology distracted people's attention from the substantive content of the case'.[101] A preoccupation with the technology might, of course, reduce if it comes to be increasingly used and viewed as less of a novelty or experiment.

Sarah's final comment quoted in the piece is this: 'It felt like a second-best option. It didn't feel professional. *It didn't feel like justice.*'[102] Arguably, the fact that Sarah was not successful in the case (she was seeking that clinically assisted nutrition and hydration be withdrawn) makes this dissatisfaction even more concerning. As Kitzinger notes, while the same outcome would in all likelihood have been reached after a face-to-face hearing, this would not have left Sarah 'wondering'.[103]

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96 Anne Bowen Poulin, 'Criminal Justice and Video Conferencing Technology: The Remote Defendant' (2004) 78(4) *Tulane Law Review* 1089, 1110. However, some judges surveyed here reported that the 'pinning' feature of MS Teams actually enabled a better view of witnesses.

97 Celia Kitzinger, 'Remote Justice: A Family Perspective', *Transparency Project Blog* (Blog Post, 29 March 2020) <www.transparencyproject.org.uk/remote-justice-a-family-perspective/>.

98 In contrast, the *Federal Circuit Court of Australia Act 1999* (Cth), s 69, requires that all participants must be able to see and hear each other at all times.

99 Kitzinger (n 98).

100 Ibid.

101 Ibid.

102 Ibid (emphasis added).

103 Ibid.

It is, however, difficult to know whether some of the issues with the remote hearing — the informality between some barristers and the judge, perceptions of not feeling heard, and so on — would have been present in a physical courtroom, too. Interestingly, one domestic violence survivor quoted by the Nuffield FJO explained:

> The hearing was just 10 minutes. It was more professional. I felt heard and respected in comparison to dealing with the same [District Judge] in previous face-to-face hearings with just me and the applicant perpetrator ...[104]

For this participant, then, the experience (albeit a very brief one, compared to the hearing described by Kitzinger) was almost diametrically opposed — even perceiving the judge to be more respectful than in previous face-to-face proceedings.

The empathy and humanity displayed (or not) by judges in family law matters is not often discussed,[105] although there is an increasing focus on judicial stress and vicarious trauma.[106] Reporting on surveys of family law judges from different jurisdictions, Resnick, Myatt and Marotta have noted the importance of family law judges being empathetic, but state that displays of empathy 'must be controlled and professional'.[107] Meanwhile, writing specifically of personal cross-examination in cases involving family violence, Booth suggests that judges may be motivated to disguise their own empathy due to the primacy given to impartiality.[108] Thus, it may be that little in the way of empathy or humanity is displayed at the best of times, and there is a lack of consensus as to whether displays of judicial empathy are desirable in any event, despite the FJO findings. Accordingly, how displays of empathy or humanity are affected by remote proceedings is difficult to gauge and likely different in each case, dependent on the nature of the case, the parties and the judicial officer.

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104 Ryan, Harker and Rothera, *Rapid Consultation* (n 34) 17.

105 On judicial empathy generally, see, eg, Susan A Bandes, 'Empathetic Judging and the Rule of Law' [2009] *Cardozo Law Review De Novo* 133 <https://ssrn.com/abstract=1431230>; Rebecca K Lee, 'Judging Judges: Empathy as the Litmus Test for Impartiality' (2013) 82(1) *University of Cincinnati Law Review* 145; Kathryn Abrams, 'Empathy and Experience in the Sotomayor Hearings' (2010) 36(2) *Ohio Northern University Law Review* 263.

106 See, eg, Kevin O'Sullivan et al, 'Traumatic Stress in Judicial Officers Pre-print' (September 2020) <https://www.researchgate.net/publication/344420667_Traumatic_Stress_in_Judicial_Officers_Pre-print>; Monica K Miller et al, 'Judicial Stress: The Roles of Gender and Social Support' (2018) 25(4) *Psychiatry, Psychology and Law* 602.

107 Alexis Resnick, Karen A Myatt and Priscilla V Marotta, 'Surviving Bench Stress' (2011) 49(3) *Family Court Review* 610.

108 Booth (n 48) 716.

IV Survey Findings

Many of the issues outlined in Part III were the subject of comment by survey participants. As noted, approximately three-quarters of the survey responses were from judges working in the Family Court or the FCC. These courts had quickly introduced Microsoft Teams ('MS Teams'), a videoconferencing platform, to facilitate the undertaking of proceedings remotely.[109] The courts already had the capacity to conduct matters by telephone and (in theory) by court AVL, although the facilities available for the latter are variable as between registries.[110] As noted, court AVL had, prior to the pandemic, also been used primarily to facilitate the attendance of a single party or witness rather than all participants being remote.[111]

Generally, participants were positive about the use of remote procedures, although this was heavily qualified in that most considered their use to be a stop-gap measure that would ideally only be used in certain, constrained circumstances, as explained below. MS Teams was the most commonly identified primary means of conducting trials (24 respondents indicated this), while phone was most common for directions hearings (23 respondents).[112]

If judges were positive about the functioning of the technology they were using (predominantly MS Teams),[113] they were more likely to express positive views about conducting proceedings remotely and about how the other participants in the proceedings (lawyers and litigants) had managed. An FCC judge explained:

> There are many positive lessons to carry forward. The use of telephone/[MS] teams for returning matters is logical and attractive to the profession. Combined with specific listing times (which I will carry forward even for in person matters) it has been welcomed and effective. Similarly, the use of remote appearance in family violence cases is a great improvement … For family violence cases, subject to issues of open and transparent justice, this has great potential. The use of [MS] teams or similar software will also be attractive as it allows both remote appearance (rather than a static presence at a registry) and it is cheap and does not require substantial investment.[114]

The reference to specific listing times refers to allocating matters a more precise time for their directions hearing — a departure from usual listing practices where multiple matters will be listed at a single time and many would then wait in and

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109 Family Court of Australia, 'Notice to the Profession — 9 April 2020' (n 20).
110 Agnew (n 49).
111 Smyth et al (n 9) 1036 n 9.
112 Cf Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35) 2, reporting that '[t]elephone hearings are being used for final and contested hearings as well as for administrative and direction hearings'.
113 Participants were asked, 'How well would you say this technology has worked?', and indicated this on a sliding scale labelled 'Very poorly' at one end, and 'Very well' at the other.
114 FCC17.

around the court to be called. Seven judges commented on reductions in waiting and travel time. One explained:

> For mentions and motions (interim hearings) this is a cheaper and more efficient option for the profession and the public, even though somewhat more cumbersome for the judicial officers. If the judge lists four interim hearings at 9:30 AM and three of them run, the last matter will not get a start until 3 PM. Practitioners have advised that they would rather be in their offices working than at court waiting. Similarly for mentions, where a solicitor may travel for an hour, wait for an hour, be in a mention for 20 minutes, and travel back to the office for up to an hour, they have advised they would rather wait in the office. If they go to court they will need to charge for 4 hours. If they prepare then do other work in the office they may only have to charge for 90 minutes.[115]

These types of benefits, and to a lesser extent the protective benefits for cases where one party might be fearful of the other, were the primary ones identified by survey participants. However, in response to a question asking for their thoughts on the Court continuing to use remote procedures into the future, 10 participants expressed the view that these benefits were only appropriate for interlocutory proceedings or procedural matters.[116]

Judges were not effusive about how legal practitioners had managed the move to remote hearings.[117] Twelve thought that legal practitioners had managed 'adequately', 10 'quite well', and only three 'very well'. Two answered 'not at all well' in response to this question. Several indicated considerable differences among the profession. One noted that the profession's 'capacity is highly variable, from extremely competent to totally unable to manage the technology.'[118] Two commented that larger firms of solicitors seemed to manage the technology better but that these were more of a rarity, as family law practitioners often work in small firms that are likely less well-resourced.[119] Some also noted that there had been improvement as practitioners both became more familiar with using the technology and invested in equipment such as headsets and microphones.

In family law proceedings, parties are expected to attend court with their lawyer, even for procedural matters.[120] It is therefore usual for the judicial officer to be able to see the parties even if they are legally represented. Three judges noted

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115 FCC29.
116 FCC13, FCC18, FCC20, FCC25, FCC26, FCC30, FCC35, Fam16, Fam21, Fam24.
117 Participants were asked: 'Thinking generally, how have the legal practitioners appearing remotely (by AVL, third-party software, or telephone, as selected) in your matters, managed the use of the technology?'
118 Fam6.
119 FCC25 and FCC29.
120 This is a matter of convention only, rather than being addressed in court rules.

that initial limitations on the number of people that MS Teams could display at any one time[121] meant that it was not always possible to see everyone, but this had been resolved: 'When it has worked well, it's been great. The pinning feature on [MS] teams where 9 people can appear on screen (rather than 4 as was previously the case) is very useful.'[122]

In line with some of the reported judgments discussed above, there were mixed views on whether self-represented litigants ('SRLs') could adequately manage the technology. Some noted that it might be more difficult for people to engage with the proceedings, depending on the environment where they were located: 'The [SRLs] were at times unable to focus. This was dependent upon where they were whilst using the technology.'[123] One judge said: 'I have concerns about who is in the room, if children are present'.[124] Another commented: 'It did work with SRLs but some had very little conception of what was happening and because of this (and other reasons), I abandoned the hearing.'[125] Concerns about how parties were managing included the judge's ability to assist if a party seemed not to be coping well: 'If a party becomes distressed the options available with a live hearing are not available by remote hearing. For example counselling assistance provided by [Legal Aid] is not available on the day etc.'[126]

From its inception, the Family Court was intended to function as a 'helping court' that would provide assistance to litigants and discourage strict adversarialism.[127] Interestingly, while many comments (given in response to a question about the judge's role[128]) related to concerns about a loss of formality, the opposite view was also expressed. A Family Court judge said:

> I have used [an audio-visual platform] for hearings — it works well to a certain extent but it does not facilitate less formality which is often of benefit in family law hearings — it is very rigid and there is far less ability to interact with counsel but particularly with the parties.[129]

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121 Fam6, FCC17, FCC28.
122 FCC28.
123 FCC30.
124 FCC16.
125 FCC20.
126 Fam3. See also Smyth et al (n 9) 1032 (noting the inability for remote litigants to access services typically provided at the courts).
127 See Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012) ch 2; and Helen Rhoades, 'The Family Court of Australia: Examining Australia's First Therapeutic Jurisdiction' (2010) 20(2) *Journal of Judicial Administration* 67, 69.
128 Participants were asked, 'Have you experienced any difficulties in ensuring that your role and impartiality have been appropriately communicated?', and could indicate this on a sliding scale labelled 'No difficulties' at one end, and 'Considerable difficulties' at the other.
129 Fam5.

More typical comments, however, described the judge's attempts to preserve the seriousness of the courtroom space. Several referred to wearing robes, sitting (alone) in the courtroom or displaying a court backdrop on their screen, and generally emphasising the formal nature of the proceedings.

Judges also had differing opinions as to whether their view of witnesses was impeded by the use of technology. Some thought that their view was better (closer),[130] while others felt that they were missing important cues.[131] For example, one judge noted that 'it reduces the ability to observe parties and their demeanour which is critical in family law matters'.[132] While some survey participants acknowledged difficulties in affording procedural fairness,[133] most did not perceive this to be a particular problem, but rather were more concerned by the parties' perceptions:

> I don't think there has been any problem in affording procedural fairness in a formal sense (and all of our litigants in final hearings have been represented) but I suspect the perception of the litigants in having a remote person on a screen make significant decisions about the parenting arrangements for their children is less than optimal.[134]

Overall, many judges commented that they had been surprised by how well, and how quickly, the courts and judicial officers had managed to adapt to the unusual circumstances. For some, these new ways of working had welcome aspects that they felt ought to be continued. For others, the circumstances were born from necessity and, while functional, were felt to be far from ideal.

V Concluding Discussion

The range of views expressed by judges in the survey largely coalesced around the sentiment that 'technology should augment and not replace access to the physical Court'.[135] Time and cost-saving elements were widely identified as beneficial, but difficulties with communication (related both to the technology itself and to human error) could render remote proceedings frustrating and tedious.[136] Judges' own experiences, comfort or discomfort in conducting remote proceedings are

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130 FCC13, FCC14, FCC18, FCC32.
131 Fam11, FCC12, FCC35, FCC36.
132 FCC32.
133 Fam3, FCC15, FCC17, FCC21, FCC23, FCC25. Participants were asked, 'Have you experienced any difficulties in ensuring procedural fairness (eg affording an opportunity to be heard and advance arguments, examine witnesses, and so on)?', and could indicate this on a sliding scale labelled 'No difficulties' at one end, and 'Considerable difficulties' at the other.
134 Fam10.
135 FCC17.
136 This resonates with the findings of Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35) 2.

key, however, given the role that the judge plays in managing court events. One survey participant explained that

> lawyers and litigants alike are out of their comfort zones and all look to the judge to set the tone, pace and structure of the hearing. Communicating the process and taking control of the process is not difficult (until the technology fails).[137]

Observation of family law proceedings conducted remotely (by Zoom) in Texas led the researchers to conclude that 'the most successful judges' were able to use Zoom to 'control' the proceedings.[138] Concerns about control were not explicitly expressed by any judges in this survey, although it seems likely that the confidence displayed by the judge in conducting the remote hearing would assist the participants, as the quote above suggests. Some judges perceived that problems with the technology and the online space generally affected the other participants more than themselves — however, several expressed the view that they found conducting proceedings remotely more fatiguing — while others felt that their role on the bench simply did not translate well to the virtual space. Perhaps the most strongly worded comment in this vein was as follows:

> [M]y one experience of using the technology to hear the last day of a part heard trial was more than enough. My ability to conduct the trial in the manner I would normally adopt honed after 20 years on the bench was completely obliterated by the artificial environment.[139]

Others did not see their role as especially different in the online environment. One explained: 'The very few issues I have had have all been with self represented litigants who, I suspect, would have been just as difficult to manage in person.'[140]

Alongside concerns about how well matters could be managed in the new environment were bigger-picture issues associated with the experience and perceptions of parties in having their matter heard in this way. Rebecca Aviel has noted, in the United States context, that most parties in family law disputes 'want proceedings that are shorter, simpler, cheaper, more personal, more collaborative, and less adversarial'.[141] However, whether this extends to litigants wanting remote hearings is a different question. As discussed below, absent an ongoing pandemic, parties must have input into whether their matter is suitable to be heard remotely. In the words of one Family Court judge: 'Remote procedures

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137 Fam6.
138 Thornburg (n 36) 12.
139 Fam5.
140 FCC31.
141 Rebecca Aviel, 'Why Civil Gideon Won't Fix Family Law' (2013) 122(8) *Yale Law Journal* 2106, 2109.

will be part of the future but experience tells me that it is a lesser service than face to face hearings.'[142]

Some responses alluded to the tensions inhering in the 'efficiency' of remote hearings juxtaposed with concerns that it might be delivering such a 'lesser service'. Two FCC judges expressed fears that the use of remote procedures into the future might impact on face-to-face circuits (ie that regional circuits would be cut back or replaced by a judge undertaking the work remotely from one of the permanent registries).[143] Another commented positively that the need for circuits would be reduced.[144] Given long-standing complaints over the funding of the family law system and a prioritisation of 'efficiency',[145] it seems likely that using remote procedures as a cost-saving measure is of interest to the court administration.[146] The Chief Justice had, pre-pandemic, expressed an interest in increasing the use of technology for parties in regional areas and those who might be at risk.[147] This is problematised by the findings of research, and court decisions, discussed above in Part III, and by the comments of some judges in the survey. For instance, those living outside of Australian capital cities experience poverty at higher rates and have lower rates of 'digital inclusion'.[148] As identified in the final report of Lord Justice Briggs into the possibilities of an online court system for England and Wales, a substantial concern would be how to assist persons who would experience difficulties in using computers to resolve their disputes.[149]

Frank Sander's concepts of the multi-door courthouse, and later of 'fitting the forum to the fuss', have been influential in the design of alternative dispute resolution processes and in presenting parties with a range of accessible means by which to solve their problems.[150] In family law, there is long-standing interest

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142 Fam6.

143 FCC17, FCC19.

144 FCC20.

145 See, eg, PwC, *Review of Efficiency of the Operation of the Federal courts* (Final Report, April 2018) <https://www.ag.gov.au/sites/default/files/2020-03/pwc-report.pdf>.

146 See, eg, Registrar McGrath, quoted in Allman (n 2): 'we are delivering justice faster than we would without the technology'.

147 Reported in Ben-Simon and Charak (n 13) 39.

148 Julian Thomas et al, *Measuring Australia's Digital Divide: Australian Digital Inclusion Index 2020* (RMIT and Swinburne University of Technology, Melbourne) 6–9, reporting (at 6): 'In 2020, digital inclusion is 7.6 points higher in capital cities (65.0) than in rural areas (57.4).' This score is calculated by reference to multiple variables, including regularity of internet access, mobile and fixed data allowances, and attitudes and skills when it comes to using the internet.

149 Lord Justice Briggs, *Civil Courts Structure Review: Final Report* (Judiciary of England and Wales, July 2016) 38–41. The concern has remained as online processes have been rolled out in the English court system: House of Commons Justice Committee, *Court and Tribunal Reforms: Second Report of Session 2019* (31 October 2019) 16.

150 See, eg, Forrest S Mosten, 'Mediation and the Process of Family Law Reform' (1999) 37(4) *Family and Conciliation Courts Review* 429, 438; Sander (n 16). The phrase 'fitting the forum to the fuss' was coined by Maurice Rosenberg, 'Let the Tribunal Fit the Case, Remarks at a Meeting of the American Association of Law Schools' (1977) 80 *Federal Rules Decisions* 147, 166.

in the idea of differentiated case management and how it might be used to direct cases to the channels most appropriate for them.[151] Given the experience of rapid transition online during the pandemic, it is arguable that remote proceedings must now be seen as an additional available means of resolving (through judicial determination) disputes. It is likely that remote procedures will not be appropriate for many disputes but may be suitable, or indeed preferable, for some kinds of disputes or parts of disputes. For example, there was widespread support among survey participants for the continued use of remote procedures for directions hearings and some interlocutory proceedings.

Sander and Goldberg identified a central question as being the nature of 'the disputants' goals in making a forum choice'.[152] This will also be key in decision-making about whether remote proceedings are suitable or not. For some matters, or for some court events, appearing remotely may not result in parties receiving a lesser service but will, rather, enable convenience, time and cost savings, and safety, without compromising (either in actuality or in perception) the proceeding. However, the subjectivity of the disputants' goals and circumstances mean that decisions about using technology in place of face-to-face hearings should be made having regard to the specific nature of the case at hand (including factors such as volume of evidence, length of time needed, type of proceeding), as well as the views and aims of the parties and their lawyers.

Moreover, vulnerable participants should still have the option of participating safely in face-to-face proceedings if they so choose; the use of technology should not be a substitute for ensuring safe access and egress from court buildings, provision of safe rooms in which to wait, and adequate security personnel and screening. In parenting decisions, adverse impacts on parties are also likely to be suffered by children, in that, if decision-making is delayed or compromised, children will bear the brunt of poor outcomes. Fairness to the parties must be balanced against children's best interests. In a pandemic context, this may mean that it is preferable to avoid delay and reach a decision more quickly. Equally, it may mean that, especially where there are serious issues to be determined about a child's time with a parent or the risks to a child in the care of a parent, a remote hearing is not appropriate.

To this end (and assuming a time when pandemic conditions subside, and the use of remote procedures going forward is not necessitated for health reasons), it would be useful to have guidance as to the types of case that might be

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151 See, eg, Andrew Schepard, 'The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management' (2000) 22 *University of Arkansas Little Rock Law Review* 395, 397; Rebecca Aviel, 'Family Law and the New Access to Justice' (2018) 86(5) *Fordham Law Review* 2279.

152 Sander and Goldberg (n 16).

suitable for the use of remote proceedings.[153] The likely disjuncture between the views of litigants themselves and the perceptions of lawyers and judicial officers, identified by the Nuffield FJO,[154] also need to be explored.

[153] As Smyth et al (n 9) identify, the guidance of the courts of England and Wales is a useful starting point.

[154] Ryan, Harker and Rothera, *Follow-Up Consultation* (n 35).

CORRECTIVE JUSTICE AND REDRESS UNDER AUSTRALIA'S RACIAL VILIFICATION LAWS

BILL SWANNIE*

This article examines the process for seeking redress under Australia's racial vilification laws. Recently, the debate concerning pt IIA of the Racial Discrimination Act 1975 (Cth) has focused on unmeritorious complaints and the importance of quickly terminating such complaints. This article argues that pt IIA establishes a civil wrong and that corrective justice provides an appropriate framework for understanding the process by which complainants may seek redress for this wrong. However, the remedial process currently fails to provide corrective justice in two ways. First, conciliation is compulsory and this unduly restricts complainants from commencing proceedings. This is inconsistent with the public character of vilification, which indicates that public vindication may be more appropriate than private settlement. Second, current costs rules may deter complainants from seeking vindication of their rights. Therefore, these rules should be modified in proceedings for racial vilification.

I INTRODUCTION

The debate concerning Australia's racial vilification laws has recently moved from focusing primarily on the substantive provisions, contained in pt IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'),[1] to issues concerning procedure, enforcement and redress. In 2017, Parliament amended the relevant procedural provisions, contained in the *Australian Human Rights Commission Act 1986* (Cth) ('*AHRCA*'),[2] following an inquiry and report that highlighted the cost of unmeritorious complaints, and the need to prevent such complaints from

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1 This article focuses on pt IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), which was inserted into the *RDA* by the *Racial Hatred Act 1995* (Cth). Most Australian states and territories have similar laws. However, the *RDA* is the only national law concerning racial vilification.

2 *Human Rights Legislation Amendment Act 2017* (Cth), which commenced on 13 April 2017. Part IIA and B of this article examine this amendment.

proceeding to court.[3] On the other hand, scholars such as Gelber and McNamara highlight the risks and burdens faced by people who seek to enforce their rights under pt IIA.[4] Further, they argue that, due to the 'public' nature of the wrong of racial vilification, the state should have a larger role in enforcing these laws.[5]

This article argues that corrective justice provides an appropriate framework for understanding, and evaluating proposed changes to, the process by which victims of racial vilification may seek redress for that wrong. Corrective justice applies generally to civil wrongs involving the infringement of individual legal rights. It requires the state to provide appropriate mechanisms for individuals to seek redress in respect of such wrongs. Further, this article argues that appropriate and adequate redress for racial vilification is not currently provided under Australian law, and suggests two legislative amendments to remedy this situation.

Part II of the article argues that the remedial process set out in the *AHRCA* should be understood within a corrective justice framework. When pt IIA of the *RDA* was enacted, its protective and remedial purpose was emphasised both in the legislative text and in parliamentary statements.[6] Further, pt IIA imposes civil liability on respondents in respect of racial vilification (as defined by s 18C), and a person 'aggrieved' by such conduct may make a complaint and pursue legal redress in respect of that conduct.[7] Breach of pt IIA therefore creates correlative

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3 Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, *Freedom of Speech in Australia: Inquiry into the Operation of Part IIA of the Racial Discrimination Act 1975 (Cth) and Related Procedures under the Australian Human Rights Commission Act 1986 (Cth)* (Inquiry Report, February 2017) ('*Freedom of Speech Report*').

4 Katharine Gelber and Luke McNamara, 'Private Litigation to Address a Public Wrong: A Study of Australia's Regulatory Response to "Hate Speech"' (2014) 33(3) *Civil Justice Quarterly* 306. This article uses the terms 'complainant', 'applicant' and 'claimant' as references to persons who make a claim under pt IIA of the *RDA*. The *Australian Human Rights Commission Act 1986* (Cth) ('*AHRCA*') uses the terms 'complainant' and 'applicant', in relation to the two stages for seeking redress (see Part IIA of this article). The term 'claimant' is generally used in the literature examined in this article. These terms are largely synonymous for the purposes of this article.

5 Ibid. See also Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps Between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488 ('Mapping the Gaps'); Katharine Gelber and Luke McNamara, 'The Effects of Civil Hate Speech Laws: Lessons from Australia (2015) 49(3) *Law and Society Review* 631 ('Lessons from Australia'). See also Dilan Thampapillai, 'Managing Dissent under Part IIA of the Racial Discrimination Act (2010) 17(1) *Murdoch University Electronic Journal of Law* 52.

6 For a detailed examination of the legislative purpose for enacting pt IIA, see Bill Swannie, 'Protecting Victims Not Punishing Perpetrators: Clarifying the Purpose of s18C of the Racial Discrimination Act' (2020) 24(1) *Media and Arts Law Review* 24. In summary, the purpose of pt IIA is to protect members of target groups from racial vilification, to provide remedies to victims of such conduct, and to deter such conduct.

7 Part IIB of the *AHRCA* is titled 'Redress for Unlawful Discrimination'.

legal rights and duties, between a victim and a wrongdoer, which is a central feature of corrective justice.[8]

Part III of this article argues that the remedial process currently fails to provide corrective justice to targets of racial vilification in two key respects. First, it fails to respect the autonomy of complainants, as it requires them to attempt conciliation before proceeding to adjudication. Attempting conciliation can be time-consuming and ultimately futile for complainants, particularly when the respondent is recalcitrant and well-resourced. Second, the remedial process strongly emphasises settlement of racial vilification complaints, rather than adjudication. Settlement, by its nature, is both voluntary and confidential. Adjudication, on the other hand, provides authoritative and public vindication for targets of racial vilification (which is, by definition, conduct that is both public and communicative).[9]

Part IV of this article recommends two legislative amendments that would address the two problems highlighted above, and which would promote corrective justice in cases of racial vilification. First, targets of racial vilification should have direct access to court for adjudication of a complaint, rather than being required to attempt conciliation in every case. This would respect a complainant's choice to seek an authoritative determination of their rights, rather than seeking voluntary settlement. Second, cost rules should be modified in respect of court proceedings for racial vilification. Currently, unsuccessful claimants may be ordered to pay a respondent's legal costs, and this may deter victims from seeking to vindicate their rights in court. This article argues that costs should be ordered only in limited circumstances, such as when a complainant commences proceedings vexatiously or has unreasonably caused a respondent to incur costs.

II Corrective Justice and Redress under Racial Vilification Laws

This Part of the article argues that corrective justice provides an appropriate framework for understanding the process by which victims of racial vilification may seek redress for that wrong. First, it outlines the provisions of pt IIA of the *RDA*, and the provisions in the *AHRCA* concerning redress. Second, it critically examines recent concerns regarding unmeritorious complaints, and the apparent need to resolve (or terminate) such complaints as quickly as possible. Third, this Part argues that corrective justice provides a suitable framework for evaluating

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8 Corrective justice is examined in Part IIC below.

9 Racial vilification is similar to defamation in that it wrongfully undermines a person's *public* standing. See Bill Swannie, 'The Influence of Defamation Law on the Interpretation of Australia's Racial Vilification Laws' (2020) 26(1) *Torts Law Journal* 34.

the process for seeking redress for breach of pt IIA. This is because pt IIA seeks to protect a legal right, and it imposes obligations on others not to infringe that right.

A *Part IIA and the* AHRCA *Remedial Process*

The substantive provisions of pt IIA consist of two operative parts.[10] First, s 18C makes it unlawful to do an act that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people', if the act is done 'because of the race' of the person or group of persons.[11] Significantly, such conduct is unlawful only if it is done 'otherwise than in private'.[12] Second, s 18D provides several exemptions from liability under s 18C. These exemptions provide defences for respondents, provided that they have acted 'reasonably and in good faith' for certain purposes.[13] This article focuses on issues concerning redress for racial vilification. However, the substantive provisions of pt IIA, and the process for seeking redress, must be considered together.[14]

The process for seeking legal redress for an alleged breach of pt IIA is set out in the *AHRCA*, and involves two stages. A person 'aggrieved' by such conduct may make a complaint to the Australian Human Rights Commission ('AHRC'),[15] and the AHRC may attempt to conciliate the complaint.[16] In certain circumstances, the President of the AHRC may (or must) terminate the complaint.[17] After a complaint is terminated, proceedings may be commenced in the Federal Court or the Federal Circuit Court.[18]

Three points should be emphasised regarding the remedial process set out in the *AHRCA*. First, only a person 'aggrieved' by the relevant conduct may make a complaint or commence proceedings in respect of that conduct. Therefore, the

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10 For a background to the enactment of Part IIA, see, eg, Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Sydney Institute of Criminology, 2002). For a critical analysis, see Dan Meagher, 'So Far So Good?: A Critical Analysis of Racial Vilification Laws in Australia' (2004) 32(2) *Federal Law Review* 225.

11 For an analysis of the requirements of s 18C, see *Eatock v Bolt* (2011) 197 FCR 261 ('*Bolt*') and the relevant case law.

12 Part IIB2 of this article examines this requirement in detail.

13 For an analysis of the requirements of the exemptions in s 18D, see *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR 761.

14 For example, the *Freedom of Speech Report* (n 3) examined both the substantive provisions in pt IIA of the *RDA* and the associated procedures in the *AHRCA*.

15 *AHRCA* s 46P.

16 Ibid s 46PF.

17 Ibid s 46PH.

18 Ibid s 46PO.

remedial process is entirely complaint-driven, in that only victims of racial vilification can take action to seek a remedy. Conversely, the state has no role in enforcing these laws (apart from providing the legal framework).[19] Therefore, the *AHRCA* provides a process by which *victims* of racial vilification may seek a remedy for the breach of their rights.

Second, the vast majority of complaints of racial vilification are either resolved or otherwise terminated at the AHRC stage, and very few complaints proceed to adjudication by a court.[20] The process set out in the *AHRCA* is intended to promote settlement of complaints rather than resolution by adjudication. Amendments to the *AHRCA* in 2017 introduced further barriers to adjudication, such as a requirement to seek leave before commencing proceedings.[21]

Third, the remedial process set out in the *AHRCA* applies to *all* types of complaint made under Commonwealth anti-discrimination legislation.[22] Therefore, the process does not distinguish between racial vilification complaints and other complaints of discrimination. However, this article argues that conduct that breaches pt IIA is qualitatively different to other types of discrimination. In particular, such conduct is by definition both *public* and *communicative*. Therefore, conciliation, which is private and confidential, may not provide proper vindication of the complainant's rights. Particularly when viewed from a corrective justice perspective, this supports the argument made in Part IV of this article, that attempting conciliation should be *optional*, rather than mandatory, for racial vilification complaints.

B *Disagreement as to the Purpose of the* AHRCA *Process*

Currently, there are widely divergent views as to the purpose of the *AHRCA* process. On the one hand, scholars such as Gelber and McNamara argue that the process is risky and burdensome for complainants, and that the state should

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19 Gelber and McNamara (n 4) argue that the state *should* have a role in enforcing racial vilification laws, as they argue that it is a public wrong.

20 Ibid 501. See Australian Human Rights Commission, *Complaint Statistics 2019–2020* (2020) 22-6. See http://humanrights.gov.au/sites/default/files/2020-10/AHRC_AR_2019-20_Complaint_Stats_FINAL.pdf

21 The *Human Rights Legislation Amendment Act 2017* (Cth), which commenced on 13 April 2017, amended the *AHRCA* by requiring complainants to obtain leave before commencing proceedings. It also emphasised the costs risks for complainants in commencing proceedings. Part IIA and B of this article examine these amendments.

22 Racial vilification is defined as a type of 'unlawful discrimination' under pt IIB of the *AHRCA*. See the definition of 'unlawful discrimination' in *AHRCA* s 3(1). The four federal discrimination Acts to which the *AHRCA* process applies are the *RDA*, the *Sex Discrimination Act 1984* (Cth), the *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth).

enforce these laws, rather than individuals.[23] Their work highlights the importance of having a clear conceptual framework for understanding the process for resolving racial vilification complaints. Having this framework enables a fair evaluation of current processes and suggested 'improvements'.

On the other hand, the *Freedom of Speech in Australia* report, published in 2017, emphasises concerns regarding unmeritorious complaints and the importance of resolving such complaints quickly and efficiently.[24] The report, and subsequent amendments, emphasise concerns regarding trivial, vexatious and otherwise unmeritorious complaints, or those having 'no reasonable prospect of success'.[25] In particular, the report emphasises the importance of efficient and timely resolution (or termination) of such complaints, and the cost, inconvenience and distress that such complaints cause *to respondents*.

The report also emphasises the costs *to the public* of attempting to resolve trivial and vexatious complaints, both at the AHRC stage and particularly when such complaints proceed to adjudication.[26] The report emphasises the importance of terminating trivial and vexatious complaints at the earliest opportunity, and preventing such complaints from proceeding to adjudication by a court.[27]

In 2017, the *AHRCA* was amended, based on recommendations made in the *Freedom of Speech* report.[28] Following the amendments, the AHRC *must* terminate a complaint (and not attempt conciliation) when the President considers the complaint 'trivial, misconceived, vexatious or lacking in substance',[29] or if there is no reasonable prospect that a court would determine that the conduct alleged is unlawful.[30] In addition, the amendments require leave of the court to commence proceedings under the *AHRCA*,[31] and courts are specifically directed, when determining costs in a proceeding, to have regard to any settlement offers

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23 Gelber and McNamara (n 4).

24 *Freedom of Speech Report* (n 3).

25 Ibid ch 3 ('Complaint Handling at the Australian Human Rights Commission').

26 Ibid [3.149]–[3.152].

27 The *Freedom of Speech Report* (ibid [3.84]–[3.92]) refers extensively to the complaint and proceedings in *Prior v Queensland University of Technology* [2016] FCCA 2853. This proceeding was ultimately dismissed by the Federal Circuit Court of Australia as having no reasonable prospect of success. The case was, however, unusual and complicated, in that it involved several respondents, including the applicant's employer. The proceeding was dismissed on a number of grounds, including that the applicant was unable to prove that statements made on one respondent's social media account were in fact made by that person. Despite the *Report*'s emphasis on this case, there is little evidence of a large number of trivial or vexatious racial vilification complaints, or that these cases are more difficult or costly for courts to resolve than any other type of proceeding.

28 *Human Rights Legislation Amendment Act 2017* (Cth).

29 *AHRCA* s 46PH(1B).

30 Ibid s 46PH(1C). Previously, the President had *discretion* to terminate complaints in these circumstances.

31 Ibid s 46PO(3A). Previously, proceedings could be commenced under the *AHRCA* without leave.

made.[32] The *AHRCA* also directs the President, when terminating a complaint, to advise complainants that courts 'can award costs in a proceeding'.[33]

The amendments sought to improve the 'efficiency' of the complaint resolution process, by preventing 'unmeritorious' complaints from proceeding to court.[34] The emphasis, therefore, was on the efficient and timely resolution of racial vilification complaints, and the cost, inconvenience and distress caused *to respondents* in responding to a complaint.[35] However, this emphasis appears to overlook the perspective of *complainants* — those whom pt IIA seeks to protect. More significantly, these justifications assume, rather than articulate, a conceptual framework for evaluating the operation of the remedial processes in the *AHRCA*. The next section will argue that corrective justice provides an appropriate framework.

C *Corrective Justice Provides an Appropriate Framework*

This section argues that corrective justice provides an appropriate framework for understanding the process for resolving complaints of racial vilification. In broad terms, corrective justice provides that a person whose legal rights have been infringed is entitled to an appropriate legal remedy, or redress, for that wrong. Therefore, corrective justice stands in strong contrast to an approach that focuses primarily on the rights and interests of *respondents*, or which emphasises the need to resolve disputes quickly and efficiently. Rather, corrective justice explicitly emphasises the rights and interests of claimants, or victims of a legal wrong.

This section first outlines relevant aspects of corrective justice and civil recourse theory. Second, it argues that corrective justice properly applies to the civil wrong of racial vilification. Finally, the section summarises the importance of corrective justice to the process for resolving complaints of racial vilification.

1 *Corrective Justice and Civil Recourse Theory*

Corrective justice concerns the rectification of interpersonal wrongs, to ensure that the victim of a legal wrong is made 'whole again', or restored to their former

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32 Ibid s 46PSA. According to standard costs rules, a party will be ordered to pay the other party's legal costs (often on an indemnity basis), if they refuse a reasonable offer of settlement and they do not achieve a more favourable order. Section IV(B) of this article examines the costs rules.

33 *AHRCA* s 46PH(2A).

34 Explanatory Memorandum, Human Rights Legislation Amendment Bill 2017 (Cth) 11.

35 The Explanatory Memorandum stated (ibid 4) that these changes made the process 'fairer for all parties', as the current process is 'weighted in favour of complainants'. On the other hand, Gelber and McNamara (n 4) argue that the *AHRCA* process is extremely burdensome for complainants.

position.[36] Aristotle's influential articulation of corrective justice emphasised the primary role of 'the judge' in restoring the balance as between a person who had been wronged and the wrongdoer.[37] Corrective justice therefore involves three entities: a claimant (whose rights have been infringed by the respondent), a respondent (who has infringed the claimant's rights), and the state. The justification for imposing a duty of rectification is simply that 'one person has been wronged, and the other has wronged them'.[38]

Although corrective justice is primarily applied in the context of tort claims, it applies more broadly to any breach of an individual's legal rights.[39] Further, corrective justice applies to civil wrongs even when there is no discernible 'gain' made by the wrongdoer.[40] Rather, the focus of rectification is on the victim, and what is needed to make this person whole again. Aristotle's principle of rectification is not merely purposed to providing financial recompense to the victim, but also extends to vindication of the claimant's rights.[41]

Like correctice justice, civil recourse theory concerns the rectification of interpersonal wrongs.[42] Three aspects of corrective justice, and civil recourse theory, are relevant in the context of this article. First, corrective justice emphasises the state's obligation to provide appropriate mechanisms for a victim to be made 'whole' again. Therefore, it is not concerned exclusively with particular remedies (ie the particular outcome ordered by a court). Rather, corrective justice also concerns the *procedures* used to resolve particular types of civil dispute.[43] Indeed, vindication of a claimant's rights (eg through a judicial

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36 Ernest Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349. As explained below, corrective justice imposes obligations on the wrongdoer and on the state.

37 Aristotle and WD Ross, *Nicomachean Ethics* (Lesley Brown (ed), Oxford University Press, 2009). Aristotle also used the term 'rectificatory justice'.

38 Ibid 1132a. Aristotle stated (ibid) that 'it makes no difference [to this justification] whether a good man defrauded a bad one, or a bad man a good one'. This is because, according to the logic of corrective justice, a wrongdoer is by definition a bad person. Aristotle distinguished corrective justice from distributive justice on the basis that the latter involved consideration of a person's merit, but the former was based purely on a wrong done by one person to another.

39 These types of claims are commonly described as 'civil', or 'private law', claims. See, eg, Ernest Weinrib, *The Idea of Private Law* (Oxford University Press, 1995). In the words of Aristotle, corrective justice applies to claims 'between man and man': Aristotle and Ross (n 37) 1131a.

40 Weinrib (n 36) 354–5.

41 Ibid. See also Linda Radzic, 'Tort Processes and Relational Repair' in John Oberdiek (ed), *Philosophical Foundations of The Law of Torts* (Oxford University Press, 2014) 248. In certain cases, corrective justice seeks to provide *vindication*, rather than compensation for loss. See Part III(B) of this article below.

42 Some aspects of civil recourse theory are referred to below. Although civil recourse theory and corrective justice are sometimes regarded as competing theories in respect of remedies for civil wrongs, the differences between these theories are not relevant for the purpose of this article, and are in any event 'gossamer thin': Ernst Wienrib, 'Civil Recourse and Corrective Justice' (2011) 39(1) *Florida State University Law Review* 273, 297.

43 Jason Varuhas, *Damages and Human Rights* (Bloomsbury, 2016) 88–9 ('Damages'). Although Varuhas does not refer specifically to corrective justice, his remedial theories are consistent with

declaration or correction notice) may provide an appropriate remedy for wrongs such as racial vilification.

Civil recourse theory focuses particularly on procedural issues in private law.[44] This theory posits that the victim of a legal wrong merely has a legal right to seek a remedy in court (rather than, as some corrective justice theorists argue, a right to a particular remedy).[45] Therefore, both corrective justice and civil recourse theory emphasise the importance of procedural aspects of rights protection, and particularly the importance of access to courts for the vindication of individual rights.[46]

Second, corrective justice focuses on the 'distinctive character of the injury' inflicted on the victim.[47] Therefore, the nature and features of the particular right infringed are key in determining appropriate modes of redress.[48] In relation to racial vilification, an important aspect of corrective justice is the public vindication of the claimant's rights. Scholars such as Varuhas argue that vindicating certain individual rights involves vindicating the interests — such as human dignity — underlying those rights.[49] He argues that this is necessary in order to 'restore the claimant to the position they were entitled to be in'.[50]

Third, civil recourse theorists emphasise the importance of a victim's *autonomy*, and they argue that a victim should be able to choose how they respond to a wrong committed against them.[51] For example, a victim may decide to initiate proceedings, to settle those proceedings, or to make no claim at all.[52]

Corrective justice and civil recourse theory are both *remedial* theories, as they concern rights and duties regarding remedies for the breach of *other* substantive rights. Scholars such as Hohfeld describe remedial duties as 'secondary' duties,

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the principles outlined here. In particular, Varuhas (at 89) argues that procedural restrictions, such as time limits for commencing a claim, are 'inapt in claims of fundamental rights, as they may impede robust judicial protection of those important rights'.

44 See, eg, Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695. See also John Goldberg and Benjamin Zipursky, 'Tort Law and Responsibility' in John Oberdiek (ed), *Philosophical Foundations of The Law of Torts* (Oxford University Press, 2014) 17.

45 Zipursky (n 44); Goldberg and Zipursky (n 44).

46 Part IIIB of this article highlights the importance of allowing claimants access to courts for redress for the wrong of racial vilification (which is by definition a public or communicative wrong).

47 Aristotle and Ross (n 37) v, 2–5, 1132.

48 Varuhas (n 43) viii.

49 Ibid 59.

50 Ibid 22.

51 Astor and Chinkin also emphasise the importance of 'empowering' victims of wrongdoing, particularly through providing effective means for resolving alleged contraventions of legal rights: Hilary Astor and Christine Chinkin, *Dispute Resolution in Australia* (LexisNexis, 2nd ed, 2002) 382.

52 Goldberg and Zipursky (n 44). However, they also recognise that this choice represents a legal *power* that a victim has over a wrongdoer, which is backed by the coercive power of the state.

as they depend on a prior breach of other 'primary' rights.[53] Remedial theories are therefore underpinned by, and support, individual rights. Individual rights are in turn commonly based by notions of human dignity, personal autonomy and the state's obligation to treat every person with equal concern and respect.[54] Remedial theories emphasise the importance of a victim of wrongdoing being able to take legal action to rectify that wrong. The right to seek rectification is based on, and gives meaning and force to, underlying legal rights, and it affirms the claimant's equal worth as a member of society.[55] The right to seek rectification also supports a claimant's autonomy, as it enables them to choose what action to take, if any, in respect of the infringement of their rights.

Corrective justice, including its procedural and remedial aspects, is supported by principles of liberal democracy and the rule of law. The principle *ubi ius, ibi remedium* — where there is a right, there must be a remedy — is foundational to a legal system based on the rule of law.[56] Therefore, a core obligation of the state is to ensure that infringements of individual rights are adequately rectified, as without effective enforcement, rights are practically worthless.[57] Therefore, there is both an individual interest and a public benefit in the effective enforcement of individual rights.[58]

2 *Corrective Justice Applies to Racial Vilification*

As mentioned above, corrective justice cogently explains how the law responds (or should respond) to a breach of individual legal rights. Further, there are particular reasons why corrective justice provides an appropriate theoretical framework for assessing the process for seeking redress for infringement of pt IIA of the *RDA*. These provisions include the three essential foundations for corrective

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53 Wesley Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710.

54 See, eg, Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977). Dworkin's influential theory of rights is based on the centrality of individual dignity, and the democratic importance of the state treating every person with equal concern and respect. Dworkin's is a particularly strong theory of rights protection, as he argued (at 272) that the state must respect individual rights even if this would not benefit the community as a whole.

55 Varuhas (n 43) 1–18.

56 Ibid 3, 88. See also Olivia Ball, 'All the Way to the UN: Is Petitioning a UN Human-Rights Treaty Body Worthwhile?' (PhD Thesis, Monash University, 2017) ch 2.

57 Ball (n 56).

58 Therefore, Varuhas argues that the distinction between 'public' and 'private' law is unhelpful and 'unsafe' in relation to legal redress for the breach of individual rights: Varuhas (n 43) 8. On the other hand, Gelber and McNamara (n 4) argue that the state, rather than individuals, should enforce pt IIA of the *RDA*, as they define this as a 'public wrong'. Like Varuhas, this article does not find the public/private distinction useful in relation to seeking redress for breach of individual rights. For example, civil wrongs (such as an assault) are commonly enforced by individuals through claims for damages.

justice: they confer *rights* on individuals, they impose reciprocal *duties* on others, and they seek to provide *redress* when those rights are infringed. Also, when pt IIA was enacted, its protective and remedial purpose was emphasised.

In relation to duties, pt IIA (which consists of ss 18C and 18D) renders certain conduct 'unlawful'. In particular, s 18C defines and renders unlawful 'racial vilification'.[59] Further, s 18D provides certain exemptions (or defences) to liability under s 18C.[60] Therefore, pt IIA imposes a duty on all members of society to refrain from racially vilifying another person or group of persons. Significantly, pt IIA imposes *civil* liability only; there are no criminal consequences for infringing pt IIA. A complaint, or proceedings, alleging breach of pt IIA involves individual complainants and respondents, and the state has no active enforcement role or powers in relation to pt IIA.[61]

Regarding rights, the *AHRCA* provides that an 'aggrieved' person may make a complaint and seek a legal remedy regarding an alleged breach of pt IIA. Therefore, only a victim (or target) of racial vilification may seek a remedy in respect of a breach of pt IIA.[62] In summary, the *AHRCA* confers a legal *right* on individuals to not be racially vilified. These rights and duties are reciprocal, or correlative, and therefore the claimant's right to seek a legal remedy can be considered a 'right' in the true sense.[63]

In terms of redress, the *AHRCA* provides certain legal remedies, where a court finds that a respondent has breached pt IIA.[64] Therefore, a claimant is entitled to certain court orders when they establish that a particular person has breached pt IIA. In summary, therefore, pt IIA and the *AHRCA* provide the three essential elements for corrective justice to apply: a claimant with legal rights, a respondent with legal duties, and legal remedies.

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59 Part IIA does not include the words 'racial vilification'. However, these words have been adopted as a 'convenient shorthand' for the type of conduct proscribed by s 18C: *Toben v Jones* (2003) 129 FCR 515, [137] (Carr J).

60 Taken together, ss 18C and 18D have a two-part, tort-like structure. Section 18C defines conduct to which prima-facie liability attaches, for which the claimant bears the onus of proof. Section 18D provides defences to liability, for which the respondent bears the onus of proof. See generally Peter Cane, *The Anatomy of Tort Law* (Hart, 1997).

61 Gelber and McNamara (n 4) 328. Gelber and McNamara compare the neutral role of the AHRC to the active regulatory powers of the Australian Securities and Investments Commission, and the Environmental Protection Authority, for example (at 310-11).

62 A 'victim' may be a person who is directly named or identified in the relevant conduct, or a member of a particular racial or ethnic group vilified in the conduct. A person who is not 'aggrieved' by the relevant conduct has no standing to bring a complaint or commence proceedings: see Gelber and McNamara, 'Mapping the Gaps' (n 5) 497.

63 See Hohfeld (n 53). Hohfeld distinguishes between 'rights' (which can be claimed by a particular person against another person with a corresponding duty), and mere privileges and immunities (which are merely defensive legal proscriptions).

64 *AHRCA* s 46PO.

Further, parliamentary debate when pt IIA was enacted confirms that these provisions were intended to provide legal protection and remedies to targets of racial vilification. When the relevant bill was introduced into Parliament,[65] the Attorney-General stated that it would establish a 'civil regime' by which 'the victim of alleged unlawful behavior' could initiate a complaint and potentially obtain a remedy in relation to unlawful conduct.[66]

In particular, the Attorney-General emphasised the protective purpose of pt IIA, stating that 'all Australians irrespective of race, colour or national or ethnic origin are entitled to fair treatment', and that 'everyone should be able to advance through life on their own merits and abilities'.[67] He noted, however, that 'major inquiries have found gaps in the protection provided by the [*RDA*]', particularly regarding racially based harassment and intimidation.[68] Referring to the *Multiculturalism Report*,[69] the Attorney-General stated that protection from racial vilification 'protects the inherent dignity of the human person'.[70] This statement highlights the individual interests that pt IIA seeks to protect, which is consistent with enabling members of target groups to initiate a complaint and to potentially obtain a legal remedy.[71]

The Attorney-General also emphasised the importance of education and changing attitudes regarding racism in Australia.[72] However, these statements support, rather than detract from, the remedial and protective purposes for enacting pt IIA. Particularly where education programs focus on raising awareness concerning the provisions and operation of pt IIA, this supports the provision's protective purpose by seeking to deter and eliminate racial vilification. Deterrence of prescribed conduct is an important aspect of corrective justice, particularly in relation to the role of courts in educating the public regarding norms of acceptable conduct.[73]

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65 Racial Hatred Bill 1994 (Cth).

66 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341 (Michael Lavarch, Attorney-General) ('Commonwealth').

67 Ibid. The Attorney-General thus drew a direct connection between the various forms of racial discrimination already prohibited by the *RDA* and the prohibition on racial vilification introduced by the Racial Hatred Bill.

68 Ibid 3336–7. The three 'major inquiry' reports referred to by the Attorney-General are: *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) ('*Royal Commission Report*'); Commonwealth Human Rights and Equal Opportunity Commission, *Report of the National Inquiry into Racist Violence in Australia* (Report, 1991); Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, April 1992) ('*Multiculturalism Report*').

69 *Multiculturalism Report* (n 68) [7.44].

70 Commonwealth (n 66) 3336.

71 In *Bolt* (n 11), Bromberg J (at [267]) stated that s 18C protects against 'conduct which invades or harms the dignity of the individual or group'.

72 Commonwealth (n 66) 3336.

73 See Varuhas (n 43) 19.

Indeed, the *Royal Commission Report* emphasised that legislation such as pt IIA can itself can have a 'powerful educative role', particularly in relation to changing attitudes and 'defining [socially] acceptable behaviour'.[74] Logically, however, it is not merely legislation that educates and defines socially acceptable behaviour. Rather, it is court decisions that interpret and apply particular legislation and which define acceptable standards of behaviour. Therefore, the importance of corrective justice, and the redress provided by courts, is supported by parliamentary statements, when pt IIA was introduced, regarding the importance of public education and changing attitudes concerning racism.

Finally, the remedial and protective purpose of pt IIA is highlighted by the inclusion of s 18E in the *RDA*, which imposes liability on an employer for breach of s 18C by an employee, where the conduct is done 'in connection with his or her duties as an employee'.[75] Section 18E(2) provides that an employer is *not* liable if it took 'all reasonable steps to prevent the employee from doing the unlawful act'. Imposing vicarious liability on an employer, in addition to the primary wrongdoer, assists complainants in obtaining an effective remedy.[76] In particular, s 18E enables an employer to be joined as a respondent to a complaint. Scholars have noted that s 18E may assist complainants particularly in relation to 'media organisations which may face liability for the actions of their journalists and announcers'.[77] Consistently, over time, a large number of complaints of racial vilification involve conduct by media presenters,[78] and s 18E has been raised in these complaints.[79] In particular, s 18E enables court orders to be made against both the employee journalist or presenter and the employer publisher or broadcaster.[80]

3 *Summary*

In summary, this Part of the article has argued that corrective justice affords an appropriate framework for evaluating the process provided by the *AHRCA* for providing redress for racial vilification. Corrective justice provides that a person whose legal rights have been infringed is entitled to an appropriate remedy, or

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74 *Royal Commission Report* (n 68) [28.3.1].

75 Commonwealth (n 66) 3341.

76 See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, in which the High Court held that a bicycle courier service was vicariously liable for an injury caused to a pedestrian by the negligence of a bicycle courier.

77 Neil Rees, Simon Rice and Dominque Allen, *Australian Anti-discrimination and Equal Opportunity Law* (Federation Press, 3rd ed, 2018) 729.

78 See McNamara (n 10) 153.

79 See, eg, *Bolt* (n 11) [66], [453].

80 Ibid. In *Bolt*, the newspaper publisher was ordered to publish a corrective notice in its newspaper and on its website.

redress, for that wrong. Further, it obliges the state to rectify the wrong. This Part has demonstrated that pt IIA of the *RDA* confers correlative rights and duties with respect to racial vilification. In particular, a person 'aggrieved' by conduct alleged to infringe pt IIA is entitled to make a complaint and seek a legal remedy under the *AHRCA*. Therefore, corrective justice provides a more appropriate framework for evaluating the provisions of the *AHRCA* than approaches that emphasise economic efficiency, or which focus primarily on the rights and interests of respondents. This Part has also highlighted that corrective justice has an important *procedural* aspect. Indeed, certain court orders, such as the correction notice ordered by the Court in *Eatock v Bolt*, may appropriately vindicate a claimant's rights.[81]

This Part provides the foundation for the remainder of this article, which examines whether the relevant provisions of the *AHRCA* are consistent with providing corrective justice regarding racial vilification complaints.

III Does the *AHRCA* Process Provide Corrective Justice?

This Part of the article examines whether the *AHRCA* process enables targets of racial vilification to achieve corrective justice. Ultimately, it determines that the process fails to provide corrective justice in two key respects. First, it fails to respect the autonomy of claimants, as it requires them to attempt conciliation (which may be futile and time-consuming) before proceeding to adjudication of a complaint. Second, the current process strongly emphasises the settlement of racial vilification complaints, rather than adjudication. Therefore, it may prevent claimants from public vindication and an authoritative determination of their rights. These two arguments are examined, respectively, in sections A and B of this Part.

A *Compulsory and Voluntary Conciliation*

A large body of legal scholarship exists on the effectiveness, and appropriateness, of conciliation in the context of anti-discrimination complaints.[82] In addition, scholars such as Gelber and McNamara argue that conciliation does not recognise the public wrong of racial vilification.[83] This article does not argue against

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81 In *Bolt* (n 11), the complainants sought an order that the respondent newspaper publish a public notice of the Court's finding. This remedy is examined in Part IIIB3 below.

82 See, eg, Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (Oxford University Press, 1990) ch 5 ('Liberal Promise'); Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010) ch 8 & 9. ('Enforcing Human Rights'); Astor and Chinkin (n 51); Anna Chapman, 'Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution' (2000) 22(3) *Sydney Law Review* 321.

83 Gelber and McNamara (n 4).

conciliation of racial vilification claims *per se*. Nor does it argue that all such claims should be adjudicated by a court. Rather, this section argues that claimants should have a *choice* as to whether they attempt conciliation on the one hand, or proceed to adjudication on the other. This argument is based on corrective justice and in particular on the importance of protecting the personal autonomy of victims of racial vilification.

This section first examines the concept of personal autonomy, and its importance in the context of dispute resolution. Second, it argues that, given the significance of personal autonomy, compulsory conciliation is not appropriate for complaints made under the *AHRCA*.

1 *Personal Autonomy and Redress for Civil Wrongs*

Personal autonomy is of central importance to civil recourse theory, which argues that a victim of a wrong should be able to *choose* how they respond to that wrong.[84] Civil recourse theorists, such as Goldberg and Zipursky, emphasise the importance of a victim's ability to choose how to respond to a wrong committed against them. In particular, they argue that victims should be able to choose whether to litigate, to settle a claim, or to do nothing.[85] They also emphasise the role of the state, which is to 'empower' victims to seek a legal remedy for wrongs committed against them.[86]

Corrective justice and civil recourse theory are underpinned by values such as human dignity and autonomy.[87] Personal autonomy is central to the protection of individual rights, which is an important role of the liberal democratic state.[88] Some key aspects of personal autonomy will now be outlined.

Autonomy concerns a person's ability to make choices over their life, free from 'external' control or interference.[89] Significantly, autonomy involves both a mental aspect (deciding what is in one's interests) and an active aspect (being able to act on that decision).[90] Autonomy is underpinned by notions of human

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84 Goldberg and Zipursky (n 44).

85 Ibid. Therefore, they regard victims as having a legal *power* — to demand responsive action from a respondent — rather than a legal *right* to a remedy (as argued by some corrective justice theorists).

86 Ibid 29.

87 Varuhas (n 44).

88 Ibid 3, 78.

89 See, eg, Thomas Scanlon, 'A Theory of Freedom of Expression' (1972) 1(2) *Philosophy and Public Affairs* 204. Scanlon regards autonomy as a 'universal moral value'. Although he emphasises autonomy in the context of free speech arguments, his broader arguments regarding the significance of personal autonomy, in relation to the state, are relevant here.

90 Ibid.

dignity and self-respect; if the state unduly restricts or undermines a person's autonomy, then it denies their human dignity.[91]

In their articulation of personal autonomy, scholars such as Scanlon and Nagel emphasise the significance of the relationship between the individual and the state. In particular, they argue that certain action by the state is improper or illegitimate because it interferes with a person's autonomy. These conceptions of personal autonomy therefore emphasise the role of the state in protecting and promoting autonomy, rather than (for example) emphasising other 'external' factors that may interfere with a person's autonomy.[92]

In summary, personal autonomy has an important role regarding the protection of individual rights, in particular regarding a victim's ability to choose to pursue avenues of redress that they consider suitable and appropriate. Civil recourse theorists particularly emphasise that persons who have had their legal rights infringed should have appropriate options as to how they respond to that wrong. Further, those options should be real and effective options, not merely formal options that are practically unavailable.

2 *Mandatory Conciliation Undermines a Complainant's Autonomy*

Currently, conciliation is mandatory for all complaints made under the *AHRCA* (ie complaints of racial vilification, and other complaints under anti-discrimination law). Therefore, a complaint must be made to the AHRC, and that complaint must be terminated, before proceedings can be commenced in respect of it. In this respect, the AHRC acts as a 'filter' for unmeritorious complaints.[93] The President of the *AHRCA* may (or must) terminate particular complaints based on certain considerations. Many of these grounds for termination involve a determination by the President that a more appropriate forum is available for resolving the complaint. For example, a complaint may be terminated if the President determines that the 'subject matter of the complaint has been adequately dealt with',[94] or that another 'more appropriate remedy … is reasonably available',[95] or that the 'complaint could be more effectively or conveniently dealt with by another statutory authority'.[96]

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91 See Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) *Philosophy and Public Affairs* 83, 93–6.

92 Other factors, such as a claimant's financial resources, may influence their choice regarding whether to commence proceedings. However, interference with this choice *by the state* stands in a different category, according to Nagel's and Scanlon's conception of autonomy.

93 Rees, Rice and Allen (n 77) 816.

94 *AHRCA* s 46PH(1)(d).

95 Ibid s 46PH(1)(e).

96 Ibid s 46PH(1)(g).

Therefore, even the most serious complaints of racial vilification, and those which are unlikely to settle at conciliation, must first be processed by the AHRC. The *AHRCA* itself acknowledges that some complaints are not appropriate for conciliation, but are more appropriately determined by a court. For example, one ground for termination is that 'the President is satisfied that the subject matter of the complaint involves an issue of public importance that should be considered by the Federal Court or the Federal Circuit Court'.[97] Similarly, a complaint may be terminated if the President is satisfied that there is 'no reasonable prospect of the matter being settled by conciliation'.[98] However, even these types of complaint must first be made to the *AHRCA*, and terminated, before proceedings can be commenced.

Several arguments are commonly presented as to why conciliation is preferable to adjudication in relation to anti-discrimination complaints.[99] In summary, it is argued that conciliation has the advantages of quickness, informality, flexibility, confidentiality, and that it helps to maintain ongoing relationships (eg in the employment context). Clearly, in certain circumstances, conciliation may be a useful and effective method for resolving a dispute. However, the issue considered here is whether *compulsory* conciliation is consistent with respecting the autonomy of victims of racial vilification.

In particular, scholars have highlighted that attempting conciliation can be futile, and it can simply delay resolution of a complaint, due to two main factors. First, conciliation is a voluntary process, the aim of which is to settle a claim by agreement.[100] As it is voluntary, respondents cannot be compelled to make serious efforts at settlement. Indeed, respondents may use this stage to delay resolution of a complaint.[101] Second, in relation to discrimination (and vilification) complaints, there is often a large disparity between the resources and knowledge of complainants and respondents, respectively. Specifically, respondents are typically better resourced and more experienced regarding legal processes than complainants.[102] This gives respondents a distinct advantage regarding negotiating a settlement, particularly given the informal nature of conciliation.

Therefore, there are legitimate reasons why a complainant may seek to have a complaint adjudicated, rather than attempting conciliation. However,

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97 Ibid s 46PH(1)(h).

98 Ibid s 46PH(1B)(b). When a complaint is terminated on either of these grounds, leave is *not* required for proceedings to be commenced based on the complaint: *AHRCA* s 46PO(3A). Therefore, these two grounds for termination stand apart from the other grounds, all of which require leave before proceedings can be commenced.

99 See, eg, Thornton (n 82); Astor and Chinkin (n 51) ch 11. See also Beth Gaze and Rosemary Hunter, *Enforcing Human Rights in Australia: An Evaluation of the New Regime* (Themis Press, 2010), and Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 776.

100 Astor and Chinkin (n 51).

101 See Gelber and McNamara (n 4).

102 Astor and Chinkin (n 51) 364.

currently, complainants must attempt conciliation before commencing proceedings. The extent to which the requirement to attempt conciliation interferes with a claimant's autonomy (and particularly their choice regarding how they respond to the wrong of racial vilification) is highlighted by two additional factors.

First, the process set out in the *AHRCA* is unique among civil wrongs in that it requires a complaint to be made to an administrative body, and terminated by that body, before it can proceed to adjudication. In relation to other civil wrongs, such as claims in contract or tort, conciliation is not compulsory in this way. In addition, Astor and Chinkin note that discrimination complaints are often factually and legally complex, and that for various reasons (including cultural differences) they are 'not easy to resolve'.[103] Therefore, such complaints may not necessarily be quickly and easily resolved by conciliation.[104]

Second, since 2011, discrimination complainants in Victoria have the option of either attempting conciliation or proceeding directly to adjudication by a tribunal.[105] Previously, attempting conciliation was compulsory in Victoria. However, optional conciliation was introduced following a detailed inquiry and report into procedures under discrimination law in that state, which specifically recommended allowing direct access to adjudication.[106] Therefore, this sets a precedent for making conciliation optional, rather than compulsory. Although the importance of a complainant's autonomy was not specifically referred to when the amendment was introduced,[107] the amendment does in fact support complainant autonomy as articulated above.[108]

In summary, mandatory conciliation severely restricts a complainant's autonomy regarding how they choose to resolve a complaint of racial vilification

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103 Ibid 367. Some discrimination complaints may not be factually or legally complex (or undisputed). However, it cannot be assumed that all such complaints are in this category.

104 Thornton also notes that singling out discrimination complaints for compulsory conciliation treats such wrongs as minor or trivial matters, rather than serious legal disputes that can proceed directly to adjudication: Thornton (n 82) 146.

105 See *Equal Opportunity Act 2010* (Vic) s 122.

106 Department of Justice, Victoria, *An Equality Act for a Fairer Victoria: Equal Opportunity Review* (Final Report, 2008) 69.

107 The Attorney-General stated that allowing direct access provided a more effective and efficient process for resolving disputes: Victoria, *Parliamentary Debate*, Legislative Assembly, 10 March 2010, 786 (Rob Hulls, Attorney General).

108 There are significant differences between the Victorian regime and the federal regime for resolving discrimination matters. In particular, the Victorian tribunal is generally a costs-free jurisdiction, whereas the federal courts are costs jurisdictions. It is difficult to determine how many discrimination complainants are now applying directly to the Victorian tribunal, as these figures are not recorded by the tribunal or by the anti-discrimination commission. See Dominique Allen, *Addressing Discrimination through Individual Enforcement: A Case Study of Victoria* (Monash University, 2019) 15–16.

(or discrimination).[109] This is significant, as attempting conciliation may cause unnecessary delay, and be futile in any case. Therefore, mandatory conciliation cannot be regarded as consistent with central principles of corrective justice and civil recourse theory. Indeed, Astor and Chinkin argue that compulsory conciliation may be a 'hurdle[…] in the way of redress', and it may in fact deter complainants from proceeding with a complaint.[110]

B *The Public Nature of Racial Vilification Makes Compulsory Conciliation Inappropriate*

This section argues that racial vilification, as defined by pt IIA of the *RDA*, is 'public' in a way that makes compulsory conciliation inappropriate. Racial vilification is therefore different from other breaches of discrimination law, which do not necessarily involve conduct that is 'public' in this sense. Therefore, compulsory conciliation is not appropriate in cases of racial vilification, although it may be appropriatein respect ot other breaches of discrimination law.

This section first examines the central principle of corrective justice, that the redress provided must respond to the particular nature and features of the wrong. In relation to racial vilification, this indicates that the state should enable public vindication of the wrong done to a victim. Second, it examines the 'public' nature of racial vilification, in comparison to other breaches of discrimination law. Third, the section contrasts the public nature of vilification with the private and confidential nature of conciliation.

1 *Corrective Justice and the Importance of Appropriate Redress*

As outlined above, corrective justice emphasises the importance of rectifying the wrong done to a person.[111] Specifically, it focuses on the 'distinctive character of the injury' inflicted on the victim.[112] Rectification necessarily requires responding to the nature and features of the particular wrong.[113]

Scholars such a Varuhas emphasise the importance of public *vindication* in providing appropriate redress for particular wrongs. He argues that public vindication, by way of determination by a court, is an appropriate form of redress

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109 Therefore, the arguments advanced in this section of the article logically apply to both racial vilification complaints and discrimination complaints. However, crucial differences between these two types of complaint are examined in the next section of the article.

110 Astor and Chinkin (n 51) 381.

111 See Part IIC above.

112 Aristotle and Ross (n 37) v, 2–5, 1132

113 Varuhas (n 43) viii.

for wrongs such as defamation.[114] This is because certain rights can be regarded as 'fundamental', and therefore the primary goal of redress is *vindication*, rather than compensation.[115]

Defamation is similar to racial vilification in that both involve 'public' conduct.[116] Further, both defamation and racial vilification involve an attack on a person's public standing, or their dignity. The next subsection of this Part examines the 'public' nature of racial vilification, which is relevantly similar to defamation. Further, racial vilification is dissimilar to other breaches of discrimination law, which do not necessarily involve 'public' conduct. This highlights the importance of public redress for such conduct, to 'restore the claimant to the position they were entitled to be in'.[117] The third subsection of this Part then turns to argue that the public nature of racial vilification is inconsistent with compulsory conciliation, which involves private settlement.

2 *The Inherently Public Nature of Racial Vilification*

As mentioned above, pt IIA of the *RDA* defines racial vilification and renders such conduct unlawful. However, such conduct is unlawful only where it is done 'otherwise than in private'.[118] Therefore, scholars such as Gelber and McNamara emphasise that racial vilification inherently involves a *public* act.[119]

The requirement that the relevant conduct is done 'otherwise than in private' is partially defined by s 18C(2) and 18C(3). Section 18C(2) provides that

> an act is taken not to have been done in private if it:
> (a) causes words, sounds, images, or writing to be communicated to the public; or
> (b) is done in a public place; or
> (c) is done in the sight or hearing of people who are in a public place.[120]

Section 18C(3) provides that 'public place' 'includes any place to which the public have access as of right or by invitation, whether express or implied and whether

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114 Ibid.

115 Varuhas (ibid) argues (at 59) that defamation protects a 'fundamental' right, because it is actionable *per se* (without proof of loss). Therefore, it protects fundamental human interests, such as human dignity, for which no amount of monetary compensation is adequate.

116 Swannie (n 9).

117 Varuhas (n 43) 22.

118 *RDA* s 18C.

119 See Gelber and McNamara (n 4) 314. See also Gelber and McNamara, 'Mapping the Gaps' (n 5) 510. This is part of the reason why Gelber and McNamara argue that racial vilification is a 'public wrong', in the sense that the state (rather than individuals) should enforce the laws.

120 The words 'not to have been done in private' seem to mean the same as 'otherwise than in private'. The different wording is due to s 18C(2) being a deeming provision. See Anna Chapman and Kathleen Kelly, 'Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context' (2005) 27(2) *Sydney Law Review* 203.

or not a charge is made for admission to the place'. The precise scope and nature of the words 'otherwise than in private' is, however, unclear.[121] In *Korczac v Commonwealth*,[122] it was noted that 'the RDA does not require the relevant acts to have occurred "in public" or "in a public place". What is required is that the acts occur "otherwise than in private".'[123]

Clearly, Parliament intended to exclude purely 'private' conversations and conduct.[124] The requirement that racial vilification must happen in public, rather than in private, is therefore a key aspect of the wrong.[125] Notably, in *McLeod v Power*,[126] Brown FM found that an exchange between the applicant and the respondent, in which the impugned statement was directed to the applicant alone, and which was not heard by or communicated to anyone else, was not done 'otherwise than in private'.[127] Brown FM stated that this was the case even though the relevant conduct took place in a public place, such as a public street.[128] Therefore, regardless of where the relevant conduct takes place, s 18C has been interpreted as requiring that a member of the public *may* be able to see or hear the relevant conduct.

This requirement is similar to the requirement in defamation law that defamatory matter be 'published' to at least one person other than the plaintiff.[129] Defamation is therefore concerned with a person's *public* reputation, rather than merely hurt feelings or private embarrassment. Similarly, racial vilification is inherently *communicative* in nature. Similar to defamation, racial vilification centrally involves communication to other people.[130] The requirement that the relevant conduct be done 'otherwise than in private' necessarily involves communicating something to 'the public'. This is evident, for example, in the provision of the *RDA* by which certain circumstances are taken 'not to have been done in private'. As mentioned above, this includes conduct that causes words, sounds, images or writing to be communicated to the public.[131]

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121 Ibid.

122 [1999] HREOC 29.

123 Ibid [46]; approved in *Amponsem v Laundry (Exhibition) Pty Ltd* [2013] FCCA 1982, [70] (Lloyd-Jones J) and *McLeod v Power* (2003) 173 FLR 31, 41 [46] (Brown FM).

124 Explanatory Memorandum, Racial Hatred Bill 1994 (Cth) 1. See also Chapman and Kelly (n 120) 213.

125 Chapman and Kelly (n 120) 209.

126 (2003) 173 FLR 31.

127 Ibid 39. In other words, the statement was outside the scope of s 18C, as it was 'private'.

128 Ibid 42.

129 *Pullman v Walter Hill & Co Ltd* [1891] 1 QB 524.

130 This is particularly evident in s 18D, which exempts certain conduct from liability under s 18C where it constitutes a 'performance [or] exhibition', or a 'statement, publication, discussion or debate', or certain types of comments or reports.

131 *RDA* s 18(1)(a). In *Bolt* (n 11), Bromberg J (at [242]) applied principles of defamation law in interpreting and applying pt IIA of the *RDA*.

The *public* nature of racial vilification distinguishes it from other breaches of discrimination law. In discrimination law, the relevant conduct must occur in certain defined areas of public life (such as the provision of employment, or goods or services).[132] However, there is no general requirement in discrimination law that the relevant conduct occur publicly, and incidents of discrimination are unlawful even if done 'in private'.[133] However, as highlighted above, it is a central requirement of racial vilification laws that the relevant conduct is done 'otherwise than in private'. Therefore, although compulsory conciliation may be appropriate for discrimination complaints, arguably it is not appropriate for resolving complaints of racial vilification.[134]

3 *Private Settlement May Not Provide Appropriate Redress*

The public and communicative nature of racial vilification stands in strong contrast to the *private* nature of conciliation at the AHRC. Negotiations and settlement reached at the AHRC are 'private' in three separate ways. First, a conciliation conference is 'to be conducted in private'.[135] Second, nothing said in the course of conciliation is admissible in subsequent court proceedings.[136] Finally, settlement agreements are typically confidential.[137] This stands in strong contrast to court proceedings, which are typically held in public,[138] and which result in a public determination. There may be very good reasons for conciliation to be conducted privately, such as enabling full and frank negotiation to occur, including the making of concessions and offers of settlement.[139] This section does not question the value of conciliation in relation to certain types of disputes.

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132 Rees, Rice and Allen (n 77) ch 2.

133 The distinction between 'public' and 'private' conduct may be difficult to make in certain circumstances. Also, some discrimination claims have a 'public' aspect to them in that they may affect other members of the community and not just the individual complainant. For example, complaints relating to access to goods and services where other members of the community with the attribute in question (such as race or disability) will also be affected. Therefore, it may be argued that these complaints are not suitable for compulsory conciliation either.

134 When pt IIA was inserted into the *RDA* in 1995, little consideration was given by Parliament to the appropriateness of conciliation for racial vilification complaints (as distinct from discrimination complaints). However, a dissenting view in the *Multiculturalism Report* (n 68) stated (at [7.48]) that 'to offer no more than conciliation … would add to the trauma of victims'.

135 *AHRCA* s 46PK(2).

136 Ibid s 46PKA(1).

137 See, eg, Dominique Allen, 'Behind the Conciliation Doors: Settling Discrimination Complaints in Victoria' (2009) 18(3) *Griffith Law Review* 776, 786–9. Confidentiality of settlement agreements is not required by the *AHRCA*, but it is commonly agreed to by the parties.

138 See, eg, *Open Courts Act 2013* (Vic).

139 However, offers of settlement, if not accepted, are admissible in relation to costs: *AHRCA* s 46PSA. Also, privacy and confidentiality may minimise or prevent additional trauma and humiliation, particularly for complainants. This may, in turn, encourage victims to lodge complaints with the AHRC. See, eg, Thornton (n 82) 154; Astor and Chinkin (n 51) 377.

Rather, it highlights the contrast between the inherently public nature of racial vilification and the private nature of conciliation and any settlement reached.[140]

This Part has highlighted two factors relevant to the appropriateness of certain processes for seeking redress for racial vilification. First, corrective justice, and particularly the principle that the redress provided should match the nature and features of the particular wrong. Second, the autonomy of the claimant should be respected, regarding how they choose to respond to a wrong. This Part has argued that compulsory conciliation is inappropriate on both of these grounds. Settlement at conciliation is private and confidential, and it does not appropriately correspond to the public nature of racial vilification. In relation to respecting a claimant's autonomy, the critical flaw with conciliation at the AHRC is its *compulsory* nature. Optional conciliation would support and promote complainant autonomy. However, complainants should not be required to attempt conciliation in every case.

Sometimes it is argued that racial vilification complainants merely want to be heard and acknowledged by their respondents, and that conciliation provides this opportunity.[141] However, scholars such as Astor and Chinkin argue that this is based on unproven assumptions regarding what claimants want in terms of redress.[142] Given the public occurrence of racial vilification, complainants may legitimately seek a more public form of redress in respect of that wrong.

Indeed, there is evidence that racial vilification complainants commonly seek a public or communicative form of redress, rather than other remedies (such as compensation, or a private apology). For example, in *Eatock v Bolt*,[143] the applicant sought an order that the respondent newspaper publish a public notice of the Court's finding.[144] Scholars such as Gaze and Smith note that 'vilification cases are brought to ensure public condemnation of the speaker, and to vindicate the principle of equality', rather than to seek an award of damages.[145] Empirical research by Gelber and McNamara confirms that members of groups who have been publicly vilified typically seek public vindication, through a court or tribunal

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140 Private settlement also undermines the important purpose of improving public awareness of racial vilification laws.

141 Astor and Chinkin (n 51) 383.

142 Ibid.

143 *Bolt* (n 11).

144 Adrienne Stone describes this as an 'expressive remedy'. See Adrienne Stone 'The Ironic Aftermath of *Eatock v Bolt*' (2013) 38(3) *Melbourne University Law Review* 926, 938–40.

145 See Beth Gaze and Belinda Smith, *Equality and Discrimination Law in Australia: An Introduction* (Cambridge University Press, 2017) 196. See also Gelber and McNamara, 'Mapping the Gaps' (n 5) 509.

hearing and determination, of the wrong committed against them.[146] They note in particular the 'dissonance' between a scheme that requires conciliation (which is confidential) as a 'first call', despite the fact 'that it will often be ill-suited to achieving an effective remedy for the public wrong incurred'.[147]

IV Legislative Amendments that Would Facilitate Corrective Justice

This Part of the article proposes two legislative amendments that would provide corrective justice for victims of racial vilification to a greater extent than current processes. First, claimants should have direct access to court for adjudication of a complaint, rather than being required to attempt conciliation first. While this builds on the arguments presented in Part III, it also emphasises the authoritative nature of court decisions (in contrast to the voluntary nature of conciliation). Second, cost rules should be modified in respect of court proceedings for racial vilification. Currently, unsuccessful applicants (and even successful applicants, in certain circumstances) may be ordered to pay the respondent's legal costs. The risk of a costs order may deter complainants from seeking vindication of their rights in court. Therefore, costs should be ordered only in limited circumstances, as outlined below.

A *The Importance of Access to Adjudication*

This section argues that access to adjudication for determination of racial vilification claims supports corrective justice in two main ways. First, adjudication provides authoritative determination of a claimant's rights. Conciliation, on the other hand, is a voluntary process aimed at resolving disputes quickly and cheaply. Second, adjudication assists in promoting awareness of the relevant provisions, which enables victims to be aware of their rights, and which may deter incidents of vilification.

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146 Gelber and McNamara (n 4). In *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, Kiefel J (at [34]) noted the importance of vindicating the applicant (an Indigenous woman) 'in the eyes of her community'.

147 Gelber and McNamara (n 4) 320.

1 *Justice versus Efficiency*

In his influential article, 'Against Settlement', US legal scholar Owen Fiss criticises approaches to dispute resolution that emphasise efficiency over justice.[148] In particular, he criticises modes of alternative dispute resolution ('ADR'), such as conciliation, that may be quick and cheap, but which may not provide 'justice', particularly for claimants.[149] Fiss emphasises that adjudication and ADR serve entirely different purposes, although proponents of ADR often assert that both methods simply resolve disputes, and that ADR does this more quickly and cheaply than adjudication.

Fiss argues that adjudication involves courts authoritatively interpreting and applying laws, whereas ADR simply seeks to settle disputes by agreement between the parties.[150] He argues that terms of settlement often reflect the relative power and financial resources of the respective parties, rather than the merits of a claim.[151] Fiss particularly emphasises that, in certain circumstances, settlement of a claim is not a substitute for judgment by a court.[152] This is because the 'authority of [court] judgments arises from the law', rather than from an agreement between two parties.[153] Certain legislation, Fiss argues, seeks to promote important social values, and, therefore, claims made under these laws should have direct access to adjudication,[154] rather than being required to attempt ADR.[155] Fiss also argues that allowing direct access to court promotes a claimant's autonomy.[156]

Fiss does not argue that all legal claims should be determined by courts, rather than resolved by ADR. Rather, he argues that claimants should have direct access to court when a legal dispute involves a 'public interest' issue.[157] In particular, this is when a legal dispute affects a large number of people, and when it seeks to challenge a serious social wrong such as racial inequality.[158] Fiss emphasises the importance of the decision of the United States Supreme Court in

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148 Owen M Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073.

149 Ibid 1075. Fiss does not refer specifically to *corrective* justice in this article. However, his views therein are consistent with corrective justice as outlined in the present article.

150 Ibid 1087.

151 Ibid 1078. See also Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 165.

152 Fiss (n 148) 1083.

153 Ibid 1080.

154 Ibid 1087.

155 Ibid 1086.

156 Ibid. Fiss's arguments are therefore consistent with this article's emphasis on the importance of promoting claimant's autonomy.

157 Ibid 1087.

158 Ibid 1089.

Brown v Board of Education of Topeka ('*Brown*'),[159] in which the Court determined that racially segregated public schools were unconstitutional, and it ordered the desegregation of public schools in the United States.[160]

Fiss argues that legal disputes such as *Brown* are not suitable for settlement by agreement, for two reasons. First, such disputes are inherently unlikely to settle, as the parties have fundamentally opposed views on an appropriate outcome.[161] Second, the public has an interest in the outcome of such disputes, as the claim seeks to promote the public good of racial equality.[162] Therefore, although such claims may be brought by individuals, they promote the public interest, as they seek to promote a socially valuable goal (such as eliminating racial discrimination), and they potentially benefit a large number of people.[163] Therefore, Fiss argues that such claims should be determined by courts rather than private settlement.

Fiss acknowledges that claimants who seek to vindicate their rights in court may face obstacles, for example due to their lack of financial resources.[164] However, he argues that judges are obliged to ensure that proceedings are conducted fairly.[165] Therefore, he argues that a claimant's lack of financial resources should not prevent them from presenting their claim to a court, and having it fairly heard and determined.[166]

Dominique Allen applies Fiss's arguments to Australian discrimination law.[167] Allen emphasises the importance of judicial articulation and protection of claimants' rights.[168] She argues that court decisions not only vindicate individual rights, but can also serve a range of broader social purposes — none of which can be achieved by private settlement.[169] Allen emphasises the importance of claimants having direct access to court for adjudication of their rights according to law.[170]

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159 347 US 483 (1954).
160 Fiss (n 148) 1089.
161 Ibid 1083.
162 Ibid 1089. Therefore, the claim potentially benefits a large number of people.
163 Ibid 1087. This supports Varuhas's argument that individual (or private) legal claims may promote the public interest.
164 Ibid 1077. See, eg, Galanter (n 151).
165 Fiss (n 148) 1077.
166 Ibid. On the other hand, scholars such as Gaze and Hunter argue that judges interpret discrimination laws narrowly, making it difficult for claimants to assert their rights. See Gaze and Hunter (n 82) 197–8. However, the decision in *Bolt* (n 11) (examined below) demonstrates that judges can on occasion interpret racial vilification laws beneficially.
167 Dominique Allen, 'Against Settlement? Owen Fiss, ADR and Australian Discrimination Law' (2009) 10(4) *International Journal of Discrimination and the Law* 191.
168 Ibid 192.
169 Ibid 199.
170 Ibid.

Fiss's and Allen's arguments can be applied to racial vilification laws. These laws seek to promote important social values, including protecting the autonomy of people subject to such conduct. Further, incidents of racial vilification may affect a large number of people and not merely the individual complainant. Therefore, there is a public interest in complainants having direct access to adjudication in respect of such claims.[171]

2 *Conciliation at the* AHRC *Does Not Authoritatively Determine Claims*

Whereas courts have the power to authoritatively determine legal claims, the AHRC is an administrative agency with limited powers. It is not a court[172] and has very limited coercive powers. Although it can require the attendance of certain people at conciliation,[173] and the production of certain documents,[174] it cannot compel a respondent to cooperate in seeking resolution of a complaint. Further, the AHRC cannot make any orders (such as costs orders) in favour of a complainant, and it cannot determine whether a complaint has been established, or order a respondent to provide any remedies.[175] The AHRC is limited to assisting the parties to resolve a complaint by agreement.[176]

Further, unlike court processes, participation in conciliation is inherently *voluntary* in nature.[177] Therefore, the efficacy of conciliation conducted by the AHRC depends almost entirely on the good faith and cooperation of the parties, and, in particular, on respondents.[178] The AHRC can do very little — apart from terminating the complaint — in the face of an uncooperative respondent. Therefore, there is very little reason for a well-resourced respondent to participate in conciliation.

3 Adjudication Promotes Awareness of Racial Vilification Laws

Another reason for allowing direct access to courts for racial vilification claims is that adjudication promotes awareness of the law.[179] Increased awareness of the law supports corrective justice in several ways. First, it enables those subject to

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171 For further discussion of the 'public interest' aspect of racial vilification claims, see Part IV(B)(2) below.
172 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.
173 *AHRCA* s 46PI.
174 Ibid.
175 *Freedom of Speech Report* (n 3) [3.24].
176 Ibid [3.23], [3.87].
177 Astor and Chinkin (n 51).
178 *Freedom of Speech Report* (n 3) [3.83].
179 Awareness of certain laws is, of course, also promoted by other types of educative programs, such as school-based programs and other awareness-raising programs.

racial vilification to be aware of their right to seek redress. Second, it may deter would-be racial vilifiers from engaging in such conduct. Third, it serves the underlying purpose of civil liability, which is to establish and reinforce norms of behaviour. These three reasons will now be examined in greater detail.

First, the importance of promoting public awareness of the provisions of pt IIA of the *RDA* was emphasised when it was introduced into Parliament.[180] Raising public awareness also supports the forms of legal redress provided by the provisions. In particular, court decisions provide an important form of education regarding particular laws. This is because court proceedings are generally held in public, and the public can attend hearings and the media can report on proceedings.[181] Court decisions are publicly available, and this assists in making laws and their interpretation publicly known. Further, this enables members of the public to become aware of their rights and duties under the law.[182] Conciliation, on the other hand, is conducted privately and therefore cannot promote awareness of racial vilification laws.[183]

Awareness-raising, and the importance of access to adjudication, supports corrective justice by enabling members of groups targeted by racial vilification to be aware of their right to seek redress. People cannot exercise their rights, or seek redress, unless they are aware of their rights under law. Significantly, the *Freedom of Speech* report noted that 'communities targeted by racial vilification were not aware of the laws or the process for making a complaint'.[184] Media coverage of court hearings can generate public discussion of racial vilification and promote greater understanding of its harms.[185] The educative effect of court decisions may have a wider reach, and greater impact, than formal education programs (eg in

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180 See Part II(C)(2) above.

181 As noted above, some respondents in racial vilification proceedings are themselves media presenters.

182 Gaze and Smith (n 144) 187.

183 This is despite strong assertions to the contrary by the AHRC. For example, in its 2018–19 annual report, the AHRC states that '80% of surveyed participants indicated that involvement in the complaint process had assisted them to better understand their rights and responsibilities under federal human rights and anti-discrimination law': AHRC, *Complaint Statistics 2018–2019* < http://humanrights.gov.au/sites/default/files/2019-10/AHRC_AR_2018-19_Stats_Tables_%28Final%29.pdf> 25 ('Chart 6: Racial Discrimination Act — Outcomes of Finalised Complaints'). However, the limited extent of this 'educative' effect is apparent, in that it relates only to people who are already involved in the AHRC dispute resolution process.

184 *Freedom of Speech Report* (n 3) [4.11].

185 Tamsin Solomon, 'Problems in Drafting Legislation against Racist Activities (1994) 1(1) *Australian Journal of the Human Rights* 265, 277. The educative function of court hearings and decisions, of course, depends on adequate and accurate media reporting on such decisions. Given that prominent media commentators have been respondents in racial vilification proceedings, this can sometimes present difficulties. See, eg, Stone (n 144), who notes that a prominent media commentator who was found to have breached pt IIA subsequently used his position to publicly criticise, and misrepresent, the Court's decision and the provisions of pt IIA. However, courts have powers to punish for contempt of court in such circumstances.

schools).[186] This is because determinations made by a court carry significant weight and authority, particularly compared to decisions made by an administrative agency such as the AHRC.

Second, awareness-raising may deter would-be racial vilifiers from engaging in such conduct. This is because such people would be made aware, by the publicity and public debate surrounding court proceedings for racial vilification, of the consequences of breaching such laws. Similar to defamation laws, the consequences of breaching racial vilification laws are both financial and reputational.[187] Deterrence of particular conduct may be considered the domain of criminal law. However, deterrence is not confined exclusively to criminal law. The law of civil wrongs also seeks to deter certain conduct, by imposing civil liability on individuals who breach those laws.[188]

Finally, awareness-raising (particularly through the publicity of court proceedings) serves the underlying purpose of civil liability, which is not merely to provide redress to individual claimants, but also to establish and reinforce norms of behaviour. As mentioned earlier, corrective justice is based on, and supports, the importance of underlying rights.[189] Although duties of rectification are owed only by the wrongdoer to the victim, *primary* rights impose duties on every member of society.[190] Also, the duty to respect primary rights is *prospective*, in that it guides future conduct (rather than merely providing rectification after a wrong is committed). Therefore, the decisions of courts in determining individual claims regarding civil wrongs serve an important normative and symbolic function in educating and reminding *every member of society* of their duties towards others under particular laws.[191]

The decision of Bromberg J in *Eatock v Bolt* ('*Bolt*')[192] illustrates these aspects of corrective justice. The decision promoted awareness of the provisions of pt IIA of the *RDA*, and highlighted the consequences for respondents of breaching those provisions. The decision vindicated the rights of the applicants, demonstrating

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186 See, eg, *Freedom of Speech Report* (n 3) [2.137].

187 Swannie (n 9).

188 Gelber and McNamara (n 4). Peter Cane (n 60) notes (at 52) that breach of tort law involves not merely liability to pay compensation, but also a degree of 'moral stigma'. Therefore, although punishment (and deterrence) is not the *primary* purpose of tort law, it is an important secondary purpose: ibid 62.

189 See Part IIC2 above.

190 Hohfeld (n 53). See also Varuhas (n 43) 16.

191 See, eg, Cane (n 60). Cane argues that tort law serves two purposes, which are interlinked. First, it provides redress to individuals who have been wronged. Second, it provides general guidance to citizens: ibid 38. He particularly emphasises the role of courts in fulfilling both of these purposes: ibid 42.

192 *Bolt* (n 11).

that those rights can and will be upheld in court.[193] The applicants in *Bolt* were Indigenous Australians, who are typically marginalised in the Australian legal system. The two respondents, on the other hand, were a prominent media commentator and a powerful media company. Nevertheless, the applicants were successful in having their claim upheld by the Court. In doing so, the Court's decision clarified that pt IIA is not limited to overtly racist epithets or abuse, and that subtle or sophisticated denigration of members of a particular racial or ethnic group may contravene that Part.[194]

Court decisions can promote public awareness of certain legal principles. For example, in *Brown*,[195] the United States Supreme Court ordered the desegregation of public schools in the United States,[196] and in *Mabo v Queensland [No 2]*,[197] the High Court of Australia recognised the existence of native title under Australian common law.[198] The *Bolt* decision may be compared to these two famous decisions, in that it prompted public discussion and debate regarding racial vilification laws.

It may be argued that court proceedings have an educative effect only if the applicant is successful in the proceeding. However, Gelber and McNamara argue that '[l]itigation may … have an educative effect, even where the conduct in question is ruled *not* to constitute [vilification].'[199] This statement is based on empirical studies, including interviews by the authors with applicants in vilification proceedings.[200] On this basis, Gelber and McNamara conclude that 'litigation is worth pursuing because it afford[s] [applicants] an opportunity, including via associated media coverage, to promote debate' about the harms of public vilification.[201]

Although the *Bolt* decision prompted broad-ranging debate concerning Australia's racial vilification laws, not all of this discussion accurately described either the relevant laws or the reasons for the Court's decision.[202] However, this debate at least made the public aware of the existence of these laws, and of the relative importance of competing arguments, such as free speech. Therefore,

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193 Adrienne Stone describes the remedy granted in *Bolt* as an 'expressive' one. See Stone (n 144) 938–40.

194 *Bolt* (n 11) [207].

195 347 US 483 (1954).

196 Fiss (n 148) 1089.

197 (1992) 175 CLR 1.

198 The decision in *Mabo v Queensland [No 2]* was based partly on considerations that included the importance of eliminating racial discrimination, in the form of the doctrine of *terra nullius*, from Australian common law.

199 Gelber and McNamara, 'Lessons from Australia' (n 5) 654.

200 This particular interview concerned homosexuality vilification; however, the point is applicable to racial vilification also.

201 Gelber and McNamara, 'Lessons from Australia' (n 5) 655.

202 Ibid. See also Stone (n 144).

adjudication of racial vilification claims, and associated media coverage, assists in promoting awareness of racial vilification laws. In particular, Gelber and McNamara's research confirms that members of communities subject to racial vilification, such as Indigenous Australians, regard racial vilification laws as an important form of standard-setting.[203] In other words, the ability to enforce such laws through the courts assists in setting standards of acceptable conduct by others. This provides a sense of protection and reassurance for members of vulnerable communities.[204] As mentioned above, the protection of the rights and interests of victims of a legal wrong is an important aspect of corrective justice. The ability to seek redress in court emphasises the equal worth of targets of vilification, as the state has 'drawn a line in the sand distinguishing between acceptable and unacceptable public behaviour'.[205] Therefore, considering the importance of access to adjudication for racial vilification complaints, Parliament should provide direct access for complainants.

B *Costs*

This article has emphasised the importance of allowing claimants access to court for adjudication of racial vilification claims. This enables claimants to exercise their autonomy, and to achieve appropriate vindication of the wrong done to them. However, adjudication has certain risks for claimants. This is particularly so at the federal level in Australia, where proceedings are determined by a court rather than a tribunal.[206] As outlined in this section, the risks of litigation are particularly serious for claimants who are inexperienced and poorly resourced.

This section argues that cost rules, and particularly the rule that an unsuccessful applicant may be ordered to pay the respondent's legal costs, should be modified in respect of proceedings for racial vilification. This is because that rule can deter complainants from seeking to vindicate their rights in court. Therefore, given the public interest in allowing access to adjudication of racial vilification claims, costs should be ordered only in limited circumstances. This

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203 Gelber and McNamara, 'Lessons from Australia' (n 5) 656.

204 Ibid 508.

205 Ibid 511. It is beyond the scope of this article to examine in detail what role the AHRC would have if complainants were granted direct access to adjudication. However, briefly, the AHRC could serve a similar function to the Victorian Equal Opportunity and Equal Rights Commission, in providing information on discrimination law and optional dispute resolution services.

206 Until 1995, the AHRC (then called the Human Rights and Equal Opportunity Commission) conducted informal hearings to determine discrimination complaints. However, in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, the High Court determined that the AHRC could not make legally binding determinations resolving a discrimination complaint. As an administrative body, the AHRC could not exercise judicial power.

section will outline the current costs rules, explain why those rules are inappropriate in relation to racial vilification claims, and then present a more appropriate rule regarding costs in such proceedings.

1 *Complexity, Uncertainty and Costs*

As mentioned above, commencing proceedings in the Federal Court or the Federal Circuit Court is the second stage in seeking redress for breach of Australia's racial vilification laws.[207] Significantly, proceedings are conducted in a court rather than a tribunal.[208] Adjudication of a claim by a court, rather than a tribunal, raises a range of challenges and risks, particularly for claimants. In summary, these are the complexity of procedural rules and substantive law, the uncertainty of the court's ultimate determination, and costs.

Regarding complexity, pt IIA of the *RDA* is complex both in its substantive aspects and in its procedural requirements. For example, applicants must prove that the alleged conduct was done 'because of' the person's race, colour or ethnic origin.[209] Numerous judicial statements have been made in relation to this requirement.[210] The reported decisions establish that this requires a causal relationship between the act and the person's race, colour or ethnic origin, and this involves consideration of the respondent's 'purpose', as well as the nature of the respondent's conduct.[211] However, in some cases applicants have been unable to prove this, even though there was evidence of a racial motive.[212]

Another reason for uncertainty is that claimants must often depend on favourable judicial inferences regarding findings of fact. Success in racial vilification proceedings relies to a large extent on whose interpretation of particular words and conduct is accepted by a court.[213] Further, this high level of uncertainty tends to favour the party with greater resources.[214] Scholars emphasise that claimants are often poorly resourced and less experienced than

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207 Proceedings can be commenced only when a complaint has been terminated by the AHRC: *AHRCA* s 46PO.

208 Under state and territory discrimination laws, proceedings are determined by a tribunal rather than a court. See Rees, Rice and Allen (n 77) 823–4.

209 *RDA* s 18C (1).

210 See *Bolt* (n 11) [308].

211 *Bropho v Human Rights and Equal Opportunity Commission* (2004) 204 ALR 761, [71] (French J).

212 See, eg, *Creek v Cairns Post Pty Ltd* [2001] 112 FCR 352; *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615.

213 Gelber and McNamara, 'Mapping the Gaps' (n 5) 493. For example, in *Hagan v Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615, the Court determined that, when all the relevant circumstances were taken into account, the use of the word 'nigger' on a public sign did not breach s 18C.

214 Gelber and McNamara (n 4) 318.

respondents.[215] Further, scholars such as Galanter argue that inexperienced and poorly resourced claimants have little chance of success in litigation, when proceeding against more-experienced and better-resourced respondents.[216]

However, the most serious risk faced by claimants in commencing and pursuing proceedings is not that of losing, but rather the risk of being ordered to pay the respondent's legal costs.[217] Both the Federal Court and Federal Circuit Court have the power to award costs in any proceeding.[218] Although this power is discretionary, the 'usual rule' is that the unsuccessful party is ordered to pay the successful party's legal costs.[219] Courts have on several occasions ordered unsuccessful applicants in racial vilification matters to pay costs.[220] Further, courts have also ordered applicants to pay costs on an *indemnity* basis (rather than merely on a party/party basis) when an offer of settlement has been unreasonably refused.[221]

2 *Current Cost Rules Are Not Appropriate*

Courts have consistently rejected the argument that different costs rules apply to proceedings brought under the AHRC.[222] However, courts have identified four factors that may militate against ordering an unsuccessful claimant to pay costs

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215 Ibid. Parties are entitled to certain limited forms of assistance by the AHRC in relation to applications to court. Claimants are entitled to assistance in preparing the forms required to make such an application: *AHRCA* s 46PT. Applicants and respondents may apply to the Attorney-General for assistance in respect of proceedings, and assistance may be provided if the Attorney-General is satisfied that refusal would involve hardship, and that it is 'reasonable' to grant the assistance: *AHRCA* s 46PU.

216 Galanter (n 151). Therefore, scholars such as Gaze and Hunter emphasise the need for the state to provide free or subsidised legal representation for parties (usually applicants) who cannot afford such representation: Gaze and Hunter (n 82) 201–21. However, they also emphasise (at 222) that costs rules, rather than lack of legal representation, 'operate as a barrier to access for … complainants'. This is because costs rules can deter even strong cases, and adverse costs awards are borne by a complainant personally: ibid 242.

217 This article is not concerned with a claimant's chances of success in litigation per se. Rather, it is concerned with whether current costs rules are an inappropriate barrier, or deterrent, to claimants accessing adjudication.

218 *Federal Court of Australia Act 1975* (Cth) s 43; *Federal Circuit Court of Australia Act 1999* (Cth) s 79.

219 *Fetherston v Peninsula Health [No 2]* [2004] FCA 594 (Heerey J).

220 See, eg, *Creek v Cairns Post Pty Ltd* [2001] 112 FCR 352; *Hagan v Trustees of Toowoomba Sports Ground Trust* [2001] FCA 123. The unsuccessful applicant in the latter proceeding was ultimately declared bankrupt; see *Trustees of the Toowoomba Sports Ground Trust v Hagan* [2007] FMCA 910.

221 See, eg, *Prior v Queensland University of Technology [No 3]* [2016] FCCA 3399. In this proceeding, one respondent also sought an order for costs against the applicant's solicitor personally. The Court declined to make such an order, as the proceeding, although misconceived, was not 'hopeless or bound to fail' (at [15]–[19]).

222 See, eg, *Fetherston v Peninsula Health [No 2]* [2004] FCA 594, [6]–[8] (Heerey J); *Hagan v Trustees of Toowoomba Sports Ground Trust* [2001] FCA 123, [31]; *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, [1] (Keifel J).

in such proceedings. First, such proceedings are 'human rights' proceedings,[223] in that they seek to vindicate a claimant's fundamental human rights.[224] Second, anti-discrimination legislation has a 'beneficial' purpose.[225] Third, such proceedings have a 'public interest' aspect, in that they benefit the public (by promoting important social purposes) and not merely the claimant individually.[226] Similarly, Gelber and McNamara have emphasised that proceedings for racial vilification involve a strong public interest aspect.[227] They argue that a person seeking to enforce such laws can be regarded as a 'private prosecutor' who 'act[s] on behalf of the group that has been targeted'.[228]

Finally, many discrimination complainants are members of disadvantaged and vulnerable racial and ethnic groups, and they consequently cannot afford legal representation.[229] The AHRC's complaint statistics illustrate the very different profile of complainants, as compared to respondents. Whereas 94 per cent of complainants are individuals, most respondents are corporations, public authorities or government departments.[230] Regarding complaints made under the *RDA*, 61 per cent of complainants were born outside Australia, and 21 per cent are Indigenous or Torres Strait Islander.[231] In particular, Indigenous Australians face a range of challenges in accessing the legal system, such as language difficulties, low levels of legal knowledge, and entrenched socio-economic disadvantage.[232]

Therefore, many applicants must either self-represent or rely on pro bono legal assistance.[233] Courts currently grant 'some latitude' to self-represented

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223 *Hagan v Trustees of Toowoomba Sports Ground Trust* [2001] FCA 123, [31].

224 See also Varuhas (n 43), who argues (at 76) that torts such as defamation (which are actionable without proof of loss) can be regarded as a type of human rights protection, as they protect fundamental human interests. Racial vilification is relevantly similar to defamation, in that it concerns a person's public standing and dignity.

225 *Fetherston v Peninsula Health [No 2]* [2004] FCA 594, [9] (Heerey J). This is consistent with Fiss's argument that laws proscribing racial discrimination seek to promote important social purposes. See Fiss (n 148) 1089.

226 However, in *Prior v Queensland University of Technology [No 3)*][2016] FCCA 3399, the Court (at [5]) seemed to conflate the issue of whether the proceedings were *by their nature* in the 'public interest' on the one hand, with whether a particular proceeding had in fact had 'generated public interest' on the other.

227 Gelber and McNamara (n 4).

228 Ibid 316. However, Gelber and McNamara (at 331) note that complainants in racial vilification proceedings are often publicly labelled 'troublemakers', and that 'their motives [are] questioned and ridiculed'.

229 Astor and Chinkin (n 51) 364.

230 AHRC (n 183) 5.

231 Ibid.

232 See, eg, Commonwealth Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, 2009) 153–5 ('*Strategic Framework Report*'). See also Commonwealth of Australia, *Access to Justice Arrangements: Productivity Commission Inquiry Report* (Report, September 2014) 6, 762–6 ('*Access to Justice Report*'). These issues are also experienced by members of other groups, such as those for whom English is not a first language.

233 AHRC (n 183) 25 ('Chart 6: Racial Discrimination Act — Outcomes of Finalised Complaints').

litigants regarding costs.[234] However, the extent of this latitude is uncertain, particularly regarding whether an applicant is considered to have acted 'reasonably' in refusing an offer of settlement.

Although these factors may be relevant to costs determinations in particular proceedings, courts have emphasised that it is the role of Parliament, rather than the courts, to determine general rules regarding costs. In *Fetherston v Peninsula Health [No 2]*,[235] Heerey J stated that Parliament may provide that different costs rules apply in particular proceedings, but noted that it had not done so regarding proceedings under the *AHRCA*.[236]

The four factors outlined above apply to all proceedings commenced under the *AHRCA*, which includes discrimination proceedings. However, there are two additional reasons why Parliament should provide different costs rules regarding proceedings for racial vilification. First, a key feature of racial vilification as a legal wrong is its public occurrence and communicative nature.[237] Therefore, according to corrective justice, claimants should be able to seek public vindication, through court proceedings, of the wrong committed against them. Second, applicants typically seek an order that vindicates their rights, rather than monetary compensation. This is consistent with the symbolic importance of redress for racial vilification as an inherently public and communicative wrong.[238] Currently, however, a claimant may be ordered to pay the respondent's costs on an indemnity basis if they (the claimant) *unreasonably* refuses an offer of settlement.[239] Cost rules may effectively deter claimants from seeking to vindicate their rights in court.

In *Eatock v Bolt*,[240] Bromberg J determined that the respondents (a newspaper and an employee writer) breached pt IIA by publishing two articles in the newspaper. The applicant sought, and the Court ordered, that the respondent newspaper publish a notice of the Court's determination in its newspaper and on its website.[241] Although the claimant was successful, the respondent argued that it was entitled to indemnity costs, because the applicant had refused an offer of settlement on similar terms to the orders ultimately made by the Court. However, Bromberg J held that the successful applicant would not be deprived of her costs,

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234 *Refaat v Barry [No 2]* [2015] VSCA 268.
235 *Fetherston v Peninsula Health [No 2]* [2004] FCA 594 (Heerey J).
236 Ibid [10].
237 See Part III(B)(2) above.
238 Ibid.
239 The fact that the applicant is self-represented is not in itself grounds for exempting them from a costs order; however, this may be relevant in considering whether an applicant has acted 'reasonably'. See *Refaat v Barry [No 2]* [2015] VSCA 268.
240 (2011) 197 FCR 261.
241 *Eatock v Bolt [No 2]* (2011) FCA 1180 ('*Bolt [No 2]*').

and would not be ordered to pay the respondent's costs, because she had not acted *unreasonably* in refusing that offer.[242] In particular, Bromberg J referred to the evidential findings achieved by the applicant, which were part of the Court's published reasons. These findings included that the published articles were substantially false, and that the applicants genuinely identified as Aboriginal, rather than (as the articles suggested) choosing to identify as Aboriginal for financial and career benefits.[243] Bromberg J held that these public findings contributed to the vindication the applicant achieved.[244]

However, courts can just as easily decide against an applicant on the issue of reasonableness. In *Prior v Queensland University of Technology [No 3]*,[245] the Court held that the applicant had unreasonably refused an offer of settlement (in the form of an apology) by the respondent, and she was therefore ordered to pay costs on an indemnity basis.[246] Therefore, costs orders present an extreme risk, particularly for complainants. Determining whether a complainant acted 'reasonably' in refusing a settlement offer depends on many factors, including a judge's assessment of the appropriateness of the redress sought.

In summary, the possibility of an adverse costs order, including indemnity costs, represents a significant risk for applicants in racial vilification (and discrimination) proceedings. Although courts have acknowledged that such proceedings are 'human rights' claims and that the legislation has a 'beneficial' character, they do not currently treat such proceedings differently regarding costs.[247] In addition, even successful applicants can be ordered to pay indemnity costs, if they are determined to have 'unreasonably' refused an offer of settlement.

Allowing disadvantaged members of society access to courts to vindicate their rights is a core obligation of the state in a liberal democracy.[248] Members of

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242 Ibid [42]. He also noted (at [47]) that the terms of settlement were inferior to the orders made.

243 Ibid. [42].

244 Ibid.

245 [2016] FCCA 3399.

246 Ibid [24]. The Court emphasised in particular that the applicant had sought compensation and not merely a declaration. The Court stated (at [23]) that the relief sought by the applicant was therefore 'for the benefit of the applicant personally'. In *Bolt [No 2]* (n 241), Bromberg J (at [37]) emphasised that the applicant in that proceeding 'made no claim for money' and only sought a declaration. It is difficult to determine whether the Court in *Prior* was attempting to distinguish the decision in *Bolt [No 2]*, and further whether the particular form of relief sought by an applicant is (or should be) relevant to the costs orders made by a court.

247 In some cases, unsuccessful applicants have been ordered to pay less than full costs. For example, in *Creek v Cairns Post Pty Ltd* [2001] FCA 1150, the unsuccessful applicant was ordered to pay one-half of the respondent's costs, as the respondent unsuccessfully argued a defence under s 18D.

248 *Strategic Framework Report* (n 232) 1, 30. This Report highlights the significant practical barriers to accessing court experienced by Indigenous Australians and members of culturally and linguistically diverse communities. These barriers include language, cultural and financial

minority groups should not be deterred from vindicating their rights by prohibitive rules concerning costs. Rather, the state should ensure that all members of society have access to courts to vindicate their rights.[249]

Therefore, Parliament should amend the *AHRCA* to provide that costs orders may be made against applicants in racial vilification proceedings only in certain limited circumstances. There are currently exemptions in various statutes that modify costs rules in similar circumstances. These provisions provide that costs orders may only be made if the court is satisfied that the proceeding was instituted vexatiously or without reasonable cause, or the applicant acted unreasonably and caused the respondent to incur costs.[250] This rule is adequate to deter vexatious or unmeritorious claims, and to encourage timely settlement.[251] Scholars such as Jean Sternlight highlight that the cost regime under the *AHRCA* is particularly harsh and punitive to complainants who fail.[252]

Although courts have declined to recognise such proceedings as an exception to the usual rule as to costs, Parliament should legislate to recognise the strong public interest in shielding complainants from costs orders in racial vilification proceedings, provided the proceedings were not instituted vexatiously or that the complainant has not unreasonably caused the respondent to incur costs.

V Conclusion

This article has argued that redress for breach of Australia's racial vilification laws should be understood within a corrective justice framework. Breach of pt IIA of the *RDA* is a civil wrong, and claimants should be entitled to appropriate forms of legal redress. Corrective justice emphasises the right of claimants to vindication of their equal worth and standing as full members of society. As an inherently public and communicative wrong, racial vilification specifically requires *public* vindication of a wronged person's rights, including appropriate access to courts for an authoritative determination of those rights.

This article has argued for two amendments to the *AHRCA*, which would promote corrective justice for claimants. First, claimants should have direct access to adjudication, rather than having to attempt conciliation first. Second,

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constraints: ibid 153–4. See also Australian Law Reform Commission, *Cost Shifting – Who Pays for Litigation?* (Report No 57, October 1995).

249 *Access to Justice Report* (n 232) 6, 464.

250 See, eg, *Fair Work Act 2009* (Cth) s 570; *Public Interest Disclosure Act 2013* (Cth) s 18.

251 See *Freedom of Speech Report* (n 3), and subsequent amendments to the AHRCA, which emphasise the importance of costs orders in deterring trivial or vexatious complaints.

252 Jean R Sternlight, 'In Search of the Best Procedure for Enforcing Employment Discrimination Laws: A Comparative Analysis' (2004) 78(5) *Tulane Law Review* 1401. Sternlight highlights that courts hearing discrimination cases in the United States award costs only in exceptional circumstances, and in the United Kingdom discrimination proceedings are generally conducted in tribunals, rather than through the courts.

costs rules should be modified so that claimants can be ordered to pay costs only if they commence proceedings vexatiously, or if they otherwise unreasonably caused the respondent to incur costs. These amendments would support claimants who seek vindication of their rights in court, which is necessary to provide appropriate redress for the wrong of racial vilification, and also to respect the autonomy of claimants.

Understanding redress for racial vilification within a corrective justice framework indicates that certain proposals advanced by scholars to make such laws 'more effective' would in fact not be appropriate. In particular, Gelber and McNamara propose that racial vilification laws be amended 'to allow any member of the community to initiate a complaint'.[253] They argue that this would improve the effectiveness of the enforcement of these laws and remove the burden of enforcement from members of target communities.[254] However, this proposal is not consistent with corrective justice, which requires a correlation between the wrongdoer and the person seeking redress. By definition, a person who has not been wronged (either individually or as a member of the target group) is not entitled to seek redress in respect of that wrong.

In addition, Gelber and McNamara propose that a governmental agency (such as an anti-discrimination commission) be given power to initiate a complaint in relation to incidents of racial vilification.[255] Again, they argue that this would improve the effectiveness and efficiency of enforcement, and that it would remove the burden of enforcement from victims.[256] Similar proposals have been made by scholars in relation to discrimination proceedings.[257] However, enforcement of racial vilification laws by a governmental agency would not only break the required correlation between the wrongdoer and the person seeking redress, it would also potentially undermine the autonomy of victims. As mentioned above, pt IIA of the *RDA* conceives of racial vilification as a wrong against members of particular racial groups. Potentially, agency enforcement seriously undermines the autonomy, or choice, of members of target groups regarding whether, when and how to seek redress under racial vilification laws. Although agency enforcement may be more 'effective' in some sense, it does not prioritise victim autonomy in the way required by principles of corrective justice.

This article proposes a new framework for understanding the types of redress provided for breach of pt IIA of the *RDA*. This framework — corrective

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253 Gelber and McNamara, 'Mapping the Gaps' (n 5) 509. This would essentially create a form of 'open standing'.

254 Ibid.

255 Ibid 510.

256 Gelber and McNamara (n 4) 309–12. Further, they argue that racial vilification is a 'public wrong' and therefore that it is inappropriate to leave enforcement to individuals.

257 See, eg, Gaze and Hunter (n 82) 246–7; Dominique Allen, 'Strategic Enforcement of Anti-Discrimination Law: A New Role for Australia's Equality Commissions' (2011) 36(3) *Monash University Law Review* 103.

justice — emphasises the rights and interests of *claimants* (or victims of racial vilification), as these rights and interests have either been ignored in the current debate concerning Australia's racial vilification laws, or have not been understood as part of an overarching conceptual framework. Providing appropriate redress under racial vilification laws obviously involves balancing competing values, such as the rights and interests of both complainants and respondents. Also, principles (such as corrective justice) must be balanced with notions of efficiency and effectiveness. This article has presented corrective justice as an appropriate framework for conceptualising redress under racial vilification laws. However, important work remains to be done to implement this framework in practical terms.

State Consent to the Provision of Humanitarian Assistance in Non-International Armed Conflicts

Jessica Schaffer*

In light of repeated denials and obstruction of relief efforts by belligerent states, particularly when directed towards non-state armed groups designated as terrorist groups or justified as a legitimate response to the COVID-19 pandemic, this article provides a comprehensive analysis of the international legal position regarding the provision of humanitarian assistance in non-international armed conflicts. The article argues that although a general right of access has not crystalised, relief operations into territory under the effective control of a non-state armed group without state consent may be permissible with Security Council authorisation or otherwise, in appropriate circumstances, under the rules of state responsibility. More broadly, belligerent parties must abide by their legal obligations to ensure that the needs of civilians are met.

I Introduction

The Office for the Coordination of Humanitarian Affairs estimated that nearly 168 million people would need humanitarian assistance in 2020, with the key driver for humanitarian needs being armed conflict.[1] The lack of essential goods and services during armed conflict aggravates the suffering inflicted by war and contributes to the forced displacement of millions of people. It is therefore critical that rapid, unimpeded and sustained humanitarian assistance is available to alleviate the effects of armed conflict. The belligerent state has the responsibility to provide for the basic needs of its civilian population or, where it is unable to do so, to allow and facilitate the provision of humanitarian assistance in its territory. However, the changing nature of warfare from international to non-international armed conflict and the proliferation of non-state armed groups have created new

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1 Office for the Coordination of Humanitarian Affairs ('OCHA'), *Global Humanitarian Overview 2020* (10 December 2019) 4, 11–12, 25. See also *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2020/366 (6 May 2020) 6 ('*Report of the Secretary-General 2020*').

and complicated challenges regarding the provision and delivery of humanitarian assistance.

Where states are facing an internal enemy they are more likely to rely on arguments of territorial sovereignty to deny access to civilians under the control of non-state armed groups, or to otherwise interfere with aid operations through direct attacks on humanitarian personnel, the use of siege and starvation as a weapon of war, or by blocking or imposing onerous restrictions on the transit of humanitarian supplies and personnel.[2] In 2019, the United Nations ('UN') Secretary-General reported widespread incidents of violence, harassment and arbitrary detention against humanitarian personnel and assets, including 535 incidents of violence against aid workers in South Sudan and 392 incidents in Yemen, as well as copious bureaucratic impediments to access causing severe delays in the provision of humanitarian services — for example, the arbitrary taxation of humanitarian workers in Somalia, and complex registration and visa processes in the Democratic Republic of Congo.[3]

Humanitarian operations have also been constrained by counter-terrorism frameworks as governments impose restrictions on funding, hampering the ability of humanitarian groups to provide assistance to civilians under the control of armed groups labeled 'terrorists'. This has significantly curtailed the abilities of relief societies to carry out necessary humanitarian work.[4] The COVID-19 pandemic has further compounded existing humanitarian challenges as measures by states to contain its spread, such as restrictions on international travel, border closures and lockdowns, have impacted the ability of humanitarian organisations to operate and of populations to access aid.[5] Furthermore, states have exploited the pandemic by adopting regressive measures disguised as emergency health measures aimed at curtailing access.[6] For example, restrictions and bureaucratic obstacles with respect to aid deliveries in Syria are preventing

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2 Government of Switzerland, *Humanitarian Access in Situations of Armed Conflict: Handbook on the Normative Framework* (Version 1, 31 December 2011) 10 ('*Handbook on the Normative Framework*'); OCHA (n 1) 14.

3 *Report of the Secretary-General 2020* (n 1) 5–6.

4 Jessica S Burniske and Naz K Modirzadeh, *Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action and Comment* (Harvard Law School Program on International Law and Armed Conflict, March 2017) 7 <http://blogs.harvard.edu/pilac/files/2017/03/Pilot-Empirical-Survey-Study-and-Comment-2017.pdf>.

5 ACAPS, *Crisis in Sight Humanitarian Access Overview: A Snapshot of the Most Challenging Contexts* (Report, 13 July 2020) 8–9.

6 *Covid 19 Pandemic Amplifying, Exploiting World's Fragilities, Secretary-General Tells Security Council Debate on Protecting Civilians in Armed Conflict*, UN Doc SC/14196 (27 May 2020) ('UN Covid-19 Press Release').

medical supplies, equipment and personnel from reaching those in need,[7] while suspensions of flights, curfews and lockdown regulations have significantly constrained and delayed humanitarian access in Libya during the pandemic.[8]

This article will comprehensively analyse the extent to which a state's sovereignty can be reconciled with the humanitarian imperative to alleviate suffering and the right of the civilian population to receive humanitarian aid. While victims of non-international armed conflicts have a right to humanitarian assistance, this is difficult to enforce, as a general right of access allowing for unilateral relief operations into opposition-held territory without state consent has not crystalised in international law. Rather, this article advocates that relief operations into territory under the effective control of a non-state armed group operating without state consent may be permissible where the Security Council provides authorisation, or otherwise under the doctrine of necessity or as a countermeasure where the necessary criteria are met. While these provide limited opportunities to circumvent state consent, this article highlights the gaps in international humanitarian law in enforcing the right of civilians to receive essential supplies and reinforces the imperative that belligerent parties abide by their legal obligations to ensure that the needs of civilians are adequately met.

II The Legal Framework Governing Humanitarian Assistance in Non-International Armed Conflicts

The term 'humanitarian assistance' is not defined in public international law and has no commonly accepted meaning in practice. The UN General Assembly has referred to humanitarian assistance as including 'medicines, non-perishable food stuffs, blankets, tents and clothing'.[9] The International Court of Justice ('ICJ') has determined that, in reference to the United States' legislative definition of humanitarian assistance as including the provision of food, clothing, medicine and other humanitarian assistance, it did not include the provision of weapons, ammunition or other equipment that could inflict serious bodily harm or death.[10] The International Committee of the Red Cross ('ICRC') has used the

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7 Human Rights Watch, 'Syria: Aid Restrictions Hinder Covid-19 Response' (Human Rights Watch, 28 April 2020) <https://www.hrw.org/news/2020/04/28/syria-aid-restrictions-hinder-covid-19-response>.

8 OCHA, 'Libya: Humanitarian Access Situation Report No 2' (April 2020) <https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/access_report_-_april_2020.pdf>.

9 GA Res 2717 (XXV), UN Doc A/Res/2717 (15 December 1970) [5(c)].

10 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ 14, 47 [97] ('*Nicaragua*').

term 'humanitarian activities' in the context of an armed conflict to mean goods that 'seek to preserve the life, security, dignity and physical and mental well-being of persons affected by the conflict, or which seek to restore the said well-being if it has been infringed upon'.[11] In light of the above, the term 'humanitarian assistance' will be used here to mean the provision of goods and services essential to the survival of the civilian population, which are urgently needed and exclusively humanitarian in nature.[12] It may comprise material aid such as food, water, medical supplies, clothing, shelter and associated logistics, as well as the services of trained personnel. 'Humanitarian access', on the other hand, refers to both the capacity of humanitarian actors to reach people in need and the ability of those affected to access the necessary assistance and services.[13] Humanitarian access is the precondition for the effective delivery of humanitarian assistance, without which the latter would not be possible.[14]

A *Humanitarian Principles*

For assistance to be humanitarian it must be provided solely to assist civilians in need and accord with the principles of humanity, impartiality and neutrality.[15] These principles are derived from the *Statutes of the International Red Cross and Red Crescent Movement*[16] and have been reiterated by the UN[17] and other humanitarian actors[18] as providing the foundation for humanitarian action. When these principles are respected, relief action 'cannot be regarded as an unlawful

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11 ICRC, 'Q&A and Lexicon on Humanitarian Access' (2014) 96(893) *International Review of the Red Cross* 359, 367.

12 Emilie Ellen Kuijt, *Humanitarian Assistance and State Sovereignty in International Law: Towards a Comprehensive Framework* (Intersentia, 2015) 37; ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflict' (32nd International Conference of the Red Cross and Red Crescent, Geneva, 8–10 December 2015) 28 ('ICRC Conference 2015'); Heike Spieker, 'Humanitarian Assistance, Access in Armed Conflict and Occupation', *Max Planck Encyclopedia of Public International Law* (March 2013) <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1701?rskey=YYEb28&result=1&prd=EPIL>.

13 *Handbook on the Normative Framework* (n 2) 13.

14 Ibid; Felix Schwendimann, 'The Legal Framework of Humanitarian Access in Armed Conflict' (2011) 93(884) *International Review of the Red Cross* 993, 993–4.

15 The Geneva Conventions of 1949 and Additional Protocols of 1977 refer to relief actions that are of an 'exclusively humanitarian and impartial nature'.

16 *Statutes of the International Red Cross and Red Crescent Movement* (adopted by the 25th International Conference of the Red Cross at Geneva in 1986, amended in 1995 and 2006) art 5(2)(a) <https://www.icrc.org/en/doc/assets/files/other/statutes-en-a5.pdf>.

17 GA Res 46/182, UN Doc A/RES/46/182 (19 December 1991) [2]. This was reaffirmed in GA Res 58/114, UN Doc A/Res/58/114 (5 February 2004) Preamble. See also SC Res 1894, UN Doc S/RES/1894 (11 November 2009) [13].

18 These principles are also enshrined in the statutes of many Non-Governmental Organisations.

intervention, or as in any other way contrary to international law'.[19] However, where they are not met, the aid will cease to be humanitarian.[20] Impartiality means that humanitarian assistance must be provided in accordance with need, with 'no discrimination as to nationality, race, religious beliefs, class or political opinions'.[21] Priority is only to be given to the most urgent cases.[22] The principle of humanity aims to prevent and alleviate human suffering wherever it is found, to protect life and health and ensure that the dignity and rights of all victims are respected.[23] Neutrality requires that assistance be provided without the provider taking sides or engaging in hostilities.[24]

While there is no specific requirement in treaty law that assistance must be provided to both sides of an non-international armed conflict,[25] the ICJ in *Nicaragua* stated that for aid to be considered humanitarian it must be given without any form of discrimination 'to all those in need'.[26] This requirement is controversial and there is no general consensus that it reflects customary international law.[27] Subsequent international practice, particularly of national humanitarian relief societies, as well as of states, has challenged the ICJ's interpretation that assistance must be provided to both sides in a non-international armed conflict.[28] It has instead been suggested that the humanitarian sector as a whole should aim for resulting impartially, rather than obliging each actor to fulfill this requirement itself.[29] This will ensure that the principle of impartiality is respected and the needs of all civilians are met, while not demanding that each actor provide assistance to both sides. While this is not reflective of current customary international law, it is not necessarily in conflict with a broad interpretation of the ICJ's reasoning above. Where a humanitarian

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19 *Nicaragua* (n 10) 114–15 [242].

20 Where a state seeks to provide humanitarian assistance without respecting the aforementioned principles, it may also constitute a breach of the principle of non-intervention: see *Nicaragua* (n 10) 115 [243].

21 *Statutes of the International Red Cross and Red Crescent Movement* (n 16) Preamble; ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (Cambridge University Press, 2nd ed, 2016) 794 <https://ihl-databases.icrc.org/ihl/full/GCI-commentary> ('*Commentary on the First Geneva Convention 2016*'); *Nicaragua* (n 10) 114–15 [242].

22 *Statutes of the International Red Cross and Red Crescent Movements* (n 16) Preamble; Jean Pictet 'The Fundamental Principles of the Red Cross (III)' (1979) 19(212) *International Review of the Red Cross* 255, 257.

23 *Statutes of the International Red Cross and Red Crescent Movements* (n 16) Preamble.

24 Ibid.

25 Ruth Abril Stoffels, 'Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps' (2004) 86(855) *International Review of the Red Cross* 537, 541.

26 *Nicaragua* (n 10) 115 [243].

27 Kuijt (n 12) 42.

28 Stoffels (n 25) 541; Kate Mackintosh, *The Principles of Humanitarian Action in International Humanitarian Law* (Humanitarian Policy Group Report No 5, March 2000) 7–8.

29 Stoffels (n 25) 541.

actor provides aid to one party to conceal its involvement in the latter's internal affairs, provides material support or otherwise influences the outcome of the conflict, the provision of aid will not meet the humanitarian principles and the operation will not be afforded protection under international humanitarian law. However, where the purpose of the aid is strictly to prevent and relieve human suffering, and offers of relief are affected by, for example, operational matters rather than political or military considerations or, alternatively, one side is in greater need, the humanitarian principles will arguably be met regardless of whether relief is provided to one party only.[30]

B *Treaty and Customary Law Framework*

International humanitarian law distinguishes between a non-international armed conflict within the meaning of Common Article 3 to the *Geneva Conventions* of 1949 and a non-international armed conflict falling within the definition in Article 1 of Additional Protocol II of 1977 ('AP II'). Common Article 3 is applicable to all non-international armed conflicts.[31] AP II is only applicable to armed conflicts taking place on the territory of a state party between the armed forces of the state and a non-state armed group.[32] Where a state has not ratified AP II, Common Article 3 remains the minimum applicable standard.[33]

No explicit rights or duties relating to humanitarian assistance are contained in Common Article 3. Rather, subpara (1) requires at a minimum that all 'persons taking no active part in the hostilities must be treated humanely without any adverse distinction'. This is applicable in all circumstances, binding on all parties to the conflict, and military necessity cannot be invoked to justify non-compliance.[34] Humane treatment is not defined; rather, it has been interpreted through state practice to mean treatment that respects a person's inherent dignity as a human being, including, but not limited to, items essential for survival, such as the provision of adequate food and drinking water, clothing, safeguards for health and hygiene, and the provision of suitable medical care.[35]

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30 Mackintosh (n 28) 7–8; Kuijt (n 12) 42; Nicholas Leader, 'The Politics of Principle: The Principles of Humanitarian Action in Practice' (Humanitarian Policy Group Report No 2, March 2000) 20.

31 For an armed conflict to fall within Common Article 3, the non-state armed group must first demonstrate a certain level of organisation; and, secondly, the hostilities must reach a minimum level of intensity: *Prosecutor v Tadic (Opinion and Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-94-1-T, 7 May 1997) 193-94 [562].

32 For AP II to apply, the non-state armed group must exercise such territorial control 'as to enable them to carry out sustained and concerted military operations and to implement this Protocol': AP II, art 1(1).

33 *Commentary on the First Geneva Convention 2016* (n 21) 564.

34 Ibid 560–1.

35 Ibid 557–8.

The failure to take all reasonable measures to provide the aforementioned items, as well as the denial of the provision of such items by an external third party, could therefore amount to inhumane treatment within the meaning of Common Article 3.[36] Subparagraph (2) of Common Article 3 establishes the right of impartial humanitarian organisations to offer their services (including the provision of humanitarian relief) to all parties to a non-international armed conflict. The ICRC is explicitly mentioned as an example of an entity entitled to rely on this provision. The provision recognises not only the state, but also the non-state armed group as a potential receiver of such an offer.[37] However, an offer of service to a non-state armed group does not constitute recognition of or support for the group under international law;[38] nor can it be considered as an unfriendly act or unlawful interference in the domestic affairs of the state.[39]

Article 18 of AP II expands the regime under Common Article 3 and sets out the principles upon which relief actions are to be based. Article 18(1) deals with humanitarian assistance from within the territory of the belligerent state and confirms the right of 'relief societies located in the territory', such as the Red Cross and Red Crescent, to offer their services.[40] Article 18(2) allows for the provision of international relief actions by the ICRC or other humanitarian organisations where the responsible party can no longer meet the basic needs of the civilian population. The provision of external relief is complementary and limited to circumstances where 'the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival'.[41]

In addition to the provisions laid down in treaty law, the ICRC has identified some obligations as having crystalised into customary international law applying in international and non-international conflicts.[42] These norms are specifically significant in non-international armed conflicts, particularly where the state has not ratified AP II. The relevant customary international law rules oblige parties,

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36 Ibid 593.

37 Although non-state armed groups cannot become parties to Common Article 3, it is binding on them, both as treaty and customary law: *Commentary on the First Geneva Convention 2016* (n 21) 505.

38 Article 3(4) Common to the four Geneva Conventions of 1949: 'The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.'

39 *Commentary on the First Geneva Convention 2016* (n 21) 804; *Nicaragua* (n 10) 114–5 [242].

40 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC/Martinus Nijhoff Publishers, 1987) 4871–2.

41 Ibid 4878.

42 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law Volume I: Rules* (ICRC/Cambridge University Press, 2005) ('*ICRC Customary Law Study*'). For criticisms of the methodology and evidence used to ascertain and support the rules, see, eg, John B Bellinger III and William J Haynes II, 'A US Government Response to the International Committee of the Red Cross Study *Customary International Humanitarian Law*' (2007) 89(866) *International Review of the Red Cross* 443, and Elizabeth Wilmshurst and Susan Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, 2007).

once relief action has been agreed to, to allow and facilitate the rapid and unimpeded passage of humanitarian relief,[43] ensure the freedom of movement of humanitarian relief personnel,[44] and respect and protect personnel and objects used in humanitarian relief.[45]

III Consent to Humanitarian Assistance in Non-International Armed Conflicts

While impartial humanitarian organisations have a right to offer humanitarian assistance, it is subject to state consent.[46] The requirement of consent is explicitly mentioned in Article 18(2) of AP II and in the commentary to Common Article 3. Rule 55 of the *ICRC Customary Law Study* likewise clarifies that access remains subject to consent in both international and non-international armed conflicts.[47] Common Article 3 is silent with respect to which party's consent is required, and it is unclear whether the humanitarian organisation must obtain the consent of both parties or whether the party to whom the offer is made can consent unilaterally. This ambiguity raises the argument that where relief operations are intended for civilians in areas under the effective control of a non-state armed group and aid can be delivered without the need to transit through territory under the state's control, the consent of the former is sufficient and it is not necessary for the humanitarian organisation to also secure the state's consent.[48] This question is particularly pertinent where the state refuses to consent to relief operations intended for citizens in opposition-controlled areas who would otherwise be without essential supplies. Notwithstanding this omission, it seems unlikely that the drafters of Common Article 3 would have intended to breach the state's territorial sovereignty by implication, as the principle of sovereign equality is fundamental in international law.[49] The silence in this provision

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43 *ICRC Customary Law Study* (n 42) 193–200, r 55.

44 Ibid 200–2, r 56.

45 Ibid 105–11, rr 31 and 32. Cf Bellinger and Haynes (n 42) 454: 'The United States does not believe Rule 31, as drafted, reflects customary international law applicable to international or non-international armed conflicts.'

46 *Commentary on the First Geneva Convention 2016* (n 21) 828; *ICRC Conference 2015* (n 12) 28.

47 *ICRC Customary Law Study* (n 42) 197.

48 Marco Sassoli, 'When are States and Armed Groups Obliged to Accept Humanitarian Assistance?' (International Association of *Professionals in Humanitarian Assistance and Protection*, 5 November 2013); Payam Akhavan et al, 'There Is No Legal Barrier for UN Cross Border Operations in Syria' (*The Guardian*, 28 April 2014) <https://www.theguardian.com/world/2014/apr/28/no-legal-barrier-un-cross-border-syria>; Francoise Bouchet-Saulnier, 'Consent to Humanitarian Access: An Obligation Triggered by Territorial Control, Not States' Rights' (2014) 96 (893) *International Review of the Red Cross* 207, 211.

49 *Corfu Channel Case* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 35: 'Between independent States, territorial sovereignty is an essential foundation of international relations.'

therefore suggests that the state's consent is prima facie necessary even when assistance is provided to civilians in territory that it no longer controls.[50]

Article 18(2) of AP II is more explicit and refers to the consent of the 'High Contracting Party concerned', which, according to the Commentary to the Additional Protocols, means the government in power.[51] Again, it has been argued that the requirement of state consent in AP II could be bypassed where relief operations are not required to transit through state-held territory, as the state party is no longer 'concerned' within the meaning of Article 18(2).[52] Such a reading implies a negation of the state's territorial sovereignty and it is again unlikely that states would have agreed at the time of drafting to be placed on the same footing as the party seeking to overthrow it. This was the stance taken by states at the Diplomatic Conference that adopted the two Additional Protocols.[53] Furthermore, while a non-state armed group may be 'concerned' with any relief operations carried out in territory under its control, it cannot be a party to AP II. As such, if the consent of the state is unnecessary, it leaves no High Contracting Party concerned, making the express reference to such a requirement redundant. In light of the silence of Common Article 3 and the specific reference to 'the High Contracting Party' in Article 18(2) AP II, as well as the primacy of state sovereignty in public international law, it is difficult to see how the consent of the state can be bypassed without such an interpretation conflicting with a strict reading of the necessary provisions. This remains the position of the ICRC.[54]

In practice, it is generally crucial that, in addition to obtaining state consent, humanitarian organisations also obtain the consent of the non-state armed group to ensure that aid is delivered safely into its territory.[55] Whether it is a legal requirement to obtain their consent rather than just a practical necessity is unclear given the silence in the Geneva Conventions. However, as Common Article 3 does not privilege the High Contracting Party and binds all 'parties to the conflict', it would be paradoxical to impose obligations upon non-state actors while simultaneously undertaking action in territory under their control without

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50 *Commentary on the First Geneva Convention 2016* (n 21) 828. This is the position of the ICRC; see *ICRC Conference 2015* (n 12) 28.

51 Sandoz et al (n 40) 4884. See also Denise Plattner, 'Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law' (1992) 32(288) *International Review of the Red Cross* <https://www.icrc.org/en/doc/resources/documents/article/other/57jmar.htm>; Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (Cambridge University Press, 4th ed, 2011) 150.

52 Michael Bothe et al, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, 2nd ed, 2013) 801.

53 Stoffels (n 25) 535.

54 ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 363.

55 *ICRC Conference 2015* (n 12) 28; Emanuela-Chiara Gillard, 'The Law Regulating Cross-Border Relief Operations' (2013) 95(890) *International Review of the Red Cross* 363, 367; Sandesh Sivakumaran, *The Law of Non-International Armed Conflicts* (Oxford University Press, 2012) 332.

their consent. Furthermore, there is a growing acceptance in public international law in general and international humanitarian law specifically that non-state actors exerting control over territory or using armed force have responsibilities under international law.[56] This is demonstrated by an increasing number of UN Security Council resolutions on the protection of civilians in armed conflict which demand that all parties to the conflict abide by their obligations to respect and facilitate relief operations.[57] As such, the consent of the non-state armed group should be sought as both a practical and legal requirement.

Where an impartial humanitarian actor makes an offer of assistance, a state is not obliged to agree unconditionally to the offer. First, the state must be unable or unwilling to fulfill its primary obligations to the civilian population.[58] Where a state is able to respond to the humanitarian needs of its civilians or has accepted an offer from elsewhere, a failure to consent will not breach its obligations.[59] Secondly, offers must meet the preliminary conditions imposed by international humanitarian law to avoid violating the principle of non-intervention.[60] Where offers are not exclusively humanitarian, impartial or otherwise carried out in a non-principled manner, states may legitimately refuse consent.[61] Thirdly, the provision of humanitarian assistance may be temporarily restricted for reasons of military necessity, for example where the presence of humanitarian actors would interfere with a military operation or, alternatively, if the safety of humanitarian personnel cannot be guaranteed.[62] However, military necessity is not a permissible ground to refuse a valid offer of service in its entirety.[63] Rather, a refusal to provide access must be strictly necessary and proportionate to achieve the aforementioned aims and any restrictions must be implemented for only as long as the relevant security conditions prevail.[64] Outside these parameters, the fact that consent must be sought does not mean that it is discretionary.[65] The requirement of consent should be read in conjunction with the dual responsibility

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56 Dapo Akande and Emanuela-Chiara Gillard, *Oxford Guidance on the Law Relating to Humanitarian Relief Operations in Situations of Armed Conflict* (UNOCHA, 2016) 13.

57 See, eg, SC Res 1894 (n 17) [14]; SC Res 1923, UN Doc S/RES/1923 (25 May 2010) [22]; SC Res 2191, UN Doc S/RES/2191 (17 December 2014) Preamble, [1]; Bouchet-Saulnier (n 48) 211–2.

58 Sandoz et al (n 40) 4871.

59 *Commentary on the First Geneva Convention 2016* (n 21) 834; *ICRC Conference 2015* (n 12) 29.

60 Schwendimann (n 14) 997; *Nicaragua* (n 10) 124–5 [242]–[243].

61 *ICRC Conference 2015* (n 12) 29; Akande and Gillard (n 56) 21.

62 *ICRC Customary Law Study* (n 42) 202, r 56; *Commentary on the First Geneva Convention 2016* (n 21) 839; Cedric Ryngaert, 'Humanitarian Assistance and the Conundrum of Consent: A Legal Perspective' (2013) 5(2) *Amsterdam Law Forum* 5, 9.

63 *ICRC Customary Law Study* (n 42) 202; *Commentary on the First Geneva Convention 2016* (n 21) 838.

64 Akande and Gillard (n 56) 24; ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 364.

65 Bothe (n 52) 800–1; Sandoz et al (n 40) 4885. This can also be distilled from the words 'shall be undertaken' in AP II, art 18(2), which suggests that the right of the state to withhold consent is necessarily constrained.

of the state to treat its civilian population humanely, as well as its obligations to take positive actions in fulfillment of the rights to life, food and health.[66] These concurrent obligations necessarily limit states' abilities to exercise their right of control.

A *Security Council Resolutions and State Consent*

States have no latitude to withhold consent to humanitarian relief operations where the Security Council has adopted a binding decision.[67] In 2014, the Security Council passed Resolution 2165 in response to the Syrian government's failure to allow the safe passage of humanitarian assistance.[68] This resolution authorised UN humanitarian agencies and their partners to deliver assistance through four designated cross points in Turkey to populations in opposition-held areas without the consent of the Syrian government.[69] This was extended annually by the Secuirty Council until 2020 when a resolution seeking to extend the operation of the cross-border mechanism for a further 12 months failed.[70]

While the Security Council did not explicitly invoke its powers under Chapter VII of the *UN Charter* when it adopted Resolution 2165, there are reasons to suggest that it was nonetheless acting under Chapter VII.[71] First, the legally binding nature of the resolution can be derived from its specific reference to Article 25 of the *Charter*,[72] which obliges member states to carry out Security Council decisions.[73] Secondly, the wording of the resolution indicates its binding nature.[74] Previous resolutions with respect to the Syrian conflict were expressed in honorary terms, urging the parties to comply with their obligations under international humanitarian law.[75] In contrast, Resolution 2165 demanded that the parties to the conflict comply with the operative provisions of the resolution and cooperate with

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66 Kuijt (n 12) 356–7; ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 369.

67 Akande and Gillard (n 56) 18; Yoram Dinstein, 'The Right to Humanitarian Assistance' (2000) 53(4) *Naval War College Review* 77, 86.

68 SC Res 2165, UN Doc S/RES/2165 (14 July 2014).

69 Ibid [2].

70 See *In Two Separate Votes, Security Council Fails to Adopt Resolutions Extending Cross-Border Mechanism for Humanitarian Aid Delivery into Syria* (Press Release, 10 July 2020) UN Doc SC/14246.

71 Andreas Zimmermann, 'Humanitarian Assistance and the Security Council' (2017) 50(1) *Israel Law Review* 3, 11–14.

72 SC Res 2165 (n 68) Preamble.

73 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276* [1971] (Advisory Opinion) ICJ Rep 16, 53 [113].

74 Ibid 53 [114].

75 Zimmermann (n 71) 5–6. See, eg, SC Res 688, UN Doc S/RES/688 (5 April 1991) [3]; SC Res 752, UN Doc S/RES/752 (5 May 1992) [8]; SC Res 794, UN Doc S/RES/794 (3 December 1992) [2]–[3]; SC Res 2042, UN Doc S/RES/2042 (14 April 2012) [10].

UN agencies and their operating partners to facilitate humanitarian access.[76] Lastly, the resolution committed the Security Council to adopting further measures in the event of non-compliance.[77] This implies that it had already taken binding measures when it adopted Resolution 2165.[78] In light of the above, and as a result of the binding nature of the resolution, the legal position of the parties to the conflict was altered and it was no longer within Syria's discretion to consent.[79]

B *Where Withholding Consent Violates a State's Obligations under International Law*

Despite the absence of specific words in AP II, sufficient state practice has arisen to establish a rule whereby a party cannot arbitrarily withhold their consent to relief operations.[80] The UN Security Council has clarified that the arbitrary denial of humanitarian access could constitute a violation of international humanitarian law.[81] This has been repeated in resolutions of the UN General Assembly, the UN Human Rights Council and the UN Secretary-General.[82] It is also recognised as a rule of customary international law.[83] However, there is no formal definition or guidance in international humanitarian law as to how the criteria of arbitrariness should be interpreted, and its use, in the context of international humanitarian law, has not been addressed by an international or national tribunal. As such, guidance as to what conduct would be arbitrary is drawn from international human rights law[84] and subsequent state practice.[85]

The withholding of consent will be arbitrary where it violates a state's obligations under, or otherwise seeks an objective contrary to, international humanitarian law.[86] Circumstances include the use of starvation against the civilian population as a method of warfare in violation of Article 14 of AP II[87] or a

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76 SC Res 2165 (n 68) [6].
77 Ibid [11].
78 Zimmermann (n 71) 12.
79 Gillard (n 55) 381.
80 *Commentary on the First Geneva Convention 2016* (n 21) 833; Sandoz et al (n 40) 4885 and Akande and Gillard (n 56) 21.
81 SC Res 2139, UN Doc S/RES/2139 (22 February 2014) Preamble; SC Res 2165 (n 68) Preamble; SC Res 2216, UN Doc S/RES/2216 (14 April 2015) Preamble.
82 GA Res 68/182, UN Doc A/Res/68/182 (18 December 2013) [14]; *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, UN Doc S/2015/453 (18 June 2015) [29]; Human Rights Council Res 29/13, UN Doc A/HRC/Res/29/13 (23 July 2015) [1].
83 *ICRC Customary Law Study* (n 42) 197, r 55.
84 See, eg, Human Rights Council, *General Comment No 35, Article 9 (Liberty and Security of Person)*, UN Doc CCPR/C/GC/35 (16 December 2014) [11]–[12].
85 Akande and Gillard (n 56) 22.
86 Ibid 23.
87 *ICRC Customary Law Study* (n 42) 186, r 53.

failure to provide civilians with sufficient food or medical care in contravention of the prohibition of violence to life and person contained in Common Article 3.[88] As such, where a humanitarian organisation makes an offer of assistance, a denial of access intending to or which could forseeably cause the starvation of the civilian population will be arbitrary and the state is required to give consent.[89] Additionally, withholding consent to punish the civilian population would violate the prohibition on collective punishment and would be arbitrary.[90] Similarly, withholding consent for the purpose of discriminating against a particular ethnic or racial group would be arbitrary, as it would violate the prohibition to treat the civilian population without adverse distinction.[91] Lastly, a failure to treat the wounded and sick humanely[92] and provide access for medical personnel and supplies[93] would amount to a violation of Common Article 3(1) and Article 7 of AP II and would be arbitrary.[94]

C *The Impact of Counter-Terrorism Legislation on Impartial Humanitarian Action*

In attempts to suppress the commission of international terrorism, the UN Security Council has passed a number of resolutions obliging member states to implement domestic measures aimed at curtailing the provision of financial and material support to terrorist groups.[95] These obligations have been broadly defined and the ensuing domestic counter-terrorism measures enacted by UN member states have the potential to include activities of humanitarian actors engaged in principled humanitarian action.[96] This creates obstacles with respect to the delivery of principled humanitarian aid to civilians under the effective control of a non-state armed group designated as a terrorist group.[97]

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88 *Commentary on the First Geneva Convention 2016* (n 21) 593, 599.
89 Ibid 836; Sandoz et al (n 40) 4885; *ICRC Customary Law Study* (n 42) 197.
90 AP II, art 4(2)(b); *ICRC Customary Law Study* (n 42) 379, r 103.
91 AP II, art 4(1); Common Article 3; *ICRC Customary Law Study* (n 42) 308, r 88.
92 AP II, art 7; Common Article 3(1) and (2).
93 *ICRC Customary Law Study* (n 42) 400, r 110.
94 Ibid 402.
95 SC Res 1267, UN Doc S/RES/1267 (15 October 1999); SC Res 1373, UN Doc S/Res/1373 (28 September 2001).
96 Katie King, Naz K Modirzadeh and Dustin A Lewis, *Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action: Working Group Briefing Memorandum* (Harvard Law School Program on International Law and Armed Conflict Counterterrorism and Humanitarian Engagement Project, April 2016) 4 <http://blogs.harvard.edu/pilac/files/2016/04/Understanding_Humanitarian_Exemptions_April_2016.pdf>.
97 For an overview of the impact of counter-terrorism measures on humanitarian action, see: Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (OCHA, July 2013); Phoebe Wynn-Pope, Yvette Zegenhagen and

An increasing number of belligerent states are denying or restricting the operation of humanitarian relief efforts on their territory under the guise of counter-terrorism, arguing that terrorist groups are manipulating humanitarian activities to fund their campaigns.[98] Where domestic counter-terrorism measures criminalise any support provided to terrorist groups, humanitarian organisations may face criminal prosecution.[99] However, the criminalisation of humanitarian assistance in these circumstances would be incompatible with the legal framework governing humanitarian assistance and the fundamental principles espoused within this framework.[100] In particular, humane treatment must be accorded to all victims, with priority only given to 'the most urgent cases of distress',[101] and adverse distinctions cannot be drawn with respect to ideology or criminality.[102] However, where counter-terrorism laws designate certain groups as terrorist and criminalise interactions with these groups, it contributes to a hierarchy of deserving victims.[103] Additionally, in circumstances where a state's counter-terrorism legalisation specifically directs humanitarian actors away from providing assistance to a 'terrorist group', the principles of impartiality and neutrality will likewise be compromised.[104] On the contrary, where humanitarian actors are provided with the ability to engage with all sides to the conflict, the principle of impartiality will be easier to meet and neutrality can be maintained.[105] Furthermore, where humanitarian actors make principled offers of assistance to civilians under the effective control of a non-state armed group designated as a terrorist group, the state is prohibited under international humanitarian law from rejecting such offers where the effect or intention of withholding consent is to discriminate against sections of the population because they support the terrorist group.[106] This would not only be contrary to the principle of non-distinction but could also amount to the crime against humanity of persecution if the

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Fauve Kurnadi, 'Legislating against Humanitarian Principles: A Case Study on the Humanitarian Implications of Australian Counterterrorism Legislation' (2016) 97(897/898) *International Review of the Red Cross* 235; Ben Saul, 'Terrorism, Counter-Terrorism and Humanitarian Law' (Legal Studies Research Paper No 16/37, Sydney Law School, 2016) 15.

98 Claudia McGoldrick, 'The Future of Humanitarian Action: An ICRC Perspective' (2011) 93(884) *International Review of the Red Cross* 965, 973.

99 Burniske and Modirzadeh (n 4) 629–30.

100 ICRC, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflict' (31st International Conference of the Red Cross and Red Crescent, Geneva 28 November–1 December 2011) 52 ('*ICRC Conference 2011*').

101 The principle of impartiality is a fundamental principle of the ICRC see Pictet (n 22) 197, 257 and was endorsed by the IJC in *Nicaragua* (n 10) 114–5 [242].

102 Commentary on the First Geneva Convention 2016 (n 21) 812; Mackintosh (n 28) 8 and Leader (n 30) 17.

103 Saul (n 97) 17.

104 *ICRC Conference 2011* (n 100) 52.

105 Burniske and Modirzadeh (n 4) 642.

106 Akande and Gillard (n 56) 24.

discriminatory conduct is committed in connection with another international crime.[107] Likewise, withholding consent to punish the civilian population for terrorist acts committed by the non-state armed group, for which the former are not responsible, would violate the prohibition on collective punishment.[108]

It is argued that domestic counter-terrorism measures challenge the perceived neutrality and impartiality of humanitarian actors, particularly in situations where the latter is reliant on a designated terrorist group to provide security or is required to engage with them to facilitate access.[109] However, mere engagement with a non-state armed group listed as a terrorist organisation in order to facilitate the provision of humanitarian aid to civilians within its effective control will not deprive a humanitarian actor of its neutrality;[110] nor can it be conceived as an unfriendly act or as an endorsement of that party's plight.[111] As long as, in working to secure and sustain humanitarian access, its actions are guided only by the alleviation of human suffering rather than the furtherance of the political, religious or ideological views of the party, or otherwise supporting its efforts, the aid will meet the neutrality requirements.[112] However, humanitarian aid should not provide one side to the conflict with a definite military advantage.[113] Where the non-state armed group or terrorist organisation is diverting relief to fund their military campaign, the neutrality of the aid may be compromised and will potentially give the state a legitimate reason to withhold consent.[114]

Questions invariably arise as to who is the appropriate actor to determine whether a non-state armed group is diverting relief for its own benefit and, furthermore, what proportion of relief needs to be diverted for the denial of consent to be lawful. Such assessments will necessarily involve balancing the humanitarian plight of civilians with the state's legitimate concerns that the enemy does not receive a definite military advantage — that aid is not channelled into the hands of terrorists or otherwise enables the group to commit more funds to terrorist activities.[115] How such assessments are made will depend on the particular factual circumstances, but they should not be left to the discretion of the state. Rather, humanitarian actors must retain operational control when

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107 *Rome Statute of the International Criminal Court* (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7(1)(b).

108 AP II, art 4(2)(b).

109 Wynn-Pope et al (n 97) 257–8.

110 *ICRC Conference 2011* (n 100) 52–3.

111 *Commentary on the First Geneva Convention 2016* (n 21) 804–5.

112 Ibid 12; Stoffels (n 25) 542–4; Mackintosh and Duplat (n 97) 12.

113 The *ICRC Commentary* with respect to international armed conflicts acknowledges that the receiving party will receive some benefit from the receipt of humanitarian assistance, but any benefit must not be so great so as to improve that party's economic or military position: Jean S Pictet (ed), *Commentary on Geneva Convention IV of 12 August 1949* (ICRC, 1958) 182.

114 Gillard (n 55) 367 and Ryngaert (n 62) 9.

115 Ryngaert (n 62) 9.

securing and sustaining humanitarian access. Where control is lost, the humanitarian actor should withdraw its offer of aid, as its perceived neutrality may be lost.

D *The COVID-19 Pandemic and Consent to Humanitarian Assistance*

On 11 March 2020, the World Health Organization declared the COVID-19 virus to be a global pandemic. In response, many states implemented emergency health measures to suppress and mitigate its spread, including banning international flights, closing borders, prohibiting social gatherings, restricting movement, and imposing countrywide lockdowns and curfews. However, measures implemented in response to COVID-19 restricting the cross-border movement of foreign workers and essential supplies have placed constraints on the operational capacity of humanitarian workers to provide aid, while social-distancing measures, lockdowns and curfews have obstructed populations from accessing aid.[116] Whether a pandemic, such as COVID-19, can provide states with the ability to legally withhold their consent to humanitarian aid involves drawing a balance between, on the one hand, the duty of the state to protect public health and control the spread of a disease and, on the other hand, its duty to provide or otherwise allow for the provision of essential services to its population.

Withholding consent to humanitarian aid is not unreasonable where ostensibly pursuing a legitimate objective, such as military necessity or protecting public health.[117] However, consent should not be withheld beyond that which is necessary and proportionate.[118] This requires striking a balancing between the legitimate objective of protecting public health and the competing humanitarian imperative to assist those in need. While measures to mitigate the devastating impacts of COVID-19 are necessary for populations in armed conflicts,[119] much like the case of military necessity, denials of consent on the basis of public health must only be temporary and limited.[120] This may include, for example, quarantine requirements for international arrivals. However, where the withholding of consent goes beyond this and compounds the consequent

116 See Human Rights Watch (n 7); OCHA (n 8); Human Rights Watch, 'Deadly Consequences: Obstruction of Aid in Yemen During Covid-19' (Human Rights Watch, 2020) <https://www.hrw.org/report/2020/09/14/deadly-consequences/obstruction-aid-yemen-during-covid-19>.

117 Akande and Gillard (n 56) 24.

118 Ibid.

119 UN Covid-19 Press Release (n 6).

120 *ICRC Customary Law Study* (n 42) 202, r 56.

suffering of the population it will amount to a violation of the state's international legal obligations and will be arbitrary. This is the position of the ICRC.[121]

This does not undermine the right of the state to exert control over relief efforts occurring on its territory.[122] This could include regulating activities in accordance with domestic laws and regulations with respect to public health and safety, such as the mandating of masks or introducing alternative methods of delivering assistance to ensure that social distancing is observed. However, states must not use public-health restrictions as a means of covertly inhibiting the passage of humanitarian operations through unnecessary delays or otherwise impeding their implementation.[123] Where such measures amount in practice to a refusal of consent, they will be arbitrary and incompatible with international humanitarian law.

IV Enforcing the Right to Humanitarian Assistance

The civilian population has a right to receive humanitarian assistance essential for its survival. This rule exists in customary law in both international and non-international conflicts.[124] It is derived implicitly from Article 18(2), which requires that relief operations 'shall be undertaken' whenever the civilian population is in need.[125] The state has the primary responsibility to fulfill this right.[126] Where the state is unwilling or unable to do so itself, it must permit and facilitate the unimpeded passage of relief operations on its territory.[127] There is increasing acceptance that non-state armed groups also have obligations under international humanitarian law to treat the population under their control humanely. This includes ensuring the safe and rapid passage of humanitarian aid and the protection of humanitarian personnel.[128] The right of impartial humanitarian organisations, including the ICRC and private actors, to offer their services to the 'parties to the conflict' does not, however, equate to a right to provide assistance, as the requirement of state consent and primacy of territorial

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121 ICRC, 'IHL Rules on Humanitarian Access and Covid-19' (Press Release, 8 April 2020) 3.
122 *ICRC Customary Law Study* (n 42) 193, r 55.
123 ICRC, 'IHL Rules on Humanitarian Access and Covid-19' (n 121) 3.
124 *ICRC Customary Law Study* (n 42) 199, r 55.
125 Ibid.
126 Sandoz et al (n 40) 4871 and 4878; ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 363, 4871; *Commentary on the First Geneva Convention 2016* (n 21) 782 and GA Res 45/100, UN Doc A/RES/45/100 (14 December 1990) Preamble; GA Res 46/182 (n 17) [4]; ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 363: this 'can be inferred [in non-international armed conflict] from the object and purpose of international humanitarian law'.
127 *ICRC Customary Law Study* (n 42) 196–7, r 55.
128 See, eg, SC Res 1894 (n 17) [14]; SC Res 1923 (n 57) [22]; SC Res 2191, S/RES/2191 (17 December 2014) Preamble, [1].

sovereignty in international law impose significant barriers with respect to the enforcement of this right.[129] Even where consent is arbitrarily withheld by the state, humanitarian actors do not have a general right of access under the Geneva Conventions.

It has been proposed that a rule of customary law has emerged in such circumstances, dispensing with the requirement of consent and allowing aid to be delivered into territory held by the non-state armed group.[130] Under this rule, cross-border operations would be lawful when the following conditions are met: aid is intended for civilians in territory under the effective control of a non-state armed group; it can be delivered by bypassing the territory of the state; the state has arbitrarily withheld its consent to such an operation; and the relief operation meets the requirements of neutrality, impartiality and humanity.[131] Such a rule was not identified in the 2005 *ICRC Study in Customary International Law*, which subjects the provision of relief to the consent of the state.[132] However, a number of commentators have argued that since the completion of this study there is sufficient international consensus, strengthened by state practice, General Assembly and Security Council Resolutions, which suggests that the requirement of consent is weakening.[133] In particular, as evidence that an international norm is developing that supports the legality of cross-border operations, commentators have pointed to a number of General Assembly and Security Council resolutions obliging parties to facilitate access and respect the safe and unhindered passage of humanitarian personnel, the lack of international responses to unauthorised aid operations, and the international condemnation by states of parties that fail to allow or facilitate humanitarian access.[134]

However, state practice in conformity with the alleged rule allowing or supporting relief operations without prior consent has not been universal or

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129 *Commentary on the First Geneva Convention 2016* (n 21) 828; Sandoz et al (n 40) 4883; *The Case of the SS Lotus (France v Turkey)* [1927] PCIJ Series A No 9, [18].

130 See Stoffels (n 25) 536; Gillard (n 55); Ryngaert (n 62) 13; Alex J Bellamy, 'Opening the Door to Humanitarian Aid in Syria: Significance, Challenges, and Prospects' (The Global Observatory, 17 July 2014) <https://theglobalobservatory.org/2014/07/opening-door-humanitarian-aid-in-syria-significance-challenges-prospects/>; Tilman Rodenhäuser and Jonathan Somer, 'The Security Council and Humanitarian Relief Operations in Opposition-Held Territories' (EJIL Talk, 12 August 2014) <https://www.ejiltalk.org/the-security-council-and-humanitarian-relief-in-opposition-held-territories/>; Naz Modirzadeh, 'Strong Words, Weak Arguments — A Response to the Open Letter to the UN on Humanitarian Access to Syria (Part 1)' (*OpinoJuris*, 12 May 2014) <http://opiniojuris.org/2014/05/12/guest-post-strong-words-weak-arguments-response-open-letter-un-humanitarian-access-syria-part-1/>

131 Akhavan et al (n 48).

132 *ICRC Customary Law Study* (n 42) 196–7.

133 Rebecca Barber, 'Facilitating Humanitarian Assistance in International Humanitarian and Human Rights Law' (2009) 91(874) *International Review of the Red Cross* 371, 389; Stoffels (n 25) 536; Akhavan et al (n 48); Sassoli (n 48) and Bothe (n 52) 801.

134 Barber (n 133) 390–1; Stoffels (n 25) 356.

adequate.[135] Importantly, states that have been the subject of such resolutions, and are therefore specifically affected, have not consistently adhered to the obligations to allow and facilitate access as directed.[136] Furthermore, while General Assembly resolutions have called for parties to facilitate access,[137] they do not go as far as proclaiming a general right of access and remain framed around the mandatory requirement of state consent.[138] Likewise, although the wording of successive Security Council resolutions have moved from reaffirming the obligation of parties to facilitate humanitarian access, to demanding that parties allow access,[139] they continue to reiterate the sovereignty and territorial integrity of the state concerned.[140] The ICRC has also maintained its position that all humanitarian operations must accord with the provisions of international humanitarian law, including the requirement of consent, and only once consent is obtained does the requirement to facilitate access arise.[141]

Whether the customary status of cross-border relief operations crystalised with the adoption by the Security Council of Resolution 2165, which required parties to the Syrian conflict to allow access without the prior consent of the government, is also contentious. First, the Security Council did not articulate or affirm a general right of access in Syria; rather, the right of access stemmed from the specific authorisation of the Security Council.[142] The lack of a general right is further reinforced by the fact that the initial resolution was limited to a period of 180 days and to UN humanitarian agencies and their implementing partners.[143] If the Security Council had intended a general right of access without Syrian government consent, it arguably would have extended the right to deliver aid cross-border to all humanitarian actors for an unlimited period of time.[144] Secondly, Resolution 2165 does not seek to interpret or challenge the rules of international humanitarian law regarding humanitarian assistance. Rather, the source of authority exercised by UN humanitarian agencies and their partners to

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135 Ryngaert (n 62) 13; Spieker (n 12); Kuijt (n 12) 333; Modirzadeh n 131.

136 For examples, see Barber (n 133) 390. See also *Report of the Secretary-General on the implementation of Security Council Resolutions 2139 (2014), 2165 (2014), 2191 (2014), 2258 (2015), 2332 (2016), 2393 (2017) and 2401 (2018)* UN Doc S/2018/724 (20 July 2018) [38] ('*Report of the Secretary-General 2018*').

137 GA Res 46/182 (n 17) [4]; GA Res 52/167, A/Res/52/167 (18 February 1998) [3] and GA Res 69/135, A/Res/69/135 (19 January 2015) [49].

138 Spieker (n 12).

139 SC Res 1894 (n 17) [4]; SC Res 1923 (n 57) Preamble; cf SC Res 2127, UN Doc S/RES/2127 (5 December 2013) [52] and SC Res 2139 (n 81) [6].

140 UNSC Res 1894 (n 17) Preamble; SC Res 2127 (n 139) Preamble; SC Res 2139 (n 81) Preamble.

141 ICRC, 'Q&A and Lexicon on Humanitarian Access' (n 11) 362.

142 Bellamy (n 130).

143 Operative paragraphs [2] and [3] of Security Council Resolution 2165 were renewed annually from 2015 to 2018 for periods of 12 months. They have not been extended past January 2020.

144 Zimmermann (n 71) 18.

deliver humanitarian assistance without consent lies in binding decisions of the Security Council.[145] Finally, all parties to the Syrian conflict continue to obstruct humanitarian assistance and consequently, access across conflict lines remains limited.[146] This again demonstrates that state practice, particularly by states specifically affected, is not uniform. Thus, while the Security Council's demands are binding on the parties to the conflict in Syria, it is premature to speak of the existence of a general customary norm allowing humanitarian actors to operate without state consent or Security Council authorisation.

As the law currently stands, international humanitarian law does not allow for a right of humanitarian relief without the consent of the territorial state, even when relief operations are intended for civilians under the effective control of a non-state armed group. However, this does not mean that the international community is powerless to act. Such operations may be legal where the source of their authority is derived from an alternative rule of international law allowing such action, for example, a binding decision of the Security Council or, alternatively, the rules of state responsibility, which are discussed below.

A *Right of Access and the Rules of State Responsibility*

The impediment of relief operations by the belligerent state is a violation of international humanitarian law, which activates the rules of state responsibility.[147] While a breach by the state does not automatically entitle the international community to conduct relief operations without consent, the wrongfulness of such action may nonetheless be precluded as a lawful countermeasure, or otherwise by the principle of necessity.[148] These exemptions are only applicable in a restricted number of circumstances and are subject to strict limitations. However, they arguably provide the only avenue to circumvent the supremacy of state sovereignty and allow for the provision of humanitarian assistance to civilians in need.

Humanitarian relief operations carried out without state consent may be justified by the principle of necessity in circumstances where such action is necessary to 'safeguard an essential interest' of the state, or of the international

145 Rodenhauser and Somer (n 130).
146 *Report of the Secretary-General 2018* (n 136) [38].
147 International Law Commission, *Draft Articles on the Responsibility of States for Intentionally Wrongful Acts, with Commentaries* (2001) UN Doc A/56/10, art 1 ('*Commentary to ARSIWA*'). There is a general consensus that ARSIWA largely reflects customary international law. See James Crawford, *State Responsibility: The General Part* (Cambridge University Press, 2013) 43.
148 *Commentary to ARSIWA* (n 147) ch V.

community as a whole.[149] The grave and imminent suffering or starvation of the civilian population may be considered an essential interest of the international community.[150] To rely on the doctrine of necessity, the unlawful relief operation must be the only (lawful) way to safeguard this interest.[151] Furthermore, it must not seriously impair the territorial sovereignty of the state, or otherwise amount to forcible humanitarian intervention.[152] Where the territorial incursion is temporary — for example, one-off airdrops of life-saving supplies — and the civilian population would otherwise starve, the violation of the state's territorial integrity will arguably not be seriously impaired.[153] Accordingly, where unlawful unilateral relief operations are the only way to deliver life-saving supplies to safeguard the civilian population from a grave and imminent peril and their scope is temporary, they may be permitted under the doctrine of necessity.[154]

Alternatively, relief operations conducted without the consent of the state may constitute lawful countermeasures, justifying an otherwise unlawful relief operation.[155] First, relief operations conducted without consent must be temporary[156] and proportionate to the injury suffered.[157] Given that relief operations will violate the state's territorial sovereignty, it must be shown that the failure to consent to relief operations amounted to a serious breach of international law.[158] This will most likely only be established in extreme cases, such as the starvation of the population.[159] Secondly, countermeasures must not amount to an act of reprisal violating the prohibition against the use of force or the rules of international humanitarian law.[160] Thirdly, the purpose of the operation must be to induce the violating state to comply with its international legal obligations.[161] Arguably, where a humanitarian actor carries out relief operations, the state's duty is fulfilled.[162] However, where the aim is to draw attention to and compel the state to cease its breaches of international law and provide or allow humanitarian assistance, such action will arguably be lawful as

149 Ibid 80, art 25.
150 Ryngaert (n 62) 14; Kuijt (n 12) 416.
151 Akande and Gillard (n 56) 53; *Commentary to ARSIWA* (n 147) 80, 83.
152 *Commentary to ARSIWA* (n 147) 84.
153 Akande and Gillard (n 56) 53.
154 Ibid.
155 *Commentary to ARSIWA* (n 147) 75–6, art 22.
156 Ibid 130, art 49(2).
157 Ibid 134–5, art 51.
158 Akande and Gillard (n 56) 55.
159 Ibid.
160 *Commentary to ARSIWA* (n 147) 131–3, art 50.
161 Ibid 129–30, art 49(1).
162 Stoffels (n 25).

long as any measures undertaken cease once the state provides or allows humanitarian assistance.[163]

While a state can generally only take countermeasures when it was directly injured by the wrongful act,[164] non-injured states can invoke the responsibility of the defaulting state and claim cessation and guarantees of non-repetition when there has been a breach of an obligation owed to the international community as a whole.[165] It is unclear whether a non-injured state can also undertake countermeasures in the collective interest to compel compliance.[166] The International Law Commission ('ILC'), in its Commentary to the *Articles on the Responsibility of States for Intentionally Wrongful Acts* ('ARSIWA'), cited some examples whereby states that could not be considered injured in the sense of Article 42 of ARSIWA had initiated economic sanctions or other similar measures in response to violations of *erga omnes* obligations.[167] However, the ILC noted that such a practice was 'limited and rather embryotic'.[168] As it stands, therefore, current state practice and *opinio juris* is not sufficiently widespread and consistent to establish a rule allowing non-injured states to undertake countermeasures in the collective interest where an *erga omnes* obligation is violated, particularly where a countermeasure would infringe the territorial sovereignty of a state.[169] On this basis, unlawful relief operations would not be justifiable as a countermeasure in accordance with the rules of state responsibility. However, if a state is injured within the meaning of Article 42 of ARSIWA, it can undertake countermeasures[170] and potentially conduct unilateral relief operations without consent. To meet the criteria in Article 42, the injured state must be specifically affected by the breach of an obligation owed to the international community as a whole.[171] The obligation to allow and facilitate humanitarian access is arguably an obligation owed to the international community as a whole, particularly in circumstances where its violation leads to a humanitarian crisis or large-scale human rights violations, or amounts to a threat to or breach of the peace.[172] For a state to show that it is injured it must demonstrate that the belligerent state's failure to consent to humanitarian relief operations has caused adverse affects on its territory. For example, a humanitarian crisis created by a failure to allow or facilitate humanitarian relief may lead to the movement of refugees into the

163 Ryngaert (n 62) 15.
164 *Commentary to ARSIWA* (n 147) 75.
165 Ibid 126–8, art 48.
166 Ryngaert (n 62) 15.
167 *Commentary to ARSIWA* (n 147) 137–9. *Erga omnes* obligations are obligations owed to the international community as a whole. At least some of the rules in the Geneva Conventions and Additional Protocols reflect *erga omnes* obligations. See Sandoz et al (n 40) 36.
168 *Commentary to ARSIWA* (n 147) 137.
169 Gillard (n 55) 372.
170 *Commentary to ARSIWA* (n 147) 129–30, art 49(1).
171 Ibid 119.
172 Kuijt (n 12) 416.

territory of neighboring states, causing competition for already scarce resources, adversely affecting the latter. However, it may be in such circumstances difficult to justify countermeasures in practice. If a state has the means to provide external relief operations, it arguably has sufficient resources to support refugees within its borders and can therefore take steps to remedy the humanitarian crisis without breaching the territorial sovereignty of the belligerent state. As such, the likelihood of a state fulfilling the criteria in Article 42 is minimal, and it will be difficult to justify an unlawful relief operation as a legitimate countermeasure.

V Conclusion

Humanitarian assistance is essential to reducing the suffering of civilians affected by armed conflicts. However, its regulation in international law involves drawing a balance between the right of the state to its territorial sovereignty, the right of victims to receive essential supplies, and the interest of the international community in enforcing this right. These competing rights and interests are not easily reconciled, as the consensual basis of international law has traditionally been privileged. However, there is growing recognition within the international community that the freedom of states is not unlimited and its conduct towards its own citizens is increasingly a matter of international concern. This has contributed to the formation of a customary rule prohibiting states from arbitrarily withholding consent to humanitarian operations in both international and non-international armed conflicts, including where relief is intended for a non-state armed group or a designated terrorist group. Where a state arbitrarily withholds consent, it will constitute a violation of international law.

However, the trajectory of international law with respect to humanitarian assistance has focused on what amounts to an arbitrary withholding of consent, rather than eliminating the requirement to obtain consent. Despite some arguments to the contrary, the requirement of consent in the Geneva Conventions and Additional Protocols remains a constriction on the provision of aid and state practice, and *opinio juris* has not evolved sufficiently so as to allow for an unfettered right of access into opposition-held territory without state consent. However, while unilateral humanitarian operations conducted without state consent will not be protected under international humanitarian law, where its legality is derived from another source of international law, namely, a biding decision of the Security Council or the rules of state responsibility, an otherwise unlawful relief operation may be permissible. Outside of those limited options, the lack of effective mechanisms to implement and enforce impartial humanitarian operations means that the right of civilians to receive assistance often remains illusory. It is therefore imperative that the international community continues to pressure belligerent parties to abide by their legal obligations to ensure that the needs of civilians are adequately met.

SEXUAL ASSAULT ON CAMPUS: NOT JUST A POLICE MATTER — A RESPONSE TO *Y V UNIVERSITY OF QUEENSLAND*

CLARE FORAN*

This article examines the case of Y v University of Queensland *and the issue of university disciplinary action in cases of student-on-student sexual assault. In addition to the question of whether universities have legal jurisdiction to decide these matters, there is the more fundamental question of whether they should. Using Martha Fineman's theory of vulnerability as a theoretical lens, this article seeks to evaluate whether accusations of sexual assault should be treated exclusively as police matters or whether universities have a moral obligation to take independent action.*

I INTRODUCTION

Sexual assault on college and university campuses has recently come to the forefront of public consciousness both in Australia and internationally. In 2017, the Australian Human Rights Commission released 'Audit of University Responses to the Change the Course Report' ('Change the Course'), a national report on the prevalence of sexual assault and sexual harassment at Australian universities.[1] In response to the report, many universities, including The University of Queensland ('UQ'), introduced a Sexual Misconduct Policy to allow specific and targeted disciplinary action to be taken in cases of sexual assault.[2] Most residential colleges have followed suit and introduced their own sexual misconduct policies, which reflect the UQ policy to varying degrees. This approach has raised concerns about whether universities should have the capacity to adjudicate on matters that amount to criminal accusations. For example,

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1 Australian Human Rights Commission, 'Change the Course: National Report On Sexual Assault and Sexual Harassment at Australian Universities' (2017) ('Change the Course').

2 Kate Jenkins, 'Audit of University Responses to the Change the Course Report', *Australian Human Rights Commission* (Web Page, December 2017) 40 <https://humanrights.gov.au/our-work/sex-discrimination/audit-2017?_ga=2.36641760.1736632119.1589769748-1647686250.1588469685>.

Shirley Alexander, the Deputy Vice-Chancellor (Education and Students) and Vice President of the University of Technology Sydney, notably posted a tweet following a Channel 7 *Sunday Night* interview with university rape survivors, which read '#SN7 penalties for sexual assault are determined by the criminal justice system, not universities!'.[3] Journalist and activist Bettina Ardnt has also been running a campaign against what she describes as university 'kangaroo courts', which she believes 'usurp the criminal law system, introducing new regulations for adjudicating sexual assault, using a "balance of probabilities" standard of proof, and making no provision for protecting the legal rights of the accused'.[4]

In the recent Queensland Supreme Court case of *Y v University of Queensland*, Lyons J considered whether UQ had jurisdiction to hear an allegation of sexual misconduct, which amounted to an allegation of criminal sexual assault.[5] Lyons J's decision turned on her interpretation of the UQ Sexual Misconduct Policy, which she held denied the University jurisdiction in these circumstances. However, some of her reasoning reflected a deeper criticism of the capacity of university disciplinary boards to adjudicate accusations of criminal sexual misconduct more generally.[6] Lyons J effectively advocated for a 'police matter' approach, whereby the allegations of sexual assault are dealt with by the criminal justice system alone and the University may only take disciplinary action where there is a criminal finding of guilt. This interpretation has since been overturned by the Queensland Court of Appeal in a judgment written by McMurdo JA with Mullins JA, with Boddice J concurring.[7]

In the wake of this litigation, this article seeks, first, to illuminate the state of the law in relation to UQ's jurisdiction in sexual assault matters and, secondly, to reflect on the deeper question of whether UQ and its residential colleges should adopt the police matter approach. An incidental effect of this analysis will be the exploration of the validity of Lyons J's reasoning, in terms of both law and human rights implications. While some aspects of this response are specific to the

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3 End Rape on Campus Australia, 'Connecting the Dots: Understanding Sexual Assault in Australian University Communities', Submission to the Australian Human Rights Commission, *University Sexual Harassment Project* (January 2017) 30 ('Connecting the Dots'), citing @SAlexander_UTS (Shirley Alexander) (Twitter, 9 October 2019, 8:21pm AEST).

4 Bettina Ardnt, 'Campus Courts a Degree too Far', *The Australian* (Online, 7 November 2019) <https://www.theaustralian.com.au/subscribe/news/1/?sourceCode=TAWEB_WRE170_a&dest=https%3A%2F%2Fwww.theaustralian.com.au%2Fcommentary%2Fcampus-courts-a-degree-too-far%2Fnewsstory%2F82e23fc5ff7756cabb838db832d401f7&memtype=anonymous&mode=premium>; Bettina Ardnt, 'Closing down Campus Kangaroo Courts', *bettinaardnt.com.au*, (Web Page) <https://www.bettinaarndt.com.au/kangaroo-courts/>.

5 *Y v University of Queensland* [2019] QSC 282.

6 Ibid [41], [65]–[66], [67]–[68], [70].

7 *University of Queensland v Y* [2020] QCA 216.

policies of UQ and its residential colleges, much of it is also relevant to universities across Australia, which may be uncertain about the limitations of their disciplinary jurisdiction and the nature of their responsibilities as public institutions.

In order to address the latter question, and to weigh the competing interests of those affected, this article will employ Martha Fineman's theory of vulnerability. Fineman's theory centres around 'the vulnerable subject' and the role of public entities in alleviating that vulnerability.[8] It fundamentally rejects the liberal conception of the legal subject as an independent and self-interested individual and instead argues that the defining characteristic of the human condition is our shared vulnerability.[9] She argues that human beings have evolved to live in societies in order to alleviate our vulnerability through the accumulation of resources, which can include physical resources, like food, but also extends to human, social, ecological and existential resources.[10] The purpose of the state, and its public institutions, is to provide its subjects with resources to help them to build resilience and alleviate their vulnerability.[11]

In applying this theory, the starting point for analysis is to understand all parties as vulnerable. A common problem with the public discourse on sexual assault is that commentators tend to acknowledge the vulnerability of one gendered subject to the exclusion of the other. Historically, the courts have treated the accused, who is typically male, as the vulnerable subject in the context of sexual assault allegations because sexual offences were commonly understood to be 'very easy to fabricate, but difficult to refute'.[12] In the era of '#Me Too', the idea of the 'vulnerable male subject' has been strongly rejected and replaced with a growing recognition of the vulnerability of women who are disproportionately the victims of sexual assault. According to Fineman's theory, the vulnerable parties in the present context obviously include those who are falsely accused of sexual assault, as well as the survivors of sexual assault and the general student body. Fineman also extends the status of vulnerability to institutions that are

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8 Martha Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 132 ('Vulnerability and Inevitable Inequality').

9 Ibid 142–3. For the traditional liberal conception of the legal subject see John Locke, *Two Treatises of Government* (Hackett Published Company, first published 1632–1704, 2016 ed); Ngaire Naffine, 'Sexing the Subject of Law' in Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (Oxford University Press, 1995) 18.

10 Fineman (n 8) 146–8.

11 Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending Boundaries of Law: Generations of Feminism and Legal Theory* (Taylor & Francis Group, 2010) 161, 163–6 ('The Vulnerable Subject').

12 *Kelleher v The Queen* (1974) 131 CLR 534, 543 (Barwick CJ), 553 (Gibbs J), 559 (Mason J).

vulnerable to external forces, including economic loss.[13] On this basis, this article also considers the vulnerability of universities and residential colleges.

While the culture wars continue over who is vulnerable and requires our protection, Fineman's theory avoids the need to engage in this war by providing a theoretical foundation upon which to consider and weigh the vulnerabilities experienced by all parties. This is similar to the human rights approach, which considers the human rights of both offenders and victims and is more commonly employed in a criminal law context.[14] Where Fineman's analysis deviates from the human right's approach is in its understanding of the proper function of the state. Under a human rights approach, the proper function of the state is the 'prevention and reduction of harm', while showing 'respect for the (alleged) offender as a rational citizen'.[15] In contrast, according to Fineman's theory, the 'state' is conceptualised more expansively to include public institutions, such as universities, and its proper function is not just to prevent or reduce harm to its subjects but to actively provide them with the resources they need to alleviate their particular vulnerabilities.[16] Fineman's theory of vulnerability therefore affords a useful analytical lens through which to assess the approaches taken in response to sexual assault allegations by public institutions, such as universities, which have the capacity to be more interventionist within their communities than the more traditional branches of government.

This article argues that all students are fundamentally vulnerable but that vulnerability is not equally shared. The Change the Course report demonstrates that sexual assault is a prevalent and heavily gendered issue, with women being three times more likely to experience sexual assault than men.[17] If UQ or its colleges took a non-interventionist stance and adopted a police matter approach, they would facilitate this inequality on their campuses and provide their female students with a less safe learning environment than their male peers. As a public institution, UQ has a responsibility to be responsive to the vulnerabilities of its students and use its resources to address instances of inequality.[18] While a police matter policy would almost completely alleviate a student's vulnerability to false allegations or false findings of sexual misconduct, it would also exacerbate the vulnerability of survivors of sexual assault, the student body generally and,

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13 Fineman, 'The Vulnerable Subject' (n 11) 173.
14 Liz Campbell, Andrew Ashworth and Mike Redmayne, *The Criminal Process* (Oxford University Press, 5th ed, 2019).
15 Ibid, 50.
16 Fineman, 'The Vulnerable Subject' (n 11) 163–6.
17 Change the Course (n 1) 49.
18 Fineman, 'Vulnerability and Inevitabel Inequality' (n 8) 148–9.

indeed, UQ and its colleges. For these reasons, this article argues that a police matter approach is not a responsible one to pursue.[19]

II Current Policy Positions and Legal limitations

A *The Findings in* Y v University of Queensland

In *Y v University of Queensland*, the finding that UQ did not have jurisdiction turned on Lyons J's interpretation of cl 4.4 of UQ's Sexual Misconduct Policy, which reads:

> The University acknowledges that Sexual Misconduct may include criminal behaviours and may be unlawful. The University does not have jurisdiction over criminal acts but can take action in respect of breaches of its rules, policies and procedures.

Lyons J held that the effect of this clause was to renounce any criminal jurisdiction, meaning that where an accusation amounts to criminal conduct, UQ has no jurisdiction to commence disciplinary proceedings unless the conduct is 'proven', either by a guilty plea or by a conviction.[20] On appeal, McMurdo JA disagreed with this interpretation and characterised cl 4.4 as 'an acknowledgement by the University that it has no jurisdiction to determine criminal responsibility, and that it would not make findings in the terms of criminal responsibility in the course of deciding whether there had been certain breaches of its rules, policies and procedures'.[21]

As this case turned on a point of interpretation, there is little discussion about the legality of the jurisdictional question. The key legal questions that remain may be summarised as follows:

1. Do disciplinary boards have the power to hear allegations of misconduct that also amount to a criminal offence?
2. If yes to 1, does this give rise to issues of double jeopardy or estoppel?
3. Do disciplinary boards have the power to conduct disciplinary proceedings concurrently with criminal proceedings?

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19 Unlike UQ, residential colleges are not strictly 'public institutions'. The colleges form separate entities from UQ and operate as private businesses using their own sexual misconduct policies and procedures. Despite their operation as a private business, I argue that colleges should be included in my analysis by extension because they are part of a set of linked institutions, which allow UQ to deliver its education services. See Fineman, 'The Vulnerable Subject' (n 11) 164.

20 *Y v University of Queensland* (n 5) [67]–[68].

21 *University of Queensland v Y* (n 7) [86].

B *Do Disciplinary Boards Have the Power to Hear Allegations of Misconduct that also Amount to a Criminal Offence?*

The leading Australian authority on the issue of whether disciplinary boards have the power to hear allegations of misconduct that also amount to a criminal offence is *Australian Communications and Media Authority v Today FM Pty Ltd* ('*Today FM*').[22] That case concerned the question of whether the Authority had the power to cancel a broadcasting licence on the basis of its belief that there had been 'a commission of a criminal offence', despite the fact that no criminal action was ever brought against the licensee. The High Court held that inquiries take their legal character from the purpose for which they are undertaken and, where they are undertaken for a disciplinary purpose, an inquiry can have the power to form and express an opinion about an existing legal right and obligation, including whether alleged conduct amounts to a criminal offence.[23] This was thought to be no different to a civil court determining whether an offence had been committed for the purposes of making a civil award for damages.[24] This was not held to be an unconstitutional exercise of judicial power because the Authority did not conclusively resolve any controversy between the two parties, the Authority's view on whether an offence had been committed would have no legal affect, and the cancelling or suspending of a broadcasting licence was not an imposition of punishment for the commission of an offence against the state.[25]

University disciplinary boards would not need to go as far as the Authority in *Today FM* because they only need to consider whether an alleged act is a breach of the University's policies, not whether that alleged act amounts to a criminal offence. While the substantive content of the Sexual Misconduct Policy may overlap with the criminal law, they remain entirely separate standards.

C *Do Issues of Double Jeopardy or Estoppel Arise?*

Where the same set of facts can give rise to disciplinary and criminal proceedings, judicial precedent indicates that the principles of double jeopardy and estoppel are not engaged because the proceedings are distinct processes, which serve different purposes. In *Purnell v Medical Board of Queensland*, Mackenzie J characterised disciplinary proceedings as being 'not criminal in nature. Nor are

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22 *Australian Communications Media Authority v Today FM (Sydney) Pty Ltd* [2015] HCA 7 ('*Today FM*').
23 Ibid [33] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [64] (Gageler J).
24 Ibid [32] (French CJ, Hayne, Kiefel, Bell and Keane JJ).
25 Ibid [58]–[59] (French CJ, Hayne, Kiefel, Bell and Keane JJ), [65] (Gageler J).

they proceedings by way of punishment.'[26] In *Hardcastle v Commissioner of Police*, which concerned disciplinary proceedings taken against a member of the Australian Federal Police ('AFP') who was accused of assault, the Court held that disciplinary proceedings are for the purpose of protecting the public, maintaining proper standards, and protecting the reputation of the AFP.[27] Similarly, in *ML v Australian Securities and Investment Commission* ('*ML v ASIC*'), the Court characterised proceedings that ASIC had brought against ML to the Companies Auditors and Liquidators Disciplinary Board seeking the cancellation of ML's registration as a liquidator as 'disciplinary' rather than 'civil' because their purpose was to protect the public interest.[28] This was echoed in *Council of the Law Society of the ACT v Bandrage*, where it was held that s 24 of the *Human Rights Act 2004* (ACT), which states that a person cannot be tried or punished for an offence more than once, does not preclude concurrent disciplinary and criminal proceedings.[29]

The common law also holds that an acquittal at criminal trial cannot give rise to an estoppel in favour of the accused to prevent disciplinary proceedings. In *Helton v Allen*, the Court held that acquittal for murder did not act as an estoppel for a civil action on the grounds of unlawful killing and, furthermore, the acquittal was not admissible as an evidentiary fact.[30] The issue of estoppel was also raised in *Re Seidler*,[31] where a hospital employee was charged with stealing, but the Crown entered a *nolle prosequi* and criminal proceedings were abandoned because there was insufficient evidence to proceed. There the Court held that disciplinary and criminal proceedings were different in nature and decided on different standards of proof and, in any case, the entry of *nolle prosequi* did not preclude the Crown from prosecuting in the future and could not be said to bar the bringing of disciplinary proceedings.[32] This approach is also evident in the United States, as the Columbia University Gender-based Misconduct Policy reads: 'University and criminal justice systems work independently from one another … law enforcement authorities do not determine whether a violation of this policy has occurred.'[33]

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26 *Purnell v Medical Board of Queensland* [1999] 1 Qd R 362, 383 ('*Purnell*').
27 *Hardcastle v Commissioner of Police* (1984) 53 ALR 593, 597 ('*Hardcastle*').
28 *ML v Australian Securities Investments Commission* [2013] NSWSC 283, [50] ('*ML v ASIC*').
29 [2019] ACTSCFC 1, [123]–[125].
30 (1940) CLR 691, 710.
31 [1986] 1 Qd R 486.
32 Ibid. See also *Criminal Code 1899* (Qld) s 563.
33 Andrea Durbach and Kristen Keith, '*On Safe Ground: Strengthening Australian University Responses to Sexual Assault and Harassment*' (Report, August 2017) 90 <https://www.humanrights.unsw.edu.au/sites/default/files/inline-files/AHR0002_On_Safe_Ground_Good_Practice_Guide_online.pdf> ('*On Safe Ground*').

D *Do Disciplinary Boards Have the Power to Conduct Disciplinary Proceedings Concurrently with Criminal Proceedings?*

There is no strict rule that prevents criminal and disciplinary proceedings based on the same facts from being run concurrently, although courts in criminal cases retain the power to disrupt the disciplinary proceedings under some circumstances. In the English case of *North West Anglia NHS Foundation v Gregg*,[34] it was held that an employer does not need to wait for the conclusion of disciplinary proceedings to commence internal disciplinary proceedings. However, where these proceedings are pursued concurrently with criminal proceedings, the disciplinary proceedings can be disrupted where it is thought that they may give rise to 'real (and not merely notional danger) that there would be a miscarriage of justice'.[35] This position is reflected in Australian law. For example, in *Baker v Commissioner of Federal Police*,[36] it was held that a government agency can dismiss an employee in relation to conduct subject to incomplete criminal proceedings, although prejudice to the employee is a factor to be considered by the employer.[37]

E *Summary of the Current Law*

In summary, there appears to be no legal reason why universities would not have the jurisdiction to hear allegations of misconduct that might amount to violations of criminal law. The courts have consistently held that disciplinary, criminal and civil proceedings serve separate functions, apply different standards, require different standards of proof, and can operate concurrently. While disciplinary proceedings determine whether there has been a breach of policy and generally serve a wider public interest, criminal proceedings determine whether there has been a breach of criminal law via the adversarial criminal process.[38] Even where an accused is acquitted at criminal law, this does not prevent a university from finding that the same alleged conduct amounts to a violation of university policy.

It is, therefore, clearly within the power of UQ to conduct disciplinary proceedings independently from criminal proceedings. The question that remains is whether the University should pursue this policy in the light of the concerns

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34 *North West Anglia NHS Foundation v Gregg* [2019] EWCA Civ 387.
35 Ibid [107].
36 *Baker v Commissioner of Federal Police* [2000] FCA 1339 ('*Baker*').
37 Ibid [30].
38 *On Safe Ground* (n 33) 89. See also Universities UK, *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct which may also Constitute a Criminal Offence* (October 2016) 4 ('*Zellick Guidelines*').

raised by Lyons J as to the lack of procedural fairness that may be afforded to students accused of sexual misconduct and the absence of legal protections that an accused receives under the criminal law.[39] In the following Parts, this article applies Martha Fineman's theory of vulnerability in order to outline the ways in which the parties affected by these policies are vulnerable and consider whether a police matter policy, such as that put forward in *Y v University of Queensland*, would exacerbate or remedy the vulnerabilities of the parties involved.

III Vulnerabilities of the Accused

A *Vulnerability to False Allegations*

Advocates for the police matter approach argue that university disciplinary proceedings leave students, and particularly male students, vulnerable to serious disciplinary consequences as a result of false allegations of sexual assault.[40]

Being falsely accused of sexual assault is likely to induce stress, as well as other negative mental health consequences, which can take their toll on the student's capacity to work and study. UQ offers counselling to any student accused of sexual misconduct through its Sexual Misconduct Support Unit ('SMSU'). However, accused students rarely access this service.[41] The accused may also be subject to 'reasonable measures' until the disciplinary proceedings are concluded.[42] This was an issue in *X v University of Western Sydney*,[43] where a student accused of sexual assault was suspended as an interim measure. However, the University failed to provide him with an opportunity to respond to the allegations and did not properly consider the impact that the suspension might have on his studies. Under pt 8.3 of the UQ Sexual Misconduct Procedures, the 'reasonable measures' appear to be arrangements that the complainant can make

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39 *Y v University of Queensland* (n 5) [65], [66].

40 See Suellen Murray and Melanie Heenan, *Study of Reported Rapes in Victoria 2000–2003* (2006) Office of Women's Policy, Department for Victorian Communities. This study looked at 850 allegations of rape over the three-year period and calculated that around 2.1 per cent of reported rapes were classified as 'false reports'. See also David Lisak et al, 'False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases' (2010) 16(12) *Violence Against Women* 1318. This study considered 136 allegations of sexual assault reported at a major northeastern university in the United States over a ten-year period and, in the context of similar research, concluded that false reporting rates are likely between two and ten per cent.

41 Kate Jenkins (n 2) 40.

42 University of Queensland, 'Sexual Misconduct Policy – Guidelines', *UQ Policy and Procedures Library* (27 October 2017) 8.3 <https://ppl.app.uq.edu.au/content/1.50.13-sexual-misconduct>.

43 [2013] NSWSC 1280; [No 2] [2013] NSWSC 1318; [No 3] [2013] NSWSC 1329; [No 4] [2013] NSWSC 1334; [2014] NSWSC 82.

with UQ, rather than measures that can be directly enforced against the accused, for example allowing changes to the complainant's class timetable in order to avoid the accused student. There is no specific mention of 'suspension' or any other measure that might be imposed upon the accused. However, there is a catch-all clause enabling UQ to take 'other safety measures', and it seems likely that suspensions might be imposed on this basis in extreme cases. If the University were to notify potential placements required to complete practical components of some courses, the accused may also face prejudice from institutions, which may refuse to host them.[44] However, the UQ Sexual Misconduct — Procedures does not state that potential placements will be informed. Hence, such refusals are unlikely to occur in the absence of some external mandatory reporting requirement, or if the 'reasonable measures' in place had some impact upon the placement.[45]

UQ disciplinary proceedings are also entirely confidential, and so there is little risk that a false allegation will result in widespread damage to a student's reputation.[46] While the complainant must be notified of the outcome of the proceedings, they will not be given details of the penalty imposed. It is possible that the police matter approach from *Y v University of Queensland* would encourage allegations to be brought publicly through the criminal justice system, exacerbating the accused's vulnerability to reputational damage.

B *Vulnerability to False Findings and False Conviction*

Disciplinary proceedings offer fewer protections to an accused student than do criminal laws and procedures, and are therefore more vulnerable to a false finding that sexual misconduct occurred. In *Y v University of Queensland*, Lyons J agreed with the submission that 'it would be a startling result if academics and students who are not required to have any legal training could decide allegations of the most serious kind without any of the protections of the criminal law'.[47] Her Honour also noted that, under the criminal law, accused persons are awarded significant protections that are not awarded in disciplinary proceedings.[48] If UQ finds that a student has committed sexual assault, this would be considered a 'level 3' breach of the UQ Student Integrity and Misconduct Policy, the penalty for

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44 *X v University of Western Sydney [No 3]* (n 43) [83]–[84].

45 University of Queensland, 'Sexual Misconduct — Procedures', *UQ Policy and Procedures Library* (27 October 2017) pt 6 <https://ppl.app.uq.edu.au/content/1.50.13-sexual-misconduct>.

46 Ibid pt 9.

47 *Y v University of Queensland* (n 5) [70].

48 Ibid [65].

which can be up to five year suspension or expulsion.[49] This would obviously have a seriously detrimental effect on the student's studies. Similarly, it should be considered that not all accused students will be affected in the same way. In her theory, Fineman distinguishes between the 'embodied' differences, which are static and exist between groups of people, and 'embedded' differences, which exist within those groups.[50] International students, for example, rely on their enrolment at the University for their student visa and students who receive welfare payments could stand to lose those payments. Where disciplinary proceedings are allowed to operate concurrently with criminal proceedings, the disciplinary proceedings may also prejudice the accused in their criminal trial. This could make the accused student more vulnerable to a false conviction, which carries more severe consequences.

The main differences between disciplinary proceedings and criminal proceedings are as follows:

1. Disciplinary proceedings employ a lower standard of proof than criminal proceedings and lack formal rules of evidence.
2. Students are less likely to have legal representation in disciplinary proceedings and may be prejudiced if they exercise their right to silence.
3. Disciplinary proceedings generally have a more limited review process than criminal proceedings.

1 *Standard of Proof and Rules of Evidence*

Unlike criminal proceedings, which require accusations to be proved 'beyond reasonable doubt', the standard of proof in disciplinary proceedings is only on 'the balance of probabilities'. Historically, where allegations of misconduct amounted to criminal allegations, disciplinary boards and tribunals were expected to apply the criminal standard of proof. Since the 1990 case of *Adamson v Queensland Law Society,* this position was changed when the Court held that disciplinary proceedings brought before a professional tribunal could not be regarded as criminal proceedings and that, consequently, the civil standard of proof applied.[51] This was upheld in *Purnell v Medical Board of Queensland*, where a medical professional was accused of sexually assaulting multiple women on

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[49] University of Queensland, 'Student Integrity and Misconduct Policy', *UQ Policies and Procedures Library* (10 July 2018) 8.9(c) <https://ppl.app.uq.edu.au/content/3.60.04-student-integrity-and-misconduct> ('UQ Student Integrity and Misconduct Policy').

[50] Fineman, 'Vulnerability and Inevitable Inequality' (n 8) 144–5.

[51] *Adamson v Queensland Law Society* [1990] 1 Qd R 498, 505–6.

separate occasions at his medical practice and the Court held that disciplinary proceedings are distinct in nature from criminal proceedings and should operate under a lower standard of proof without applying criminal laws of evidence.[52]

Without the criminal laws of evidence, there are few safeguards in place to protect accused students from having highly prejudicial evidence brought against them. This might include character evidence, propensity evidence or 'hearsay evidence', all of which are only admissible in criminal courts under certain circumstances.[53] Nonetheless, any evidence adduced would still be required to be logical and probative in order to support the conclusions.[54] The UQ Student Integrity and Misconduct Policy explicitly states that 'the decision-maker must make a decision based on the finding of facts that are established on sound reasoning and relevant evidence'.[55]

There is also precedent to suggest that the *Briginshaw* test applies to disciplinary proceedings, at least in relation to misconduct in legal and health professions.[56] This means that where the allegations made are serious in nature, a high degree of certainty is required before they can make a finding against the accused.[57] If these principles were to extend to university disciplinary proceedings for allegations of sexual assault, the disciplinary board would have to be satisfied to a higher degree of certainty than they would be if the accusation were less serious.

2 *Legal Representation and the Right to Silence*

In Australia, there is no common-law right to legal representation at the public's expense at criminal trial. However, the judge in each case has the power to stay proceedings where the accused is unrepresented and this would result in an unfair trial.[58] Accused persons do, however, have the right to remain silent.[59] In disciplinary hearings, students may be allowed legal representation in certain circumstances, including where the charge or potential penalties are very serious.[60] They also have the right to remain silent. However, failure to present a

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52 *Purnell* (n 26) 368–9, 383–5.

53 See *Evidence Act 1977* (Qld) s 15, ss 83–103; *Makin v Attorney General for New South Wales* [1984] AC 57; *Pfennig v The Queen* (1995) 182 CLR 461; *R v Hughes* [2012] QCA 208; *R v Lester* [2008] QCA 354, [43]–[80]; *R v Hytch* [2000] QCA 315; *Baker v The Queen* [2012] HCA 27.

54 Robert Lindsay, 'Disciplinary Hearings: What Is to be Done?' (2015) 80 (May) *AIAL Forum* 77, 83.

55 UQ Student Integrity and Misconduct Policy (n 49), 8.6.

56 Hon Justice PE Smith, 'Briginshaw and Disciplinary Proceedings' (Paper delivered to the Queensland Law Society, 18 June 2019).

57 *Briginshaw v Briginshaw* (1938) 60 CLR 336.

58 *Human Rights Act 2019* (Qld) s 32(2)(f); *Dietrich v R* (1992) 177 CLR 292.

59 *Police Powers and Responsibilities Act 2000* (Qld) s 397.

60 *R v Secretary of State for the Home Department ex parte Tarrant* [1984] 1 All ER 799, 816.

full defence when asked by the disciplinary board might practically prejudice the accused.[61] Given that students are unlikely to be legally represented in disciplinary proceedings, this could cause the accused to incriminate themselves prior to the conclusion of criminal proceedings. If this were to occur, then the criminal court has the power to stay proceedings on a discretionary basis, although the risk of self-incrimination alone is not sufficient to warrant a stay.[62] This approach has been criticised for not giving sufficient weight to the prejudice created by concurrent proceedings and the primacy of criminal proceedings in our legal system.[63] In *ML v ASIC*, it was argued that if the accused were to disclose his defence during disciplinary proceedings, then his defence strategy would become known prior to his criminal trial and this would allow others to modify or falsify evidence to respond to his defence.[64] The judge in that case, however, noted that this can also be an advantage because it also gives the accused an opportunity to practice cross-examining witnesses.[65]

The prejudice caused to the accused is somewhat mitigated by the fact that university disciplinary proceedings are confidential and may be precluded from being introduced as evidence at criminal trial because of the unfair prejudice that it would cause. It should also be noted that the trial judge can direct the jury not to consider material that is not before the court and that the trial judge has the capacity to stay a criminal trial, although this power would be reserved for extremely rare cases where the prejudice against the accused is so great that there is no possibility for a fair trial.[66]

3 *The Review Process*

Once the disciplinary decision of the relevant university body is handed down, the accused has limited avenues for review. The UQ Student Integrity and Misconduct Policy allows for the merits of the decision to be reviewed via an internal process, but only where the student can raise new information that has come to light since the making of the decision, where the decision was procedurally incorrect or unfair, or where the penalty imposed was disproportionate.[67]

Disciplinary action by a university does attract the procedural protection of administrative law, most notably the right to procedural fairness. In Queensland, this means that an aggrieved student can have a decision against them reviewed

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61 *Baker* (n 36) [27]–[28].
62 *McMahon v Gould* (1982) 7 ACLR 202.
63 *Baker* (n 36) [34].
64 *ML v ASIC* (n 28) [38].
65 Ibid [55].
66 Ibid [57]–[59]; *Jago v District Court of New South Wales* (1989) 168 CLR 23, 34, 75.
67 UQ Student Integrity and Misconduct Policy (n 49) 9.1.3.

on the basis of any of the grounds contained in s 20(2) of the *Judicial Review Act 1991* (Qld). This means that universities need to ensure that their policies include certain procedural safeguards. For example, the accused student must receive fair notification of the accusations against them, must be allowed to respond to the accusations during a hearing,[68] and must have access to the documentary evidence that is 'credible, relevant and significant to the decision to be made'[69] or that may be prejudicial.[70] In a study conducted by Bruce Lindsay into the perceptions and observations of students and staff of university disciplinary procedures, it was found that while there was general satisfaction with the particulars provided to accused students, issues did arise with the disclosure of evidence.[71]

Unlike courts, university decision-makers are not generally obliged to provide written reasons for their decisions.[72] The absence of written reasons can lead to lower quality decisions, which are not as well reasoned and harder to scrutinise.[73] It may also make it difficult to determine whether a decision was affected by actual or apprehended bias by the decision-maker, something that was in issue in *X v University of Western Sydney*. In that case, the University's decision-makers made multiple submissions that, even if they had provided the accused with proper details of the complaint made against him, his response would not have changed their minds with regard to suspending him. These submissions suggest that the University's decision-makers did not approach their decision without bias, with honesty and in good faith.[74]

The provision of written reasons would also protect accused students from unreasonableness in decision-making. Decisions that lack an evidentiary intelligible justification, including those that are a 'disproportionate exercise of an administrative decision…', are considered 'unreasonable' and may be judicially reviewed on those grounds.[75] Despite the lack of legal obligation to provide written reasons, there is clearly a strong case that doing so is in the best interests of natural justice.[76]

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68 *Kirk v Industrial Relations Commission of New South Wales* [2010] HCA 1.

69 *Kiao v West* (1985) 159 CLR 550, 629, cited in Bruce Lindsay, 'University Discipline and the "Higher Education Crisis": Student Advocates' Experiences and Perceptions of Quasi-Judicial Decision Making in the University Sector' (2009) 31(4) *Journal of Higher Education Policy and Management* 327, 331.

70 *Kanda v Government of Malaya* [1962] AC 322, cited in Lindsay (n 69) 331.

71 Lindsay (n 69) 330–1

72 *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656.

73 Lindsay (n 69) 331.

74 *X v University of Western Sydney [No 3]* (n 43) [86]–[87].

75 Lindsay (n 54) 81.

76 Ibid 83.

Bringing a judicial review case, however, can be very expensive, and it cannot be expected that all accused students will have the financial resources to assert their rights in this way. In addition, it should be considered that if the university fails to comply with their own policies in the process of decision-making, this does not necessarily supply grounds for the courts to remit or quash a disciplinary decision. This is because university policies do not have the force of law, and so failing to comply with them is not 'an error in law'.[77]

C *Summary*

The main concern for students who are falsely accused of sexual assault is the adverse consequences they may face if the accusation results in a false finding by the disciplinary board of sexual misconduct. Disciplinary proceedings do not offer the same protections to an accused that are offered under criminal law, and a false finding of sexual misconduct can result in long-term suspension or expulsion. The level of procedural protection differs depending on the policies of the university in question. At the bare minimum, accused students should receive a fair hearing, notice of the accusation in sufficient detail and a copy of the relevant evidence. While there is no obligation to provide written reasons, this would be strongly encouraged, as it provides an important procedural safeguard to protect the accused from bias and unreasonableness by the decision-makers. Failure to provide these procedural safeguards may mean that the accused would be able to access remedies under s 30 of the *Judicial Review Act 1991* (Qld), which remedies include the quashing or remitting of the decision. This legal protection, however, will typically only be available to students with the financial resources to access proper legal advice and representation.

It is also important to bear in mind that these vulnerabilities are not unique to students accused of sexual misconduct. Students are equally as vulnerable to being falsely accused of any other kind of crime and face the same procedural disadvantages in their disciplinary proceedings. If the police matter approach is taken with regard to sexual offences, then it should also apply to all other forms of criminal conduct.

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77 *X v University of Western Sydney [No 4]* (n 43) [266].

IV Vulnerabilities of Sexual Assault Survivors

A *Vulnerability to the Failures of the Criminal Justice System*

Sexual-assault survivors under a police matter approach would have to rely entirely on the criminal justice system in order to obtain a meaningful remedy, and would be left vulnerable to the efficacy issues that plague that system.

First, survivors may choose not to take criminal action. The Change the Course survey found that only 43 per cent of those who made a formal report of sexual assault to their university stated that they also made a report to the police.[78] Survivors may decide not to undergo criminal proceedings for a variety of reasons, including the public nature of those proceedings and the significant risk of re-traumatisation, particularly during cross-examination.[79]

Secondly, where the matter is reported to the police, there is no guarantee that it will be taken to trial. This was considered in *Lewis v Prosthetists and Orthotists Board*,[80] which involved disciplinary proceedings against an orthotist who was accused of maintaining an inappropriate sexual relationship with a patient and having sexual intercourse with her without her consent. While criminal proceedings were contemplated, they did not ultimately go ahead, although the patient did bring a civil action for rape. The Court acknowledged that even where grounds might exist for a criminal charge, there are a range of reasons why the decision might be made not to prosecute, and that it 'would be absurd if that position deprived a disciplinary committee of the jurisdiction to look into the matter'.[81]

Thirdly, even where criminal proceedings are undertaken, conviction rates for sexual assault in Australia are very low and have declined in recent years.[82] The Connecting the Dots Report prepared by End Rape on Campus Australia quoted Amy Chmielewski, an associate attorney in the United States, who stated: 'Often, the educational community provides the last meaningful chance to recognize a victim's injury, censure an offender's conduct, and communicate disapproval of sexual assault in general, with the possible result of deterring similar future conduct.'[83]

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78 Change the Course (n 1) 138.

79 Connecting the Dots (n 3) 32; See also Haley Clark, '"What is the Justice System Willing to Offer?" Understanding Sexual Assault Victim/Survivors' Criminal Justice Needs' [2010] *Family Matters* 28.

80 [2001] EWCA Civ 837.

81 Ibid, [19].

82 Connecting the Dots (n 3) 32.

83 Ibid, citing Amy Chmielewski 'Defending the Preponderance of Evidence Standard in College Adjudications of Sexual Assault' [2013] 1 *BYU Education and Law Journal* 143, 170.

Finally, sexual assault survivors who do pursue criminal charges are vulnerable to the additional trauma inflicted by the criminal justice process itself. Extensive literature has been written about the re-traumatisation of sexual assault victims during the criminal justice process. While in-depth discussion of this literature goes beyond the scope of this article, in broad terms it indicates that poor treatment by police, as well as the process of giving evidence and being cross-examined on that evidence, can cause further psychological harm to survivors of sexual assault.[84] Moreover, many sexual assault trials will turn on the issue of whether the alleged victim consented to the contact, meaning that 'the victim's character is put on trial in ways that are unparalleled in other areas of the law'.[85]

If universities are unable to offer meaningful remedies, survivors are even less likely to come forward to disclose their experiences of sexual violence. According to the Change the Course report, 87 per cent of sexual assault victims did not make a formal report, and 79 per cent did not seek any support or assistance from their university at all.[86] Submissions to the Change the Course report identified that one reason for this is that victims do not believe that their university will take effective action if a formal report is made or help is sought.[87] If universities were to implement a police matter approach, student confidence in the effectiveness of their universities response would fall and reporting rates would continue to remain low.

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84 Kerstin Braun, 'Legal Representation for Sexual Assault Victims — Possibilities for Law Reform' (2014) 25(3) *Current Issues in Criminal Justice* 819, 821, citing: J Doak, *Victims' Rights, Human Rights and Criminal Justice: Reconceiving the Role of Third Parties* (Hart Publishing, 2005) 297; JL Herman, 'Justice from the Victims' Perspective' (2005) 11(5) *Violence Against Women* 571, 574; L Ellison, *The Adversarial Process and Vulnerable Witness* (Oxford University Press, 2001) 16; J Stubbs, 'Sexual Assault, Criminal Justice and Law and Order' [2003] 14 *Women Against Violence: An Australian Feminist Journal* 17; P Resick 'Psychological Effects of Victimisation: Implications for the Criminal Justice System' (1987) 33(4) *Crime & Delinquency* 468, 475; Australian Law Reform Commission, *Family Violence — A National Legal Response* (Report No 114, 2010); Haley Clark (n 79) 28, 31–2; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002) 356–62; Mary Heath, 'Women and Criminal Law: Rape' in Patricia Easteal (ed), *Women and the Law in Australia* (Lexis Nexis Butterworths, 2010) 88, 88–92.

85 Christine Morely, *Practising Critical Reflection to Develop Emancipatory Change: Challenging the Legal Response to Sexual Assault* (Taylor & Francis Group, 2014) 29, citing New South Wales Ministry for the Status and Advancement of Women, *Sexual Assault Phone-In Report: the NSW Government Response* (Report, 1993).

86 Change the Course (n 1) 120.

87 Ibid 145–6.

B *Vulnerability to Educational Cost*

Bringing an allegation of sexual assault to criminal trial would also take a serious educational toll on the survivors and, as was noted in an assessment of university responses to sexual violence in Canada, it is 'women [who] bear the educational cost of men's sexual violence'.[88] Survivors of sexual assault also have an immediate need to be safe on campus, and the criminal justice system is not well placed to meet these immediate needs, as matters can take up to several years to come to trial. The criminal law clearly cannot respond with the speed or redress necessary to allow the survivor to complete their education.[89] The complainant can request 'reasonable measures' to be taken by their university to ensure that they still feel safe to attend class, such as adjusting timetable amendments to ensure that the complainant and the accused are not in classes together.[90] However, this arrangement may not be possible in some courses — a difficulty that arose in *X v University of Western Sydney [No 3]*.[91]

C *Vulnerability to Ongoing Trauma*

UQ provides survivors of sexual assault with multiple resources through which they can build resilience. The UQ policy, and many of the college policies, state that they aim to be 'trauma informed' in order to reduce the emotional and psychological impact of the process on complainants. Complainants can access the counselling services at the Sexual Misconduct Support Unit, which offers counsellors who are specifically trained to help trauma victims and are more immediately available than the University's general counsellors.[92] The University also offers academic support, which can include extensions and special consideration, and has introduced a 'First Responders Network', which helps students to identify which staff have received the proper training in order to receive a disclosure regarding sexual violence.[93]

D *Summary*

If UQ were to take a police matter approach, and thus only intervene in cases where there is a criminal conviction, it would inherit the efficacy issues that

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88 Elizabeth Sheehy and Daphne Gilbert, 'Responding to Sexual Assault on Campus: What can Canadian Universities Learn from US Law and Policy?' in Elizabeth Quinlan et al (eds), *Sexual Violence at Canadian Universities* (Wilfrid Laurier University Press, 2017) 291, 294.

89 Ibid.

90 University of Queensland, 'Sexual Misconduct — Procedures' (n 45) pt 8.

91 *X v University of Western Sydney [No 3]* (n 43) [16].

92 Kate Jenkins (n 2) 40.

93 Ibid.

plague the criminal justice system's handling of sexual assault matters, including low reporting rates, low prosecution rates and low conviction rates. This would increase the educational cost that survivors must wear when UQ is not able to take immediate disciplinary action in response to an allegation. This is somewhat remedied, however, by resources provided by UQ, such as the provision of 'reasonable measures', the SMSU and the First Responders Network.

Furthermore, if the police matter approach were taken it would have to be applied to all criminal conduct and not just sexual offences. Otherwise, UQ or its colleges would be endorsing a double standard.

VI Vulnerabilities of the University and Colleges

If UQ and its colleges implement a police matter approach, they may be vulnerable to economic losses as a result of legal action for failure to meet their duty of care and failure to comply with fundamental human rights under the *Human Rights Act 2019* (Qld) ('*HRA*').

The exact relationship between universities and students is not clearly legally defined. In *Griffith University v Tang* ('*Tang*'),[94] Gleeson CJ noted that the lack of evidence 'which bears upon the legal nature and incidents of the relationship between the parties is curious'.[95] In that case there was no evidence of a contract between the University and a PhD student. However, the Court left open the possibility that there might have been one.[96] In *X v University of Western Sydney*, it was held that there could be no contractual relationship between the University and the student because there was no certainty in the contractual terms.[97] Moreover, in *Tang*, the Court held that universities were also public entities, which means that their decisions are susceptible to judicial review.[98] This finding also suggests that universities would be considered 'public entities' for the purposes of the *HRA* and that their decisions must procedurally and substantively comply with fundamental human rights in accordance with the Act.[99] It should be noted that this would not apply to colleges, as they are not 'public entities'.

94 *Griffith University v Tang* (2005) 221 CLR 99 ('*Tang*').
95 Ibid 108.
96 Ibid.
97 *X v University of Western Sydney [No 4]* (n 43) [255].
98 *Tang* (n 94) 135 (Kirby J).
99 *Human Rights Act 2019* (Qld) s 58.

A *University Vulnerability to Negligence Claims*

Universities do appear to have a duty of care to protect students from foreseeable harm. However, the exact scope of this duty remains largely untested. There is no perfect analogy for the duty of care owed by a university because the student–university relationship is quite unique. Universities cannot exercise the level of control over its students that a school or prison can, but it is involved in the day-to-day lives of its students more than would be expected in a typical occupier–entrant relationship.[100] There is no precedent in Australia that establishes the extent to which a university might have an obligation to protect students from the criminal acts of other students. However, this issue has been considered in the United States.

In the US, the duty of care owed by the universities to students originally followed the doctrine of 'loco parentis' until the 1960s, when it was felt that this did not properly reflect the level of autonomy that students exercise.[101] This change in attitude resulted in the so-called 'no duty' doctrine. However, that doctrine has recently fallen out of favour, as demonstrated by the landmark case of *Furek v University of Delaware*.[102] That case concerned a personal injury case brought by a student who suffered significant burns when a cleaning product was poured on him as part of a hazing ritual at a college fraternity. The University had started an anti-hazing campaign, which largely consisted of placing anti-hazing posters around campus. The Court held that the University had an obligation to protect its students from the illegal actions of other students and that the current anti-hazing campaign was not sufficient to discharge its duty of care. In making this finding, the Court also relied on the fact that the University knew that there was a risk of injury to students because it was aware that dangerous hazing practices were occurring. The University was therefore in a better position than students to introduce measures to eradicate hazing practices and the student had a reasonable expectation that the University would protect him from foreseeable harm.[103]

In the Australian context, Stanley Yeo has argued that whether a university owes a duty of care will turn on whether the harm was reasonably foreseeable and whether the university has assumed responsibility so that it was reasonable for the student to rely on the university to protect them from this foreseeable harm. The scope of that duty will then be determined by considering a number of factors,

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100 Stanley Yeo, 'The Responsibility of Universities for their Student's Personal Safety' (2002) 6 *Southern Cross University Law Review* 77, 85–6.

101 Ibid 79.

102 *Furek v University of Delaware* 594 A 2d 506 (1991).

103 Yeo (n 100) 83–4.

such as the seriousness of the injury and the practicality of the precautions.[104] In *Simundic v University of Newcastle*,[105] the New South Wales Supreme Court did not rule out the submission that the University's duty of care may require it to provide a suitably safe study environment and that harm would be reasonably foreseeable where the University was on notice about a student's mental health issues and their experience of trauma.[106]

In *Waters v Winter and The University of New England* ('*Waters*'),[107] the court also suggested that, in some circumstances, the University may be liable for personal injuries that occur at residential colleges. In that case, a student brought an action for negligence against the University and a residential college for not providing security guards at a college event where he was assaulted by gatecrashers. The court found that the master of the college is primarily responsible for the welfare of students at college but that the University also has a general duty of care to protect students from injury and, in this case, no 'independent duty of care' was imposed on the University.[108] Unfortunately there was no elaboration on when an 'independent duty of care' might arise.

Applying the principles from the case law to the matter of sexual assault on campus a UQ, it could be argued that students would have a reasonable expectation that the University would use its Sexual Misconduct Policy to protect them from foreseeable harm of sexual assault. Whether the sexual assault was 'foreseeable' would depend on the facts. However, it would be difficult to argue that the harm was not 'foreseeable' where the University was already aware of an allegation of sexual assault against the accused perpetrator. This means that if the University took the police matter approach and another assault was committed by the same individual while the matter was coming to trial, the University would face a serious risk of being found liable for negligence. This argument was neatly expressed by Brett Solokov, CEO for the National Centre for Higher Education Risk Management in the US, when he stated: 'The first rape by a perpetrator is free. The second one is going to cost you seven figures.'[109]

B *Colleges' Vulnerability to Negligence Claims*

The relationship between colleges and students is less complicated than that between the university and students. As identified in *Waters*, the master of the

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104 Ibid 98.
105 *Simundic v University of Newcastle* [2005] NSWSC 586.
106 Ibid [17]–[18].
107 *Waters v Winter and The University of New England* [1998] NSWSCA 248 ('*Waters*').
108 Ibid [26].
109 Sheehy and Gilbert (n 88) 297.

college has the primary duty of care to students in relation to conduct that takes place on college campus so long as the harm was reasonably foreseeable.[110] Moreover, *O'Meara v Dominican Fathers* raised the possibility that colleges may owe a higher duty of care under contract. In that case, it was held that it was an implied term that college authorities bore the responsibility of monitoring 'the conduct of persons on the premises so as to be able to recognise dangerous situations, or the development of dangerous practices, in order that appropriate measures could be utilised to guard against them'.[111] If colleges were to implement a police matter approach, they would be at even greater risk than the university of facing a successful claim for negligence and would likely face an additional claim for breach of contract.

C *University Vulnerability to Human Rights Actions*

As a public entity, it is unlawful for UQ to make decisions without complying both procedurally and substantively with the fundamental human rights contained in the *HRA*. However, it should be noted that any actions brought under the *HRA* need to be 'piggybacked' onto another pre-existing cause of action, such as judicial review or tort.[112] Even where an action under the *HRA* is successful, this does not amount to jurisdictional error by a university and the courts do not have the power to invalidate the decision.

The *HRA* is a new and largely untested piece of legislation in Queensland. However, case law from Canada suggests that a failure to warn individuals about a foreseeable risk of sexual assault may be considered a violation of their right to liberty and security of person.[113] In *Jane Doe v v Metropolitan Toronto Commissioners of Police*, a woman succeeded in arguing that the decision of the police not to alert women in the area to the existence of the 'balcony rapist' was a violation of her right to security of person and equality before the law.[114] In another Canadian case, *Ford v Nipissing*, the Court held that it is not sufficient for a university to take threats and harassment seriously at the first instance; it must continue to 'remain diligent in pursuing the matter' and remain in contact with the complainant.[115] This suggests that by implementing a police matter approach, a University may fail to protect the fundamental rights of students under the *HRA*.

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110 *Waters* (n 107) 6.
111 *O'Meara v Dominican Fathers* (2013) 152 ACTR 1, [118].
112 *Human Rights Act 2019* (Qld) s 59.
113 *Human Rights Act 2019* (Qld) s 29.
114 *Jane Doe v Metropolitan Toronto Commissioners of Police* (1998) 39 OR (3d) 487.
115 *Ford v Nipissing University* 2011 HRTO 204, [72]–[73].

D *Vulnerability to the Limitations of the Criminal Justice System*

The police matter approach would also prevent universities and colleges from using their policies to address areas of the law that are unclear or in need of reform. Union College, for example, includes 'stealthing' as part of their definition of sexual misconduct, which refers to nonconsensual condom removal during sex.[116] While this is an obvious betrayal of trust, it is currently unclear whether it would vitiate consent and be considered 'sexual assault' under the criminal law in Queensland.[117] Similarly, Emmanuel College's Respectful Relationships Policy also elevates the requirement of consent to the standard of 'informed consent', which is adapted to address the factors that contribute to sexual assault in a college context.[118] For example, 'informed consent' must be 'free from the influence of others, especially older community members', which responds to the peer pressure and hazing identified as key issues in the Change the Course report.[119] UQ and its colleges should also be aware that a police matter approach will not only restrict their capacity to address specific issues, but it will also mean that they will effectively endorse and inherit the controversial aspects of the criminal law around sexual assault, which are not present in the UQ Sexual Misconduct Policy. The most prominent example is the 'reasonable mistake of fact' defence, under which it is a complete defence if the accused honestly and reasonably believed the person to be consenting, even if they were in fact not consenting.[120] The debate around this defence is beyond the scope of this article and it is unclear to what extent such a defence could be relied upon under the current policy.[121] Nonetheless, universities and colleges should be aware of its existence if considering taking a police matter approach.

It is commonly accepted that university and college general misconduct policies may include in their definition of 'misconduct' conduct that is deemed unacceptable but which is not necessarily illegal — for example, prohibitions around bullying and harassment. A police matter approach would mean that the

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116 Union College, 'Union College Policies 2019' *Union College Policies* <https://www.unioncollegeuq.com.au/unioncollegepolicies/> 12.

117 See Alexandra Brodsky, '"Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal' (2017) 32(2) *Columbia Journal of Gender and Law* 183.

118 Emmanuel College, 'Respectful Relationships Policy' (January 2020) 1–2.

119 Change the Course (n 1) 187.

120 *Criminal Code 1899* (Qld) s 24.

121 Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (Consultation Paper, December 2019) < https://www.qlrc.qld.gov.au/___data/assets/pdf_file/0011/636554/qlrc-wp78.pdf>. See also Jonathan Crowe and Bri Lee, 'The Mistake of Fact Excuse in Queensland Rape Law: Some Problems and Proposals for Reform' (2020) 39(1) *University of Queensland Law Journal* 39. cf Andrew Dyer, Submission to the Queensland Law Reform Commission, *Review of Consent Laws and the Excuse of Mistake of Fact* (5 February 2020).

provisions of UQ's Sexual Misconduct Policy that deal with sexual assault would be the only instances where the University would not require a standard of conduct that is higher than the bare minimum required by the criminal law.

E *Vulnerability to Reputational Damage*

The risk of reputational damage to UQ is a controversial matter, which can justify conflicting policy approaches. In *Y v University of Queensland*, UQ submitted that allowing the Disciplinary Board to hear allegations of sexual assault assists the University in maintaining its reputation and enforcing the standards expected of students.[122] Lyons J dismissed this argument by relying on the findings in *X v University of Western Sydney [No 4]*, where the Court found that the issue of the University's reputation was an 'extraneous issue' and introduced a potential conflict between the interests of the University and the interests of the accused, 'whose interests had to be considered in an impartial and objective matter'.[123] There are a number of issues with this approach.

First, it is not clear how this is compatible with the UQ Student Integrity and Misconduct Policy, under which 'behaving in a manner that prejudices the reputation of the University' is its own ground of general misconduct.[124]

Secondly, the issues considered in *Y v University of Queensland* were fundamentally different in nature to those considered in *X v University of Western Sydney [No 4]*. When deciding the fate of an individual student accused of misconduct, it may be important to consider their interests in 'an impartial and an objective matter', but in *Y v University of Queensland*, the Court was considering the high-level policy question of whether the University had jurisdiction to hear these allegations at all. This is one example of where Lyons J only considered the specific circumstances of Y instead of the broader jurisdictional question.

Thirdly, it would be artificial to suggest that the integrity of UQ is not an underlying consideration in all University policy making matters. The case law surrounding professional disciplinary proceedings has found that one of the legitimate purposes of these proceedings is 'to protect the integrity of the profession' and, similarly, the University should have the capacity to use its misconduct policies to protect its reputation.[125]

An irony associated with the reputational damage argument advanced by UQ is that, for many years, this argument was used to support the police matter

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122 *Y v University of Queensland* (n 5) [41].
123 *X v University of Western Sydney [No 4]* (n 43) [284].
124 UQ Student Integrity and Misconduct Policy (n 49) 6.2.2(b).
125 *Purnell* (n 26) [50].

approach. For example, in *Guidance for Higher Education Institutions: How to Handle Alleged Student Misconduct which may also Constitute a Criminal Offence* ('*Zellick Guidelines*'), it was recommended that universities should not take disciplinary action unless the victim has made a report to the police and those proceedings have concluded.[126] In recent years, however, this approach has been criticised on the grounds that it treats students like consumers rather than as individuals with human rights, and that it 'unduly [protects] institutions rather than supports students'.[127] The fact that UQ was prepared to argue in *Y v University of Queensland* that being able to enforce its Sexual Misconduct Policy was essential for the University's reputation seems to reflect a growing societal concern about the prevalence of sexual assault and the role of institutions in addressing this.

F *Summary*

UQ has an obligation to provide a safe and inclusive learning environment, and the implementation of a police matter policy would significantly hinder the University's capacity to meet that obligation. The case is even clearer for residential colleges as they owe a duty of care both in negligence and in contract. A police matter approach would also prevent the University and colleges from being able to target specific issues that contribute to sexual assault on campus and set a higher standard of conduct than is required under the criminal law. This not likely to satisfy the general public's expectation of what a responsible public institution should be doing to address the issue of sexual assault and leaves the University and the residential colleges vulnerable to reputational damage.

V Vulnerabilities of the Student Body Generally

A *Vulnerability to Sexual Assault*

There is also concern that the police matter approach from *Y v University of Queensland* may impair the protective function of disciplinary proceedings and leave the student body vulnerable to harm. Lyons J dismissed the 'duty of care' issue by applying the same reasoning used to dismiss concerns about damage to the University's reputation, arguing that this should not be relevant because it puts the University's interests in direct conflict with those of the student.[128] The difficulty with this approach is that it ignores the fact that a duty of care does not

126 *Zellik Guidelines* (n 38) 4.
127 *On Safe Ground* (n 33) 90.
128 *Y v University of Queensland* (n 5) [41].

exist for the benefit of the University but rather for the benefit of the student body. Where the University is hindered in its ability to meet its duty of care, the student body is put a risk. In addition, Lyons J noted that 'there appear to be no issues of public safety involved given that the applicant has continued in the medical faculty of the University for the last 19 months which included clinical placements'.[129] This observation appears to suggest that public safety was not endangered because no further accusations of sexual assault had been made against the applicant in the 19 months between the first complaint and the matter finally coming to court. Again, Lyons J appears to lose sight of the broader implications of the jurisdictional question. The relevant question is not whether public safety was in fact endangered in the case of Y, but rather whether it may be endangered if the University can never take immediate action after being notified of an allegation of sexual assault. It also ignores the fact that sexual assault goes largely unreported, especially in a university context.[130]

The courts have distinguished disciplinary proceedings from civil proceedings on the grounds that the purpose of disciplinary proceedings are not punitive and serve to 'protect the public'.[131] The Australian Law Reform Commission also raised the concern that criminal proceedings are 'often lengthy', which can 'impede the protective function of disciplinary measures' when considering concurrent criminal and disciplinary proceedings for breaches of government policy by public servants.[132] This is particularly the case at UQ, where the Sexual Misconduct — Procedure does not specifically endorse the use of interim measures against a student accused of sexual assault, such as suspension.[133] The University may also put people at risk who might not necessarily be covered by their duty of care, such as employees or clients at external businesses where the accused student might be put on placement. In *X v University of Western Sydney [No 3]*, the University stated that it would be necessary for them to notify potential placements of the allegations against the student. However, it is unclear whether such action would be taken by UQ.[134]

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129 Ibid.
130 Change the Course (n 1) 120.
131 See *Hardcastle* (n 27) 597; *Purnell* (n 26) 383; *ML v ASIC* (n 28) [50].
132 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia* (ALRC Report No 112, 28 July 2010) 12.154 < https://www.alrc.gov.au/publication/secrecy-laws-and-open-government-in-australia-alrc-report-112/12-administrative-obligations-in-the-australian-public-service/processes-for-dealing-with-breaches/>.
133 See University of Queensland, 'Sexual Misconduct Policy — Guidelines' (n 42) 8.3.
134 *X v University of Western Sydney [No 3]* (n 43) [83]–[84].

VI Conclusion

University and college disciplinary boards have jurisdiction under Australian law to hear and decide allegations of sexual assault as a violation of their student misconduct policies, regardless of the existence or outcome of any concurrent criminal proceedings.

When looking at the issue through the lens of vulnerability offered by Fineman's theory, it is clear that it is the responsibility of the University, as a public entity, and the colleges, as institutions linked to a public entity, to be responsive to the vulnerabilities experienced by its students, and this cannot be achieved by taking a non-interventionist police matter approach such as that implicitly advocated for by Lyons J in *Y v University of Queensland*.[135] Fineman's theory provides a framework for universities and colleges to approach policy decisions in a way that acknowledges the inherent vulnerability of all students, while allowing for the fact that vulnerability is not equally shared, and to respond to this vulnerability by providing students with the resources they need to build resilience.

Accused students experience a high degree of vulnerability when considering the seriousness of the consequences that may follow such an accusation. On balance, a police matter approach would appear to be the most effective approach to address that vulnerability, as the student would be protected by all of the safeguards that exist within the criminal justice system (although, as noted, it is possible that this approach would encourage allegations to be brought publicly through the criminal justice system, exacerbating the accused's vulnerability to reputational damage). However, the police matter approach would do very little to address the vulnerability experienced by survivors of sexual assault, the university and the student body generally. The criminal process can be slow and traumatic, meaning that it is often not an effective mechanism to protect sexual assault survivors, as well as other students. Failure to protect the student body could leave universities open to negligence claims and reputational damage. The prevalence of sexual assault on university campuses suggests that police action is not sufficient to address this issue and that universities and colleges across Australia should exercise their disciplinary jurisdiction to provide a safe and supportive learning environment for all students. UQ has already taken a number of positive steps in order to provide students, whether they are the complainant or the accused, with the resources they need to build resilience, including services offered by the SMSU and the First Responders Network.[136] Nonetheless, these need to be complemented with robust and effective disciplinary processes in order to provide effective redress for survivors, to protect the student body generally

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135 Fineman, 'The Vulnerable Subject' (n 11) 164.

136 Fineman 'Vulnerability and Inevitable Inequality' (n 8) 146–7.

and to ensure that the University and colleges are meeting their duty of care and human rights obligations.

Despite this, the vulnerability of accused students must be taken seriously by university administrators and university policies must ensure that these students receive appropriate notice of the allegations, including all of the relevant facts necessary to respond to the allegations, as well as access to the supporting documentary evidence, and a fair hearing. Providing students with written reasons for the university's decision is also recommended in order to reduce the risk of decisions being unreasonable or biased, and to make it easier for the accused student to have the decision reviewed.

In addition, the occurrence of false allegations, and the vulnerabilities that falsely accused students experience, are not unique to sexual assault. These vulnerabilities exist in all cases where a student is accused of any potentially criminal conduct. There is no reason why the police matter approach is necessary with regard to sexual offences but not with regard to other offences. Yet, it would clearly be an untenable position for universities if they required a finding of criminal guilt in order to take disciplinary action every time an allegation of misconduct was also a potential breach of the criminal law. Disciplinary proceedings and criminal proceedings serve distinct and important functions in protecting the public, and in helping survivors to lift the personal, psychological and economic burden that they carry as a result of sexual violence.

JUDICIAL ACTIVISM AND CONSTITUTIONAL (MIS)INTERPRETATION: A CRITICAL APPRAISAL

JOHNNY M SAKR* AND AUGUSTO ZIMMERMANN†

In this article, the authors explore the concept of judicial activism and its application in the Australian domestic cases of Australian Capital Television Pty Ltd v Commonwealth *and* Love v Commonwealth, *and in the US case of* Obergefell v Hodges. *The article highlights the devastating effects of judicial activism on legal interpretation, arguing that such activism compromises the doctrine of separation of powers and affects the realisation of the rule of law, resulting in a method of interpretation that incorporates personal biases and political opinion, thus ignoring the original intent of the framers of the Australian Constitution. Moreover, the article highlights that implementing a federal Bill of Rights might further exacerbate these ongoing problems concerning judicial activism in Australia.*

I INTRODUCTION

This article highlights the emergence and effects of judicial activism in Australia and, briefly, the United States. Such activism no doubt occurred in the Australian cases of *Australian Australian Capital Television Pty Ltd v The Commonwealth*[1] ('*ACTV*') and *Love v Commonwealth* ('*Love*'),[2] as well as during the federal takeover of income taxation. In the United States ('US'), judicial activism is evident in the well-known case of *Obergefell v Hodges* ('*Obergefell*').[3] In this article, we assess the aforementioned cases and highlight some fundamental elements of judicial activism. We then critically assess the broader implications of judicial activism, not only for democracy and the rule of law, but also for federalism and the doctrine of separation of powers. The article also provides important reasons as

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1 (1992) 177 CLR 106 ('*ACTV*').
2 [2020] HCA 3 ('*Love*').
3 576 US 644 (2015) ('*Obergefell*').

to why the enactment of a federal Bill of Rights in Australia would only aggravate the problems created by judicial activism.

II Defining Judicial Activism

Judicial activism is a term normally used to describe a certain tendency of judges to consider outcomes, attitudinal preferences and other extra-legal issues when interpreting the applicable law. That being so, Professor Galligan has described 'judicial activism' in terms of 'control or influence by the judiciary over political or administrative institutions'.[4]

The phrase 'judicial activism' is used by its detractors to indicate the deliberate act of judges who subvert, ignore or otherwise flaunt the law. This exercise of judicial power has been vehemently condemned by some leading judicial voices in common-law history, including the much-celebrated 19th century American judge and constitutional lawyer, Thomas M Cooley. In his *Principles of Constitutional Law*, Cooley commented:

> The property or justice or policy of legislation, within the limits of the Constitution, is exclusively for the legislative department to determine; and the moment a court ventures to substitute its own judgement for that of the legislature, it passes beyond its legitimate authority, and enters a field where it would be impossible to set limits to its interference.[5]

Sir Owen Dixon was another deeply influential judicial voice to speak out very strongly against judicial activism. Chief Justice of Australia from 18 April 1952 to 13 April 1964, Sir Owen is widely regarded as the nation's greatest-ever jurist. Duly credited with transforming the High Court into one of the most respected in the common-law world, he was a passionate advocate of judicial restraint and constitutional government. He once explained his favoured interpretative approach as follows:

> It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions. It is an entirely different thing for a judge who is discontented with a result held to flow from a long-accepted principle deliberately to abandon the principle in the name of justice or of social necessity or of some social convenience. The former accords with the technique of the common law and amounts to no more

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4 Brian Galligan, 'Judicial Activism in Australia' in Kenneth Holland (ed), *Judicial Activism in Comparative Perspective* (Macmillan, 1991) 70, quoted in Chief Justice RS French, 'Judicial Activism — The Boundaries of the Judicial Role' (2010) 10(1) *Judicial Review* 1, 9.

5 Thomas M Cooley and Andrew C McLaughlin (ed), *Principles of Constitutional Law* (Little, Brown & Co, 3rd ed, 1898) 158.

> than an enlightened application of modes of reasoning traditionally respected in the courts … The latter means an abrupt and almost arbitrary change … The objection is that in truth the judge wrests the law to his own authority.[6]

Sir Harry Gibbs (1917–2005) is another celebrated Australian judge who fiercely opposed all forms of judicial activism. Australia's Chief Justice from 1981 to 1987 (and serving as a member of the High Court from 1970 to 1981), Gibbs argued that '[a]t the heart of what is called judicial activism is the notion that in deciding a case the judges … must reform the law if the existing rules or principles appear defective'.[7] Such an approach, according to him, 'confound[s] the distinction between legislative and judicial functions, and in that respect is contrary to constitutional principle'.[8]

According to the late US Supreme Court Justice Antonin Scalia, the 'Great Divide' with regard to constitutional interpretation is that between *original* meaning (whether derived from the Framers' intent or not) and *current* meaning.[9] This 'progressive' method of constitutional interpretation assumes the existence of what is called 'the living constitution' — a body of law that grows and changes from age to age, in order to meet the 'changing needs of society'.[10] Whereas the originalist method recognises the importance of knowing the drafters' intent and context, the idea of 'living constitution' is based on the premise that the document must evolve over time, according to the 'changing needs of society' as perceived by the judicial elite.

Michael Kirby, a former High Court judge and undoubtedly a judicial activist himself, once postulated that 'the Constitution is to be read according to contemporary understandings of its meaning, to meet … the governmental needs of the Australian people'.[11] According to Kirby, 'the text of the Constitution must be given meaning as its words are perceived by succeeding generations of Australians, reflected in this Court'.[12] Lionel Murphy, another former Higher Court judge, contended that judges are entitled to change the law 'openly and not by small degree … as much as they think necessary'.[13] He was referring to legal

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6 Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Law Book Company, 1965) 158.

7 Sir Harry Gibbs, 'Judicial Activism and Judicial Restraint: Where Does the Balance Lie?' (Conference Paper, Constitutional Law Conference, University of New South Wales, 20 February 2004) 1 <http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/mdocs/59_Harry Gibbs.doc>.

8 Ibid 7.

9 Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997) 38.

10 Ruth Bader Ginsburg, 'Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication' (2004) 22(2) *Yale Law & Policy Review* 329, 337.

11 *Eastman v The Queen* (2000) 203 CLR 1, 80 [242].

12 *Brownlee v The Queen* (2001) 207 CLR 278, 314 [105].

13 Lionel Murphy, 'The Responsibility of Judges' in Gareth Evans (ed), *Law, Politics and the Labor Movement* (Legal Services Bulletin, 1980) 5–6.

interpretation in general and the interpretation of the Constitution in particular. Such an approach regards judicial activism as always preferable, while an intentionalist or purposive approach would be relevant only in terms of legal history. Based on such a premise, Deane J opined that to take an originalist approach is 'to construe the Constitution on the basis that the dead hands [of the past] reached from their graves to negate or constrict the natural implications of its express provisions or fundamental doctrines', so as to deprive the document of 'its vitality and adaptability to serve succeeding generations'.[14]

This activist approach comports with a notion of the evolution of the law that harbours a considerable distrust of tradition. Though one might think it is a good idea for members of the judicial elite to interpret the written constitution according to contemporary needs, there is actually a remarkable degree of superficiality in maintaining that no good reason can be given for today's generation being ruled by the 'dead hands of the past'.[15] After all, the *Australian Constitution* was intended to be an enduring instrument, aiming at expressly limiting (restraining) the potentially arbitrary powers of the government, including the judicial branch of government. Moreover, it is entirely possible to 'evolve' the *Constitution* by democratic means and not by way of judicial activism. After all, the document can be altered at any time via popular referendum pursuant to s 128 of the *Australian Constitution*.

To claim that unelected judges are entitled to evolve the law in the light of contemporary values is dangerously misleading. This sort of argument is always open to the objection that there are actually myriad opinions in our pluralistic society as to what such values might be. For members of the judicial elite to give the *Australian Constitution* an operation that appears to be the most convenient, is to basically run two grave risks: (1) judicial misappropriation of contemporary values, and (2) writing out of the *Constitution* the provision requiring popular referendum for the amendment of the constitutional text.[16] As Sir Harry Gibbs correctly points out, 'to regard social attitudes as a source of law tends to undermine confidence in the courts, when it is thought that the judges have based their decision on their own notions rather than on the law, and it also renders the development of the law unpredictable since the values which the court recognises are in effect those in the minds of the judges themselves'.[17]

Another influential former judge to express his firm opposition to all forms of judicial activism is Dyson Heydon. Prior to being appointed to the country's

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14 *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171.

15 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 27.

16 *New South Wales v Commonwealth* (2006) 229 CLR 1, 303–5 [738] (Callinan J) ('*Work Choices*').

17 Gibbs (n 7) 7.

highest court, Heydon served as the youngest ever Dean of Law at The University of Sydney, and then as a Justice of the New South Wales Court of Appeal. Activist judges are described by him as those who decide cases not by reference to established principles, but instead by 'some political, moral or social programme'.[18] In the words of two leading constitutional-law academics:

> There is no doubt that Heydon was and is a brilliant legal mind, with a very firm grip on the applicable law. His distinguished legal and judicial career is credit to that … He [has] spent his entire judicial career crafting a judicial philosophy of the judge whose intellect, integrity and fidelity to the law would maintain the public's confidence in the justice system and the rule of law.[19]

The activist judge is described by Heydon as someone who is deliberately engaged in activities that are pre-emminently 'political' in nature. Such activism reflects the attitude of judges who are negatively affected by self-interest or partisan politics. Rather than creating law or debating the merits of legislation, judicial activists forget that their legitimate role is to do justice according to the law. In his celebrated article, 'Judicial Activism and the Death of the Rule of Law', Heydon commented:

> Judges are appointed to administer the law, not elected to change it or undermine it … A judge who dislikes the constraints of membership of the judiciary because it prevents the fulfilment of a particular program or agenda, should … leave that group, join or start a political party, and seek to enter a legislature.[20]

The doctrine of precedent as applied in the common-law system is no more than a refined and formalised example of the ordinary decision-making process that seeks to avoid arbitrariness and promote efficiency, certainty and consistency. As Heydon correctly puts it, precedent is 'a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law.'[21]

Precedent is important, but it is not precedent that ultimately binds in matters of constitutional law. Instead, what really binds in such matters is the authentic meaning of the law as expressed in its literal words and reflected in the drafter's original intent. Thus, as famously stated by the late Felix Frankfurter (1882–1965) of the US Supreme Court, 'the ultimate touchstone of

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18 Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 495.

19 Gabrielle Appleby and Heather Roberts, 'Bias and the Black-Letter Judge: Who is Dyson Heydon?' *The Conversation* (21 August 2015) <https://theconversation.com/bias-and-the-black-latter-judge-who-is-dyson-heydon-46341>.

20 Heydon (n 18) 507.

21 Ibid 515.

constitutionality is the *Constitution* itself and not what we have said about it'.[22] After serving as a distinguished professor of administrative law at Harvard Law School from 1914 to 1939, Frankfurter went on to serve as Associate Justice of the US Supreme Court from 1939 to 1962. As stated by his obituary published in *The Harvard Crimson*, 'his greatest contribution was not in the particular areas of law he illuminated, but in the conception of a judge's role that he forged. Deeply believing that judges must give wide scope to the other, elected branches of government, Frankfurter sought to restrain the exercise of judicial power.'[23]

Frankfurter strongly believed that precedent, if it is not in perfect harmony with the letter and spirit of the *Constitution*, ought to be overruled. In this context, whereas respect for precedent is important to produce predictability and fairness in the legal system, the courts are not ultimately subject to their previous decisions if this might involve a question of vital constitutional importance. In fact, Frankfurter considered that the courts should re-examine any decision objectively involving the creation of precedent that is manifestly wrong and therefore contrary to the express words of the law. Naturally, he was talking about the Supreme Court's obligations with respect to its own prior decisions. Lower courts are not free to ignore what the highest court has said about the written constitution, for that would introduce chaos into the legal system. This was the same view expressed by Sir Isaac Isaacs (1855–1948), who served on the High Court of Australia from 1906 to 1931. He once pointed out that some decisions actually need to be overruled. As he explained:

> A prior decision does not constitute the law, but is only a judicial declaration as to what the law is … If we find the law to be plainly in conflict with what we or any of our predecessors erroneously thought it to be, we have, as I conceive, no right to choose between giving effect to the law, and maintaining an incorrect interpretation. It is not, in my opinion, better that the Court should be persistently wrong than that it should ultimately be right.[24]

The High Court has traditionally taken the view that, as the nation's highest court, it is not really bound by its own previous decisions. However, and for quite obvious reasons, its judicial members have been extremely reluctant to overturn the Court's previous decisions. The unanimous Court commented on the issue in *Lange v Australian Broadcasting Corporation* ('*Lange*'), declaring that '[t]his Court is not bound by its previous decisions. Nor has it laid down any particular rule or

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22 *Graves v New York ex rel O'Keefe*, 306 US 466, 491 (1939).

23 Anon, 'Felix Frankfurter Dies; Retired Judge Was 82', *The Harvard Crimson* (23 February 1965) <https://www.thecrimson.com/article/1965/2/23/felix-frankfurter-dies-retired-judge-was/>.

24 *Australian Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australasia* (1913) 17 CLR 261, 275–8.

rules or set of factors for re-opening the correctness of its decisions.'[25] A few decades earlier, in *Hughes & Vale Pty Ltd v New South Wales*, Kitto J explained that, in constitutional cases, 'it is obviously undesirable that a question decided by the Court after full consideration should be re-opened without grave reason'.[26] However, a unanimous Court in *Lange* stated that it should not be doubted that the Court should re-examine any decision if it objectively 'involves a question of "vital constitutional importance" and is "manifestly wrong"'.[27]

Needless to say, judges who adhere to the philosophy of judicial activism are much less inclined to respect precedent. One such activist judge was Lionel Murphy, an Australian politician who was a Senator for New South Wales from 1962 to 1975, serving as Attorney-General in the Whitlam Government, and then sitting on the High Court from 1975 until his death in 1986. He deemed precedent 'a doctrine eminently suitable for a nation overwhelmingly populated by sheep'.[28] Activist judges such as Murphy have treated judicial work as 'an act of uncontrolled personal will'.[29] With respect to existing laws that bring about legal certainty and predictability, which are two important elements for the realisation of the rule of law, judges who openly eschew precedent are ultimately violating their own sworn allegiance to upholding the law faithfully. Of course, it must go without saying that one of the primary roles of judges is to pronounce the words of the law. As noted by the celebrated Chief Justice John Marshal of the US Supreme Court in *Osborne v Bank of the United States*:

> The judicial department has no will in any case … Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words, to the will of the law.[30]

III How Australian Judges Have Undermined Federalism (and the Framer's Desire for a 'Federal Balance')

In drafting the *Australian Constitution*, the framers sought to maintain a balance of powers between the Australian states and their newly formed central government. They designed the federal *Constitution* to distribute and limit the powers of each tier of government, federal and state. Hence, one of the basic

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25 (1997) 189 CLR 520, 554 ('*Lange*').
26 (1953) 87 CLR 49, 102.
27 *Lange* (n 25) 554.
28 Murphy (n 13) 5.
29 Heydon (n 18) 505.
30 22 US (9 Wheat) 738, 866 (1824).

characteristics of Australia's constitutionalism is precisely the express limitation on federal powers where all the remaining powers shall continue with the states.

Whereas the federal power is limited to express provisions that are found in ss 51 and 52 of the *Constitution*, with these powers being variously concurrent with the states and exclusive, the substantial remaining residue was left undefined to the Australian state.[31] The basic idea was to reserve to the people of each state the ultimate right to decide for themselves on the more relevant issues through their own legislatures.[32] Sir Samuel Griffith, the leading federalist proponent at the first Convention, who then served as the inaugural Chief Justice of Australia from 1903 to 1919, commented in 1891:

> The separate states are to continue as autonomous bodies, surrendering only so much of their powers as is necessary to the establishment of a general government to do for them collectively what they cannot do individually for themselves, and which they cannot do as a collective body for themselves.[33]

The Judiciary Bill was introduced by Alfred Deakin (1856–1919) into federal Parliament in 1903. A prominent leader of the Federation movement — indeed one of the principal authors of the *Australian Constitution* — Deakin managed to become Australia's second Prime Minister after Edmund Barton resigned to take up a seat on the High Court. When the Judiciary Bill was introduced and put to vote in Parliament, Deakin explained that the federal courts would have power to guarantee continuing powers of the states and the preservation of the federal balance. Deakin then called the High Court the 'keystone of the federal arch'.[34]

In his comment concerning the early days of Australian federation, which is found in the eighth edition of his celebrated *Introduction to the Study of the Law of the Constitution*, the British jurist and constitutional theorist Albert V Dicey (1835–1922) explains that members of the High Court were expected by the drafters of the *Australian Constitution* to be 'the interpreters, and in this sense the *protectors* of the Constitution. They are in no way bound … to assume the constitutionality of laws passed by the federal legislature.'[35]

The High Court originally comprised only three members: Chief Justice Samuel Griffith and Justices Edmund Barton and Richard O'Connor. Griffith was the leader of the 1891 Convention and Barton of the 1897–8 Convention. O'Connor was one of Barton's closest associates. These judges had a deep commitment to the spirit and letter of the *Constitution*. They clearly sought to protect the federal

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31 Mark Cooray, 'A Threat to Liberty' in Ken Baker (ed), *An Australian Bill of Rights: Pro and Contra* (Institute of Public Affairs, 1986) 35, 35.

32 Albert V Dicey, *Introduction to the Study of the Constitution* (Macmillan, 1915) 387.

33 *Official Report of the National Australasian Convention Debates* (Sydney, 11 March 1891) 243, citing Edward Augustus Freeman, *History of Federal Government in Greece and Italy* (Macmillan, 2nd ed, 1893) 31–2.

34 Commonwealth, *Parliamentary Debates*, Senate, 18 March 1902, 10,967, cited in Geoff Gallop, 'The High Court: Usurper or Guardian?' (1995) 9(2) *Legislative Studies* 60, 61.

35 Dicey (n 32) 387–8 (emphasis added).

nature of the *Constitution* by applying two basic doctrines: 'implied immunity of instrumentalities' and 'state reserved powers'.

'Implied immunity of instrumentalities' seeks to protect the independence of the existing tiers of government. It ensures that both the central and state governments remain immune from each other's laws and regulations. If federalism implies that each government enjoys autonomy in its own spheres of power, then no level of government should be allowed to tell another level of government what it must or must not to do.

'State reserved powers' ensure that the residual legislative powers of the states must not be undermined by an expansive reading of federal powers.[36] The doctrine protects the powers belonging to the states when the *Constitution* was formed — 'powers which have not by that instrument been granted to the Federal government, or prohibited to the States'.[37] Curiously, such an idea of reserved power is actually manifested in s 107 of the *Australian Constitution*, which states: 'Every power of the Parliament of a Colony which has become … a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth.'[38] In other words, every power that is not explicitly given to the Commonwealth shall be reserved to, or 'continue' with, the Australian states.

Regrettably, the doctrines of 'state reserved powers' and 'implied immunity of instrumentalities' were gradually undermined by subsequent members of the High Court. The problem started to manifest itself more vividly when two of the most notorious centralists who had attended the Conventions, Sir Isaac Isaacs and Henry Higgins, were appointed by the federal government to the High Court in 1906. Isaacs and Higgins had indeed participated at the 1891 and 1897–8 Conventions. However, they were often in the minority in all of the most important decisions. They had no formal role in shaping the final draft of the *Constitution*. In fact, they were excluded from the drafting committee that settled the final draft of the *Constitution*.[39]

Although there is good reason to question the reliability of their views regarding the underlying ideas and general objectives of federation,[40] from the very beginning Isaacs and Higgins adopted a highly centralist reading of the *Constitution*. Under Isaacs' leadership, both the 'implied immunity of instrumentalities' and the 'state reserved powers' doctrines were overturned. For Isaacs, s 107 was not about protecting state reserved powers, but rather about

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36 Peter Hanks, Jennifer Clarke, Patrick Keyzer and James Stellios, *Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 7th ed, 2004) 569.

37 Cooley and McLaughlin (n 5) 35–6.

38 Australian *Constitution* s 107.

39 Walter Sofronoff, 'Deakin and the Centralising Tendency' (2008) (September) *Quadrant Online* 86.

40 Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* 1.

continuing its exclusive powers and protecting them by express reservation in the *Constitution*. This is a misreading of s 107, which determines that the state parliaments should continue to exercise their full legislative powers, except for those powers that had been exclusively given to the Commonwealth Parliament at Federation.

The drafters intended to provide the Australian states with 'original powers of local self-government, which they specifically insisted would continue under the [federal] *Constitution* subject only to the carefully defined and limited powers specifically conferred upon the Commonwealth'.[41] Because their intention was to allow these state legislative powers to 'continue', only the federal powers were specifically defined by the written text of the *Constitution*.

In this sense, it is perfectly reasonable to conclude that the continuation of state powers in s 107 is logically prior to the conferral of any powers to the federal Parliament, in s 51. As Professor Aroney correctly points out, '[s]uch a scheme … suggests that there is good reason to bear in mind what is *not* conferred on the Commonwealth by s 51 when determining the scope of what is conferred. There is a good reason, therefore, to be hesitant before interpreting federal heads of power as fully and completely as their literal words can allow.'[42]

This leads to our analysis of s 109 of the *Constitution*. According to s 109, 'when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid'.[43] Two things must be said about this provision. First, only federal legislative powers are explicitly limited by the *Constitution*, and not the legislative powers of the states. Second, it is only a *valid* federal law that can prevail over a state law. Hence, no inconsistency arises if the federal law cannot be justified by any head of federal power conferred by the *Constitution*, or it goes outside the explicit limits of the *Constitution*. If so, the matter is not really about inconsistency, but instead about the invalidity of federal law on grounds of its unconstitutionality.

This would have been less complicated if the courts had not decided to apply a controversial 'test' to resolve such matters of inconsistency. Nowhere to be found in the *Constitution*, such a test has been instrumental in expanding central powers at the expense of the powers of the states. First mentioned by Isaacs J almost 100 years ago, in *Clyde Engineering Co Ltd v Cowburn*, and then endorsed by the High Court in almost every subsequent case, the 'cover the field test' suggests that '[i]f … a competent legislature expressly or impliedly evinces its intention to

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41 Ibid 13.

42 Nicholas Aroney, 'The Ghost in the Machine: Exorcising Engineers' (Conference Paper, The Samuel Griffith Society, 14–16 June 2002) <https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d51704e17b63ec0f3114a/1553813877635/v14chap2.pdf>.

43 *Australian Constitution* s 109.

cover the whole field, that is a conclusive test of inconsistency where another legislature assumes to enter to any extent upon the same field.'[44] As noted by Gibbs, the adoption of such an inconsistency test 'no doubt indicates that the Courts have favoured a centralist point of view rather than a federal one'.[45]

The High Court has normally favoured a literalist approach at the expense of an originalist approach toward the *Constitution*. Its non-originalist approach is clearly observable in the traditional interpretation of s 51(xxix) of the *Constitution*. This provision gives the federal Parliament power to make laws with respect to external affairs. Since the federal Executive has entered into thousands of treaties on a wide range of matters, the potential for its legislative branch to rely on such power in order to legislate on all sorts of topics is considerable.

Unfortunately, in *R v Burgess; Ex parte Henry*, the Court held that reliance by the Commonwealth on the external affairs power is not restricted to its own enumerated powers to make laws with respect to the external aspects of the subjects mentioned in s 51.[46] As a result, together with the regular operation of s 109 (inconsistency), the external affairs power has the potential to 'annihilate State legislative power in virtually every respect'.[47]

This possibility of an expansive or broader interpretation of the external affairs power undermining the federal compact, particularly by the transferal of powers originally allocated in the states to the federal government, was recognised by Dawson J, who saw such a broad interpretation as having 'the capacity to obliterate the division of power which is a necessary feature of any federal system and our federal system in particular'.[48] The same problem was identified by Gibbs J in *Commonwealth v Tasmania*, where his Honour stated:

> The division of powers between the Commonwealth and the States which the Constitution effects could be rendered quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the [Commonwealth] Parliament so that they embraced literally all fields.[49]

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44 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466, 486.
45 Sir Harry Gibbs, 'The Decline of Federalism?' (1994) 18(1) *University of Queensland Law Journal* 1, 3.
46 *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 641.
47 Gibbs (n 45) 5.
48 *Victoria v Commonwealth [Industrial Relations Act Case]* (1996) 187 CLR 416, 568.
49 (1983) 158 CLR 1, 100 (Gibbs CJ, dissenting).

IV Judicial Activism in the Federal Takeover of Income Taxation

One of the least satisfactory aspects of the Australian federal system is its vertical fiscal imbalance.[50] While the drafters wished to secure the states with a privileged financial position and independence, the courts have actively facilitated a dramatic expansion of federal taxation powers. As a result, the states have become heavily dependent on the Commonwealth for their revenue, and any semblance of federal balance has largely disappeared.

To provide an example, in 1901, only the Australian states levied income tax. In 1942, however, the Commonwealth sought to acquire exclusive control over the income tax system. The takeover was finally confirmed by the High Court in *South Australia v Commonwealth* ('*First Uniform Tax Case*').[51] When the war was over and the argument for the income tax takeover was no longer valid, the Commonwealth did not return this power to the States but continued to monopolise the income tax system. Hence, a further challenge was made by the states regarding the constitutionality of the takeover. In *Victoria v Commonwealth* ('*Second Uniform Tax Case*')[52] the High Court confirmed the validity of the Commonwealth's income tax system, as well as its power to impose whatever conditions it sees fit in granting money to the states.

Talking about this granting of federal money, s 96 of the *Australian Constitution* gives the Commonwealth power to grant financial assistance 'to any State on such terms and conditions as the Parliament thinks fit'.[53] The Court has allowed the grants section to be used to subject the states to conditions that the central government chooses to impose on them.[54] As such, the states have been induced to achieve all sorts of objects on behalf of the Commonwealth that the Commonwealth itself would never be able to achieve under its own heads of powers found in the *Constitution*. This includes the important areas of education,[55]

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50 Brian Galligan and Cliff Walsh, 'Australian Federalism: Developments and Prospects' (1990) 20(4) *Publius* 7.

51 (1942) 65 CLR 373 ('*First Uniform Tax Case*').

52 (1957) 99 CLR 575.

53 *Australian Constitution* s 96.

54 See *First Uniform Tax Case* (n 51).

55 In *A-G (Vic); ex rel Black v Commonwealth* (1981) 146 CLR 559, the High Court held that the Commonwealth could grant the states money on condition that the states then paid it to religious schools.

health, roads,[56] and compulsory purchase of land.[57] Thanks to the non-originalist interpretation by the Court, it did not take so long for s 96 to become, in the words of Sir Robert Menzies, 'a major, and flexible instrument for enlarging the boundaries of Commonwealth action; or, to use realistic terms, Commonwealth powers'.[58]

The financial problems of the states have been further aggravated by judicial rulings that disregard the intention of the constitutional legislator. Such decisions have prevented the Australian states from raising their own taxes. They cannot raise anywhere near the revenue they so desperately need. The Commonwealth collects over 80 per cent of taxation revenue (including GST), but is responsible for only 54 per cent of government outlays. By contrast, the states collect 16 per cent of taxation revenue but account for approximately 39 per cent of all outlays.[59] As a result, the states have turned to other sources of 'taxation', including traffic fines and gambling, although they continue to remain heavily dependent on federal grants. When the Commonwealth grants them money, it often does so with conditions attached. However, as George Williams points out, 'the States have no real choice but to accept the money, even at the cost of doing the Commonwealth's bidding'.[60]

As can be seen, disregard for the federal nature of the *Australian Constitution* has allowed for a gradual and continuous expansion of Commonwealth powers. This has resulted in a Federation that is far removed from that which was originally envisaged by the framers of the *Constitution*. From the perspective of preserving the federal nature of the *Constitution*, writes Professor Greg Craven,

> the High Court has been an utter failure as the protector of the States, and even this conclusion does less than justice to the depth of the Court's dereliction of its intended constitutional duty. The reality is that the Court has not merely failed to protect the States, but for most of its constitutional history has been the enthusiastic collaborator of successive Commonwealth governments in the extension of central power. Indeed,

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56 In *Victoria v Commonwealth [Federal Roads Case]* (1926) 38 CLR 399, the High Court allowed the Commonwealth to grant the states money on the condition that it should be used to construct roads designated by the Commonwealth, even though road-building did not fall within any enumerated power.

57 In *Pye v Renshaw* (1951) 84 CLR 58, the High Court dealt with the effect of s 51(xxxi) (Commonwealth's power to make laws for acquiring property on just terms) on s 96 (the grants power). The High Court held that the Commonwealth is able to get around the restrictions in s 51(xxxi) by ensuring that the law could not be characterised as land acquisition. Hence, s 51(xxxi) does not restrict the s 96 grants power, and the Commonwealth can therefore evade the s 51(xxxi) requirement that property must be acquired on just terms.

58 Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell, 1967) 76.

59 Andrew Stewart and George Williams, *Work Choices: What the Court Said* (Federation Press, 2007) 12–13.

60 Ibid 13.

> the enthusiasm of the Court for this centralising enterprise has not uncommonly exceeded the appetite of the federal government itself.[61]

The fundamental point in terms of understanding the impact upon the states of the High Court's exegesis of the *Constitution* is that, since the 1920s, the Court has constantly allowed the Commonwealth to expand its powers, and even to the point where many of the purported advantages of federalism have either been lost or are not realised to their full extent.[62] The Court needs to understand that the federal nature and structure of the *Australian Constitution*, in particular its limited powers conferred upon the central government (as opposed to those powers that should have continued with the Australian states), 'by no means implies that federal legislative power is to be accorded interpretative priority. Quite the contrary.'[63]

V *AUSTRALIAN CAPITAL TELEVISION*: ANOTHER EXAMPLE OF JUDICIAL ACTIVISM?

The implied freedom of political communication is a constitutional principle recognised by the High Court in the early 1990s, which effectively prevents the government from disproportionately restricting freedom of political expression. The principle is based primarily on an understanding of our system of representative (and responsible) government, which therefore requires that the people and their representatives must be able to communicate in a free and open manner about political matters.

The High Court case of *ACTV* came about within the context of election broadcasting and advertising.[64] It concerned the validity of pt IIID of the *Political Broadcasts and Political Disclosures Act 1991* (Cth) ('*BPD*'),[65] which governed political advertising throughout election campaigns, and mandated broadcasters to televise political advertisements for free at other times.

The High Court held pt IIID to be invalid, on the basis that it contravened the *Australian Constitution*'s implied freedom of political communication

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61 Greg Craven, 'The High Court and the States' (Conference Paper, The Samuel Griffith Society, 18 November 1995) <https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d2bfd7817f7035849dc52/1553804289685/v6chap4.pdf>.

62 See George de Q Walker, 'The Seven Pillars of Centralism: Federalism and the Engineers' Case' (Conference Paper, The Samuel Griffith Society, 14–16 June 2002) <https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d515a104c7b096eed3480/1553813860731/v14chap1.pdf>.

63 Aroney (n 42).

64 Alison Hughes, 'The High Court and Implied Constitutional Rights: Exploring Freedom of Communication' (1994) 1(2) *Deakin Law Review* 173, 173.

65 *Political Broadcasts and Political Disclosures Act 1991* (Cth) ('*BPD*') pt IIID.

provisions.[66] Disregarding the fact that the framers declined to incorporate a Bill of Rights in the *Constitution*,[67] Mason CJ insisted that '[f]reedom of communication in the sense just discussed is so indispensable to the efficacy of the system of representative government for which the Constitution makes provision that it is necessarily implied in the making of that provision.'[68]

In a joint judgment, Deane and Toohey JJ highlighted that the extent of legislative power in s 51 of the *Australian Constitution* is expressly made 'subject to' the *Constitution*. Their Honours opined that the section directs obedience to the implications in the *Constitution*. Devoid of legislative intention to deviate from the inference of freedom of political communication, the *BPD* was interpreted as subject to this implication.[69]

However, Dawson J dissented, removing himself from what he believed was 'a slide into uncontrolled judicial law-making'[70] or, in other words, judicial activism. His Honour rejected the idea that the *Australian Constitution* possessed an implied freedom of communication provision, relying on the deliberate decision of the framers to abstain from a Bill of Rights:

> [I]n this country the guarantee of fundamental freedoms does not lie in any constitutional mandate but in the capacity of a democratic society to preserve for itself its own shared values … [T]here is no warrant in the Constitution for the implication of any guarantee of freedom of communication which operates to confer rights upon individuals or to limit the legislative power of the Commonwealth.[71]

Dawson J believed that valid implications can only be made if they are drawn from other Constitutional provisos, or from the *Constitution* as a whole:[72] 'If implications are to be drawn, they must appear from the terms of the instrument itself and not from extrinsic circumstances.'[73] In support of his dissent, Dawson J referred to Brennan J's judgment in *Queensland Electricity Commission v Commonwealth*.[74]

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66 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106. See also Tom Campbell, *Prescriptive Legal Positivism: Law, Rights and Democracy* (University College London, 2004) 175; Donald Speagle, 'Australian Capital Television Pty Ltd v Commonwealth' (1992) 18(4) *Melbourne University Law Review* 938, 944.

67 Hughes (n 64) 177.

68 *ACTV* (n 1) 140.

69 Hughes (n 64) 177.

70 Ibid 188.

71 *ACTV* (n 1) 183–4.

72 Hughes (n 64) 178.

73 *ACTV* (n 1) 181.

74 (1985) 159 CLR 192, 231: 'The Constitution summoned the Federation into existence and maintains it in being. Any implication affecting the specific powers granted by the Constitution must be drawn from the Constitution itself. It is impermissible to construe the terms of the Constitution by importing an implication from extrinsic sources when there is no federation save that created by the express terms of the Constitution itself.'

This 'implication' of an implied freedom of political communication may be regarded as another example of judicial activism by Australia's highest court. According to James Allan, 'this implied right was [not] discovered; rather, it was made up by the judges at the point of application'.[75] As Professor Allan points out,

> it would be a mistake for 22 million Australians to have their free-speech problems sorted out for them by a committee of seven unelected ex-lawyers because the people you vote for haven't got the courage to repeal what needs to be repealed. That, in my view, is a terrible mistake on any view that takes account of long-term consequences. We are better off as a country to be stuck with 18C for a few more years than to go to the judges and have them fix it for us.[76]

Professor Allan's view is that the implied freedom of political communication is itself the result of judicial activism. Indeed, the Court's decision in that case, as well as others concerning a possible implied freedom, initially generated considerable discussion and debate. Much of the ongoing debate concerns the question of whether such an implication can be legitimate when the framers of the *Constitution* deliberately decided to not explicitly include in the constitutional text a right like freedom of political communication. Of course, some may suggest that such an implication could be legitimate when all the evidence suggests that freedom of speech is essential to the democratic nature of our system of representative government. Considered in isolation, each step in the reasoning in cases like *ACTV* appears to be very plausible but, according to Nicholas Aroney et al, when its cumulative effect is considered, the result actually involves 'a significant transfer of power to the courts to make determinations of elections and political speech'.[77]

There is no actual disagreement between Professor Allan and us about the activist nature of these decisions. However, the implied freedom of political communication is now an entrenched part of the Australian constitutional landscape and — judging by the recent pronouncements of the Court — it is not going anywhere anytime soon. We also believe that the separation of powers between the judiciary and the legislature is fundamental to a functioning democracy. This separation, however, can be disturbed by excessive judicial activism. This is why Professor Allan is correct to state that Australia should not

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75 James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'riginalism' 36(2) *Melbourne University Law Review* 743, 748, citing James Allan, 'Implied Rights and Federalism: Inventing Intentions while Ignoring Them' (2009) 34(2) *University of Western Australia Law Review* 228, 230–3.

76 James Allan, '18C: Repeal It!', *Quadrant Online*, 2 August 2020 <https://quadrant.org.au/magazine/2016/06/18c-repeal/>.

77 Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 361.

enact a federal Bill of Rights. He has written prolifically on the topic of judicial activism and how the judicial elite lacks the legitimacy and training to engage in wider debates about social or economic policy. We agree that, in our legal system, the courts are not well equipped to carry out public policy decisions — a function that parliaments are far better equipped to handle. To think that courts are or should be so equipped involves adding to the judiciary an extraordinary function that, on balance, may diminish rather than enhance the rule of law.[78]

VI *WORK CHOICES*: ANOTHER EXAMPLE OF JUDICIAL ACTIVISM?

The federal power for the regulation of industrial relations is found in s 51(xxxv) of the *Australian Constitution*. It is quite a narrow grant of power, as it provides only a very limited scope for federal regulation of the area. Accordingly, the federal law on this subject matter should be limited solely to matters of conciliation and arbitration, and only for the prevention and settlement of industrial disputes extending beyond the limits of any one state. Because of the narrow scope of this provision, it is no coincidence that the present national industrial relations system is not based on s 51(xxxv), but rather primarily on s 51(xx). The latter has the regulation of corporations as the proper head of power. However, a literal interpretation of the *Constitution* has allowed the federal government to create a comprehensive industrial relations system 'with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth'.[79]

The Commonwealth has used s 51(xx) to legislate on employees of 'constitutional corporations' formed within the limits of the Commonwealth. This is a clear attempt to overcome the express limitations of the *Constitution*, which are found in s 51(xxxv). However, in *New South Wales v Commonwealth* ('*Work Choices*') a five-to-two majority of the Court held that so long as the federal law can be directly or indirectly characterised as a law somehow dealing with corporations, it does not matter whether such a law may affect another subject matter altogether.[80] In sum, a head of power does not need to be read narrowly in order to avoid breaching an explicit limitation that is derived from another head of power, even if the final result may render the latter entirely ineffective.

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78 Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, 'How to Repeal 18C' (2016) 32(3) *Policy* 62, 64.

79 *Australian Constitution* s 51(xx).

80 *Work Choices* (n 16).

Work Choices basically confirmed the centralist approach of the High Court to matters of constitutional interpretation, thus allowing the Commonwealth to legislate over areas originally under the control of the Australian states. For the states, write Andrew Stewart and George Williams, 'the *Work Choices* case was lost as far back as the *Engineers* decision', in 1920, when 'the Court discarded any idea of a balance between federal and State power'.[81] Strongly dissenting in *Work Choices*, Callinan J contended that the centralising principles adopted by the Court have produced 'eccentric, unforeseen, improbable and unconvincing results'.[82] These principles, according to his Honour, 'have subverted the Constitution and the delicate distribution or balancing of powers which it contemplates'.[83] As noted by Callinan J:

> There is nothing in the text or the structure of the Constitution to suggest that the Commonwealth's powers should be enlarged, by successive decisions of this Court, so that the Parliament of each State is progressively reduced until it becomes no more than an impotent debating society. This Court too is a creature of the Constitution. Its powers are defined in Ch III, and legislation made under it. The Court goes beyond power if it reshapes the federation. By doing that it also subverts the sacred and exclusive role of the people to do so under s 128.[84]

Since *Work Choices*, the scope of the corporations power has become 'almost without limits'.[85] That being so, Greg Craven satirically describes the decision in terms of 'a shipwreck of Titanic proportions'.[86] According to him, *Work Choices* has struck 'a devastating blow against Australian federalism'.[87] However, he acknowledges that such a decision was not unexpected due to the Court's long history of not only ignoring the drafter's intentions, but also not properly recognising that no provision in the text of the *Constitution* should be interpreted in isolation, so that the document can be interpreted as a whole.[88]

Work Choices, therefore, does not strictly speaking represent an instance of judicial activism. After all, the Court merely applied its own traditional methods of centralist interpretation in disregard of the original intent of the framers, as well as the federal balance to be found in the *Australian Constitution*. Such a method, while violating some basic rules of hermeneutics, ultimately supports

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81 Andrew Stewart and George Williams, *Work Choices: What the High Court Said* (Federation Press, 2007) 8.
82 *Work Choices* (n 16) 319–20 [772].
83 *Work Choices* (n 16) 325 [775].
84 Ibid 327 [779].
85 David Flint, 'High Court Strikes Blow Against States' Rights', *Newsweekly* (20 January 2007) <http://www.newsweekly.com.au/articles/2007jan20_cover.html>.
86 Greg Craven, 'Work Choices Shipwreck', *Perspective* (6 December 2006) <https://www.abc.net.au/radionational/programs/archived/perspective/greg-craven/3382392>.
87 Ibid.
88 Ibid.

the view that any federal legislation can regulate any aspect or activity of a constitutional corporation as properly defined in accordance with s 51(xx) of the *Australian Constitution*.[89]

VII Adding the Racial Element to Migration Law: *Love v Commonwealth*

The *Love* case[90] represents a further instance of aggressive judicial activism by the High Court. The notorious case has been succinctly summarised by Chris Merrit: 'Even when born overseas and holding the citizenship of another country, foreign criminals with Aboriginal ancestry can no longer be treated as aliens for the purposes of migration law.'[91]

Love involved two plaintiffs, Daniel Love and Brendan Thoms. Both men were born overseas and each had one Aboriginal Australian parent. Love was born in Papua New Guinea and Thoms in New Zealand. Both identified as Aboriginal Australian apparently in order to avoid extradition. Although they had somehow managed to be recognised as members of an Aboriginal community, neither men actually sought to become Australian citizens.[92]

Both plaintiffs were serving a term of imprisonment of 12 months or more. Mr Love was given a 12-month jail sentence for assault occasioning bodily harm.[93] Mr Thoms was convicted of a domestic violence assault for which he received an 18-month sentence.[94] The Commonwealth sought to deport them pursuant to s 501(3A) of the *Migration Act 1958* (Cth).[95] The Commonwealth's rationale was founded upon the citizenship status, or lack thereof, of Mr Love and Mr Thoms.

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89 George Winterton et al, *Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Co, 2nd rev ed, 2007) 280.

90 *Love* (n 2).

91 Chris Merritt, 'Lunacy Protects Foreigners Over Us', *The Australian* (Online, 12 February 2020) <https://www.theaustralian.com.au/business/legal-affairs/lunacy-protects-foreigners-over-us/news-story/274e7b2c2690ecc9023beb021ac40b26>.

92 Gavin Scott et al, 'Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3', *Norton Rose Fulbright* (Case Summary, 13 February 2020) <https://www.nortonrosefulbright.com/en/knowledge/publications/baf59e4f/love-v-commonwealth-thoms-v-commonwealth>, citing *Love* (n 2) [31], [44], [126], [133], [147], [178], [181].

93 Anon, 'A Man Has Launched a High Court Case Suing the Commonwealth for False Imprisonment', *News.com.au* (Online, 17 October 2017) <https://www.news.com.au/national/queensland/a-man-has-launched-a-high-court-case-suing-the-commonwealth-for-false-imprisonment/news-story/4013b54dc2ff771a09d964e28c13190c>.

94 Elizabeth Byrne and Josh Robertson, 'High Court Rules Aboriginal People Cannot be Deported for Criminal Convictions, Cannot be 'Alien' to Australia', *ABC News* (Online, 11 February 2020) <https://www.abc.net.au/news/2020-02-11/high-court-rules-aboriginal-people-cant-be-deported/11953012>.

95 *Migration Act 1958* (Cth) s 501(3A).

The Commonwealth argued that the plaintiffs were aliens, since they were not Australian citizens and, therefore, it was within the Commonwealth's power to deport them pursuant to s 51(xix) of the *Australian Constitution*.[96]

By a majority of 4–3, the Court decided that, although born overseas and not Australian citizens,

> Aboriginal Australians (understood according to the tripartite test in *Mabo v Queensland [No 2]* (1992) 175 CLR 1) are not within the reach of the power to make laws with respect to aliens, conferred on the Commonwealth Parliament by s 51(xix) of the *Constitution* ("the aliens power"). That is the case even if the Aboriginal Australian holds foreign citizenship and is not an Australian citizen under the *Australian Citizenship Act 2007* (Cth).[97]

Setting this precedent essentially subjects Australia's migration law to the arbitrary proclamation of Aboriginality by any possible Aboriginal community member.[98] However, the law traditionally says that being an Australian citizen is a privilege, not a right. Citizenship should not be automatically imposed based on race or any subjective identification of a person, particularly when such a person has no intention of becoming an Australian citizen. The minority judgment in *Love* echoed a similar concern, maintaining that 'the Commonwealth's constitutional power under s 51(xix) should not be limited by race'.[99] Chief Justice Susan Kiefel stated:

> [T]he legal status of a person as a "non-citizen, non-alien" would follow from a determination by the Elders, or other persons having traditional authority amongst a particular group, that the person was a member of that group... [This] would be to attribute to the group the kind of sovereignty which was implicitly rejected by *Mabo [No 2]* — by reason of the fact of British sovereignty and the possibility that native title might be extinguished — and expressly rejected in subsequent cases.[100]

Sky News host Andrew Bolt also highlighted that

> the High Court ruled that people who identify as Aboriginal now have one right that people of any other race do not ... No one calling themselves Aboriginal can now be expelled by the government from Australia — even if they're born overseas, even if they aren't Australian citizens and even if they're criminals.'[101]

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96 *Australian Constitution* s 51(xix). Cf Scott et al (n 92).

97 High Court of Australia, '*Love v Commonwealth*; *Thoms v Commonwealth* [2020] HCA 3' (Judgment Summary, 11 February 2020) <https://www.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-3-2020-02-11.pdf>.

98 *Love* (n 2) [25], [137], [196].

99 Scott et al (n 92), citing *Love* (n 2) [31], [44], [126], [133], [147], [178], [181].

100 *Love* (n 2) [25].

101 As quoted by Frank Chung, 'High Court Ruling on Indigenous Deportation "Will Lead to Racial Division and Strife"', *News.com.au* (Online, 12 February 2020) <https://www.news.com.au/

It seems, therefore, that racial identity is somewhat 'fluid'. Is this the direction in which Australia wishes to go?

The majority in *Love* recognised the existence of a third category of person. Such person is neither an alien nor a citizen. Chris Merrit has highlighted the potentially unintended consequences of the Court's decision: 'The High Court's ruling means Aboriginal elders and community leaders can stymie moves to deport foreign criminals if they determine they have Aboriginal ancestry.'[102] As a result, 'indigenous people — even those born overseas — cannot be considered "aliens" and deported on character grounds'.[103]

The Morrison Government has commented that, 'on the face of it', the High Court decision in *Love* has 'created a new category of persons — neither an Australian citizen under the Australian Citizenship Act, nor a non-citizen'.[104] However, such persons have been given the protection of an Australian citizen if they commit a deportable offence under the *Migration Act 1958* (Cth). We can call this 'synthetic citizenship'. As noted by James Allan, the Court 'effectively constitutionalised identity politics … [and] introduced a race-based limit on the parliament's power'.[105] Allan was so appalled by this act of sheer activism that he even proposed a way to fix the debacle, namely, that the 'the Attorney-General needs to call the Solicitor-General in and tell him, order him, to take the position in every single future case that *Love* was wrongly decided'.[106]

Morgan Begg has similarly opined that the High Court's decision 'to exclude a specific group from the scope of the constitutional aliens power is the most radical instance of judicial activism in Australian history'.[107] He also identifies the concern highlighted earlier, namely, that the decision in *Love* 'has led to the absurd position that a person can be a non-citizen but not subject to Australia's migration laws'.[108]

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national/courts-law/high-court-ruling-on-indigenous-deportation-will-lead-to-racial-division-and-strife/news-story/4e03589cbdbfef9f455a753b44b2d725>.

102 Chris Merritt, 'No Place for Race in the Constitution', *The Australian* (Online, 14 February 2020) <https://www.theaustralian.com.au/business/legal-affairs/no-place-for-race-in-the-constitution/news-story/3bfa8f2c19c2164c3b0f9495f864f19f>.

103 Olivia Caisley, 'High Court Rules on New Status for Indigenous People', *The Australian* (Online, 12 February 2020) <https://www.theaustralian.com.au/nation/high-court-says-indigenous-men-daniel-love-and-brendan-thoms-are-not-aliens/news-story/9bff27b00ad8b7ee6f98e4a46fbea28f>.

104 As quoted by Chung (n 101).

105 James Allan, 'High Court Ruling: Activist Justices' Alien View of Court's Power', *The Australian* (Online, 14 February 2020) <https://www.theaustralian.com.au/business/legal-affairs/activist-justices-alien-view-of-courts-power/news-story/bfff4c2f860a65426dddaf5f91cf9ff6>.

106 James Allan, 'High Court of Wokeness: How on Earth Did the Coalition Allow This Travesty to Happen?', *The Spectator Australia* (Online, 21 February 2020) <https://www.spectator.com.au/2020/02/high-court-of-wokeness/>.

107 As quoted by Chung (n 101).

108 Ibid.

VIII An Example of Judicial Activism in US Jurisprudence — *Obergefell v Hodges*

Although Australia faces its own demons of judicial activism, it is not alone. The 2015 US case of *Obergefell*[109] also demonstrated the presence of judicial activism. The underlying principle of the majority in *Obergefell* was that individual liberty enshrines one's right to personal choice.[110] Although the majority understood that 'the Constitution contemplates that democracy is the appropriate process for change, so long as that process does not abridge fundamental rights',[111] the Court injected post-modern thought into the legal system, arguing that fundamental rights evolve with society; they are not stagnant with traditional thought.[112] The majority therefore concluded that same-sex couples could exercise their fundamental right to marry prior to legislative approval.[113]

As previously noted by one of the authors of this article, 'the majority's view subverts and invalidates laws due to matters of personal opinion'.[114] This is a clear example of judicial activism. Chief Justice Roberts (dissenting) maintained that '[w]hether same-sex marriage is a good idea should be of no concern to' his contemporaries on the bench.[115] His Honour further highlighted that 'a State's decision to maintain the meaning of marriage that has persisted in every culture throughout human history' is not considered a violation of fundamental right.[116]

It is because of five unelected members of the Supreme Court of the United States that same-sex marriage is now considered 'a fundamental right'. It is simply not compatible with democratic theory that the law means whatever it ought to mean, and that unelected judges get to decide what that is.[117] Again, this is another example of judicial activism confounding 'the distinction between legislative and judicial functions'.[118] As Scalia J (dissenting) explained:

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109 *Obergefell* (n 3).
110 Ibid 646 (majority opinion).
111 Ibid 676 [17] (majority opinion).
112 Ibid 705–6 (majority opinion). See Augusto Zimmermann, 'Judicial Activism and Arbitrary Control: A Critical Analysis of *Obergefell v Hodges* 556 US' (2015) 17(4) *University of Notre Dame Law Review* 77, 79.
113 *Obergefell* (n 3) 677 [18] (majority opinion): 'The dynamic of our constitutional system is that individuals need not await legislative action before asserting a fundamental right.'
114 Zimmermann (n 112) 79.
115 *Obergefell* (n 3) 686 (Roberts CJ, dissenting).
116 Ibid.
117 Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in Amy Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3, 22.
118 Zimmermann (n 112) 79.

> This is a naked judicial claim to legislative — indeed, super-legislative — power; a claim fundamentally at odds with our system of government. Except as limited by a constitutional prohibition agreed to by the People, the States are free to adopt whatever laws they like, even those that offend the esteemed Justices' "reasoned judgement". A system of government that makes the People subordinate to a committee of nine unelected lawyers does not deserve to be called a democracy.[119]

The 'dreaded monster' of the ruling minorities is the so called tyranny of the majority. It conjures up visions of peasants with pitchforks storming their masters' castle.[120] Small wonder, then, that such a 'tyranny of the majority' has been a favourite slogan of the ruling minorities, who, according to Mary Ann Glendon, conveniently prefer to ignore that one of our most basic rights is the freedom to govern ourselves and our communities by bargaining, persuading and, ultimately, majority vote.[121] As Professor Glendon points out, the reality is that 'tyranny by the powerful few' is by far the most likely outcome of any method of judicial interpretation that concentrates so much decision-making power over the details of everyday life in a 'vanguard' of privileged individuals, particularly the members of a judicial elite who think they 'know better than the people what the people should want'.[122]

The Founding Fathers of the United States viewed fundamental rights as pre-existing the state; 'it was generally believed that rights were God-given, existing separate and apart from any human grant of power and authority'.[123] Fundamental rights were called 'inalienable' precisely because they were viewed as sourced in God.[124] Thus, the American Founders 'regarded government as creative of no rights, but as strictly fiduciary in character, and as designed to make more secure and make more readily available rights which antedate it and which would survive it'.[125] As Professor Barnett has pointed out, fundamental rights 'were the rights persons have independent of those they are granted by

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119 *Obergefell* (n 3) 717 (Scalia J, dissenting). Justice Scalia also stated (at 713): 'Today's decree says that my Ruler, and the Ruler of 320 million Americans coast-to-coast, is a majority of the nine lawyers on the Supreme Court … This practice of constitutional revision by an unelected committee of nine, always accompanied … by extravagant praises of liberty, robs the People of the most important liberty they asserted in the Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.' Cf Zimmermann (n 112) 79 n 23.

120 Mary Ann Glendon, 'Comment', in Gutmann (n 117) 95, 113.

121 Ibid.

122 Ibid.

123 Lael Daniel Weinberger, 'Enforcing the Bill of Rights in the United States' in Suri Ratnapala and Gabriël A Moens (eds), *Jurisprudence of Liberty* (LexisNexis, 2nd ed, 2011) 93, 105.

124 Suzanna Sherry, 'The Founders' Unwritten Constitution' (1987) 54(4) *University of Chicago Law Review* 1127, 1132, quoting Silas Downer, *A Discourse at the Dedication of the Tree of Liberty* (1786), in Charles S Hyneman and Donald S Lutz (eds), *American Political Writing During the Founding Era, 1760–1805* (Liberty Fund, 1983) vol 1, 97, 100.

125 Edward S Corwin, *The 'Higher Law' Background of American Constitutional Law* (Cornell University Press, 1955) 67.

government and by which the justice or property of governmental commands are to be judged'.[126]

It is upon this foundation that the American Bill of Rights was constructed, enshrining rights that already existed. These rights rejected any idea of human-made 'fundamental rights'. As Thomas Jefferson rhetorically asked: 'Can the liberties of a nation be secure when we have removed their only secure basis, a conviction in the minds of the people that these liberties are a gift of God?'[127] This is precisely the 'higher law' background of American constitutional law, argued the celebrated Edward S Corwin, the McCormick Professor of Jurisprudence at Princeton University from 1908 to 1946.[128] Universally acclaimed as among the leading constitutional scholars of the 20th century, Professor Corwin argued that the American Founders were profoundly inspired by an idea of fundamental rights. These fundamental rights were entirely based on the rules of a higher-law jurisprudence deemed by them 'to be binding on Parliament and the ordinary courts alike'.[129]

By contrast, the US Supreme Court has essentially created new 'fundamental rights' — rights that were once viewed as God-given and, accordingly, inalienable vis-à-vis the individual. As such, the US Supreme Court judges essentially become 'God' unto themselves.[130] The autonomy is indistinguishable. It is this arbitrary power currently exercised by unelected judges that is the primary catalyst for the ongoing, uncontrolled form of judicial activism taking place both in the United States and beyond.

If constitutional interpretation simply means such a raw exercise in judicial power, then the very ideal of fundamental rights might not serve in the long term to protect the people from new forms of tyranny by the most powerful, the more privileged elements of society. Tyranny, Professor Glendon reminds us, 'need not … announce itself with guns and trumpets. It may come softly — so softly that we will barely notice when we become one of those countries where there are no citizens but only subjects.'[131] So softly, she adds, 'that if a well-meaning foreigner should suggest, "Perhaps you could do something about your oppression", we might look up, puzzled, and ask, "What oppression?"'[132]

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126 Randy E Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2004) 54.
127 As quoted in Rousas John Rushdoony, *The Politics of Guilt and Pity* (Fairfax Thoburn Press, 1978) 135.
128 Corwin (n 125).
129 Ibid 48.
130 Zimmermann (n 112) 80.
131 Glendon (n 120) 113–14.
132 Ibid 114.

IX A Federal Bill of Rights? The Potential Growth of Judicial Activism in Australia

If judicial activism in Australia has been possible even without the enactment of a federal Bill of Rights, one can only imagine what might happen if and when such abstract declarations are enacted at the federal level. Indeed, judicial activism in Australia has occurred regardless of an abstract declaration of rights.

A federal Bill of Rights will allow judges to have the final say on all sorts of matters of social policy. The result could be very detrimental to the rule of law, because it could culminate in 'a great temptation to appoint judges whose views on those questions of policy are views of which the executive government approves'.[133] As noted by Sir Harry Gibbs, 'the circumstances surrounding some judicial appointments in the United States show that it has often been impossible to resist this temptation. Thus one of the essentials of a free society — an independent judiciary — tends to be weakened when the judges are given what virtually amounts to political power.'[134]

The framers of the *Australian Constitution* generally believed that the institutions of representative and responsible government, coupled with a well-designed federal system, 'would provide adequate protection for civil and political rights without the need for a judicially-enforced bill of rights'.[135] Hence, in a landmark ruling, Anthony Mason CJ stated: '[T]he prevailing sentiment of the framers [of the *Australian Constitution*] [was] that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens. That sentiment was one of the unexpressed assumptions on which the Constitution was drafted.'[136]

Sir Robert Menzies, Australia's longest serving Prime Minister, maintained that the framers had deliberately refrained from adopting a Bill of Rights because they understood that 'to define human rights is either to limit them — for in the long run words must be given some meaning — or to express them so broadly that the discipline which is inherent in all government and ordered society becomes impossible'.[137] That being so, under the system of constitutional government envisaged by the Australian Founders, one proceeds on the assumption of full rights and freedoms, and then turns to the positive law only to see whether there

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133 Sir Harry Gibbs, 'Does Australia Need a Bill of Rights?' (Conference Paper, The Samuel Griffith Society, 18 November 1995) <https://static1.squarespace.com/static/596ef6aec534a5c54429ed9e/t/5c9d2c2cf9619a31d240c2f0/1553804334067/v6chap7.pdf>.

134 Ibid.

135 Aroney et al (n 77) 356.

136 *ACTV* (n 1) 136.

137 Robert Menzies, *Central Power in the Australian Commonwealth* (Cassell & Co, 1967) 52.

might be an exception to the general rule. After comparing this model with the American one of a constitutionally enacted Bill of Rights, the late constitutional lawyer W Anstey Wynes commented:

> The performance of the Supreme Court of the United States has become embroiled in discussions of what are really and in truth political questions, from the necessity of assigning some meaning to the various "Bill of Rights" provisions. The Australian Constitution ... differs from its American counterpart in a more fundamental respect in that, as the ... Chief Justice of Australia [Sir Owen Dixon] has pointed out, Australia is a "common law" country in which the State is conceived as deriving from the law and not the law from the State.[138]

Naturally, the supporters of a federal Bill of Rights may argue that its enactment by an elected government makes the invalidation of statutes on the basis of interpreting the Bill indirectly democratic. Nothing could be further from the truth. In reality, increasing judicial power by means of legislation, even if done by democratic means, amounts to 'voting democracy out of existence, at least so far as a wide range of issues of political principles is concerned'.[139] Bills of rights may have such a deleterious effect of weakening democracy by transferring the decision-making authority from elected representatives of the people to an unelected and barely accountable judiciary, although there is no moral or political consensus amongst members of the judicial elite. As noted by James Allan:

> What a bill of rights does is to take contentious political issues — ... issues over which there is reasonable disagreement between reasonable people — and it turns them into pseudo-legal issues which have to be treated as though there were eternal, timeless right answers. Even where the top judges break 5–4 or 4–3 on these issues, the judges' majority view is treated as *the view* that is in accord with fundamental rights.
>
> The effect, as can easily be observed from glancing at the United States, Canada and now New Zealand and the United Kingdom, is to diminish the politics (over time) to politicize the judiciary.[140]

The delicate constitutional balance of power between the judiciary and the legislature is basic to a functioning democracy. Such a balance, however, has been deeply upset in numerous countries across Europe and North America due to human-rights legislation. Indeed, the legal philosopher Jeremy Waldron believes that judicial enforcement of a Bill of Rights is utterly inconsistent with the ability

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138 W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book Co, 2nd ed, 1956) vii.

139 Jeremy Waldron, 'A Rights-Based Critique of Constitutional Rights' (1993) 13(1) *Oxford Journal of Legal Studies* 18, 46.

140 James Allan, 'Why Australia Does Not Have, and Does Not Need, a National *Bill of Rights*' (2012) 24(2) *Journal of Constitutional History* 35, 40.

of ordinary citizens to influence decisions through democratic political processes. He says:

> If we are going to defend the idea of an entrenched Bill of Rights put effectively beyond revision by anyone other than the judges, we should … think [that] … even if you … orchestrate the support of a large number of like-minded men and women and manage to prevail in the legislature, your measure may be challenged and struck down because your view of what rights we have does not accord with the judges' views.[141]

It is impossible not to observe the irony in such decision-making reducing the size of the electoral franchise. Decision-making rule in the top courts simply determines that five votes beat four. It is as simple as that and a mere reduction of the franchise. What this process does, therefore, is to provide a small committee of lawyers with the ultimate power to decide controversial moral values by striking down of an Act of Parliament. Of course, there may be distrust of the judicial elites and their capacity to make 'proper' decisions. Commenting on this fact, Goldsworthy concludes:

> My impression is that in countries such as Britain, Canada, Australia and New Zealand, a substantial proportion of the tertiary-educated, professional class has lost faith in the ability of their fellow citizens to form opinions about public policy in a sufficiently intelligent, well-informed, dispassionate and carefully reasoned manner. They may be attracted to the judicial enforcement of rights partly because it shifts power to people (judges) who are representative members of their own class, and whose educational attainments, intelligence, habits of thought and professional ethos are thought more likely to produce "enlightened" decisions.[142]

Bills of Rights, federal or otherwise, lead to the further politicisation of the judiciary. As the generalities expressed in such legal documents are applied to real-life situations (and rights frequently conflict with one another), there is a concrete need for the imposition of methods of judicial interpretation that truly respect the spirit of the document and the intention of the legislator. After all, writes Mirko Bagaric, 'rights documents are always vague, aspirational creatures and give no guidance on what interests rank the highest. This leaves plenty of scope for wonky judicial interpretation.'[143] The way a judge may 'interpret' an abstract right may be influenced by the political environment and his or her own political biases and ideological inclinations.

Given that these factors are outside the judge's area of expertise, there is no reason as to why judges should determine the whole hierarchy of rights and interests in our community. There is obvious potential in such a situation for partisan administration of justice. In practice, as far as declarations of rights are

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141 Waldron (n 139) 50–1.

142 Jeffrey Goldsworthy, 'Losing Faith in Democracy', *Quadrant Online* (25 May 2015) <https://quadrant.org.au/magazine/2015/05/losing-faith-democracy/>.

143 Mirko Bagaric, 'Your Right to Reject the Bill of Rights', *The Herald Sun* (Melbourne, 8 November 2005) 19.

concerned, the supposed neutrality and moderation of judges prove illusory. As Professor Moens has written:

> The possibility of attributing different meanings to provisions of bills of rights creates the potential for judges to read their own biases and philosophies into such a document, especially if the relevant precedents are themselves mutually inconsistent. Indeed, in most rights issues, the relevant decisions overseas are contradictory. For example, rulings on affirmative action, pornography, "hate speech", homosexual sodomy, abortion, and withdrawal of life support treatment vary remarkably. These rulings indicate that the judges, when interpreting a paramount bill of rights, are able to select quite arbitrarily their preferred authorities ... Since a bill of rights will often consist of ambiguous provisions, judges can deliberately and cynically attribute meanings to it which are different to the intentions of those who approved the bill ... in Australia's case the electorate.[144]

The *Canadian Charter of Rights and Freedoms* ('*Charter*') is a good point of observation because it is broadly regarded as a model by most human-rights activists in Australia. Curiously, such a charter has allowed the Supreme Court of Canada to find 'legal' grounds to invalidate all laws against abortion. The Court has used the *Charter* to protect tobacco advertising, to extend the franchise to all prisoners, to rewrite the marriage laws to include homosexuals, and even to make it much harder to freeze the salaries of judges in comparison to the those of other civil servants! These Canadian judges have clearly read their own ideology into the law and are now the country's major political players. The clause in the *Charter* that allows review of legislation if reasonable limits can be justified in a free and democratic society has proved entirely ineffective in curbing the problem of judicial activism. As noted by Professor Moens:

> Since that criteria [sic] means essentially nothing in a legal sense, judges are effectively commanded by the instrument itself to give rein to their own moral sensibilities over legal criteria in deciding the validity of legislation. In such circumstances, it is not surprising in Canada the individual social and political beliefs of the judges are considered more important than the words of the Constitution itself.[145]

Whereas it may be argued that in most legal systems a judicially enforceable Bill of Rights might improve human-rights protection, the basic question for nations like Australia is whether this would be desirable for that particular reason. As any Bill of Rights consists of abstract and flexible principles of political morality, judicial 'interpretation' of such documents eventually becomes rather indistinguishable from the moral and political philosophy of a few unelected judges. Human rights legislation, being entirely abstract and general in nature,

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144 Gabriël A Moens, 'The Wrongs of a Constitutional Entrenched Bill of Rights' in M A Stephenson and Clive Turner (eds), *Australia: Republic or Monarchy? Legal and Constitutional Issues* (University of Queensland Press, 1994) 233, 236.

145 Ibid.

naturally requires some form of 'creative' interpretation. And yet, there is little guidance to assist in the process of applying such abstract provisions. The outcome depends largely on the views of a few unelected judges, thus facilitating a mechanism whereby a small elite of privileged lawyers can force its own values and beliefs on a reluctant majority of the people.

X Conclusion

Judicial activism is a phenomenon increasingly growing in importance all over the world, including in common-law countries such as Australia and the United States. This article has explained how judicial activism negatively affects the application of the law by giving a meaning that substantially departs from the drafters' original intent, and sometimes even departing from the literal meaning of the words as conveyed in the law. Such a problem was noticeable in the cases of *Work Choices*, *ACTV* and *Love* in Australia, and in the *Obergefell* case in the United States, as it relates to the creation of a 'fundamental right' to same-sex marriage by unelected judges.

Unfortunately, as explained in this article, the values that an activist judge is willing to enforce do not necessarily derive from the law. Otherwise, the term 'activist' would not be applied to such instances. This exercise in raw judicial power should be challenged, and the reason is quite simple: Not only does it violate the proper role ascribed to members of the judiciary, but also, in a true democracy, it is the will of the people, directly or indirectly manifested by means of their elected representatives in Parliament, that should always prevail, not the individual opinions of a tiny judicial elite composed of privileged members of the legal profession.

Judicial activism obscures the doctrine of separation of powers, seemingly voiding the walls that separate them. While social change may be a factor in interpreting the law, it should not be the intentional factor that eases the need for the judge to faithfully apply the law according to the intention of the legislator. As rightly stated, judges should leave their political and social prejudices out of the court room. To do otherwise is to poison the role that should be seen as a privilege, not an entitlement. Precedent should be one of the influencing factors when it comes to matters of constitutional interpretation, but ultimately it is the text of the *Constitution* that remains the ultimate touchstone when it comes to matters of constitutional interpretation.

To conclude, the rule of law requires that judges are not free to decide a case in any way they like. The legitimacy of the court system effectively depends on judges exercising their power on the basis of something other than personal

opinion or politics.[146] Thus, we conclude this article with the words of one of Australia's most respected legal academics and constitutional lawyers, Professor Emeritus Jeffrey Goldsworthy. As he has correctly reminded us, just as the majority of citizens may be wrong, so too may be the opinions of a judicial minority. That being so, he concludes: '[I]n the absence of an objective method of determining who is right, it is better that the majority should prevail'.[147]

146 Elizabeth Ellis, *Principles and Practice of Law* (Lawbook Co, 2005) 169.
147 Jeffrey Goldsworthy, 'Losing Faith in Democracy' (2015) (May) *Quadrant Magazine* 13.

Book Reviews

Legal Transplants in East Asia and Oceania (Cambridge University Press, 2019) ISBN 9781108475297 Hardback, 330 pp

Edited by Vito Breda

This book provides a rich source of material and a significant resource on the topic of legal transplants. The 14 specialist authors present informative and usefully interlocking chapters of both a theoretical and specific case nature.

The book is in three main parts. They deal, respectively, with matters of theory, diverse case studies, and case studies specific to the protection of rights and the environment. There are 12 chapters, plus an Introduction and Conclusion, and an extensive table of cases and a table of legislation.[1]

The first substantive chapter is that by Harding.[2] It provides a critique of the Watson/Le Grand debate on transplants. It is this chapter that sets the theme for the book and is the general point of linkage for the various chapters.

Corrin[3] in ch 2 deals with the vexed matter of 'statutes of general application' and their relationship to the notion of transplants.[4] Whatever the merit of the formula in colonial times, it has now well passed its 'best before' date. The fact that the formula is retained by some countries perhaps indicates their attitude to law of the introduced kind, to the concept of the rule of law, and to their colonial past.

Kaino[5] provides a historical and conceptual survey of the major law reforms of 19th-century Japan and the links to the theories of Bentham. This chapter, like ch 5, indicates the persistence of local phenomena in legal development.

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1 Mostly relating to common-law jurisdictions. The usefulness of this material is substantially curtailed by the absence of any indication of the page or chapter in which the listed material may be found. This and a number of typographical errors and incorrect citations are irritating, but overall they do not detract from the merit of the book.

2 Andrew Harding 'The Legal Transplants Debate: Getting Beyond the Impasse?' in Vito Breda (ed), *Legal Transplants in East Asia and Oceana* (Cambridge University Press, 2019) 13–33.

3 Jennifer Corrin, 'Transplant Shock: The Hazards of Introducing Statutes of General Application' in Breda (n 2) 34–62.

4 A statute of general application could be seen as an ex post facto piece of legislating and therefore contrary to the rule of law.

5 Michihiro Kaino, 'Bentham's Theory of Legal Transplants and His Influence in Japan' in Breda (n 2) 63–83.

Gussen[6] pursues the Harding theme and relates institutional innovation and constitutional design to evolutionary biology.[7] The study uses three federal constitutions — those of the United States, Canada and Australia — to explain the theory.

Gray[8] considers the transplantation of 'good faith' in contract into contemporary common-law situations.

Viven-Wilksch[9] considers the introduction of the *United Nations Convention on Contracts for the International Sale of Goods* ('CISG') into Australian law. The focus is on how long it might take or what the conditions are for the introduction of CISG principles to be declared a success. This chapter links well with the contract and good faith discussion of the preceding chapter.

An example of a possible transplant in the field of public law relates to the notion of proportionality — stated to be from France through the common-law system. This is discussed by Campbell and Lee[10] in their chapter, which deals with the apparent Australian reluctance to follow some common-law precedent. That reluctance is in turn consistent with the material on good faith, and also on the cultural origins of an idea.

The terminological and conceptual debate on 'transplants', as Stamboulakis[11] indicates in the case study of 'Lessons from the Singapore International Commercial Court', does not fully capture the 'multi-fold, simultaneous, and iterative' borrowing processes inherent to any transactional dealings, which implicate 'disparate actors, applications, and flows in multiple directions'.[12] Stamboulakis's focus is on the connection between 'legal transplants' and the "procedural hybridity" exemplified by the Singapore International Commercial Court. A practitioner may recognise and be more

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6 *Benjamen Gussen*, 'On the Hardingian Renovation of Legal Transplants' in Breda (n 2) 84–108.

7 This is reminiscent of Bernhard F Freund's 'On Mathematical Patterns in the Web of the Law Indicating a Quasi-Biological Evolution' (2007) 13 *Revue Juridique Polynésienne* 53.

8 Anthony Gray, 'The Incomplete Legal Transplant — Good Faith and the Common Law' in Breda (n 2) 111–31.

9 Jessica Viven-Wilksch, 'How Long Is Too Long to Determine the Success of a Legal Transplant? International Doctrines and Contract Law in Oceania' in Breda (n 2) 132–57.

10 Colin Campbell and HP Lee, 'Proportionality in Australian Public Law' in Breda (n 2) 158–82.

11 Drossos Stamboulakis, 'Legal Transfer and "Hybrid" International Commercial Dispute Resolution Procedures: Lessons from the Singapore International Commercial Court' in Breda (n 2) 183–210.

12 Stamboulakis (n 11) 188 n 23. The author is here quoting from G Shaffer, 'Transnational Legal Ordering and State Change' in G Shaffer (ed), *Transnational Legal Ordering and State Change* (Cambridge University Press, 2019) 9. Also, at 200 n 67, referring to J Gillespie, 'Towards a Discursive Analysis of Legal Transfers into Developing East Asia' (2007–8) 40 *New York University Journal of International Law and Politics* 657, 713, Stamboulakis states that 'it must be recalled that it is difficult — if not "impossible" — to attempt to deterministically model legal transfers'.

attracted to the Miller analysis[13] than to the theoretical analysis of Watson/Legrand/Teubner.[14]

The Liljeblad[15] piece considers the International Bar Association ('IBA') endeavours to 'introduce notions of an independent national bar association for Myanmar'. This piece clearly demonstrates the difference between transplanting with purely domestic origins and a missionary endeavour such as that of the IBA in Myanmar. This is to be compared with other similar endeavours in the field of human rights and the environment.

In ch 10, Techera[16] considers shark sanctuaries as vehicles for transplanting conservation tools. Techera uses shark sanctuaries to demonstrate both vertical and horizontal transplanting — ie from domestic systems to international law, and from one domestic system to another — eg from the Cook Islands to the Marshall Islands. Techera makes the important point[17] that borrowing as such is perhaps not the major challenge; rather, the challenge is the implementation in systems that have limited financial, technical and legal resources.

O'Brien[18] addresses the rise of the anti-impunity norm in international discourse, and particularly the case of the Japanese 'comfort stations' of the World War II era.

The chapter by Torresi[19] considers the development of rules for migrants who are 'engaged in temporary migration projects and who do not seek involvement and often indeed avoid investment in their receiving society'; the focus is on the need for a special support system for such migrants particularly in the host and home countries.

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13 Jonathan M Miller, 'A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process' (2003) 51(4) *American Journal of Comparative Law* 839. Miller's analysis is described by Jonathan Liljeblad, 'The Independent Lawyers' Association of Myanmar as a Legal Transplant: Local Challenges to the Idea of an Independent National Bar Association' 211–29, 241: 'Miller categorizes legal transplants into those that are cost-saving, where law-makers save time and costs by using solutions from other jurisdictions; externally dictated, where foreign actors impose foreign legal models into a country; entrepreneurial where domestic actors promote foreign legal ideas; or legitimacy-generating, where domestic actors associate themselves with prestigious foreign legal ideas to build legitimacy.'

14 Liljeblad (n 13) 214.

15 Liljeblad (n 13).

16 Erika Techera, 'Shark Sanctuaries as Vehicles for Transplanting Conservation Tools in Disparate Legal Jurisdictions' in Breda (n 2) 233–55.

17 Ibid 241.

18 Sophia O'Brien, 'Global Norms; Local Resistance: Addressing Impunity in Japan and Beyond' in Breda (n 2) 256–96.

19 Tiziana Torresi, 'Legal Transplants, Temporary Migration Projects and Special Rights' in Breda (n 2) 297–320.

The topic of 'transplanting' is, as the theoretical chapters of this book demonstrate, a much vexed one. It is a generally held view that, in the field of transplantation, public law is a less suitable area for such transfer of ideas. There is, however, great similarity among many constitutions, and often there is little but the country's name in a constitution to indicate its country of application. Equally, criminal law and family law ideas may be thought to be more difficult to transplant because of their close relationship to the social context, but even in those cases there are major examples of the taking of ideas from one legal system, often with a totally different legal and social culture, to another with significant success.

The book is interesting in itself, but also in the range of thoughts that it can stimulate in the mind of a reader. For instance:

- A change in a legal system may be nothing new in substance but simply naming something in accordance with the dominant taxonomy of the legal system — what may be seen as an innovation or a transplant may be simply a renaming for recognition purposes.[20]
- If 'good faith' is acceptable in the field of insurance, why should it not be generally accepted?
- How do the idea of good faith and the role of equity interact in the common law?
- What of the Australian 'Contract Code'?[21]
- And what of the provenance and progress of the various criminal codes in the region: the Code Penal 1791 of France, the Codice Penale 1889 of Italy, the Criminal Code proposal of Sir James Fitzjames Stephen?
- And the propensity of the United Kingdom to planting ideas abroad that it did not accept for itself?
- And the shift in the notion of adoption from something of religious/family or property protection to a welfare concept?
- The Ombudsman and its lineage?
- And what of the family protection legislation — which spread widely from a New Zealand initiative?
- And the ill fate of endeavours to transplant the New Zealand accident compensation system?
- And how did Vanuatu 'become' a common-law state?
- How to get rid of a transplant?[22]
- Where does transplanting merge into creativity within the local system?

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[20] For example, where the categorisation of a river or a mountain as a legal person attempts to reflect in the dominant system a status in another system.

[21] Law Reform Commission of Victoria, *An Australian Contract Code* (Discussion Paper No 27, September 1992).

[22] Consider, for instance, the history of fundamental rights and freedoms in Tuvalu.

The theoreticians are still working their way through a nomenclature or structuring of the ideas about transplants. From a practitioner's point of view, Watson is probably correct. In practice, 'transplanting' is often easy, it is not always known or planned, and there is a certain inevitability about it in many cases. Even an act of translating within a system can change the course of development of the legal system. The range of possibilities for 'transplanting' is potentially infinite. Further, the process for their introduction can be quick or slow.

Pursuing the botanical metaphor, the movement of legal concepts and structures across country boundaries is, it seems, very like the seeds that are blown by the wind, the seeds that are sown by birds, and those conscious actions of humans that spread plants. The consequence in each case is the same … and wonderful.

Breda, in the closing chapter, states that

> one of the side-effects of [a] pragmatic rather than theoretical understanding of foreign-inspired legal reforms is that much of the debate over the nature of pragmatic plausibility of legal transplants appears hollow. …
>
> Modern legal transplants in East Asia and Oceania are … a manifestation of multiple social engineering endeavours managed by receiving legal systems. The book shows the benefits and a few of the short-comings that foreign-inspired legal reforms have had in these geographical areas.[23]

The book illustrates the diversity, the lack of agreement about, and the extensive evidence of transplants. Each chapter in the book provides interesting comparative insights into how systems view themselves and how they view others. Each chapter is worthy of a review in itself. This is a book to read.

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[23] Vito Brida, 'Conclusion' in Breda (n 2) 321–4.

Legal History Matters: From Magna Carta to the Clinton Impeachment (Melbourne University Press, 2020) ISBN 9780522877137 Paperback, 243 pp

Edited by Amanda Whiting and Ann O'Connell

Legal history is sometimes seen, to quote William Wordsworth, as little more than the study of 'old, unhappy, far-off things'.[1] Paul Finn recently observed that legal history has, 'for the most part, … been marginalised to the point of near extinction'.[2] To which he quite correctly adds that '[t]his is more than a matter for regret. It impoverished our legal imagination.'[3] At least from a superficial analysis, the absence of legal history on the curricula of most Australian law schools reveals a similarly bleak picture of the subject.[4] Other evidence points in a more positive direction,[5] and reports of the death of legal history may have been exaggerated after all. For a few decades now, the High Court of Australia has drawn freely on English historical case law and legal treatises in a range of private law areas. Paradoxically, these judges have used the past intending to create a distinctly Australian private law. In many of these decisions, old English equitable principles have been prominent. Examples include extending the doctrine of penalties beyond cases of breach of contract,[6] and attempts to sideline unjust enrichment to explain restitutionary liability.[7] On this evidence alone, it is not very difficult to find a decidedly utilitarian justification for the study of legal history.

There are some significant challenges in teaching legal history to modern students. Speaking in generalities, the biggest of these is their ignorance. It is not so much that students do not possess much detail of legal history — this is to be expected — but rather that they lack a feel for the dynamics of history and societal change, which makes teaching the subject difficult. There is often little sense of how different the world was in 1200, 1400, 1800 or even 1950. Part of the challenge

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1 William Wordsworth, 'The Solitary Reaper' (poem, first published 1807).

2 PD Finn, 'Foreword' in Justin T Gleeson, JA Watson and Ruth CA Higgins (eds), *Historical Foundations of Australian Law — Volume I: Institutions, Concepts and Personalities* (Federation Press, 2013) v.

3 Ibid.

4 Amanda Whiting and Ann O'Connell, *Legal History Matters: From Magna Carta to the Clinton Impeachment* (Melborne University Press, 2020) 2–3.

5 Ibid 1, 5.

6 *Andrews v Australian and New Zealand Banking Group Ltd* (2012) 247 CLR 205.

7 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516.

is overcoming a reluctance to engage with the primary sources. Whiting and O'Connell suggest that one way of making the study of legal history a more meaningful exercise is for 'students to undertake an extended piece of legal history research and writing, so that they can take the necessary time to develop historical research skills while also deepening their understanding of the legal matter under investigation'.[8] The essays in this volume are the fruits of that approach.

As with any edited collection, some chapters will appeal to some readers more than others. This volume cannot be said to lack variety. It is nevertheless a shame that none of the chapters deal with the history of private law, which is a difficult but rewarding area of study. As it is, the subjects range from Anne Boleyn to Bill Clinton. Although there is no common thread to the essays, there are some prominent unifying themes. The first of these is Magna Carta. Matthew Psycharis looks at the position of Magna Carta in the Reformation.[9] He concludes that 'the Charter had an influential role to play in the development of English law in the period of 1520–60'.[10] Since this chapter was written, this hitherto unexplored period as far as Magna Carta is concerned has been considered in detail by the foremost English legal historian, Sir John Baker.[11] Psycharis, who is rightly careful not to claim too much, raises some interesting questions, especially around the role that the Charter may have played in developing ideas of precedent. In the second contribution on Magna Carta, Phoebe Williams considers the 19th-century repeal of large parts of the Charter and at the same time the way that it was used as an idealised 'symbol of England's glorious past' by some of those who advocated law reform.[12]

A second theme — and one that encompasses most of the chapters in the volume — focuses on criminal trials of various kinds. The trials discussed had wider consequences beyond the individual defendants, and the authors do a good job in putting them into context. In 'Due Process of Judicial Murder?', Lisette Stevens looks at the trial of Anne Boleyn.[13] Having carefully considered the conduct of other treason trials of the period, she concludes that 'Anne's trial was anomalous and unfair even by contemporary standards'.[14] The suffragettes and the 'Rush the Commons' trial are the subject of Alexandra Harrison-Ichlov's

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8 Whiting and O'Connell (n 4) 7.

9 Matthew Psycharis, 'Meeting More's Challenge: How the *Magna Carta* Helped Build a Robust *Lex Anglicana*' in Whiting and O'Connell (n 4) ch 1.

10 Ibid 12.

11 Sir John Baker, *The Reinvention of Magna Carta 1216–1616* (Cambridge University Press, 2017).

12 Phoebe Williams, 'A Nineteenth-Century View of the Magna Carta' in Whiting and O'Connell (n 4) ch 3, 81.

13 Lisette Stevens, 'Due Process of Judicial Murder?' in Whiting and O'Connell (n 4) ch 2.

14 Ibid 43.

chapter.[15] She shows that if the government planned to use the prosecution to supress the suffragettes, they merely succeeded in giving the movement valuable publicity for their cause. Another prosecution, that of Isaac Harris and Max Blanck for manslaughter of their employees killed in a factory fire, also helped bring about beneficial changes and is considered in Jack Townsend's chapter.[16] Although the defendants were acquitted, this trial, along with similar incidents, helped to promote the case for greater worker protection. However, one can surely only read Townsend's comment, that 'Harris and Blanck were opportunistic profiteers who took advantage of laissez-faire political and economic order to maximise profits at the expense of their workers', and think, especially in the context of the garment industry now largely based in Asia, plus ça change, plus c'est la même chose.

Two other American defendants are more likely to divide opinion than Harris and Blanck. Samuel O'Connor argues that the trial and conviction of Alger Hiss for perjury was 'the necessary catalyst for the paranoid worldview that would come to characterise a certain element of the American right'.[17] Undoubtedly, Nixon used Hiss to make a name for himself and to promote an anti-Communist agenda.[18] Well-healed Liberals never forgave Nixon for the pursuit of one of their own. If anything, recent evidence points more clearly to the fact that Hiss was in fact a spy rather than an innocent. Nixon is not the first or the last objectionable individual to succeed in getting himself elected President. The attempt to impeach Bill Clinton is discussed by Katherine Kilroy.[19] She concludes that there are lessons in the affair for future attempts at impeachment, observing that Clinton largely retained public support, as well as crucially that of fellow Democrats, even if there was a credible case against him. Kilroy also speculates that modern millennials would be much less forgiving of Clinton's predatory sexual behavior. Perhaps the irony here is that, despite the cost and length of the impeachment proceedings, there remain many unanswered questions about both the Clintons. These are chronicled in all their appalling technicolor squalor by the brilliant and fearless Christopher Hitchens.[20]

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15 Alexandra Harrison-Ichlov, 'A Symbol, a Safeguard, an Instrument: Reflections on the 1908 "Rush the Commons" Trial and the Campaign for Women's Suffrage in Early Twentieth-Century England' in Whiting and O'Connell (n 4) ch 6.

16 Jack Townsend, 'The People of the State of New York v Isaac Harris and Max Blanck: Putting Capitalism on Trial' in Whiting and O'Connell (n 4) ch 7.

17 Samuel O'Connor, 'Alger Hiss as Cipher: The Political and Historical Legacy of the Hiss Case' in Whiting and O'Connell (n 4) ch 4, 100.

18 John A Farrell, *Richard Nixon The Life* (Scribe Melbourne, 2017) 111–28.

19 Katharine Kilroy, 'Campaigning for a Verdict: Politics, Partisanship and the President on Trial' in Whiting and O'Connell (n 4) ch 9.

20 Christopher Hitchens, *No One Left to Lie To* (Allen & Unwin, 2012).

It is perhaps unfair to single out two chapters for special praise when a number in the volume would not look out of place in an edited collection of professional legal historians. Xavier Nicolo's chapter on the rebellion of miners in the Ballarat goldfield in 'Guilty of Sedition but Innocent of Treason' makes excellent use of court transcripts to explore the important differences between prosecutions for sedition and treason.[21] Sedition is also considered by Simon Pickering.[22] His subject, Brian Cooper, was a lowly official in the Australian Administration in New Guinea. Remarks he supposedly made about Robert Menzies and his government and in favour of independence resulted in a prosecution. No one comes out of this story very well — not ASIO, not Menzies, and perhaps more surprisingly not Chief Justice Dixon, when the case finally reached the High Court. Pickering makes good use of ASIO files in the National Archives. Cooper unlike Hiss had no influential friends, but one can only conclude that his prosecution was much less warranted. These and the other chapters show that legal history can be an exciting and relevant subject for students to study. It does — in the pun of the books title — matter.

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[21] Xavier Nicolo, 'Guilty of Sedition, but Innocent of Treason: The Aftermath of the Eureka Stockade' in Whiting and O'Connell (n 4) ch 5.

[22] Simon Pickering, 'A Voice in the Wilderness: Revisiting the Political Trial of Brian Cooper' in Whiting and O'Connell (n 4) ch 8.

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