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## ARTICLES

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### Articles

# Breathing Life into the *Human Rights Act 2019* (Qld): The Ethical Duties of Public Servants and Lawyers Acting for Government

Kent Blore* and Brenna Booth-Marxson†

*Much of the work of government is carried out by public servants with the assistance of lawyers. Because the* Human Rights Act 2019 *(Qld) (*'Human Rights Act'*) is intended to change the way government works, it also has consequences for the way public servants and lawyers carry out the work of government. This article explores the impact of the* Human Rights Act *on the ethical duties of public servants to give frank advice and to implement policy decisions faithfully, as well as the ethical duty of lawyers to act in their client's best interests. While the* Human Rights Act *brings a new rigour to the frank advice that public servants must give, they must still respect the ultimate decision of the government of the day. Similarly, the* Human Rights Act *brings lawyers closer to the edge of legal and policy advice, but this article puts forward a 'supervisory' approach as one way that lawyers can avoid straying too far into policy development and debate. The* Human Rights Act *breathes new life into old ethical duties by reminding us of the importance of candour and fidelity. Equally, frank advice and collaboration between lawyers and policy officers breathe life into the ambition of the* Human Rights Act.

## I Introduction

The *Human Rights Act 2019* (Qld) ('*Human Rights Act*') seeks to introduce a 'culture of justification' into the Queensland public sector.[1] Now, whenever an act,

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1 Queensland, *Parliamentary Debates*, Legislative Assembly, 31 October 2018, 3184 (YM D'Ath, Attorney-General); Explanatory Notes, Human Rights Bill 2018 (Qld). On the 'culture of justification' generally, see Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal on Human Rights* 31, 32; *S v Makwanyane* [1995] 3 SA 391, 454 [156] n 171 (Ackermann J); *PJB v Melbourne Health* (2011) 39 VR 373, 448–9 [333] (Bell J) ('*PJB*'); Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463; Murray Hunt, 'Introduction' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds), *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 1, 15–16.

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decision or statutory provision in Queensland limits a human right, that limit must generally be justified according to a test of proportionality. This new culture of justification interacts with the ethical duties of public servants and lawyers in unfamiliar ways. Public servants have an ethical duty to implement the policy agenda of the government of the day. That deference to the policy choices of government is accentuated for lawyers advising government. The traditional view is that lawyers must stick to the law without straying into questions of policy. But now that limits on human rights must be justified, public servants may need to second-guess the government's policy choices, and lawyers advising on whether the limit is justified will be drawn more closely into the merits of the decision.

This article is divided into three substantive parts. Part II sets out the structure of the *Human Rights Act* and how it gives rise to a new culture of justification for the public service in Queensland. In Part III, the article explores the ethical duties of public servants, setting out the pre-human rights understanding of those duties, before considering the impact of the *Human Rights Act*, asking: can public servants provide full and frank advice that is incompatible with human rights? Does their ethical duty to faithfully implement government policy still apply if the policy breaches human rights? Does the conferral of new human rights on public entities — such as the right to take part in public life — alter their ethical duties?

Part IV segues to the ethical duties of lawyers acting for government. Again, it sets out the traditional view of these duties prior to the introduction of the *Human Rights Act*, and then goes on to explore the new role of lawyers in a human rights paradigm. In particular: can lawyers still stick doggedly to the law when proportionality is a question of mixed fact and law? How can they avoid crossing over from legal advice to policy advice and getting caught up in the merits of a proposal? In considering human rights compatibility, what is the appropriate division of labour between lawyers (who seek to identify options that are 'open') and policy officers (who seek to identify the 'best' option)?

Given that Queensland is the latest Australian jurisdiction to adopt human rights legislation, this article focuses on the Queensland context, grappling with the impact on ethical duties by reference to Queensland laws, professional rules and ethical codes of conduct. However, the article also has relevance for public servants and lawyers operating under a human rights framework in other jurisdictions, such as the Australian Capital Territory ('ACT') and Victoria,[2] as well as for those advising the Commonwealth as to whether proposed federal legislation is compatible with human rights.[3]

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[2] *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Victorian Charter').

[3] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

## II The New Culture of Justification

The *Human Rights Act* adopts a 'dialogue model' in line with equivalent legislation in the ACT, Victoria and the United Kingdom. Under the dialogue model, each of the three branches of government are given a role to play in protecting and promoting human rights, creating a dialogue between them about how best to achieve that goal. However, at the end of the day, Parliament has the final say.[4] In Parliament, members who propose new legislation must now table a statement of compatibility, which sets out whether the legislation would be 'compatible with human rights'.[5] As to the executive, 'public entities' must now act and make decisions in a way that is 'compatible with human rights' (sometimes called the 'substantive limb'), as well as give proper consideration to human rights whenever they make a decision (the 'procedural limb').[6] Finally, the courts must interpret legislation, if possible, in a way that is 'compatible with human rights'.[7] If the Supreme Court or Court of Appeal is unable to interpret legislation compatibly with human rights, they have a discretion to issue a declaration of incompatibility.[8] Rather than invalidate the legislation, the declaration enlivens a procedure that sends the matter back to Parliament for reconsideration. And on goes the dialogue.

The common thread running through these new obligations is the concept of 'compatib[ility] with human rights'.[9] According to s 8, a measure will be compatible with human rights if (a) it does not limit human rights at all, or (b) it does limit a human right, but that limit is nonetheless justified according to the test of proportionality set out in s 13. Section 13 then sets out a structured way of thinking through whether a limit on human rights is justified. It broadly aligns with the structured proportionality test applied in human rights jurisprudence around the world.[10] According to that test, a limit on human rights will be justified if it meets four requirements:

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4 George Williams, 'The Distinctive Features of Australia's Human Rights Charter' in Matthew Groves and Colin Campbell (eds), *Australian Charters of Rights a Decade On* (Federation Press, 2017) 22, 23. See also *R v Momcilovic* (2010) 25 VR 436, 462–3 [93]–[96] (Maxwell P, Ashley and Neave JJA). Cf criticisms of the term 'dialogue model': *Momcilovic v The Queen* (2011) 245 CLR 1, 67–8 [95]–[96] (French CJ) ('*Momcilovic*').

5 *Human Rights Act 2019* (Qld) s 38 ('*Human Rights Act*').

6 Ibid ss 58(1)(a), (b).

7 Ibid s 48.

8 Ibid s 53(2). While s 53(2) provides that the 'Supreme Court' may make a declaration of incompatibility, the Court of Appeal is a division of the Supreme Court: *Supreme Court of Queensland Act 1991* (Qld) s 5(1)(b).

9 *Human Rights Act* (n 5) ss 38(2), 48(1), (2), 53(2), 58(1)(a), (5)(b).

10 Kent Blore, 'Proportionality Under the *Human Rights Act 2019* (Qld): When Are the Factors in s 13(2) Necessary and Sufficient and When are They Not?' (2022) 45(2) *Melbourne University Law Review* (advance). See also Explanatory Notes, Human Rights Bill 2018 (Qld) 5, 17; *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273, [104] (Martin J) ('*Owen-D'Arcy*'); *Re*

- the measure must have a proper purpose or legitimate aim;[11]
- the measure must be rationally connected to that purpose, meaning that it actually helps to achieve that purpose;[12]
- the measure must be necessary, meaning the purpose cannot be achieved in some other way that has a lesser impact on human rights;[13] and,
- the measure must strike a fair balance between its purpose and the impact on human rights.[14]

In combination, these provisions mean that whenever an act, decision or statutory provision in Queensland limits a human right, subject to certain exceptions, that limit must now be justified using the test of proportionality in s 13. In this way, the *Human Rights Act* introduces a 'culture of justification'.[15] The question explored in this article is what this new culture of justification means for public servants and lawyers who act for government.

## III How the *Human Rights Act* Impacts the Ethical Duties of Public Servants

### A *The Ethical Duties of Public Servants Pre-Human Rights*

Public servants in Queensland are required to comply with the Code of Conduct for the Queensland Public Service.[16] The Code of Conduct reflects the ethics values set out in the *Public Sector Ethics Act 1994* (Qld). According to those values, public servants have a 'duty to uphold the system of government'.[17] Our system of government is one of responsible government, meaning that the executive government is carried out by Ministers who are answerable to Parliament, and through Parliament to the people.[18] Thus, public servants have a 'duty to operate within the framework of Ministerial responsibility to government, the Parliament

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*Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449 [148] (Warren CJ) ('*Re Major Crime*'); *R v Oakes* [1986] 1 SCR 103, 138–40 [69]–[71] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ) ('*R v Oakes*'); *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J), 40–1 [103]–[104] (Tipping J), 69 [203]–[204] (McGrath J) ('*R v Hansen*'); *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80 (Lord Clyde for the Judicial Committee); *Huang v Secretary of State for the Home Department* [2007] 2 AC 167, 187 [19] (Lord Bingham for the Judicial Committee); *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 790–1 [73]–[74] (Lord Reed JSC).

11 *Human Rights Act* (n 5) s 13(2)(b).

12 Ibid s 13(2)(c).

13 Ibid s 13(2)(d).

14 Ibid ss 13(2)(e)–(g).

15 See generally n 1.

16 *Public Sector Ethics Act 1994* (Qld) s 12H.

17 Ibid s 8(1)(a).

18 *Constitution of Queensland 2001* (Qld) s 42(2). See also *Comcare v Banerji* (2019) 267 CLR 373, 436–7 [148] (Gordon J) ('*Comcare*').

and the community'.[19] With the burden of responsibility, Ministers also have democratic legitimacy. For this reason, they have the final say on policy, not public servants.[20]

The origins of responsible government can be traced back to the Glorious Revolution of 1688.[21] However, it was the expansion of the franchise in England from the 1830s that gave ministerial responsibility its democratic hue: Ministers became responsible indirectly to the people through a Parliament that reflected the will of the people.[22] Around the same time, the increasing size and complexity of government led to the Northcote-Trevelyan civil service reforms, which replaced ministerial patronage with a permanent professional public service based on competitive recruitment and promotion.[23] As a permanent institution, the civil service built an ethos of political neutrality in order to serve successive governments, irrespective of which political party was in power. Queensland inherited responsible government upon separation from New South Wales in 1854.[24] Soon afterwards, Queensland also adopted the British model of a permanent civil service.[25]

Since the mid-1800s, the professionalism of the public service has centred around two key duties:[26] (1) to give full and frank advice, but (2) once the government has made a decision with the benefit of that advice, to implement whatever that decision may be.[27] As long ago as 1929, the Head of the UK Home Civil Service, Sir Warren Fisher, said:

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19 *Public Sector Ethics Act 1994* (Qld) s 8(1)(c).

20 *Comcare* (n 18) 437–8 [150] (Gordon J). 'Were this not so, the result would be government by the unelected': Ian Killey, *Constitutional Conventions in Australia* (Anthem Press, 2014) 116, quoting Treasury Board of Canada Secretariat, *Meeting the Expectations of Canadians, Review of the Responsibilities and Accountabilities of Ministers and Senior Officials, Report to Parliament* (President of the Treasury Board, 2005) 13.

21 Alpheus Todd, *On Parliamentary Government in England: Its Origin, Development, and Practical Operation* (Longmans, Green & Co, 1867) vol 1, 8, 45–6.

22 Elizabeth Wicks, *The Evolution of a Constitution: Eight Key Moments in British Constitutional History* (Hart Publishing, 2006) 61, 76–7.

23 Stafford H Northcote and C E Trevelyan, *Report on the Organisation of the Permanent Civil Service* (Report, 1854). See also *Comcare* (n 18) 400 [31] (Kiefel CJ, Bell, Keane and Nettle JJ), 413 [70] (Gageler J), 456 [203] (Edelman J).

24 *Australian Constitutions Act 1842* (Imp) 5 & 6 Vict, c 76, s 52.

25 *Civil Service Act 1889* (Qld). That original regulation of the civil service can be traced through the *Public Service Act 1896* (Qld), the *Public Service Act 1922* (Qld), the *Public Service Management and Employment Act 1988* (Qld), and the *Public Service Act 1996* (Qld), to the current *Public Service Act 2008* (Qld).

26 See William Edward Hearn, *The Government of England: Its Structure and its Development* (Robertson, 1867) 238–9, quoted in *Comcare* (n 18) 414–15 [72] (Gageler J).

27 Subject only, perhaps, to 'a fundamental issue of conscience', in which case the public servant should seek to resolve the matter, and then either carry out the instructions as resolved, or resign: Robert Armstrong, 'The Duties and Responsibilities of Civil Servants in Relation to Ministers' in Geoffrey Marshall (ed), *Ministerial Responsibility* (Oxford University Press, 1989) 140, 143–4 [10]–[11]. The importance of civil servants maintaining personal (as distinct from professional) ethical standards is only likely to come to the fore in extreme scenarios, such as the example of the role senior civil servants played in Nazi Germany in implementing the government's policy of the Final Solution: see Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, first published 1963, 2006 ed) 112–14.

> Determination of policy is the function of ministers, and once a policy is determined it is the unquestioned and unquestionable business of the civil servant to strive to carry out that policy with precisely the same good will whether he agrees with it or not. That is axiomatic and will never be in dispute. At the same time it is the traditional duty of civil servants, while decisions are being formulated, to make available to their political chiefs all the information and experience at their disposal, and to do this without fear or favour, irrespective of whether the advice thus tendered may accord or not with the minister's initial view.[28]

A public servant who provides advice that is obsequious and simply what the government wishes to hear fails to fulfil their duty to provide advice which is full and frank. Not only is such advice less useful to their Minister, it also risks reinstating the old system of patronage by another name. As Ian Killey points out, 'a public service is politicised if public servants are not able to provide frank and fearless apolitical advice, or if "public servants censor themselves as political sycophants"'.[29] If necessary, public servants must be bold enough to say to their Minister, as one apparently did in England in the 1920s, 'if you will do such a silly thing, of course you must, but is it essential to you to do it in that silly way'?[30] Of course, public servants can ask such bold questions with more tact.

These two key duties are reflected today in the ethics values set out in the *Public Sector Ethics Act 1994* (Qld). Public servants have a 'duty to provide advice which is objective, independent, apolitical and impartial'.[31] Once decisions are made with the benefit of that advice, public servants 'are committed to effecting official public sector priorities, policies and decisions professionally and impartially'.[32] Of course, public servants also have other ethical duties,[33] but it is these two ethical duties that have endured the longest and which will tell us most about the impact of the *Human Rights Act*.

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28 Royal Commission on the Civil Service, *Minutes of Evidence Taken Before the Royal Commission on the Civil Service (1929–30)* (His Majesty's Stationery Office, 1930) 1268 [11], quoted in Ivor Jennings, *Cabinet Government* (Cambridge University Press, 3rd ed, 1959) 125. Generations later, another Head of the Home Civil Service, Sir Robert Armstrong, restated the same principle in remarkably similar terms: Armstrong (n 27) 141–2 [5].

29 Killey (n 20) 121–22, quoting RFI Smith and David Corbett, 'Responsiveness Without Politicisation: Finding a Balance' in Colin Clark and David Corbett (eds), *Reforming the Public Sector: Problems and Solutions* (Allen & Unwin, 1997) 27, 28.

30 Killey (n 20) 122.

31 *Public Sector Ethics Act 1994* (Qld) s 6(b).

32 Ibid s 8(b).

33 In particular, s 7 of the *Public Sector Ethics Act 1994* (Qld) recognises a duty to promote the public good. Notions of the public trust and the public interest are influential in the US and Canada but have been criticised as allowing public servants to determine what is in the public interest according to subjective considerations: see, eg, Bradley Selway, 'The Duties of Lawyers Acting for Government' (1999) 10(2) *Public Law Review* 114, 120–1. While that debate is important, it need not be explored in this article in order to consider the impact of the *Human Rights Act* (n 5) on the ethical duties of public servants more broadly.

## B *The New System of Government that Public Servants Uphold*

On a fundamental level, the *Human Rights Act* tinkers with the system of government that public servants are to uphold. As we saw in the last section, public servants help Ministers to be responsible to Parliament, and through Parliament to the people. The traditional view is that human rights are unnecessary in a system of responsible government. The worst excesses of executive power are curbed by holding Ministers to account in Parliament, and the worst excesses of legislative power are curbed by holding Parliament to account at the ballot box. As Sir William Harrison Moore said in 1902, 'the rights of the individual are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power'.[34] On this view, should Parliament abuse its power, it is up to 'the people themselves to resent and reverse' the abuse.[35] The traditional faith in parliamentary supremacy was formed at a time when it was thought that the only alternative on offer was the American model of entrenching a bill of rights and giving unelected judges the final say about human rights.

By passing the *Human Rights Act*, the Queensland Parliament has acknowledged that ministerial responsibility and democratic elections do not always guarantee respect for human rights. The Queensland Parliament also recognised that the American model is not the only alternative on offer. Beginning in 1990, one by one, New Zealand, the United Kingdom, the ACT and Victoria have all shown that there is a third way, what Stephen Gardbaum terms the 'new Commonwealth model of constitutionalism'.[36] Queensland's *Human Rights Act* follows in that Commonwealth tradition by adopting a 'dialogue model' for the protection of human rights, meaning that Parliament has the final say about the protection of human rights, not the courts. The dialogue model also harnesses the accountability mechanisms of responsible government and democracy. Through statements of compatibility, Ministers must now be upfront with Parliament about whether any legislation they propose would be compatible with human rights.[37] Parliamentary committees then scrutinise Bills for compatibility with human rights and double check the Minister's workings.[38] When these processes reveal that the proposed legislation would not be compatible with human rights,

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34 William Harrison Moore, *The Constitution of the Commonwealth of Australia* (John Murray, 1902) 329. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136, 139–40 (Mason CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27] (French CJ, Kiefel, Bell and Keane JJ), 226 [110]–[111] (Gageler J), 258 [219] (Nettle J) ('*McCloy*'); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 68 [87] (Gageler J).

35 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

36 Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49(4) *American Journal of Comparative Law* 707; Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice* (Cambridge University Press, 2013).

37 *Human Rights Act* (n 5) s 38.

38 Ibid s 39.

Parliament is 'required to confront that choice squarely'[39] and 'accept the political cost'.[40] The *Human Rights Act* not only works to bring human rights questions to the attention of Parliament and the people, it also safeguards their say by protecting human rights that are essential to a functioning democracy, including the right to take part in public life.[41] Indeed, as the preamble states, '[h]uman rights are essential in a democratic and inclusive society'. In this way, the *Human Rights Act* moves beyond a narrow view of democracy as brute majoritarianism to a richer conception of democracy, in which 'each citizen ha[s] not only an equal part in government but an equal place in its concern and respect'.[42]

What all of this means is that public servants in Queensland now work to uphold a subtly, yet profoundly, different system of government. Public servants are no longer mere tools to pursue the public good at any cost. In a system of government committed to self-restraint, it is ultimately public servants who do the restraining. They are now like Ulysses' crew who tied him to the mast of the ship to help him resist the lure of the Sirens' call. In one sense, this is a new and uncomfortable position for public servants to find themselves in. In another sense, none of this is revolutionary. If public servants were not counselling against the worst excesses of executive and legislative power before the *Human Rights Act*, then they were not doing their job of giving frank advice to assist Ministers in their responsibility to Parliament. However, as will be seen, the *Human Rights Act* does bring a new clarity to old duties.

### C *Public Servants Developing and Implementing Policy Post-Human Rights — New Rights and New Duties*

The *Human Rights Act* affects public servants in two ways. It imposes new duties on them to act compatibly with human rights, but it also extends new human rights to public servants. We argue that nothing in the *Human Rights Act* displaces the two core ethical duties of public servants: (1) to fearlessly advise in the formulation of policy, and then (2) to loyally implement the policy choices of the government of the day. Rather, a human rights framework reinforces those ethical duties and offers public servants a more detailed roadmap for how to go about fulfilling their ethical duties.

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39 *Minogue v Victoria* (2018) 264 CLR 252, 277 [76] (Gageler J) (albeit in relation to the override clause) ('*Minogue v Victoria*').

40 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131 (Lord Hoffman) (albeit in relation to the principle of legality).

41 *Human Rights Act* (n 5) s 23.

42 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996) 70.

Public servants are, of course, human beings. By virtue of being human, they hold human rights,[43] some of which are critical to fulfilling the ethos of public service. For example, the right of equal access to the public service[44] helps to ensure a diverse and professional public service appointed on merit.[45] And it is only by exercising their freedom of expression[46] that public servants can give full and frank advice to Ministers. As citizens, public servants also retain a right to take part in their political community.[47] Public servants do not surrender these rights upon entering the public service.[48] Indeed, the *Human Rights Act* recognises that human rights are inalienable and incapable of being forfeited.[49] However, the human rights of public servants do need to be balanced against the right of the community as a whole to an 'effective political democracy'.[50] An independent and apolitical public service is critical to ensuring an effective political democracy.[51]

Ethical duties that demand too much of public servants may not be compatible with human rights. Case law in Canada and Europe tells us that a duty of loyalty that prevents a public servant from making allegations of corruption would be incompatible with their freedom of expression.[52] Likewise, a blanket ban on all public servants being a member of a political party would not strike a fair balance between the human rights of public servants and the need for an apolitical public service.[53] For example, it would go too far to prevent school teachers from belonging to a political party. In Queensland, the Code of Conduct recognises this by stating, '[o]ur work as a public service employee does not remove our right to be active privately in a political party, professional organisation or trade union.'[54] On the other hand, even deep limits on the political rights of public servants may be justified if the measure is targeted at particular public servants for whom there is a particular need for independence. For example, the Electoral Commission of

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43 See *Human Rights Act* (n 5) Preamble cl 2, s 11.

44 Ibid s 23(2)(b).

45 Human Rights Committee, *General Comment No 25*, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (27 August 1996) annex V ('*General Comments under Article 40, Paragraph 4 of the International Covenant on Civil and Political Rights*') 7 [23]. We contend that the right of equal access to the public service is largely fulfilled by the merit principle set out in s 27 of the *Public Service Act 2008* (Qld). Of course, to ensure a truly diverse public service, there may need to be special measures or affirmative action as envisaged by s 15(5) of the *Human Rights Act* (n 5): see, eg, *Re Ipswich City Council* [2020] QIRC 194, [54]–[66] (Merrell DP).

46 *Human Rights Act* (n 5) s 21.

47 Ibid s 23(1).

48 *Lane v Franks*, 573 US 228, 231 (Sotomayor J for the Court) (2014).

49 See *Human Rights Act* (n 5) Preamble cl 2, s 41.

50 *Ahmed v United Kingdom* (2000) 29 EHRR 1, 35–7 [49]–[54]. See also *Goryaynova v Ukraine* (2021) 73 EHRR 4, 102 [49] ('*Goryaynova*').

51 Albeit in the context of the implied freedom of political communication, see *Comcare* (n 18) 399 [31], 404–5 [42] (Kiefel CJ, Bell, Keane and Nettle JJ), 423 [100]–[101] (Gageler J), 439 [155] (Gordon J), 451–2 [190], 455–6 [202] (Edelman J).

52 *Goryaynova* (n 50) 102 [50], 104–5 [61].

53 *Osborne v Canada (Treasury Board)* [1991] 2 SCR 69, 100 (Sopinka J for Sopinka, Cory and McLachlin JJ); *Vogt v Germany* (1996) 21 EHRR 205, 237–9 [59]–[61]. See also *Comcare* (n 18) 422 [98] (Gageler J).

54 Public Service Commission, *Code of Conduct for the Queensland Public Service* (at 1 January 2011) 6 [1.4].

Queensland must stand above any suggestion of party politics to ensure trust in the outcome of elections. Accordingly, it may be legitimate to demand that the Commission's employees forfeit any membership of a political party.[55]

For the most part, it is clear that the human rights of public servants do not trump their ethical duties to provide impartial advice and to faithfully implement government policies. They cannot rely upon their freedom of conscience[56] to thwart government policy. They cannot exercise their freedom of expression[57] to give advice to a Minister that is subjective, partisan or partial. This was recently made clear by the Queensland Industrial Relations Commission in the case of *Gilbert v Metro North Hospital Health Service*.[58] That case concerned an alleged breach of the Public Service Code of Conduct by a nurse for speaking to the media without making clear she was speaking in her capacity as a representative of a trade union, rather than as a public service employee. The Industrial Relations Commission found that the Code of Conduct limits freedom of expression under the *Human Rights Act*, but that that limit is justified by the need to maintain 'a high performing apolitical public service'.[59] Ultimately, 'a public sector employee cannot contravene the behavioural expectations of their employer and expect immunity in reliance on the [*Human Rights Act*] in respect of their rights to freedom of expression and freedom of association'.[60] Otherwise, the human rights of public servants will come at the cost of an effective political democracy.

New rights are only one side of the coin. The other side of the coin is that the *Human Rights Act* imposes new human rights obligations on 'public entit[ies]' under s 58. It is clear that public servants are 'public entit[ies]'.[61] But do they owe these human rights obligations when carrying out their functions of advising Ministers and implementing government policy?

There are good arguments that public servants are not directly subject to these human rights obligations when helping to formulate policy or to implement policy. In the context of the *New Zealand Bill of Rights Act 1990* (NZ), Andrew Butler and Petra Butler have argued that 'policy development work, including proposals in Cabinet papers', are not caught by the obligation to act compatibly with human rights, because they do not amount to 'acts' at all.[62] They have 'no legal or

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55 *Re Victorian Electoral Commission* (2009) 31 VAR 445, 459 [90], 460 [92], [99], 465–6 [139]–[140] (Harbison VP). The *Electoral Act 1992* (Qld) does disqualify party members from certain roles in the Electoral Commission of Queensland: see ss 13(b), 22(4), 25(2)(b), 30(4), 31(2)(b), 32(2)(b), 32A, 121C(3).

56 *Human Rights Act* (n 5) s 20(1).

57 Ibid s 21.

58 [2021] QIRC 255.

59 Ibid [375] (O'Connor VP). See also at [376]–[380], [473]. However, those observations may be obiter dicta given that the Commission found there was no piggy-back cause of action available in respect of the applicant's complaints about the Code of Conduct: at [358].

60 Ibid [377].

61 *Human Rights Act* (n 5) s 9(1)(b).

62 Andrew Butler and Petra Butler, *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, 2nd ed, 2015) 116 [5.2.11].

practical effect or status'.[63] Arguably, for the same reasons, policy development in Queensland might not amount to an 'act' or 'decision', such that s 58 of the *Human Rights Act* does not apply.

The counterargument is that the *Human Rights Act* is intended to apply to all acts and decisions of public entities, no matter how large or small the action, and no matter how junior or senior the public entity: the 'consideration of human rights is intended to become part of decision-making processes at all levels of government'.[64] Further, 'Parliament in enacting [s 58 of the *Human Rights Act*] clearly intended that human rights would be considered from the early stages of the development of government policy'.[65] On this view, public servants have an obligation to think about human rights in everything they do, including the formulation of policy.

But even on this view, public servants are largely shielded from scrutiny before the courts by the 'piggyback clause' in s 59 of the *Human Rights Act*. The piggyback clause provides that a person can only challenge a public entity's act or decision on human rights grounds if the person is able to say that the public entity's act or decision was already unlawful for some other reason. For policy work, any piggyback cause of action is likely to lie against the person ultimately responsible for the policy: generally, a more senior public servant or the Minister.[66]

Consequently, in the vast majority of cases, the public servant's obligation under s 58 of the *Human Rights Act* will likely be an imperfect obligation: they have to comply with it, but there are no legal consequences if they do not.[67] That the obligation is imperfect does not detract from its importance. Still, public servants should not shy away from giving full and frank advice for fear that they will be acting unlawfully in doing so. For example, they should not hesitate to recommend that an override declaration be enacted where the government can only achieve its policy objective by breaching human rights, even though the

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63 Ibid.

64 *Waratah Coal Pty Ltd v Youth Verdict Ltd* [2020] QLC 33, [43] (Kingham P) ('*Waratah Coal*'), quoting *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 184 [185] (Emerton J) ('*Castles*'). See also *Bare v Independent Broad-Based Anti-Corruption Commission* (2015) 48 VR 129, 203 [235] (Tate JA): 'the Charter [is] intended to have a normative effect on the conduct of public authorities' ('*Bare*').

65 *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 503 [195] (Dixon J) ('*Certain Children [No 2]*').

66 See *Minogue v Dougherty* [2017] VSC 724, [8]–[11], [76]–[78] (Dixon J) (where the absence of a delegation suggested that the prison Governor was the appropriate public entity, not the more junior prison officer whose decision was challenged).

67 However, it should be noted that a breach of s 58(1) of the *Human Rights Act* (n 5) may be the subject of a complaint to the Queensland Human Rights Commission under pt 4, even if the complainant does not have available an independent cause of action.

recommendation itself may not be compatible with human rights.[68] The *Human Rights Act* allows for this course of action.[69]

Further, once the Minister has landed upon a policy choice, arguably, a public servant cannot decline to implement the policy on human rights grounds. The Directors-General — who head up the public service for each department — are required to follow the directions given by their Minister, and they are required to implement goals in accordance with the government's policies and priorities.[70] Below the Director-General, the public servants of each department have an obligation at common law to follow any lawful and reasonable direction given in the course of their employment, which would include a direction to implement the policy of the government of the day.[71] Failure to do so may give rise to disciplinary action.[72] Arguably, this means that the exception in s 58(2) of the *Human Rights Act* applies. That exception provides that public entities are relieved of their human rights obligations under s 58(1) where 'the [public] entity could not reasonably have acted differently or made a different decision … under law'.[73] The counterargument would be that the public entity still has a discretion not to follow the direction.[74] This is because the common law duty of employees is only to comply with 'lawful' directions, and a direction which breaches s 58(1) would not be 'lawful'. However, a breach of s 58(1) is a non-jurisdictional error of law, meaning that Parliament intended for the act or decision to have continuing validity despite the breach.[75] That is, Parliament intended for a direction to a public servant in breach of s 58(1) to be valid, even though it is 'unlawful'. It is unlikely that a public servant can ignore a valid direction because they consider it would breach human rights. At least, '[i]t would be a brave officer who chose in such circumstances to disobey and chance his or her luck with testing the [lawfulness of the direction] in the courts.'[76] Unless and until a public servant takes that drastic step, the direction would remain binding, such that s 58(2)

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68 An example might be a recommendation to include an override declaration for national uniform legislation in order to ensure that the application of the *Human Rights Act* (n 5) in Queensland does not result in a different interpretation in Queensland, compared to another jurisdiction, undermining the objective of uniformity. See, eg, *Legal Profession Uniform Law Application Act 2014* (Vic) s 6; Explanatory Memorandum, Legal Profession Uniform Law Application Bill 2013 (Vic) 4. Cf Michael Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Victorian Government Printer, 2015) 203–9 (recommendation 47).

69 *Human Rights Act* (n 5) s 43. In relation to the Victorian Charter, see *Minogue v Victoria* (n 39) 277 [75]–[76] (Gageler J).

70 *Public Service Act 2008* (Qld) ss 98(1)(a), 100.

71 *R v Darling Island Stevedoring & Lighterage Co Ltd; Ex parte Halliday; Ex parte Sullivan* (1938) 60 CLR 601, 621–2 (Dixon J); *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 362 [117] (Finn J).

72 *Public Service Act 2008* (Qld) s 187(1)(d).

73 *Human Rights Act* (n 5) s 58(2).

74 For Victorian authority that the equivalent exception in the Victorian Charter applies where the public entity does not have a discretion, see *PJB* (n 1) 423 [230] (Bell J); *Bare* (n 64) 201 [227] (Warren CJ), 234 [324], 235–6 [326] (Tate JA), 301 [547] (Santamaria JA).

75 *Human Rights Act* (n 5) s 58(6)(a).

76 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 201 [4.70].

would apply to relieve them of their human rights obligations. Accordingly, public servants should not withhold their advice or decline to implement policy choices for fear of breaching their own human rights obligations.

### D *Consideration of Human Rights by Proxy*

Whether or not policy officers owe human rights obligations themselves, it is clear they will be advising entities that do have such obligations. The consideration public entities give to human rights is inextricably linked to the consideration given by the ultimate decision-maker. When a Minister introduces a Bill into the Legislative Assembly, they must set out in a statement of compatibility whether, in their opinion, the Bill is compatible with human rights.[77] Ministers can only form that opinion with the benefit of the full and frank advice of public servants. Further, when a Minister makes a major decision — such as a decision to grant a mining approval[78] — they must do so in a way that is compatible with human rights.[79] Ministers will rely on full and frank advice to come to such a conclusion. Some public servants themselves will also make important decisions, which must be compatible with human rights. For example, the Director-General of the Department of Justice and Attorney-General makes important decisions about blue cards under the *Working with Children (Risk Management and Screening) Act 2000* (Qld), which have repercussions for access to employment as well as the safety of children.[80] In turn, the Director-General will rely on the advice of more junior public servants about whether the decision is compatible with human rights. When providing advice to the Minister or more senior public servants, public servants may not themselves be exposed to litigation or a complaint for failing to consider human rights. But it would be remiss of them not to turn their minds to the human rights obligations of Ministers or more senior public servants, and to provide advice about whether proposed legislation, acts or decisions would be compatible with human rights.

The risk of not doing so was borne out in *Certain Children v Minister for Families and Children [No 1]* ('*Certain Children [No 1]*'), the first iteration of the *Certain Children* litigation in Victoria.[81] A briefing paper had been prepared for the Minister to support a decision to gazette the Grevillea unit — a wing of an adult maximum security prison — as a 'youth justice centre'.[82] The conditions in the Grevillea unit were harsh. Children were kept in solitary confinement in cells built

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77 *Human Rights Act* (n 5) ss 38(1), (2).
78 See, eg, *Waratah Coal* (n 64) [53] (Kingham P).
79 *Human Rights Act* (n 5) s 58.
80 See, eg, *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152 (Member Stepniak) (albeit in relation to the subsequent human rights obligations of QCAT).
81 *Certain Children v Minister for Families and Children [No 1]* (2016) 51 VR 473 ('*Certain Children [No 1]*').
82 Ibid 478 [17] (Garde J).

for adult men for up to 20 hours a day, the children were handcuffed when being escorted to exercise yards, and corrections officers carried capsicum spray.[83]

There could have been little doubt that the human rights of the children were, at the very least, raised on the facts of the decision. Yet, in the 14 paragraphs that made up the briefing paper to the Minister, there was no mention of human rights at all. In the absence of any hint that human rights had been considered, Garde J noted that the serious impact on human rights of the children was 'unplanned and largely unforeseen':

> It is not a situation where a meticulous decision-maker fully evaluated the human rights in question coming to a careful and controlled decision limiting the impact on human rights.
>
> Rather the impacts on human rights were collateral and unintended in the circumstances that occurred. They were not proportionate. There was no diligent or methodical analysis of the nature of the human rights, the purpose, nature, extent or importance of any limitation. There was no consideration as to whether there were less restrictive means available. The consequences were serious …[84]

The complete failure to consider human rights meant that the Minister's decision was unlawful under the procedural limb. Justice Garde made a declaration to that effect. Thus, a public servant's failure to consider human rights can have very real consequences for the person they are advising, as well as for the government more broadly.[85]

During the transition to a culture of justification, it is only natural that public servants will be reluctant to engage with human rights, being unfamiliar with the concepts and wary of the risks. Yet, some of the reasons for hesitancy people may have should be dispelled. First, policy objectives and human rights are not mutually exclusive. In fact, the ultimate objective of many policies is the fulfilment of human rights.[86] Take, for example, the implementation of policy measures to enforce social distancing requirements and other COVID-19 responses. The goal of those measures was to protect the health and safety of the community in a global pandemic. Protection of health and safety by the State of its citizens is the fulfilment of the right to life.[87] Similarly, legislation designed to strengthen the response to domestic and family violence fulfils the right to

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83 Ibid 482 [50], 484 [62], 485 [65], 491 [108] (Garde J).

84 Ibid 515 [221]–[222] (Garde J).

85 Conversely, '[a] detailed brief that informed the decision' may lead a court to give some deference to the decision when reviewing on human rights grounds: *Certain Children [No 2]* (n 65) 508 [217] (Dixon J).

86 Vanessa MacDonnell, 'The Civil Servant's Role in the Implementation of Constitutional Rights' (2015) 13(2) *International Journal of Constitutional Law* 383, 388.

87 *Human Rights Act* (n 5) s 16. See, eg, *Innes v Electoral Commission of Queensland [No 2]* (2020) 5 QR 623, 683 [295] (Ryan J) ('*Innes*'); Statement of Compatibility, COVID-19 Emergency Response Bill 2020 (Qld) 22.

security of the person and the protection of families and children.[88] Right to information legislation is the fulfilment of freedom of expression.[89] Facilitating traditional Torres Strait Islander adoption practices is the fulfilment of cultural and kinship rights.[90] Policy goals are very often human rights goals.

Second, the questions asked by the test of proportionality in s 13 of the *Human Rights Act* are the same questions that are already asked in any sound policy-making process. All of the elements of the test in s 13 reinforce good policy work.[91] It asks all the same questions: what am I doing? Why am I doing it?[92] Is it going to work?[93] Is there something else I could do that better respects the rights of individuals?[94] Does this strike a fair balance between the competing considerations?[95] At its core, s 13 really just offers public servants an opportunity to double check their policy rationale (or the policy rationale offered by the government). While there is nothing new in policy officers second-guessing the policy proposals of government when providing advice, there is something new in the sophistication demanded by the proportionality test in s 13.[96] It gives rigour to the advice that public servants must give to their Minister or to the government.

As Mary Dawson, a very senior public servant in Canada, put it after a decade of the *Canadian Charter of Rights and Freedoms*:

> The *Charter* has had a salutary effect on the policy-development process. Certainly, it has complicated the responsibilities of the policy planner. However, the need to identify evidence, rationales, and alternatives, when assessing policies for *Charter* purposes, has enhanced the rationality of the policy-development process.[97]

Of course, the gold standard of policy work is not always possible. The reality is that public servants do not always have the luxury of time to consider the issues and gather evidence when formulating policy. In the face of a direction from above, they may also not be at liberty to adapt the policy to avoid impacts on

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88 *Human Rights Act* (n 5) ss 26, 29(1). It is clear victims of crime have human rights: see, eg, *R v Mills* [1999] 3 SCR 668, 718 [72], 723–4 [85], 727 [90], 729 [94] (McLachlin and Iacobucci JJ for L'Heureux-Dubé, Gonthier, McLachlin, Iacobucci, Major, Bastarache and Binnie JJ).

89 *Human Rights Act* (n 5) s 21. See, eg, *T34 and Queensland Police Service* [2020] QICmr 1, [26], citing *XYZ v Victoria Police* (2010) 33 VAR 1, 98 [573] (Bell J); *Horrocks v Department of Justice* [2012] VCAT 241, [110] (Ginnane J).

90 *Human Rights Act* (n 5) s 28(2)(c). See, eg, Statement of Compatibility, Meriba Omasker Kaziw Kazipa (Torres Strait Islander Traditional Child Rearing Practice) Bill 2020 (Qld) 2.

91 Chris Humphreys, Jessica Cleaver and Catherine Roberts, 'Considering Human Rights in the Development of Legislation in Victoria' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 209, 215 [7.40]; Mattias Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4(2) *Law & Ethics of Human Rights* 141, 150.

92 *Human Rights Act* (n 5) s 13(2)(b).

93 Ibid s 13(2)(c).

94 Ibid s 13(2)(d).

95 Ibid ss 13(2)(e)–(g).

96 *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547 [27] (Lord Steyn) (the proportionality criteria 'are more precise and more sophisticated').

97 Mary Dawson, 'The Impact of the Charter on the Public Policy Process and the Department of Justice' (1992) 30(3) *Osgoode Hall Law Journal* 595, 603.

human rights. The *Human Rights Act* will often bend to meet the reality of those pressures, but sometimes the *Human Rights Act* will demand a higher standard of policy work despite those pressures.

Insofar as these pressures are time constraints, the time available in which to make a decision may be relevant to the level of consideration that must be given to human rights.[98] But time constraints will not excuse a complete failure to consider human rights. As Garde J said in *Certain Children [No 1]*:

> In an emergency or extreme circumstance, or where critical decisions have to be made with great haste, there are grave risks that human rights may be overlooked or broken, if not life or limb endangered. The existence of an emergency, extreme circumstance or need for haste confirms, not obviates, the need for proper consideration to be given to relevant human rights. [99]

Public servants may need to make time to consider the impact on human rights, and to be brave enough to ask for more time when the impact on human rights cannot be properly thought through in the time available.[100]

When it comes to evidence, public servants need to remember that the burden of justifying a limit on human rights rests with the State or the public entity.[101] Evidence will not always be needed to justify limits on human rights. For example, in some cases it may be 'obvious or self-evident' that the measure is effective and that no other alternative would be as effective.[102] But more often than not, evidence will be required. Not only that, the evidence will need to be 'cogent and persuasive'.[103] In this way, s 13 reinforces an evidence-based approach to policy development. Sometimes it will require a public servant to advise their Minister that a limit on human rights cannot be justified unless evidence can be found to support the measure.

Sometimes, the government will have a rigid policy agenda, which policy officers have little ability to influence. Their role may be confined to attempting to justify the limits the policy imposes on human rights. Retrofitting is not bad in principle, provided the outcome of the justification analysis is not predetermined. If a policy's impact on human rights cannot be justified, a public servant has an ethical duty to tell their Minister, and all the more so if they think their Minister

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98 *Minogue v Thompson* [2021] VSC 56, [66], [69] (Richards J) ('*Minogue v Thompson*').

99 *Certain Children [No 1]* (n 81) 508 [188].

100 On the impact on proposed legislation of compressed timeframes, see: Humphreys, Cleaver and Roberts (n 91) 219 [7.70].

101 *R v Oakes* (n 10) 136–7 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ); *Multani v Commission Scolaire Marguerite-Bourgeoys* [2006] 1 SCR 256, 282 [43] (Charron J); *R v Hansen* (n 10) 42 [108] (Tipping J); *Re Major Crime* (n 10) 448–9 [147] (Warren CJ); *PJB* (n 1) 441–2 [310] (Bell J); *Owen-D'Arcy* (n 10) [108], [128], [175] (Martin J).

102 *R v Oakes* (n 10) 138 [68] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ). See also *R v Hansen* (n 10) 76 [232] (McGrath J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 572–3 [161] (Bell J).

103 *R v Oakes* (n 10) 138 [68] (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ), quoted in *Re Major Crime Act* (n 10) 448–9 [147] (Warren CJ); *Owen-D'Arcy* (n 10) [109], [133] (Martin J).

does not want to hear it. The public service risks being politicised if public servants only provide the advice their Ministers want to hear.

Public servants have a particularly important role to play in the final balancing stage of the proportionality analysis. To conclude that a proposed measure would be compatible with human rights, the public servant must form the view that it would strike a fair balance between the benefit to be gained from achieving the purpose of the measure, weighed against the harm it would cause to human rights.[104] In considering the harm, the policy officer must place themselves in the shoes of the rights-bearers who will be impacted by the measure and consider what is at stake. This final weighing analysis involves a value judgment.[105] But the nature of the value judgment should not be misunderstood. It is a judgment informed by the values of our society, including respect for human rights.[106] It is not a judgment informed by the *personal* values of any particular public servant; it does not provide a backdoor for subjective or partisan advice from public servants.[107]

Some might think that public servants should refrain from entering into the value judgment in the final balancing exercise in s 13(2)(g), leaving the most political of the stages of s 13 to those who are politically accountable. But public servants would shirk their duty to provide full and frank advice if they provided incomplete advice on whether a measure is compatible with human rights. To skip the final weighing analysis would be to skip the most important step in answering that question. Moreover, public servants will give bad advice if they simply advise a Minister that the measure will strike a fair balance if the Minister thinks it will. Because our society now places value on human rights, the value judgment is not a blank cheque, even for Ministers.

In helping the Minister to balance the competing values, the public servant must bring to the Minister's attention all available information that bears on the value judgment. This may include statements from international materials and case law about the relative importance of the human right at stake, with which the Minister may not be familiar. For example, if *ad hominem* legislation is being considered to detain a particular person indefinitely, the public servant has a duty to raise the growing international consensus that such legislation would necessarily strike an unfair balance between the need to protect the safety of the

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104 *Human Rights Act* (n 5) ss 13(2)(e)–(g); Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 340.

105 *Bank Mellat v Her Majesty's Treasury [No 2]* [2014] AC 700, 790–1 [74] (Lord Reed); *McCloy* (n 34) 219 [89] (French CJ, Kiefel, Bell and Keane JJ).

106 *R v Oakes* (n 10) 136 (Dickson CJ for Dickson CJ, Chouinard, Lamer, Wilson and Le Dain JJ).

107 Dawson (n 97) 598.

community, on the one hand, and the right not to be subjected to cruel, inhuman or degrading punishment,[108] on the other hand.[109]

Not only must public servants bring relevant information to the Minister's attention, as policy officers, their role extends to advising the Minister about where the balance should be struck. This can legitimately include a recommendation to give greater protection to human rights than the bare minimum required to meet the threshold of 'compatibility with human rights'.[110] Policy can strive for better than that. Of course, it is the Minister's prerogative to determine where the balance should lie, as well as the level of risk they are willing to incur that a court will disagree, but that does not diminish the task of the policy officer to provide frank and fearless advice. Section 13 not only provides public servants with a platform for giving more rigorous advice, it requires them to do so, consistently with their ethical duties.

## IV How the *Human Rights Act* Impacts the Ethical Duties of Lawyers Acting for Government

### A *The Ethical Duties of Lawyers Acting for Government Pre-Human Rights*

Solicitors and barristers hold distinct ethical obligations. If they are also public servants, they will have overlapping ethical duties,[111] but their ethical duties as public servants may be attenuated by the nature of their role as a lawyer. Legal practitioners are required to act in their client's best interests,[112] 'unaffected by their own interests or those of other person(s) or by their perception of the public interest'.[113] Of course, lawyers have other ethical duties, including an overriding duty to the court. However, it is the duty to act in the client's best interests that will tell us most about the impact of the *Human Rights Act* on the role of a lawyer.

That a lawyer's client is the government does not alter the duty to act in that client's best interests. Lawyers acting for government serve the public interest by

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108 *Human Rights Act* (n 5) s 17(b).

109 See *Vinter v United Kingdom* (2016) 63 EHRR 1, 38 [114]; *Minogue v Victoria* (n 39) 272 [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 276 [72] (Gageler J); Legal Affairs and Safety Committee (Qld), *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021* (Report No 15, November 2021) 35–7.

110 *Human Rights Act* (n 5) s 8.

111 Selway (n 33) 123.

112 Queensland Law Society, *Australian Solicitors Conduct Rules 2012* (at 1 June 2012) rr 4.1.1, 12.1; Bar Association of Queensland, *Barristers' Conduct Rules 2011, as amended* (at 23 February 2018) rr 4(d), 37. The Conduct Rules do not apply to government lawyers who do not hold a practising certificate: *Legal Profession Act 2007* (Qld) s 12. Nonetheless, government lawyers still hold ethical duties, and the Conduct Rules remain a useful reference point: QLS Ethics and Practice Centre, *Guidance Statement No 19 Government Lawyers: Independence and Privilege* (2020) 2 [3], 6 [8].

113 G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 7th ed, 2021) 122 [4.05].

seeking to preserve the legislative and executive power of the State, so that the legislature and the executive have the widest scope possible in which to pursue the public good.[114] That is why, in constitutional cases, the Attorney-General will often intervene in court proceedings to support the validity of legislation, even though the government of the day would not necessarily introduce similar legislation. The Attorney-General is concerned with preserving the State's power, not necessarily to exercise that power today, but in case that power is one day needed to achieve the public interest. Lawyers advise government about the limits of legislative and executive power, and trust that whatever government does within those parameters will be in the public interest. The branches of government that have been elected by the public are, after all, best qualified to say what is in the public interest.[115] The traditional view is that lawyers avoid invoking their own personal views about the public interest by giving their client advice 'only about the law; the law is a lawyer's area of expertise and they should confine themselves to that expertise'.[116] As Bradley Selway, a former Solicitor-General for South Australia, put it:

> Considerable care needs to be taken to ensure that any role of lawyers in relation to the ethical behaviour of governments, their agencies and employees does not become an excuse for the involvement of lawyers in moral and policy issues for which they may have no particular expertise and certainly have no authority.[117]

On the other hand, advice to government agencies may only be helpful if it takes account of the overall policy context. To properly advise in the overall context, lawyers may sometimes need to stray into questions of policy. Doing so is not unethical.[118] But, a lawyer advising government must make 'clear to the client what parts of the advice relate to matters where the client is bound to comply and what parts relate to matters where the client's policy opinion is the ultimate determinant'.[119] Otherwise, the client may be led to believe that the lawyer's personal views about policy have the sanction of law.

However, when advising government, sometimes lawyers must go beyond the letter of the law to the deeper legal principles at stake. According to Selway, this is because the government has a unique obligation to uphold the rule of law. 'With this in mind, the task for the lawyer acting for government is not to identify his or her own moral beliefs, but rather to identify and apply the accepted moral beliefs and practices of the relevant government system.'[120] In the Australian context, Gabrielle Appleby has identified three 'core government principles' that

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114 Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 218–23.
115 *Bare* (n 64) 305–6 n 510 (Santamaria JA).
116 Brian J Preston, 'Climate Conscious Lawyering' (2021) 95(1) *Australian Law Journal* 51, 52.
117 Selway (n 333) 121.
118 Dal Pont (n 113) 473 [13.95].
119 Selway (n 333) 121–2.
120 Ibid 122.

senior government lawyers may need to 'remind' government about when government appears to have forgotten about them. These principles are the rule of law (which includes the prohibition on arbitrary exercise of government power, protections of judicial independence and fair process, and extends at least some way towards protecting individual rights), the democratic principle and the federal principle.[121] Lurking in those core government principles is a nascent concern for human rights. But prior to the *Human Rights Act*, a lawyer would generally have been out of place if they were to provide robust and unsolicited advice about the impact of a government measure on human rights.

In the private sector, a parallel development has been the idea of corporate responsibility for human rights. In 2011, the UN Human Rights Council unanimously endorsed[122] the *UN Guiding Principles on Business and Human Rights*,[123] which set out the corporate responsibility of businesses for respecting and promoting human rights. Lawyers' associations around the world have since adapted the Guiding Principles to the work of lawyers.[124] In 2015, the International Bar Association recommended that bar associations draw 'to their members' attention the ethical considerations that a lawyer should take into account in the field of business and human rights when advising clients'.[125] The Law Council of Australia has taken up that baton, releasing a position paper in 2016, which sets out the relevance of the Guiding Principles to the Australian legal profession.[126] The emerging consensus is that lawyers have an ethical duty to give holistic advice to their clients, which extends beyond advice about risks that are strictly legal, to the financial risks and reputational risks that may flow from breaching human rights.[127] Even before the *Human Rights Act*, an emerging view was that if a lawyer has a duty to provide holistic advice to private companies, *a fortiori* they must have a duty to provide holistic advice to government.

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121 Appleby (n 114) 141.

122 Human Rights Council, *Human Rights and Transnational Corporations and Other Business Enterprises*, HRC Res 17/4, 17th sess, Agenda Item 3, UN Doc A/HRC/RES/17/4 (6 July 2011, adopted 16 June 2011) 2 [1].

123 United Nations, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.

124 See, eg, the summary in Law Council of Australia, *Business and Human Rights and the Australian Legal Profession* (Position Paper, January 2016) 11–12 <https://www.lawcouncil.asn.au/publicassets/23a50215-bed6-e611-80d2-005056be66b1/1601-Position-Paper-Business-and-Human-Rights-and-the-Australian-Legal-Profession.pdf>.

125 International Bar Association, *IBA Business and Human Rights Guidance for Bar Associations* (2015) 13 <https://www.ibanet.org/document?id=Business%20and%20Human%20Rights%20Guidance%20for%20Bar%20Associations>.

126 See Law Council of Australia (n 124).

127 See, eg, David Nersessian, 'Business Lawyers as Worldwide Moral Gatekeepers? Legal Ethics and Human Rights in Global Corporate Practice' (2015) 28(4) *Georgetown Journal of Legal Ethics* 1135, 1183–7.

### B *The Fundamental Shift in Principle for Lawyers Acting for Government*

On a fundamental level, the *Human Rights Act* draws lawyers into advising about matters within the limits of power, not only in extreme scenarios when government needs reminding about the core principles of government, but as a matter of course. Advice about whether proposed legislation would be compatible with human rights is not advice about whether Parliament *can* pass that legislation. Parliament can always enact an override declaration to wind back the operation of the *Human Rights Act*.[128] Even if Parliament does not enact an override declaration and the Supreme Court later finds that the legislation is incompatible with human rights, the legislation would remain valid.[129] Similarly, advice about whether a decision of a public entity is compatible with human rights is not advice about whether the decision is valid. Breach of the human rights obligations in s 58 is a non-jurisdictional error.[130] That is, public entities are authorised 'to go wrong' and make a decision that is not compatible with human rights.[131] Unless and until the decision is set aside on appeal or in a judicial review proceeding, it remains valid.

Of course, the *Human Rights Act* has made these legal questions, which a lawyer is qualified to answer. And in many ways, the *Human Rights Act* merely draws out more explicitly the human rights aspects of the 'core government principles', which already informed advice to government. But the lodestar for the lawyer acting for government is no longer the maximisation of State power. The *Human Rights Act* imposes self-restraint within the limits of power. When providing advice, lawyers now have a role to play in informing government about whether its legislative and executive measures remain within the bounds of its own self-imposed restraints. When conducting litigation, there remains a State interest in defending government measures on human rights grounds,[132] but not

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128 *Human Rights Act* (n 5) s 43. Parliament even has power to impliedly repeal the sunset clause in s 45(2) of the *Human Rights Act* (n 5). Victoria did this, for example, in s 74AB(5) of the *Corrections Act 1986* (Vic). Cf *Minogue v Victoria* (n 39) 277 [76] (Gageler J) (the sunset clause 'ensures that a person's human rights once overridden cannot be permanently forgotten. The justification for that person's human rights being overridden must be periodically re-evaluated'.).

129 *Human Rights Act* (n 5) ss 48(4), 54.

130 Ibid s 58(6).

131 *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 141 [163] (Hayne J) (in relation to non-jurisdictional errors generally, not non-jurisdictional errors under the *Human Rights Act* (n 5) specifically).

132 This was foreseen in the UK long before it was subject to human rights litigation: J Edwards, *The Law Officers of the Crown: A Study of the Offices of Attorney-General and Solicitor-General of England with an Account of the Office of the Director of Public Prosecutions of England* (Sweet & Maxwell, 1964) 308 n 70.

at the cost of undermining the coherence of the *Human Rights Act*.[133] That may be why the *Human Rights Act* provides the Attorney-General with a right of intervention in human rights litigation,[134] even though some manifestation of the State is likely to be a party already.[135] Whereas a public entity has an immediate interest in winning by any route, the Attorney-General represents the longer-term interest in maintaining an effective human rights system.[136] Of course, lawyers acting for the Attorney-General act on her instructions, and she has the final say on the submissions to be put to the court on how the *Human Rights Act* is intended to operate (and successive Attorneys-General may hold different views about that). But the Attorney will be aware that the whole point of allowing courts to review government measures for compliance with human rights is to allow for the possibility that sometimes the government will lose. Were it otherwise, litigation under the *Human Rights Act* would be for show and would make a mockery of human rights.

### C *Lawyers Acting for Government Post-Human Rights — New Rights and New Duties*

Apart from changes at the level of principle, how exactly does the *Human Rights Act* affect the ethical duties of lawyers who act for government? Like public servants, lawyers may have new rights and duties under the *Human Rights Act*. Again, we argue that these new rights and duties under the *Human Rights Act* do not alter the broad contours of the existing ethical duties of lawyers who act for government, but they do bring lawyers closer to the outer edges of legal advice.

Lawyers, too, believe it or not, are human beings who hold human rights. An important human right for lawyers is freedom of expression.[137] The *UN Basic Principles on the Role of Lawyers* ('*UN Basic Principles*'), adopted in 1990, recognise

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133 A parallel might be drawn to the approach of some Solicitors-General to 'resist the short-term kill, in ignorance of what the long-term aim is': Appleby (n 114) 225, quoting Thomas Pauling, former Solicitor-General of the Northern Territory. Another parallel might be the prosecutor's duty to give a full and firm presentation of the prosecution case, but not to secure a conviction at any cost, and certainly not at the cost of a fair trial. The prosecutor's role is to assist the court to arrive at the truth, 'without any concern as to whether the case is won or lost': *Livermore v The Queen* (2006) 67 NSWLR 659, 669 [48] (McClellan CJ at CL, Johnson and Latham JJ).

134 *Human Rights Act* (n 5) s 50(1).

135 A contrary view might be that the Attorney-General may only intervene where the State is not already a party. This view has been taken with respect to the Attorney-General's right of intervention under s 78B of the *Judiciary Act 1903* (Cth): *Mullholland v Australian Electoral Commission* (2003) 128 FCR 523, 529 [14] (Black CJ, Weinberg and Selway JJ). However, there is precedent in Queensland and Victoria of the Attorney-General intervening under the *Human Rights Act* (n 5) or the Victorian Charter, even though the State was already a party: *Johnston v Commissioner of Police (Qld)* [2021] QSC 275, [54] (Dalton J); *Kerrison v Melbourne City Council* (2014) 228 FCR 87, 97 [38] (Flick, Jagot and Mortimer JJ).

136 See, eg, *Hospice New Zealand v Attorney-General (NZ)* [2021] 3 NZLR 71, 77 [7] (Mallon J): '[t]he Attorney-General represents the public interest, with no particular stance one way or the other on the propriety of assisted dying'.

137 *Human Rights Act* (n 5) s 21.

that '[l]awyers like other citizens are entitled to freedom of expression'.[138] Freedom of speech is not only important to the lawyer personally, but also to their clients, on whose behalf they speak, fearlessly if need be.[139] Nonetheless, the human rights of lawyers do not trump their ethical duties. According to the *UN Basic Principles*, when lawyers exercise their human rights, they still need to conduct themselves 'in accordance with the law and the recognized standards and ethics of the legal profession'.[140] Ethical rules must be read in light of human rights,[141] and in some cases may need to be adjusted to be compatible with human rights.[142] But as a general rule, the limits on what lawyers can do under the ethical rules are justified by reference to the need to protect 'the administration of justice' as well as 'the public'.[143] Thus, for example, freedom of expression is not a licence to communicate with the court and others in a discourteous or offensive manner. Similarly, freedom of expression is not a licence to express private opinions about policy in the course of providing legal advice.

As to new duties under the *Human Rights Act*, it should first be noted that it is highly unlikely that private lawyers will have any human rights obligations under the Act. They would not be converted into 'functional' public entities[144] merely because they have a retainer to advise or act for government.[145] As public service employees, it is true that government lawyers will themselves be public entities.[146] But that does not mean that their human rights obligations (to the opposing litigant, for example) will trump their ethical duties of partisanship and fidelity to the State as their client. At general law, lawyers owe a fiduciary obligation to give undivided loyalty to their client.[147] Where there is any conflict between acting in the client's best interests and complying with human rights, the exception in s 58(2) of the *Human Rights Act* will relieve the government

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138 The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Role of Lawyers*, Havana, Cuba 27 August to 7 September 1990, [23]. These principles were 'welcome[d]' by UN General Assembly, *Human Rights in the Administration of Justice*, GA Res 45/166, 45th sess, Agenda Item 12[1], UN Doc A/RES/45/166 (18 December 1990) 279 [4].

139 *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 200 (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Lander v Council of the Law Society (ACT)* (2009) 168 ACTR 32, 51 [37]–[38], 53 [57] (Higgins CJ, Gray and Refshauge JJ); *McDonald v Legal Services Commissioner [No 2]* [2017] VSC 89, [26] (Bell J) ('*McDonald*') (overturned on appeal, but not on Charter grounds).

140 The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (n 138) [23].

141 *McDonald* (n 139) [20], [40] (Bell J).

142 Ethical duties of lawyers will not be compatible with human rights merely because they are ethical duties. Likewise, not all regulation of lawyers will be compatible with human rights: see, eg, *Steur v Netherlands* (2004) 39 EHRR 33, 713–14 [45]–[46].

143 *Histed v Law Society of Manitoba* (2007) 287 DLR (4th) 577, [60] (Steel JA, Hamilton and Joyal JJA agreeing).

144 *Human Rights Act* (n 5) s 9(1)(h).

145 Certainly, there is New Zealand authority that a lawyer who provides advice to a private client in relation to dealings with government is not thereby performing a public function for the purposes of s 3(b) of the *New Zealand Bill of Rights Act 1990* (NZ): see *Fan v The Queen* [2012] 3 NZLR 29, 42 [51] (Asher J for the Court).

146 *Human Rights Act* (n 5) s 9(1)(b).

147 Dal Pont (n 113) 225 [6.05].

lawyer of their human rights obligations.[148] This is also consistent with the *UN Guiding Principles on Business and Human Rights*, adopted in 2011, as well as the earlier *UN Basic Principles on the Role of Lawyers*, adopted in 1990. According to the *UN Basic Principles*, '[l]awyers shall always loyally respect the interests of their clients.'[149] While lawyers have a duty to 'seek to uphold human rights and fundamental freedoms', they are to do this by 'protecting the rights of their clients and in promoting the cause of justice'.[150]

Of course, there will often be occasions when government lawyers can act compatibly with human rights *and* simultaneously act in their client's best interests. In those circumstances government lawyers will likely still need to comply with their human rights obligations under s 58. For example, when lawyers provide advice to government, they can often provide advice that is both compatible with human rights and in the client's best interests (especially given the client's own human rights obligations).[151] Further, when conducting litigation, government lawyers act in accordance with the model litigant principles and the standard of 'fair play'.[152] To some extent, this involves considering the impact of litigation on others, which is entirely consistent with taking into account their human rights, such as the right to a fair hearing.[153] Beyond the conduct required by the model litigant principles, the client's interests likely take precedence.[154]

Nor does the nature of advice about the *Human Rights Act* alter the general rule that lawyers should avoid straying too deeply into questions of policy. It is true that compatibility with human rights is a question of mixed law and fact.[155] For this reason, assessing a policy proposal for compatibility with human rights 'draws [lawyers] more deeply into the facts, the balance that has been struck and the resolution of the competing interests', compared to traditional legal advice, which avoids questions of policy altogether.[156] But it is still possible to draw a

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148 In *Innes* (n 87), the applicant submitted that the Solicitor-General was a public entity and had breached his human rights obligations. Ryan J did not address this submission in the judgment and implicitly rejected it.

149 The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (n 138) [15].

150 Ibid [14].

151 Lawyers may not always be able to provide human rights compatible advice that is also in their client's best interests. For example, government lawyers may advise that it would be appropriate to enact an override declaration under s 43 of the *Human Rights Act* (n 5).

152 *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ). See also Queensland Government, 'Model Litigant Principles' (4 October 2010) <https://www.justice.qld.gov.au/___data/assets/pdf_file/0006/164679/model-litigant-principles.pdf>.

153 *Human Rights Act* (n 5) s 31.

154 Lawyers may also be shielded from scrutiny as to whether they complied with s 58 of the *Human Rights Act* (n 5) because potential litigants will not have an independent cause of action available to them, as required to agitate a breach of s 58 by the piggyback clause in s 59. In fact, doctrines such as advocates' immunity may remove independent causes of action: see *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1.

155 *Thompson v Minogue* [2021] VSCA 358, [99] (Kyrou, McLeish and Niall JJA) ('*Thompson*').

156 *PJB* (n 1) 444 [317] (Bell J) (albeit in relation to the role of a court, rather than a lawyer), quoted in *Certain Children [No 2]* (n 65) 506 [211] (Dixon J).

distinction between the policy inputs that go into a s 13 analysis, and the legal conclusion that results from a s 13 analysis. One way to do this is to mirror the approach taken by courts when reviewing a measure for compatibility with human rights.

When a court reviews an act or decision for compatibility with human rights, its jurisdiction is 'supervisory', not 'substitutionary'.[157] That means the court cannot find that the act or decision breached human rights simply because it takes a different view of the matter on the merits.[158] That said, of course, 'in the end, the Court must decide for itself whether the public authority has acted incompatibly with human rights'.[159]

In the same way, lawyers should approach their role in human rights matters as 'supervisory', not 'substitutionary'. By 'supervisory', we do not mean to suggest a hierarchy between policy officers and lawyers. We mean only that lawyers should recognise that their role is one step removed. As Vanessa MacDonnell puts it, lawyers should play a 'framing or guiding' role in a human rights context, and should 'not dictate the finer details of polic[y]'.[160] When a lawyer is asked to give advice about whether a major policy initiative is compatible with human rights, ideally a policy officer will already have attempted the justification analysis called for by s 13 (perhaps with the benefit of high-level, preliminary legal advice). The lawyer can then 'supervise' that analysis by drawing attention to any deficiencies or recommending changes to bolster compatibility with human rights. Even if a first attempt has not been made, a lawyer might still be able to undertake the justification analysis if the client has provided clear instructions regarding the policy inputs, including what the policy objective is,[161] the evidence that the measure will actually help to achieve that objective,[162] and any consideration given to alternative measures.[163] Of course, there may be other cases where the policy inputs are self-evident.[164] For example, the purpose of a statutory provision (and therefore the purpose of the limit it imposes on human rights)[165] is ultimately a question of statutory construction, for which a lawyer should not need instructions.

On the other hand, a supervisory approach would not mean eschewing questions of policy altogether. Given the exacting and fact-intensive nature of the justification analysis in s 13, the lawyer may be required to go further in second-guessing policy choices than has previously been considered appropriate.[166] For

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157 *PJB* (n 1) 443–4 [314]–[317] (Bell J); *Certain Children [No 2]* (n 65) 506–8 [211]–[216] (Dixon J); *Minogue v Thompson* (n 98) [81] (Richards J); *Owen-D'Arcy* (n 10) [146]–[149] (Martin J).

158 *PJB* (n 1) 443 [314] (Bell J).

159 *Thompson* (n 155) [100] (Kyrou, McLeish and Niall JJA). See also at [98]–[99].

160 MacDonnell (n 86) 396.

161 *Human Rights Act* (n 5) s 13(2)(b).

162 Ibid s 13(2)(c).

163 Ibid s 13(2)(d).

164 *Momcilovic* (n 4) 250 [684] (Bell J).

165 Cf *Re Application for Bail by Islam* (2010) 4 ACTLR 235, 247 [36], 308 [343] (Penfold J).

166 Dawson (n 97) 603.

example, a lawyer will need to put to their client any obvious alternative that would appear to achieve the policy objective without harming human rights (or which harms them to a lesser extent). Even if raising the alternative may imply that the client should have made a different policy choice, the lawyer's duty to their client is to advise with candour and courage. Ultimately, lawyers may need to advise that a policy proposal falls down at one of the hurdles in s 13 of the *Human Rights Act* and this may come uncomfortably close to policy advice. 'The degree of risk that will compel the advice that a proposed law [or act or decision] is [incompatible with human rights] is difficult to quantify.'[167] Nevertheless, 'lawyers have to be prepared to give a frank and realistic assessment and to state when a proposed law [or act or decision] is not likely to be acceptable.'[168] While policy officers may see this as an intrusion in the initial stages of the new human rights culture, we know from the experience overseas that the resistance to input from lawyers will likely subside as lawyers and policy officers reconfigure the way they work together in a human rights context.[169]

### D *The Problems with Lawyers Adopting a 'Substitutionary' Approach, and why Policy Officers should Take Up the Challenge of Human Rights Compatible Policy Development*

If lawyers themselves attempt to come up with the policy inputs required for a s 13 analysis, they risk 'substituting' their own views on matters of policy. That may not be unethical per se, and the experience in New Zealand, the UK and Canada suggests that, over time, lawyers may come to be embedded as 'important member[s] of the policy-development team'.[170] But the role of lawyers in Queensland has not yet evolved in that direction. Until then, a 'substitutionary' approach by lawyers may prove problematic for a number of reasons.

First, there may be forensic value in policy officers undertaking the compatibility assessment. While the *Human Rights Act* does not require public entities to keep a record of their consideration of human rights,[171] practically, such a record will be critical to meet any allegation that the public entity failed to give

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167 Ibid 598.

168 Ibid. On the courage lawyers may need when advising on human rights matters in a highly charged environment, see: Chief Justice Marilyn Warren, 'Being a Government Lawyer' (Speech, Government Lawyers Conference, 23 June 2017) 15 <https://www.supremecourt.vic.gov.au/sites/default/files/assets/2017/09/93/569bb23c7/speechgovernmentlawyersconference23062017.pdf>.

169 Dawson (n 97) 596, 599; James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (UBC Press, 2005) 493–4; Janet L Hiebert, 'Rights-Vetting in New Zealand and Canada: Similar Idea, Different Outcomes' (2005) 3(1) *New Zealand Journal of Public and International Law* 63, 70.

170 Dawson (n 97) 599. See also Hiebert (n 169) 69–70, 77; Christopher McCorkindale and Janet L Hiebert, 'Vetting Bills in the Scottish Parliament for Legislative Competence' (2017) 21(3) *Edinburgh Law Review* 319, 331.

171 *Minister for Families and Children v Certain Children* (2016) 51 VR 597, 620 [94] (Warren CJ, Maxwell P and Weinberg JA).

proper consideration to human rights as required by the 'procedural limb' in s 58. The court will 'assume that the respondent decision-maker, doubtless wishing to uphold the validity of the decision, will seek to put into evidence all such materials as will demonstrate that the relevant considerations were taken into account'.[172] As we saw with *Certain Children [No 1]*, a failure to adduce *any* evidence that human rights were considered will likely lead to a finding that the public entity breached the procedural limb.[173] But where the only evidence is set out in a legal advice, the public entity will be placed in the invidious position of having to choose whether to waive legal professional privilege or risk failing to provide sufficient evidence to satisfy the procedural limb.[174]

Another strategic consideration is that a compatibility assessment carried out by lawyers may be scrutinised more closely by a court. The standard of 'proper consideration' for the purposes of the procedural limb is a variable standard which depends on all the circumstances.[175] You will recall that, in *Certain Children [No 1]*, Garde J ruled that the decision to gazette an adult maximum-security prison as a youth justice centre was unlawful, in part because no consideration had been given to the impact on human rights. Following that ruling, a team of government lawyers prepared a human rights assessment for a fresh decision to again gazette the Grevillea unit as a youth justice centre. When the new decision was challenged in *Certain Children v Minister for Families and Children [No 2]*, one reason why Dixon J demanded a higher standard of proper consideration was that 'the Charter compatibility [had been] carried out by, or under the direction of, the VGSO [the Victorian Government Solicitor's Office]'.[176] At the very least, when lawyers are asked to prepare a human rights compatibility assessment, they should be aware of these forensic risks, and they should advise their clients where appropriate.

Second, lawyers do not necessarily have any particular expertise in matters of policy.[177] Not only do they not have general training in policy development, more likely than not, they will not have any specific knowledge about the policy proposal at hand. Generally, lawyers will be disconnected from the process of developing the policy under consideration. Because of that disconnect, there is a risk that any policy rationale that a lawyer comes up with will not reflect the actual reason for limiting human rights. We noted above that policy officers do not always have free rein in the policy choices they make. But lawyers are likely to feel

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172 Ibid 620 [95] (emphasis omitted).

173 *Certain Children [No 1]* (n 81) 510–11 [197]–[199], [202]–[203] (Garde J). See also *LG v Melbourne Health* [2019] VSC 183, [80]–[83] (Richards J).

174 Legal professional privilege may also be waived inadvertently: see, eg, *Loielo v Giles* [2020] VSC 619, [18] (Ginnane J). Further, if legal advice strays too far into questions of policy and was not prepared for the dominant purpose of providing legal advice, legal professional privilege may be lost for the whole advice: eg, *Re King* [2018] FWC 6006, [14]–[16] (Commissioner Wilson).

175 *Minogue v Thompson* (n 98) [54] (Richards J). See also at [66], [69], [75].

176 *Certain Children [No 2]* (n 65) 584 [491] (Dixon J).

177 Selway (n 333) 121; Hiebert (n 169) 100.

even more constrained by the ultimate policy choice of the client, meaning they are more likely to undertake a human rights assessment with a fixed outcome in mind. By contrast, a policy officer who undertakes a compatibility assessment usually has some ability to adjust the policy to make it more compatible with human rights. By aiming to make the justification fit the policy outcome, rather than the other way around, lawyers are more likely to engage in window dressing (though, of course, policy officers are not immune from doing the same). If lawyers do find themselves straining to justify a limit on human rights, they must remember that ultimately it is not their role to 'rubber stamp a policy that has already been predetermined'.[178]

Third, there is value in policy officers considering human rights from the outset of policy development, rather than outsourcing that work to lawyers as an afterthought. After all, one of the objectives of the *Human Rights Act* is to inaugurate a culture of justification across the public sector.[179] As Emerton J said in relation to the equivalent legislation in Victoria:

> The Charter is intended to apply to the plethora of decisions made by public authorities of all kinds. The consideration of human rights is intended to become part of decision-making processes at all levels of government. It is therefore intended to become a 'common or garden' activity for persons working in the public sector, both senior and junior.[180]

Policy officers can only develop human rights expertise by engaging with human rights. If lawyers monopolise human rights, policy officers will never have that opportunity, giving rise to the impression that human rights are a 'lawyers' picnic'.[181] Moreover, if consideration of human rights does not form an organic part of policy development, the transformative potential of the *Human Rights Act* will be lost. When policy officers think about human rights from the outset, and human rights considerations permeate all steps in the policy process, the policy will be formed under the influence of human rights. If policy officers encounter problems in the process of justifying the policy under s 13, they can tweak the policy to make it more compatible with human rights.[182] Generally, those opportunities have already passed by the time a lawyer thinks about human rights — after the policy has already been developed.

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178 Philippe Sands, 'Torture Team: Abuse, Lawyers, and Criminal Responsibility' (2009) 48(2) *Washburn Law Journal* 353, 371.

179 *Human Rights Act* (n 5) s 3(b).

180 *Castles* (n 64) 184 [185] (Emerton J), endorsed in *Bare* (n 64) 199 [221] (Warren CJ), 219–20 [279], 223 [288]–[289] (Tate JA), 297–9 [535]–[536], [538] (Santamaria JA); *Hoskin v Greater Bendigo City Council* (2015) 48 VR 715, 725 [35]–[36] (Warren CJ, Osborn and Santamaria JJA).

181 *Director of Housing v Sudi* (2011) 33 VR 559, 596 [212] (Weinberg JA) (albeit in relation to the piggyback clause).

182 Joanna Davidson, 'Impact of the Victorian Charter upon Policy and Legislative Development' in Julie Debeljak and Laura Grenfell (eds), *Law Making and Human Rights* (Lawbook Co, 2020) 324, 351–2 [10.220].

Finally, lawyers and policy officers bring a fundamentally different perspective to human rights questions. As Brems puts it, '[d]etermining whether or not any particular measure that restricts a human right constitutes a violation of that right is the main pre-occupation of the human rights lawyer…'[183] The lawyer's focus on 'violation' is a focus on the borderline between compatibility and incompatibility with human rights. That tends to result in advice about what is the bare minimum required to meet the threshold of 'compatibility with human rights'.[184]

The ultimate risk that guides a lawyer's advice is the risk of an adverse ruling by a court.[185] But in Queensland, where a body of human rights case law is yet to develop, lawyers may hesitate to advise that a court will likely find a breach of human rights in the absence of any adverse ruling on the point to date.[186] Moreover, when that case law does begin to develop, and human rights begin to intersect with difficult questions of policy, the courts will likely apply a form of deference to Parliament and the executive, whether consciously or otherwise.[187] For instance, in the UK case of *R (Conway) v Secretary of State for Justice*, the courts '[w]eigh[ed] the views of Parliament heavily in the balance' in order to conclude that assisted suicide laws imposed a justified limit on the right to privacy.[188] The courts reasoned that 'Parliament [wa]s a far better body for determining the difficult policy issue'.[189] Deference may even be required by s 13(1) of the *Human Rights Act*, as it calls for justification in a 'democratic society'. Democracy 'generally requires that significant policy decisions be left to the branch[es] of government best suited to make them: the Parliament [and the executive]'.[190] But a deferential ruling by a court does not mean that the measure is compatible with human rights; a deferential ruling simply means that the court recognises it is not

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183 Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) *Human Rights Law Review* 349, 350.

184 *Human Rights Act* (n 5) s 8.

185 Janet Hiebert, 'Governing under the Human Rights Act: The Limitations of Wishful Thinking' [2012] *Public Law* 27, 34; McCorkindale and Hiebert (n 170) 331; MacDonnell (n 866) 393, 396, 398, 403. MacDonnell notes that this focus of legal advice may give too much power to courts. She ultimately sees a role for legal advice that goes beyond the risk of an adverse court ruling to advice about the executive's obligation to implement and promote human rights.

186 Section 48(3) of the *Human Rights Act* (n 5) encourages recourse to human rights jurisprudence in other jurisdictions to fill this lacuna, but there are some human rights which are relatively unique to Queensland (such as the right not to have one's property arbitrary deprived in s 24(2) and the right to a name in s 26(3)), and even for comparable rights there is no guarantee Queensland courts will follow case law developed elsewhere: see *Momcilovic* (n 4) 36–8 [18]–[19] (French CJ). On the difficulties presented for lawyers by the absence of case law on point, see: Dawson (n 97) 601; McCorkindale and Hiebert (n 170) 336.

187 See *R v Hansen* (n 10) 43–5 [113]–[119] (Tipping J); *PJB* (n 1) 446 [324] (Bell J); *Certain Children [No 1]* (n 81) 513 [213] (Garde J); *Certain Children [No 2]* (n 65) 508–9 [218]–[219] (Dixon J); *Minogue v Thompson* (n 98) [50] (Richards J). Cf *Thompson* (n 155) [100] (Kyrou, McLeish and Niall JJA).

188 *R (Conway) v Secretary of State for Justice* [2018] 3 WLR 925, 968 [193] (Etherton MR, Leveson P and King LJ). The Supreme Court refused permission to appeal: *R (Conway) v Secretary of State for Justice* [2019] 1 WLR 1125 (Baroness Hale PSC, Lord Reed DPSC and Kerr JJSC).

189 *R (Conway) v Secretary of State for Justice* (n 188) 967 [186] (Etherton MR, Leveson P and King LJ).

190 *Palmer v Western Australia* (2021) 388 ALR 180, 251 [276]; 95 ALJR 229, 287 [276] (Edelman J) (albeit in the context of constitutional freedoms).

in a position to say otherwise. The political branches of government are still required to consider for themselves whether the limit on human rights is justified; they are only relieved of scrutiny by the courts. Unfortunately, because lawyers are so focused on the risk posed by adverse court rulings, they are likely to interpret a deferential court ruling as meaning that the threshold of compatibility with human rights is pushed downwards. Through the lens of litigation risk, the range of options which are 'open' appears to be wider. With legal advice like this, the political branches of government are also likely to interpret a deferential ruling by a court 'as a licence to proceed with a restrictive measure without having to perform their own in-depth evaluation' of human rights compatibility.[191]

Not only are lawyers guided by the deference of courts, they are themselves prone to defer to their client when it comes to value judgments. Yet, the final step in justifying a limit on human rights is a value judgment about where the balance should lie between human rights and countervailing societal interests.[192] That weighing exercise is the crux of the test of proportionality. If compatibility assessments are outsourced to lawyers, but lawyers decline to enter into the value judgment in the final stage of that analysis, no one will truly grapple with the question of whether the benefits of the policy outweigh the harm it causes to human rights. This could entrench a form of the bystander effect — the social phenomenon where no one offers aid in an emergency because they assume someone else will. The policy officer will assume the lawyer has done the heavy lifting for the human rights assessment, and the lawyer will assume the policy officer has done that work. Effectively, the result will be that limits on human rights will only need to pass through proper purpose, suitability and necessity,[193] as lawyers will feel qualified to pass judgment on those elements. Everyone will assume the limit strikes a fair balance,[194] but no one will have actually considered that question meaningfully. The result, in practical terms, can only be a further lowering of the threshold of compatibility with human rights.[195]

Policy officers are uniquely placed to engage in the weighing analysis.[196] Weighing up competing goals is the essence of their work. More importantly, they are uniquely placed to look beyond the borderline between compatibility and

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191 Brems (n 183) 353 (albeit in relation to the related concept of 'margin of appreciation'). Cf Human Rights Statement of Compatibility, Voluntary Assisted Dying Bill 2021 (Qld) 2 (where it was acknowledged that the likelihood of deference did not relieve the Minister of her obligation to grapple with human rights compatibility).

192 *Human Rights Act* (n 5) ss 13(2)(e)–(g).

193 Ibid ss 13(2)(b)–(d).

194 Ibid ss 13(2)(e)–(g).

195 Another possibility is that lawyers may be more ready to conclude that a limit on human rights is not justified because they are not familiar enough with the policy rationale that justifies the measure. This may explain the propensity of lawyers in the New Zealand Ministry of Justice to advise that Bills are incompatible with human rights: Hiebert (n 169) 77, 92–3, 98–101, 103; Grant Huscroft, 'The Attorney-General's Reporting Duty' in Paul Rishworth et al (eds), *The New Zealand Bill of Rights* (Oxford University Press, 2003) 195, 196, 214–6.

196 See also Hiebert (n 169) 92–3, 99–101. Hiebert makes the point that political actors are better placed to engage in the weighing analysis than government lawyers.

incompatibility with human rights, to degrees of human rights protection beyond the borderline. This is because policy officers are seeking to adopt the 'best' option, not merely the option which is 'open'. A human rights culture in the hands of policy officers carries the promise of optimising human rights beyond the bare minimum.[197] They can make policies 'inspired and guided by' human rights.[198] Whereas lawyers see human rights protection as 'a bottom line', policy officers have the capacity to see human rights promotion as 'a horizon line — which does not signal a maximum, but rather approaches "best practice" or at least "good practice"'.[199] In Greek myth, Ulysses' strategy of tying himself to the mast was not the only strategy for resisting the lure of the Sirens. Orpheus opted instead to play the lyre to drown out the Sirens' call. Rather than resist the temptation to abuse power through self-restraint, governments can drown out the temptation by actively promoting human rights. In a human rights system that goes beyond 'protection' of human rights to the 'promotion' of human rights:

> Instead of asking their advisers how to draft a bill or make policy choices in such a way as to avoid human rights violations, governments should ask them guidance on how to make norms and policies that offer the most and the best guarantees for human rights protection.[200]

While that may seem utopian, that is the stated goal of the *Human Rights Act*: not only to 'protect', but also to 'promote' human rights.[201] Outsourcing all consideration of human rights to lawyers has the potential to imperil both objectives.

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197 Indeed, for some theorists, human rights are 'optimization requirements', meaning they must be realised 'to the greatest extent possible given the legal and factual possibilities': Robert Alexy, 'Proportionality and Rationality' in Vicki C Jackson and Mark Tushnet (eds), *Proportionality: New Frontiers, New Challenges* (Cambridge University Press, 2017) 13, 14, quoting Robert Alexy, *A Theory of Constitutional Rights*, tr Julian Rivers (Oxford University Press, 2002) 47. The proportionality analysis required by s 13 of the *Human Rights Act* (n 5) 'express[es] this idea of optimisation — the first and second [steps], suitability and necessity, refer to optimisation relative to the factual possibilities and the third [step], the law of balancing, concerns optimisation of the legal possibilities': *Clubb v Edwards* (2019) 267 CLR 171, 307–8 [397] (Gordon J).

198 MacDonnell (n 86) 388. This has, apparently, been the experience in Victoria: Humphreys, Cleaver and Roberts (n 91) 224 [7.130]. See also Human Rights Council, *Report of the United Nations High Commissioner for Human Rights on the Role of the Public Service as an Essential Component of Good Governance in the Promotion and Protection of Human Rights*, 25th sess, Agenda Items 2 and 3, UN Doc A/HRC/25/27 (23 December 2013) 4 [9]: '[h]uman rights principles provide a set of values to guide the work of Governments and other political and social actors ... Moreover, human rights principles inform the content of good governance efforts: they may inform the development of legislative frameworks, policies, programmes, budgetary allocations and other measures.'

199 Brems (n 183) 355.

200 Ibid 370.

201 *Human Rights Act* (n 5) s 3(a). See also the long title of the Act, which commences, '[a]n Act to respect, protect and promote human rights'.

## IV Conclusion

In many ways, the *Human Rights Act* alters very little about the role of public servants and lawyers acting for government. Public servants and lawyers have always had ethical duties to give full and frank advice, including to counsel against breaches of the rule of law and against the worst excesses of government power. The only change is that that advice now extends explicitly to impacts on human rights. While public servants and lawyers bear new human rights, such as a right to freedom of expression, this does not give them licence to provide anything but independent and impartial advice. With the benefit of that advice, the Minister will come to a landing on a policy proposal, which the public servant will then be duty-bound to implement. Likewise, the lawyer is duty-bound to act on instructions with undivided loyalty to their client. Public servants and lawyers cannot shirk these duties because they take a different view on whether the measure is compatible with human rights. An important exception built into s 58(2) of the *Human Rights Act* means that public servants must continue to comply with their common law obligation to follow reasonable directions, and lawyers must continue to comply with their fiduciary obligation to give undivided loyalty to their client. As the aphorism goes, the more things change, the more they stay the same.

Yet, there is also something revolutionary about the *Human Rights Act*. On a fundamental level, it alters the system of government that public servants are required to uphold. The old view that public servants are merely a tool to pursue the public good at any cost has given way to a new role for public servants in helping government to stay within the boundaries of compatibility with human rights. Similarly, the old view that lawyers help government to pursue the public good by working to maximise legislative and executive power is no longer a complete picture. The *Human Rights Act* gives a new role to lawyers to advise government about how to comply with its self-imposed constraints *within* the limits of its powers. These shifts in the roles of public servants and lawyers are subtle but profound.

For public servants, the *Human Rights Act* brings a new rigour to the frank advice they must give about whether a policy proposal is justified. While the factors in s 13 align with pre-existing principles about robust policy development, the factors test the rationality of the measure more meticulously and, in many cases, demand evidence to support the proposal. The final balancing exercise in s 13 requires particular frankness from public servants. They must openly grapple with whether the policy objective outweighs the impact on human rights. Failure to do so not only undermines the protection and promotion of human rights; it also represents a breach of the public servant's ethical duty to give full and frank advice, without fear and without seeking the Minister's favour.

For lawyers, s 13 of the *Human Rights Act* brings them closer to the border between law and policy. Until we become accustomed to the new order of things, that will be uncomfortable for everyone involved. One way lawyers can stick to the law side of the border is by following a 'supervisory' approach, rather than a 'substitutionary' approach. This means the lawyer reviews the policy rationales put forward by policy officers, instead of coming up with their own policy inputs. There are a number of reasons why lawyers should take this approach, not least of which is that lawyers generally lack policy expertise. Moreover, the human rights culture that the *Human Rights Act* is meant to inaugurate is a culture that applies at all levels of government. Human rights considerations are supposed to saturate all government decision-making. That culture shift is doomed to fail if lawyers hold a monopoly on human rights.

Fundamentally, lawyers and policy officers bring a different perspective to human rights. Lawyers are concerned with risk, asking what is the bare minimum needed to safeguard against an adverse court ruling? A human rights culture concerned with the bare minimum is an impoverished human rights culture. By contrast, policy officers are focused on making the best policy possible in the factual and legal context. They can look beyond the bare minimum of human rights 'protection' to the horizon line of human rights 'promotion'. Policy officers hold in their hands — in their advice, in their briefs and in their recommendations — the ability to realise the full potential of the human rights framework. Ultimately, policy officers and lawyers each have a role to play in protecting and promoting human rights. Human rights are best served by policy officers and lawyers working together collaboratively, bringing their different skillsets to their common enterprise.

The *Human Rights Act* breathes new life into old ethical duties and reminds us of the importance of candour and fidelity for both public servants and lawyers acting for government. But those ethical duties of candour and fidelity also breathe life into the ambition of the *Human Rights Act*. It is through compliance with ethical duties — through frank advice and collaboration between lawyers and policy officers — that the promise of the *Human Rights Act* is to be fulfilled.

# ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES, LAW REFORM AND THE RETURN OF THE STATES

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*Aboriginal and Torres Strait Islander peoples have long called for structural reform to Australia's institutional framework to protect and promote their rights. In recent years, however, state and territory governments have proven more receptive to Aboriginal and Torres Strait Islander peoples' advocacy than the Commonwealth. In this article, we identify and map the return of the states and territories — and the retreat of the Commonwealth — in Indigenous law reform. While substantial progress has been made, significant risks are involved in the pursuit of subnational reform. It remains imperative that the Commonwealth government meaningfully engage with the aspirations of Aboriginal and Torres Strait Islander peoples as recorded in the Uluru Statement from the Heart.*

## I INTRODUCTION

In the wake of the historic 1967 referendum extending the Commonwealth Government's legislative power in Indigenous affairs, Prime Minister Harold Holt made a prediction to his Cabinet that the electorate would 'undoubtedly look increasingly to the Commonwealth Government as the centre of policy and responsibility' regarding Aboriginal and Torres Strait Islander affairs.[1] That prediction proved true. Prior to the referendum, the Commonwealth Government had occupied a relatively marginal place within Indigenous affairs, because of its ostensible lack of constitutional authority.[2] After federation in 1901, the states continued — virtually unimpeded by Commonwealth intervention — in their pre-federation roles of governing Aboriginal and Torres Strait Islander peoples through laws and policies that variously entailed forms of domination, racism, paternalism, exclusion and neglect.[3] With the states responsible for controlling so

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1 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Aboriginal Studies Press, 2nd ed, 2007) 61, quoting Harold Holt ('*1967 Referendum*').

2 Ibid ch 2; John Chesterman and Brian Galligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge University Press, 1997) ch 4.

3 See further Chesterman and Galligan (n 2) ch 1,2 and 5.

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many aspects of their lives, Aboriginal and Torres Strait Islander people directed most of their activism, advocacy and ire towards state governments.[4]

After many decades of oppressive and racially discriminatory governance by the colonies and their successor states, First Nations advocates and their non-Indigenous allies came to see the Commonwealth as the level of government most likely to be sympathetic to Indigenous demands. This view drove the campaign for constitutional change culminating in the 1967 referendum.[5] In the decades after the referendum, the Commonwealth would become the focal point for Indigenous affairs policy and Aboriginal and Torres Strait Islander advocacy.[6] As a result, the Commonwealth Government came to play a leading role in many key legal and policy reforms in Indigenous affairs, including expanded funding for social services,[7] protection against racial discrimination,[8] recognition of Indigenous rights to land,[9] protections for cultural heritage,[10] the establishment of Indigenous representative bodies[11] and the proliferation of Indigenous community organisations.[12] But in a remarkable and yet little-considered reversal of the historic constitutional and policy change inaugurated by the 1967 referendum, the centre of momentum (progressive and otherwise) in Indigenous law reform has now shifted back to the states and territories.

The return of the states and territories has been most pronounced in areas that, broadly speaking, are constitutional in nature, and can be traced to the election of the Coalition Government of John Howard in 1996. That election marked the beginning of two key changes in Indigenous affairs. First, in dismantling institutions of Aboriginal and Torres Strait Islander self-determination, advancing an agenda of 'practical reconciliation' and seeking to devolve responsibilities to the subnational level, the Howard Government commenced the Commonwealth's retreat from the promise of the 1967 referendum.[13] Second, obstruction, resistance and delay in the Commonwealth sphere prompted a pragmatic decision by some Aboriginal and Torres Strait

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4 For examples, see Bain Attwood and Andrew Markus, *The Struggle for Aboriginal Rights: A Documentary History* (Allen & Unwin, 1999) pts 1–2.

5 Attwood and Markus, *1967 Referendum* (n 1) 9–12, 14, 30, 44.

6 Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 144–7, 160–3, 167–71.

7 John Gardiner-Garden and Joanne Simon-Davies, 'Commonwealth Indigenous-Specific Expenditure 1968–2012' (Background Note, Parliamentary Library, Parliament of Australia, 28 September 2012); Patrick Sullivan, *Belonging Together: Dealing with the Politics of Disenchantment in Australian Indigenous Policy* (Aboriginal Studies Press, 2011) 4.

8 See, eg, *Racial Discrimination Act 1975* (Cth). See also Lino (n 6) ch 6.

9 See especially *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Native Title Act 1993* (Cth).

10 *Aboriginal and Torres Strait Islander Heritage Protection Act 1986* (Cth).

11 See, eg, *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth). See also Tim Rowse, *Indigenous and Other Australians Since 1901* (UNSW Press, 2017) 280–2; Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) 118–31.

12 See, eg, *Aboriginal Councils and Associations Act 1976* (Cth); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). See also Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (UNSW Press, 2002) 1–25.

13 Lino (n 6) 33, 37–8, 171–2.

Islander peoples to seek change at the subnational level. Where that approach has borne fruit, it has done so in large part due to the receptiveness of sympathetic Labor governments, which have progressed reform intermittently, borrowing and adapting from each other.[14] The most recent manifestation of this combination of Commonwealth recalcitrance and subnational openness has concerned the reforms proposed in the 2017 Uluru Statement from the Heart: Indigenous constitutional recognition through a First Nations Voice to Parliament followed by treaty-making and truth-telling processes.

In this article, we seek to identify and map the return of the states and Territories in Indigenous law reform. We chart that return across four different domains: constitutional recognition (Part II), Indigenous representative bodies (Part III), treaty-making (Part IV) and truth-telling processes (Part V). Our goal is to explain this important development rather than to celebrate it. Indeed, as Megan Davis has pointed out, there are significant downsides and risks involved in the pursuit of protections of Indigenous rights at the subnational level.[15] Acutely aware of those problems, many First Nations advocates remain staunchly — and rightly so — committed to the pursuit of nationwide law reforms, even in the face of ongoing Commonwealth indifference or outright obstruction. That commitment is most evident in the powerful campaign for a national First Nations Voice enshrined in the Australian Constitution as the first step to meeting the demands laid out by Aboriginal and Torres Strait Islander peoples in the Uluru Statement.[16] While reform at the subnational level can offer significant benefit, there are also major downsides to turning back to the states and territories in Indigenous law reform. Our hope is that a fuller account of this subnational turn and its causes can help in the tasks of evaluating its consequences and thinking about pathways towards the return of the Commonwealth.

## II Constitutional Recognition

Proposals to constitutionally 'recognise' Aboriginal and Torres Strait Islander peoples have historically focused on the Commonwealth rather than the states. After the 1967 referendum, calls for constitutional reform concerning Indigenous rights once more became pronounced from the late 1970s. Whereas the 1967 referendum campaign foregrounded protections for Indigenous people as Australian citizens, the new demands for constitutional change foregrounded

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[14] On the idea of laboratory federalism: *New State Ice Co v Liebmann* 285 US 262, 311 (Brandeis J) (1932); Gabrielle Appleby and Brendan Lim, 'Democratic Experimentalism' in Rosalind Dixon (ed), *Australian Constitutional Values* (Hart Publishing, 2018) 221. In the context of treaty-making in Australia: Harry Hobbs and George Williams, 'Treaty-Making in the Australian Federation' (2019) 43(1) *Melbourne University Law Review* 178, 217–29.

[15] Megan Davis, 'Voice, Treaty, Truth', *The Monthly* (online, July 2018) <https://www.themonthly.com.au/issue/2018/july/1530367200/megan-davis/voice-treaty-truth>.

[16] *Uluru Statement from the Heart* (National Constitutional Convention, 26 May 2017).

Aboriginal and Torres Strait Islander peoples' collective rights to land, culture and autonomy.[17] Often, First Nations activists used the language of 'recognition' as a way of advancing their constitutional demands.[18]

As they first emerged in the late 1970s and early 1980s, Indigenous claims for constitutional recognition envisioned substantial, even radical, transformations in the distribution of public power within the Australian state's institutional framework. The emphasis in these claims for constitutional recognition was on granting First Nations peoples' greater autonomy and territory. Such claims for recognition could be realised through changes to the 'small-c' constitutional order such as a treaty, formal amendments to the Australian Constitution, or a combination of both. Indigenous claims for constitutional recognition in this era were also often accompanied by demands for international recognition of Indigenous peoplehood.[19] From around the 1990s, debates over Indigenous constitutional recognition increasingly focused on formal amendments to the Constitution and making Aboriginal and Torres Strait Islander peoples visible within it. But for Indigenous advocates, such constitutional changes were overwhelmingly not purely about symbolism; they were also about redistributing political power to better protect Indigenous rights and autonomy.[20] For instance, in a 1995 report on the Keating Government's proposed 'Social Justice Package', an advisory committee operating within the Aboriginal and Torres Strait Islander Commission took a wide-ranging view on how constitutional recognition could operate to 'foster attitudinal change and a realignment of the power position of indigenous peoples'.[21] Among the possibilities for constitutional recognition proposed by the committee were protections in the Constitution for distinct Indigenous rights, the creation of Indigenous parliamentary seats and separate Indigenous parliaments, provisions facilitating and protecting treaties, and the establishment of Indigenous states and territories.[22]

By the end of the 1990s, the more far-reaching ideas for Indigenous constitutional recognition put forward by Aboriginal and Torres Strait Islander activists from the late 1970s had been largely eclipsed in prominence by a narrower, more conservative proposal developed by the Federal Coalition Government led by John Howard.[23] This proposal, which would have seen the incorporation of a new, legally unenforceable preamble in the *Australian Constitution* formally recognising Aboriginal and Torres Strait Islander people as 'the nation's first people', was put to a referendum in 1999 alongside a proposal

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17 Lino (n 6) 16–17, 154–6, 167–71, 218–19.
18 Ibid 16–24.
19 Ibid.
20 Ibid 24–33.
21 Aboriginal and Torres Strait Islander Commission (ATSIC), *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (Report, 1995) [4.10] <http://www.austlii.edu.au/au/other/IndigLRes/1995/1.html>.
22 Ibid.
23 Lino (n 6) 33–8.

for Australia to become a republic: both were roundly defeated.[24] The Howard proposal for a new preamble was not exclusively focused on Aboriginal and Torres Strait Islander people; rather, the reference to their status as First Peoples was framed within a broader series of statements including mention of Australia's multiculturalism, the sacrifice of those who had defended the country at war, 'hope in God', and commitment to 'freedom, tolerance, individual dignity and the rule of law'.[25]

The Howard Government's constitutional recognition proposal needs to be understood against the backdrop of the Government's determination to push back against what Howard derisively labelled the 'rights agenda' and the legal and political gains it had made since the 1967 referendum.[26] The proposal also needs to be seen in the context of Howard's staunch rejection of what he called 'the black armband view of Australian history', which emphasised injustice and discrimination against Aboriginal and Torres Strait Islander peoples and which Howard saw as increasingly dominant.[27] The Government's 1999 proposal for Indigenous constitutional recognition should be seen as the Government '[a]cceding to widespread community feeling for reconciliation while seeking to contain that sentiment's grander ambitions' for a more substantive transformation in the Indigenous–settler political relationship.[28]

The Commonwealth's intensely combative approach to Indigenous affairs and the failure of the 1999 referendum created an opening for action on constitutional recognition in the states, which all states would ultimately take up. In 2004, the Bracks Labor Government in Victoria passed legislation that made Victoria the first state to recognise Aboriginal and Torres Strait Islander people in its Constitution. It did so by inserting a new section 1A:

> **Recognition of Aboriginal people**
>
> (1) The Parliament acknowledges that the events described in the preamble to this Act occurred without proper consultation, recognition or involvement of the Aboriginal people of Victoria.
>
> (2) The Parliament recognises that Victoria's Aboriginal people, as the original custodians of the land on which the Colony of Victoria was established –
>
> (a) have a unique status as the descendants of Australia's first people; and
>
> (b) have a spiritual, social, cultural and economic relationship with their traditional lands and waters within Victoria; and

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24 Parliamentary Library, Department of Parliamentary Services, *Parliamentary Handbook of the Commonwealth of Australia 2020* (Commonwealth, 35th ed, 2020) 443–4.

25 Mark McKenna, 'First Words: A Brief History of Public Debate on a New Preamble to the Australian Constitution 1991–99', (Research Paper 16 1999–2000, Australian Parliamentary Library, 4 April 2000) < https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp9900/2000RP16>.

26 Lino (n 6) 33–4.

27 Commonwealth, *Parliamentary Debates*, House of Representatives, 30 October 1996, 6158 (John Howard, Prime Minister).

28 Lino (n 6) 34.

> (c) have made a unique and irreplaceable contribution to the identity and well-being of Victoria.[29]

Even after the Rudd Labor Government came to federal power in 2007 with early commitments to pursue Indigenous constitutional recognition, the slow progress nationally saw more states follow Victoria's early lead by incorporating Indigenous recognition provisions into their own constitutions.[30] All of these provisions were designed to be purely symbolic, having no effect on how public power is distributed or regulated.[31] For that reason, many First Nations people criticised them as tokenistic, insincere and inadequate.[32] Nonetheless, their existence has demonstrated that reform may be easier at the subnational level and has also paved the way for the pursuit of more ambitious 'small-c' constitutional reforms subnationally.

## III Indigenous Representative Bodies

The capacity of Aboriginal and Torres Strait Islander peoples to have their voices heard in Parliament is limited. Although Aboriginal and Torres Strait Islander people were granted the right to vote in federal elections since 1962,[33] the structure and operation of the Australian electoral system inhibits the capacity of a territorially dispersed, demographic minority to secure seats in the federal Parliament.[34] While the 1967 referendum empowered the Commonwealth with the legislative authority to enact laws with respect to Indigenous peoples, it was not until the 1972 Whitlam Government formally recognised self-determination as Australian policy that the first attempt to remove these barriers were made.[35] These efforts were important but limited. In practice, a deliberately constrained

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29 *Constitution Act 1975* (Vic) s 1A, as inserted by *Constitution (Recognition of Aboriginal People) Act 2004* (Vic).

30 See, eg, *Constitution of Queensland 2001* (Qld) Preamble, as amended by *Queensland (Preamble) Amendment Act 2010* (Qld); *Constitution Act 1902* (NSW) s 2, as amended by *Constitution Amendment (Recognition of Aboriginal People) Act 2010* (NSW). See also Lino (n 6) 42–7.

31 Lino (n 6) 109–10.

32 See, eg, Kerrin Binnie, 'Constitutional Preamble Opposed by Indigenous Leaders and Opposition', *ABC News* (online, 23 February 2010) <http://www.abc.net.au/news/2010-02-23/constitutional-preamble-opposedby-indigenous/341300>.

33 *Commonwealth Electoral Act No 31 of 1962* (Cth) s 2. Aboriginal and Torres Strait Islander peoples entitled to vote in state elections were enfranchised at the federal level in 1949: *Commonwealth Electoral Act No 10 of 1949* (Cth) s 3. As Indigenous peoples in Queensland, Western Australia and the Northern Territory were precluded from voting in state elections, they remained unable to vote in Commonwealth elections until 1962. See also: Murray Goot, 'The Aboriginal Franchise and Its Consequences' (2006) 52(4) *Australian Journal of Politics and History* 517, 525.

34 Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) ch 2.

35 Will Sanders, 'Towards an Indigenous Order of Australian Government: Rethinking Self-Determination as Indigenous Affairs Policy' (Discussion Paper No 230, Centre for Aboriginal Policy Research, 2002) 1; Gary Foley, 'Whiteness and Blackness in the Koori Struggle for Self-Determination: Strategic Considerations in the Struggle for Social Justice for Indigenous People' (2000) 19–20 *Just Policy: A Journal of Australian Social Policy* 74; Robert Tonkinson and Michael Howards (eds), *Going It Alone? Prospects for Aboriginal Autonomy: Essays in Honour of Ronald and Catherine Berndt* (Aboriginal Studies Press, 1990); Ian Anderson, 'The End of Aboriginal Self-Determination?' (2007) 39(2–3) *Futures* 137.

understanding of self-determination continues to impede Aboriginal and Torres Strait Islander peoples' ability to control their own affairs. Instead, the focus is on Indigenous-led service delivery organisations and political representation through Indigenous representative bodies.[36] As we demonstrate, although a national representative body remains a key aspiration, Aboriginal and Torres Strait Islander peoples have had more recent success at building state and territory organisations.

### A *Early Indigenous Voluntary Associations and Organisations Aspiring to National Status*

Aboriginal and Torres Strait Islander peoples have long been active in establishing their own organisations to progress their interests. The more prominent of these institutions have been predominantly focused on the national level. Consider the Australian Aborigines League ('AAL'), which was one of the first Indigenous associations when it formed in Victoria in 1934.[37] Under the leadership of Aboriginal rights activist William Cooper, the AAL made considerable headway. In 1937, it secured almost 2,000 signatures for a petition addressed to King George V calling for Aboriginal representation in the Australian Parliament.[38] That same year, William Ferguson, Pearl Gibbs and Jack Patten formed the Australian Aborigines Progressive Association ('AAPA'). The AAPA worked collaboratively with the AAL to bring together Aboriginal people for the first 'Day of Mourning' on 26 January 1938,[39] where protestors advocated for full and equal access to citizenship rights.

The work of the AAL and the AAPA was continued and extended by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders ('FCAATSI'). Established in the late 1950s, FCAATSI campaigned for constitutional reform and played a crucial role in advocating for Indigenous rights during the lead up to the successful 1967 referendum.[40] Reflecting the larger political trends of the times, its emphasis was on equal citizenship rights. Over time, this position broadened and extended to include advocacy for recognition of

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[36] A central legislative outcome of the era of self-determination was the *Aboriginal Councils and Associations Act 1976* (Cth), which gave Indigenous peoples the statutory right to form associations. Over 3,000 Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, 'Culturally Appropriate Indigenous Accountability' (2000) 43(9) *American Behavioral Scientist* 1514, 1517.

[37] Bain Attwood and Andrew Markus, *Thinking Black: William Cooper and the Australian Aborigines' League* (Aboriginal Studies Press, 2004) 1.

[38] Andrew Markus, 'William Cooper and the 1937 Petition to the King' (1983) 7(1) *Aboriginal History* 46, 50–1.

[39] John Maynard, 'Fred Maynard and the Australian Aboriginal Progressive Association (AAPA): One God, One Aim, One Destiny' (1997) 21 *Aboriginal History* 1, 2.

[40] Josephine Bourne, 'Telling Our Story, Owning Our Story, Making Our Story' in Megan Davis and Marcia Langton (eds), *It's Our Country Too: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016) 60.

collective rights and identification as distinct peoples. By 1973, FCAATSI had become an Aboriginal and Torres Strait Islander managed and controlled organisation which provided a mechanism for Aboriginal and Torres Strait Islander people to take control over their own cultural affairs. However, following the 1967 referendum, successive federal governments began to establish their own forums for Indigenous affairs policy advice, leaving FCAATSI in an awkward position. Funding cuts significantly limited the capacity of FCAATSI to operate, and the organisation was extinguished by 1978.[41]

## B *The Impact of the 1967 Referendum*

The 1967 referendum empowered the Commonwealth with legislative power in Indigenous affairs. Following the vote, the Holt Government entered that domain by establishing the Council for Aboriginal Affairs ('CAA'). The CAA marked the first government-sponsored Indigenous organisation. It was tasked with advising government on national policies for Aboriginal people and recommending policy coordination between the states and Commonwealth.[42] However, consisting of three non-Indigenous men, Dr Nugget Coombs, Bill Stanner and Barrie Dexter, the CAA struggled to represent Aboriginal interests. The CAA was served by the Office of Aboriginal Affairs ('OAA'). Incorporated into the Prime Minister's Department, the OAA was responsible for implementing policy and administering legislation. Yet, the small staff of the OAA meant that it also held little weight and value as a body advocating for Indigenous people's interests.

Government policy shifted with the election of the Whitlam Labor Government in 1972. The new government established a Department of Aboriginal Affairs, which took over the functions of the OAA, and Indigenous affairs within the Department of the Interior, advising government, as well as implementing and administering Indigenous policy. Significantly, the DAA recruited and appointed Indigenous staff, ensuring a more accurate representation of Aboriginal people within the executive.[43] The decision to increase recruitment of Indigenous staff within the public service reflected a marked shift in Indigenous policymaking from assimilation and integration to 'self-determination'. Although Whitlam lost office in 1975, this principle remained central to Indigenous policymaking until the election of the Howard Government in 1996. Practising this policy, successive governments experimented with nationally representative Indigenous bodies designed to

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41 Lino (n 6) 17.

42 Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) 123; Tim Rowse, *Obliged to be Difficult: Nugget Coombs' Legacy in Indigenous Affairs* (Cambridge University Press, 2000) 30; Melinda Hinkson and Jeremy Beckett, *Appreciation of Difference: WEH Stanner and Aboriginal Australia* (Aboriginal Studies Press, 2009) 43.

43 Vanessa Castejon, 'Aboriginal Affairs: Monologue or Dialogue?' (2002) 26(75) *Journal of Australian Studies* 27.

develop and channel policy advice to government.[44] Bodies created included the National Aboriginal Consultative Committee (1973–1977), the National Aboriginal Conference (1977–1985), and ATSIC (1989–2005).

Each of these national Indigenous bodies had some successes, but none survived government interference and pressure, and all were abolished after clashing with government over the scope of their authority and independence.[45] This is a recurring problem. Rather than respecting the wants and wishes of Indigenous people and their guidance and control over their own affairs, Australian governments understand self-determination rights in a deliberately limited way. Governments may be interested in hearing 'the Aboriginal voice',[46] but only through structures of their own design and control.

It is no surprise then that ATSIC was replaced with the National Indigenous Council – an Indigenous advisory body whose members were appointed by government rather than chosen by their community. Although that Council too was eventually abolished, no representative body with a structural relationship to government has been established. Notwithstanding some movement towards a representative First Nations Voice, the federal government is still advised by Indigenous people it itself appoints. The only real self-determined national Indigenous representative bodies that have existed in Australia were ATSIC and the National Congress of Australia's First Peoples (2010–2019), the latter of which was not integrated into government policy development.

### C *The Emergence of Subnational Representative Bodies*

Following the abolition of ATSIC, First Nations looked to establishing representative bodies at the state and territory level. Torres Strait Islander people relied on the continuation of the Torres Strait Regional Authority ('TSRA') established in 1994 under the former *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) (now known as the *Aboriginal and Torres Strait Islander Act 2005*). The TSRA was established as a separate Commonwealth entity from ATSIC that administers services and programs to the Torres Strait Islands.[47] While the TSRA is funded by the Department of Finance and Administration, its regional governance framework and the aspirations of Torres Strait Islander people for greater autonomy, is captured within the TSRA 2001 Bamaga Accord.[48] To achieve such autonomous representation, the TSRA consists of twenty elected

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44 Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (n 11) 123–4.

45 Ibid.

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 November 1978, 3449 (Ian Viner, Minister for Aboriginal Affairs).

47 Aboriginal and Torres Strait Islander Commission, Office of Evaluation and Audit, *Evaluation of the Torres Strait Regional Authority* (Evaluation, June 2001) 8.

48 Garth Nettheim, 'Towards Regional Government in the Torres Strait' (2002) 5(16) *Indigenous Law Bulletin* 4.

representatives who work to strengthen the economic, social, and cultural development of Aboriginal and Torres Strait Islander people living in the Torres Strait.[49]

No other subnational representative body enjoys the same powers and responsibilities of the TSRA, but a number of institutions have been developed in several states and territories. In 2008 the Aboriginal and Torres Strait Islander Elected Body ('ATSIEB') was established in the Australian Capital Territory ('ACT') and, in the same year, the South Australia Aboriginal Advisory Council ('SAAC') was established in South Australia ('SA'). Both bodies mark the beginning of government-supported Indigenous representative organisations at the subnational level.

ATSIEB provides a political voice and platform for Aboriginal and Torres Strait Islander peoples living in the ACT on government programs, services, and policies to ensure they are considerate and inclusive of Aboriginal and Torres Strait Islander people. This also ensures programs, services and policies are effective and accessible to Aboriginal and Torres Strait Islander people living in the Territory.[50] Similarly, SAAC provides the SA government with advice on existing and new programs and policies that affect Aboriginal people, emerging issues likely to affect SA Aboriginal people, the development and implementation of future policies and services concerning Aboriginal people, and how the government should consult with Aboriginal communities.[51] Although both bodies are composed only of Indigenous peoples, they are limited to providing advice to their respective governments – they have no formal relationship with the federal government. This limitation is shared by all state or territory-based Indigenous representative bodies.

Other limitations are present in the Victorian First Peoples Assembly, established in 2019. Like developments in other states and territories, the First Peoples Assembly emerged as a result of frustration with Commonwealth intransigence on constitutional reform. Unlike the ACT and SA bodies, however, the Victorian First Peoples Assembly was designed to progress the State's commitment to treaty (discussed in more detail below). The primary role of the Assembly is to work collaboratively with the Victorian Government to develop a treaty negotiation framework under which treaties can be progressed. The Assembly operates as an independent not-for-profit company, rather than set up under State legislation. However, its mandate is more limited than that of a standing representative body. Unlike the proposed First Nations Voice outlined in the Uluru Statement from the Heart, or the ATSIEB or SAAC, the Victorian First

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49 Ibid; 'Qld Councils Urged to Cooperate', *The Age* (online, 27 July 2007) <https://www.theage.com.au/national/qld-councils-urged-to-cooperate-20070727-gdqpnf.html>.

50 *Aboriginal and Torres Strait Islander Elected Body Act 2008* (ACT) s 8.

51 South Australian Aboriginal Advisory Council, *Government of South Australia: Department of the Premier and Cabinet* (Web Page, 2021) <https://www.dpc.sa.gov.au/responsibilities/aboriginal-affairs-and-reconciliation/south-australian-aboriginal-advisory-council>.

Peoples Assembly is not intended to provide advice on laws and policies that affect First Nations peoples. Although it may speak out on these and other matters, its structural link to government is restricted to developing a treaty negotiation framework. Nonetheless, the structure of the Assembly may inform other states and territories as they embark on similar processes.

The establishment of the Assembly has also caused some tension within Aboriginal communities. Only 7 per cent of those eligible to vote participated in the first election in 2019, leading some candidates to secure election with only a handful of votes.[52] While recognising challenges involved in encouraging participation in an entirely novel process and in circumstances where trust in government is lacking,[53] the structure of the Assembly may also have contributed to a sense of anxiety and unease among some Aboriginal Victorians.[54] Indeed, the Yorta Yorta Council of Elders boycotted the election, describing the process as a 'pathway to assimilation'.[55] Nonetheless, as the Assembly continues to work with government to develop a treaty negotiation framework, scepticism within the community may dissipate. At the time of writing, the Assembly has commenced preliminary discussions with the Victorian government to broaden its mandate and establish a permanent Indigenous Voice to give Aboriginal Victorians influence over government decision-making. That proposal has not yet been formalised but is expected to come to a head in 2023 when the final stages of the Assembly's treaty framework negotiations begin.[56]

No Indigenous representative body exists in Western Australia, but recent moves suggest one may be established soon. In June 2018, the Western Australian Government released a discussion paper exploring whether an office for advocacy and accountability in Aboriginal affairs is desirable. The Discussion Paper makes clear that any new body would be an independent and permanent statutory office for advocacy and accountability in Aboriginal affairs in the State.[57] The Office would be responsible for determining how service delivery, accountability, and efficiency of State government programs for Aboriginal people and communities

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52 Noel Towell, 'Historic Vote, But Only 7 Per Cent Turned Out for Aboriginal Poll', *The Age* (online, 10 November 2019) <https://www.theage.com.au/politics/victoria/historic-vote-but-only-7-per-cent-turned-out-for-aboriginal-poll-20191110-p53950.html>.

53 Jill Gallagher, 'The Work of the Victorian Treaty Advancement Commission to Bring us Closer to Treaties' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Sovereign, Relational, Ready: Treaty Making Two Hundred and Fifty Years Later* (Federation Press, 2021) 220.

54 Sarah Maddison, Julia Hurst and Dale Wandin, 'The Mess of Colonialism, the Complexity of Treaty' in Harry Hobbs, Alison Whittaker and Lindon Coombes (eds), *Sovereign, Relational, Ready: Treaty Making Two Hundred and Fifty Years Later* (Federation Press, 2021) 179.

55 Chris Walker, 'Trick or Treaty?' (Press Release, Yorta Yorta Elders Council, 25 June 2019) <https://yynac.com.au/press-release-trick-or-treaty/>.

56 Paul Sakkal and Jack Latimore, 'A "Black Parliament"? Victorian Government Discusses Indigenous Voice', *The Age* (online, 23 October 2021) <https://www.theage.com.au/national/victoria/a-black-parliament-victorian-government-discusses-indigenous-voice-20211022-p592dj.html>.

57 Government of Western Australia, *An Office for Advocacy and Accountability in Aboriginal Affairs in Western Australia* (Discussion Paper, June 2018).

can be improved. If successfully established, it would also advocate for Aboriginal people and communities across the State.[58]

The proposal has received tentative support. Respondents generally agreed that an independent Office could be effective in changing the way the Western Australian government engages with Aboriginal people and may provide them with the ability to voice their concerns directly to government.[59] However, it is unclear whether the Office would have a formal advisory role to the State legislature. Reflecting this uncertainty, some respondents have suggested the Office should be empowered with a stronger role in law and policy development and a more formalised relationship with the State parliament. Those respondents also suggested this role might also advance a treaty process in Western Australia.[60] At the time of writing, the Western Australian government is still in the process of considering community feedback.

### D *The Continued Absence of a National Representative Body*

The emergence of subnational Indigenous representative bodies in several states and Territories is positive, but the continuing absence of a national Indigenous representative body challenges Aboriginal and Torres Strait Islander peoples' ability to have their voices heard and interests considered in the processes of government. As recorded in the Uluru Statement from the Heart, the inability to speak and be heard represents the 'torment of our powerlessness'.[61] The call for a First Nations Voice to Parliament is drawn from the understanding that structural reform to empower Indigenous peoples with an institutional position from which to negotiate and develop a relational partnership with the Australian state is necessary. A constitutionally entrenched body that has the ability to specifically speak to both houses of Parliament on First Nations law and policy reform can enhance the development of a partnership built on a foundation of mutual respect and inclusivity in national decision-making processes.

The Commonwealth government initially dismissed calls for a First Nations Voice.[62] While the Scott Morrison-led Liberal National government has since softened its tone and sought greater details on the design of the body, the government has reiterated its position that it will not consider the Voice's legal

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58 Ibid 2. See further Rangi Hirini, 'WA Announces Initiative for Indigenous Voice to State Parliament', *National Indigenous Television News* (online, 7 June 2018) <https://www.sbs.com.au/nitv/nitv-news/article/2018/06/07/wa-announces-initiative-indigenous-voice-state-parliament>.

59 Government of Western Australia, *Strengthening Accountability and Advocacy in Aboriginal Affairs* (Community Feedback Report, July 2019) 3.

60 Ibid 4.

61 *Uluru Statement from the Heart* (n 16).

62 Malcolm Turnbull, George Brandis and Nigel Scullion, 'Response to Referendum Council's Report on Constitutional Recognition' (Media Release, Parliament of Australia, 26 October 2017); Elliot Johnston, 'Malcolm Turnbull's Big Let-Down' (2018) 87 *Australian Options* 4, 4–6.

form until the co-design process has been finalised.[63] First Nations involved in the authorship of the Uluru Statement remain steadfast that constitutional entrenchment of the Voice is critical to ensure its success, longevity and effectiveness as a national Indigenous representative body that holds cultural legitimacy and links to local and regional level Indigenous Voices. This is particularly important given that several states and territories are at various stages of talking treaty with First Nations.

## IV Treaty-Making

When European colonial powers met Indigenous political communities, they often negotiated arrangements to secure trading rights or safe passage. Over time, these agreements were formalised into treaties through which colonial powers sought to attain the legal right to obtain land and develop settlements. These agreements were not always fair and equitable and colonial powers did not always respect the promises that they had made. However, in establishing formal legal relationships with First Nations, European powers 'were clearly aware that they were negotiating and entering into contractual relations with sovereign nations'.[64] In Australia, no treaties were signed at first contact, in the early years of settlement, or at federation.[65] Despite evidence that Aboriginal and Torres Strait Islander peoples possessed 'a subtle and highly elaborate' system of laws,[66] colonisation proceeded on the basis that the country was 'vacant'.[67] Aboriginal and Torres Strait Islander peoples' sovereignty was not recognised in law, setting in place a legal framework that continues to dismiss the fact that sovereignty was never ceded.[68]

Aboriginal and Torres Strait Islander peoples have long resisted this contention. It was not until after the 1967 referendum, however, that the claim for a legal, binding, and formal agreement or treaty became more pronounced. Perhaps reflecting the concerted push to compel the Commonwealth to engage in Indigenous affairs following the referendum, these calls were directed to the

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63 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, (Final Report, 29 November 2018) xvii, Recommendation 1; Mark Leibler, 'Co-design Brings Voice an Octave Closer to Success', *The Australian* (online, 22 January 2021) <https://www.theaustralian.com.au/commentary/codesign-brings-voice-an-octave-closer-to-success/news-story/1f7bbab4b5025413b8dbccbe149f979e>; Rob Harris, 'Ken Wyatt Launches Voice to Parliament Consultation', *Sydney Morning Herald* (online, 30 October 2019) <https://www.smh.com.au/politics/federal/ken-wyatt-launches-voice-to-parliament-consultation-20191029-p535g6.html>.

64 Miguel Alfonso Martinez, Special Rapporteur, *Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 18 [110].

65 See generally George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020).

66 *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 267 (Supreme Court of the Northern Territory).

67 Sir Richard Bourke, *Proclamation*, 26 August 1835.

68 *Love v Commonwealth* (2020) 270 CLR 152, 221–2 [178] (Keane J).

federal government, not the states. The first prominent call came in 1969. That year, Jack Davis, the President of the Western Australian Aboriginal Association, wrote to the Federal Council for the Advancement of Aborigines and Torres Strait Islanders to propose the negotiation of a treaty which would recognise Aboriginal peoples as the original owners of the continent. Davis argued that agreements should be struck between the Commonwealth Government and leaders of each Indigenous kinship group.[69] While Davis' letter went nowhere, calls for a national treaty or treaties continued into the 1970s. In March 1972, the Aboriginal Tent Embassy called for a treaty that would acknowledge dispossession and recognise their rights,[70] while in October that year, 1,000 Larrakia people signed a petition calling on Queen Elizabeth II to help negotiate a treaty.[71]

First Nations aspirations for treaty continued to focus on the Commonwealth. In 1979, the National Aboriginal Conference ('NAC'), an elected Indigenous body advising the federal government, passed a resolution demanding 'a treaty of commitment be executed between the Aboriginal Nation and the Australian Government'.[72] Expecting the government might object to the word 'treaty' and its connotations with international statehood, the NAC later proposed a compromise term, calling instead for a 'Makarrata' between 'the Aboriginal Nation' and 'the Australian Government'.[73] In response to community pressure, the Senate asked its Standing Committee on Constitutional and Legal Affairs to examine the feasibility of securing a compact or Makarrata between the Commonwealth Government and Aboriginal people. In 1983, the Standing Committee delivered its report, recommending constitutional change in order to implement a 'compact'.[74]

Treaty advocacy petered out following the dismantling of the NAC in 1985, but it returned to political prominence in the period surrounding the bicentennial of British colonisation in 1988. The Aboriginal Sovereign Treaty '88 campaign called for the recognition of the sovereignty of Aboriginal people and their ownership of Australia and for the Commonwealth Government to enter into a treaty with the Aboriginal nations of Australia.[75] The Barunga Statement, developed at the Barunga Festival in the Northern Territory, also called on 'the Commonwealth Parliament to negotiate with us a Treaty recognising our prior

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69 Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–1981' (2011) 42(3) *Australian Historical Studies* 372, 377; Karen O'Brien, *Petitioning for Land: The Petitions of First Peoples of Modern British Colonies* (Bloomsbury, 2018) 74.

70 Williams and Hobbs (n 65) 35.

71 Robert Secretary et al, *Larrakia Petition to the Queen*, 17 October 1972.

72 Fenley (n 69) 378.

73 National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper, World Council of Indigenous Peoples, Canberra, April 1981).

74 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later…: Report on the Feasibility of a Compact or 'Makarrata' between the Commonwealth and Aboriginal People* (Parliamentary Paper No 107, 13 September 1983) xii, Recommendation 1.

75 Treaty 88 Campaign, 'Aboriginal Sovereignty: Never Ceded' (1988) 23(91) *Australian Historical Studies* 1–2.

ownership, continued occupation and sovereignty and affirming our human rights and freedom'.[76] The Barunga Statement was presented to Prime Minister Bob Hawke, who accepted its terms and announced that 'there shall be a treaty negotiated between the Aboriginal people and the Government on behalf of all the people of Australia'.[77] No treaty eventuated, however, and the idea was quietly shelved in 1991. Calls for a national treaty by ATSIC in the new millennium also fell on deaf ears.[78]

In the light of this history, it is significant to note that it is only recently that the treaty debate has included state and territory governments. The Uluru Statement from the Heart called for the establishment of a national Makarrata Commission to 'supervise a process of agreement-making between governments and First Nations',[79] implying treaties at both the state and national level. While the federal government has so far ignored the push for a Makarrata Commission, over the last few years, Victoria,[80] the Northern Territory,[81] Queensland,[82] and South Australia,[83] have officially committed to enter treaty negotiations with Aboriginal peoples. The shift towards subnational treaty-making is not simply a reflection of Aboriginal and Torres Strait Islander peoples' frustration at the failure of the Commonwealth to implement the Uluru Statement, but a broader and deeper anger at the failure of successive federal governments to meaningfully progress the decade-long national debate on constitutional recognition.[84] The initial burst of activity at the subnational level reveals the role of supportive Labor governments and laboratory federalism in Indigenous affairs in the Australian federation.

South Australia subsequently abandoned its treaty process following a change of government,[85] but several other states and territories have indicated that they support treaty. In 2018, the ACT government declared they were open to

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76 'The Barunga Statement', Australian Institute of Aboriginal and Torres Strait Islander Studies (Web Page, 2022) <https://aiatsis.gov.au/explore/barunga-statement>.

77 Prime Minister Robert Hawke (Speech, Barunga Sports and Cultural Festival, Northern Territory, 12 June 1988) <https://pmtranscripts.pmc.gov.au/sites/default/files/original/00007334.pdf>.

78 Council for Aboriginal Reconciliation, *Reconciliation: Australia's Challenge* (Final Report, December 2000) 106, Recommendation 6; Hannah McGlade (ed), *Treaty: Let's Get it Right!* (Aboriginal Studies Press, 2003).

79 *Uluru Statement from the Heart* (n 16).

80 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic).

81 *Treaty Commissioner Act 2020* (NT), app.

82 Department of Aboriginal and Torres Strait Islander Partnerships, Queensland Government, *Treaty Statement of Commitment and Response to Recommendations of the Eminent Panel* (Statement, August 2020).

83 Kyam Maher MLC, 'Treaty' (Speech, Parliament House, Adelaide, 14 December 2016); Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017).

84 Harry Hobbs, 'The Road to Uluru: Constitutional Recognition and the UN *Declaration on the Rights of Indigenous Peoples*' (2020) 66(4) *Australian Journal of Politics and History* 613.

85 Michael Owen, 'Aboriginal People Failed by "Expensive Gesture" Treaties', *The Australian* (online, 11 June 2018) <https://www.theaustralian.com.au/nation/aboriginal-people-failed-by-expensive-gesture-treaties/news-story/84b000a2f0b81c82801d93cc9a45cb3c>.

discussing a treaty process with Traditional Owners in the Canberra region,[86] and in 2021 provided funding to facilitate that conversation.[87] In June 2021, the Tasmanian Liberal government committed to talk treaty with Aboriginal Tasmanians, appointing former Governor Kate Warner and law professor Tim McCormack to lead discussions.[88] The New South Wales Labor Opposition also promised to hold treaty talks with Aboriginal nations within the State if they won their 2019 election.[89] Western Australia has not committed to a treaty process, but developments in that state have helped ensure treaty remains at the forefront of political attention. The size and scope of an Indigenous Land Use Agreement negotiated between the state government and the Noongar people in 2016 has led to its being characterised by some public lawyers as Australia's first treaty. The largest and most comprehensive agreement to settle Aboriginal interests in land in Australian history, the settlement covers around 200,000km$^2$ and 'includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage', amounting to a total value of about $1.3 billion.[90] Not all Noongar people supported the agreement. Following several years of objections, the Settlement has finally commenced.[91]

The Victorian process has moved furthest along. In June 2018, the Victorian Parliament passed Australia's first treaty bill. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) creates a legislative basis for negotiating a treaty with Aboriginal people in the State. Under the Act, the government is required to recognise an Aboriginal-designed representative body (subsequently established as the First Peoples' Assembly of Victoria) that will administer a self-determination fund to support First Nations in their treaty negotiations.[92] The representative body will also work with the government to establish a treaty negotiation framework. That framework must accord with several guiding principles set out in the Act: self-determination and empowerment; fairness and equality; partnership and good faith; mutual benefit and sustainability; and

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86 Nakari Thorpe, '"Real Outcomes" Needed for Clan Groups to Support Any ACT Treaty Process', *National Indigenous Television News* (online, 28 September 2018) <https://www.sbs.com.au/nitv/nitv-news/article/2018/06/25/real-outcomes-needed-clan-groups-support-any-act-treaty-process>.

87 Jasper Lindell, 'Funding for First Indigenous Treaty Process in ACT Budget', *Canberra Times* (online, 7 February 2021) <https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/>.

88 Lucy Shannon, 'Tasmanian Government Commits to Time Frame for Truth-Telling, Treaty Talks with Indigenous Community', *ABC* (online, 23 June 2021) <https://www.abc.net.au/news/2021-06-23/tasmanian-aboriginal-truth-telling-treaty-discussions/100235634>.

89 Calla Wahlquist, 'NSW Labor Plans to Sign Treaty Recognising Indigenous Ownership', *Guardian Australia* (online, 25 January 2018) <https://www.theguardian.com/australia-news/2018/jan/25/nsw-labor-plans-to-sign-treaty-recognising-indigenous-ownership>.

90 Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 31.

91 Ben Wyatt, 'High Court Clears the Way for Historic South West Native Title Settlement to Proceed' (Media Statement, 26 November 2020).

92 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) ss 9–10.

transparency and accountability.[93] Jill Gallagher, the Victorian Treaty Advancement Commissioner, explained the role of the First Peoples' Assembly:

> Their role is to negotiate the roadmap so clans or mobs or nations here in Victoria can eventually negotiate their own treaties. … This assembly here in Victoria can be about empowerment. It can be about reshaping our relationship with Victorians, reshaping our relationship with government, and acknowledging the past so we can all move on. It's about reparations and it's about giving a voice to the voiceless. And we've been voiceless for 230 years, in our own country. That's what it's about.[94]

Following elections for the First Peoples' Assembly in 2019, discussion on a treaty negotiation framework has commenced. At the same time, Aboriginal Nations in Victoria are considering their own position. This will take time, and as a result, negotiations are not expected to begin for several years.

The focus on subnational treaty-making is understandable in this context, but it carries some significant challenges. First, there is some concern among Aboriginal and Torres Strait Islander peoples over the genuineness and sincerity of state and territory governments' commitment to renegotiating relationships and empowering First Nations peoples through treaty. For example, before the treaty process in South Australia was abandoned, Aboriginal nations had expressed concern that the process was rushed. In consultations with the State's Treaty Commissioner, many people argued that it 'should be slowed down so that Aboriginal people can properly digest what is being proposed and the principles behind the proposition'.[95] Similar complaints have been made in Victoria. In that State, Djab Wurrung Traditional Owners launched the 'No Trees, No Treaty' campaign to protest VicRoads' plan to cut down sacred trees and highlight the State government's refusal to listen to their position.[96] The Queensland treaty process has also been criticised as moving too quickly. The hurried process fuels concern that it is being driven by that State's alarm over the *Timber Creek* decision,[97] and the desire to foreclose substantial compensation claims.[98]

Second, there are also difficult legal questions surrounding state and territory treaty processes. The constitutional allocation of legislative power means that there are certain matters that cannot be part of a subnational treaty,

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93 Ibid ss 21–6.

94 Quoted in Lorena Allam, 'Victoria a Step Closer to Indigenous Treaty with Creation of First Peoples' Assembly', *Guardian Australia* (online, 11 April 2019) <https://www.theguardian.com/australia-news/2019/apr/11/victoria-a-step-closer-to-indigenous-treaty-with-creation-of-first-peoples-assembly>.

95 Roger Thomas, Office of the Treaty Commissioner, *Talking Treaty: Summary of Engagements and Next Steps* (Report, 21 July 2017) 8.

96 Madeline Hayman-Reber, 'No Trees, No Treaty: Protestors Continue to Amass at Djab Wurrung Site', *National Indigenous Television News* (online, 26 August 2019) <https://www.sbs.com.au/nitv/article/2019/08/22/no-trees-no-treaty-protesters-continue-amass-djab-wurrung-site>.

97 *Northern Territory v Griffiths* (2019) 269 CLR 1 ('*Timber Creek*').

98 See discussion in Williams and Hobbs (n 65) 226, 238; Michael Dillon, 'Policy Implications of the Timber Creek Decision' (Working Paper No 128, Centre for Aboriginal Economic Policy Research, 2019) 9.

potentially threatening the possibility of a comprehensive settlement. Additionally, Aboriginal nations whose traditional lands stretch across state and territory borders may find their negotiating partners have very different ideas over the content and process of treaty-making (assuming that both governments are even committed to negotiating treaty). The 'uncoordinated pursuit of treaty across the federation'[99] poses real challenges for Aboriginal and Torres Strait Islander peoples.

Most problematically, state and territory based treaties are legally vulnerable to Commonwealth interference. The terms of any Victorian treaty, for example, could be overridden by Commonwealth legislation grounded on the race power in s 51(xxvi) of the Constitution. Similarly, a Northern Territory treaty could be invalidated by Commonwealth legislation under s 122 revoking self-government over certain matters. If it was so inclined, the Commonwealth could override any or all parts of a treaty entered into with a state or a territory. Nonetheless, in assessing the legal vulnerability of subnational treaty processes it is important to note that — even with a First Nations Voice — a Commonwealth treaty will not be legally impregnable either; '[i]n the absence of constitutional protection of treaty rights, a future federal Parliament could enact legislation to abrogate any national treaty settlement as well'.[100] For this reason, it is important that treaty processes are insulated from political interference. A First Nations Voice and a comprehensive process of local and regional truth-telling may assist in this endeavour.

## V Truth-Telling

Truth-telling is an important part of the process towards achieving reconciliation between First Nations people of Australia and the Australian government and non-Indigenous Australians. Truth-telling forms the third-sequenced pillar of reforms proposed within the Uluru Statement from the Heart. Delegates who participated in the process of drafting the Uluru Statement understood that a constitutionally protected Indigenous Voice would provide the necessary resources and political legitimacy Indigenous people need prior to entering agreement-making processes. Delegates also considered that without an Indigenous Voice and treaty, truth-telling processes and initiatives will be vulnerable because they will be limited by non-Indigenous bureaucracies that have failed to make real changes and forced Indigenous peoples to continuously relive and retell their trauma and oppression.[101] The delegates' desire for truth-

99 Megan Davis, 'Step by Step: The Road to a Settlement' (2018) 146 *The Monthly* 12, 12; Harry Hobbs, 'Treaty Making and the UN Declaration on the Rights of Indigenous Peoples: Lessons from Emerging Negotiations in Australia' (2019) 23(1–2) *International Journal of Human Rights* 174.

100 Hobbs and Williams (n 14) 226.

101 Sana Nakata, 'On Voice, and Finding a Place to Start', *Indigenous Constitutional Law* (Blog Post, 3 March 2021) <https://www.indigconlaw.org/home/on-voice-and-finding-a-place-to-start>.

telling was to ensure that it not only reveals historic and continuing injustices against Indigenous peoples but provides community with a sense of justice, peace and healing. More importantly, it is intended to allow learning from past mistakes and to prevent recurrence.

Despite the renewed focus on truth-telling inaugurated by the Uluru Statement, it is not a novel idea. Several major truth-telling initiatives have occurred since the 1967 referendum. The most extensive and consequential of these have been undertaken by Commonwealth governments. More remarkable is that the most prominent of these national truth-telling processes have occurred in relation to traditional areas of state and territory responsibility.

One such initiative was the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC'), established by the Hawke Labor Government in 1987 and concluding its work in 1991. The Royal Commission was precipitated by vocal Indigenous activism over the alarming number, and often the suspicious nature, of the deaths of Aboriginal and Torres Strait Islander people in police custody or prison. In a wide-ranging, multi-volume report that addressed both national and regional issues, the Royal Commission exposed the high and disproportionate figures of Indigenous deaths in custody, the contexts in which those deaths occurred and their causes. It revealed entrenched racial discrimination and corrupt, violent behaviour from police authorities towards Indigenous people placed into the custody of the police.[102] The RCIADIC acknowledged the Commonwealth's funding and leadership role in Indigenous affairs, and its capacity to pressure state and territory governments and agencies to implement recommendations targeted towards police, corrections, health services, the Attorneys-General and the courts.[103]

The RCIADIC was a watershed moment of truth-telling about the ongoing violence visited upon Aboriginal and Torres Strait Islander peoples by the settler colonial legal system. It continues to be a touchstone of public debate and Indigenous advocacy today, even as many of its recommendations remain unimplemented.[104] The beginning of Commonwealth disengagement from the Royal Commission can be traced to the Howard Government. As then Social Justice Commissioner Mick Dodson noted at a Commonwealth-convened national Ministerial Summit on Indigenous Deaths in Custody in 1997:

> [T]he Commonwealth demonstrated its co-operative approach by hiring a room so the states and territories could announce what they intended to do, then made defensive

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102 *Royal Commission into Aboriginal Deaths in Custody* (National Report, 15 April 1991) vol 1–4.

103 See ibid, Recommendation 1.

104 Thalia Anthony et al, '30 Years On: Royal Commission into Aboriginal Deaths in Custody Recommendations Remain Unimplemented' (Working Paper No 140, Centre for Aboriginal Economic Policy Research, 2021).

> noises about criminal justice being a state responsibility and sent the Ministers home to get on with the job.[105]

Longer-scale national truth-telling initiatives have also been set up. In 1991, the Council for Aboriginal Reconciliation ('CAR') was established to undertake a formal, 10-year process of national reconciliation between Indigenous and non-Indigenous Australians. CAR consisted of 25 members who represented Aboriginal and Torres Strait Islander communities and the broader Australian community. One of its statutory functions was to progress the cause of reconciliation by promoting 'a deeper understanding by all Australians of the history, cultures, past dispossession and continuing disadvantage of Aborigines and Torres Strait Islanders' — and providing 'a forum for discussion by all Australians of issues relating to reconciliation'.[106] While CAR supported a range of important national and local initiatives in truth-telling, it had a difficult relationship with the Howard Government, which rejected its final recommendations for constitutional reform and treaty.[107]

In 1995, the Keating Labor Government initiated another major national truth-telling initiative, this time into the Stolen Generations – the thousands of Aboriginal and Torres Strait Islander children removed from their families by Australian governments since the late 19th century. As with the RCIADIC, the Bringing Them Home Inquiry (as it would come to be known) came about as a result of Indigenous advocacy, stemming from a concern that 'the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and their families and the provision of services'.[108] The Bringing Them Home Report was 'widely read, with sixty thousand copies purchased in the first year of its release alone',[109] and community knowledge and understanding of the Stolen Generations has improved substantially since the 1990s.

Acceptance of Australian history at a Commonwealth level was resisted by former Prime Minister John Howard who referred to acknowledgement of events like the Stolen Generations and the frontier wars as a 'black armband' view of history. The black armband places a white blindfold on history and, in doing so, has contributed to societal and government failure to acknowledge the experiences of Indigenous people as a result of past wrongful government actions.

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105 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Fifth Report* (Human Rights and Equal Opportunity Commission, 1997) 23.

106 *Council for Aboriginal Reconciliation Act 1991* (Cth) ss 6(b), (d).

107 Lino (n 6) 37–8.

108 Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) 15.

109 Anne Orford, 'Commissioning the Truth' (2006) 15(3) *Columbia Journal of Gender and Law* 851, 867.

This has maintained the gap that has been a barrier to achieving truth-telling and reconciliation in Australia at a national level with Indigenous people.[110]

Not all governments supported this position. Reflecting the trend that we have identified in this article, sympathetic state and territory governments rejected Howard's denial of history. Between 1997 and 2001, all state and territory governments acknowledged past practices and policies of forced removal of Aboriginal and Torres Strait Islander children and issued their own apologies for the trauma those policies caused.[111] It was not until a Labor government was elected at the federal level that a formal national apology to Indigenous people was made on behalf of the Commonwealth government for its contribution to the Stolen Generations.[112] The impact of the national apology is evidence of the importance of historical acceptance of past government actions to achieve healing and reconciliation.[113]

It is this sentiment that lay behind the Uluru Statement from the Heart's call for a Makarrata Commission to oversee a process of truth-telling about Australia's history. Such a process is integral for healing and reconciliation to occur in a manner that would bring benefit to all Australians, particularly Aboriginal and Torres Strait Islander people. The First Nations representatives who participated in the regional dialogues and Uluru Convention strongly supported the implementation of truth-telling initiatives. It was in their view that doing so would provide the Australian people with a fuller understanding and awareness of First Nations culture and history. In Adelaide, for instance, delegates explained:

> [We] want the history of Aboriginal people taught in schools, including the truth about murders and the theft of land, Maralinga, and the Stolen Generations, as well the story of all the Aboriginal fighters for reform. Healing can only begin when this true history is taught.[114]

Across the country, dialogue participants emphasised that the true history of colonisation must be told. In their view, truth could serve as a bridge to connect

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110 Patrick Brantlinger, '"Black Armband" versus "White Blindfold" History in Australia' (2004) 46(4) *Victorian Studies* 655, 657.

111 Coral Dow, 'Sorry: The Unfinished Business of the Bringing Them Home Report' (Background Notes, Parliamentary Library, Parliament of Australia, 4 February 2008).

112 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister).

113 Paul Daley, 'Historian Shines a Light on the Dark Heart of Australia's Nationhood', *Guardian Australia* (online, 10 March 2014) <https://www.theguardian.com/world/postcolonial/2014/mar/10/historian-shines-a-light-on-dark-heart-of-australias-nationhood>; Brantlinger (n 110) 658; Lawrence McNamara, 'History, Memory and Judgment: Holocaust Denial, the History Wars and Law's Problems with the Past' (2004) 26(3) *Sydney Law Review* 353.

114 Referendum Council, *Final Report of the Referendum Council* (Report, 30 June 2017) 19 n 31.

acknowledgment of historic injustices with a contemporary project of structural reform.[115]

The Commonwealth governments in power since the Uluru Statement was issued have not responded to its call for truth-telling processes. At most, they have adopted tokenistic policies. On 1 January 2021, for instance, Prime Minister Scott Morrison announced his decision to change a single word in the Australian national anthem; the line that Australians are 'young and free' would be amended to 'one and free' in a bid to honour Indigenous people.[116]

In the face of the federal government's seeming indifference to a nationally-led truth-telling process as envisioned by the Uluru Statement, the Victorian Labor Government has taken the initiative. In June 2020, the First Peoples Assembly of Victoria called on the Victorian Government to establish an independent truth commission or inquiry to formally recognise historic wrongs, and past and ongoing injustices as a result of colonisation.[117] The Victorian government responded to those calls with support. Over the latter part of 2020, the First Peoples Assembly commenced work designing Australia's first officially designated Truth and Justice Commission. On 9 March 2021, the State government announced the establishment of the Yoo-rrook Justice Commission in partnership with the First Peoples Assembly. The Yoo-rrook Justice Commission will be Australia's first ever truth-telling Commission.[118]

The Commission commenced its work investigating past and present injustices against the Aboriginal people of Victoria in July 2021. This broad jurisdiction allows detailed focus on the interconnections between past and ongoing contemporary harm. Indeed, it is likely that the Commission will explore how abuses suffered during the frontier wars and colonial period continue to affect and influence the experiences of Aboriginal Victorians today, particularly in relation to harms such as deaths in custody and incarceration.[119] With the powers of a Royal Commission, the Yoo-rrook Justice Commission will be able to fulfil its responsibilities independent of government. Nevertheless, some limitations do exist; it will not have the power to order reparations, punish

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115 Gabrielle Appleby and Megan Davis, 'The Uluru Statement and the Promises of Truth' (2018) 49(4) *Australian Historical Studies* 501; Megan Davis, 'The Long Road to Uluru Walking Together: Truth Before Justice' (2018) 60 *Griffith Review* 15, 41.

116 Jessie Yeung, 'Australia Has Changed its National Anthem in a Bid to Reflect 60,000 Years of Indigenous History', *CNN* (online, 1 January 2021) <https://edition.cnn.com/2021/01/01/australia/australia-anthem-indigenous-intl-hnk-scli/index.html>.

117 Joseph Dunstan, 'Victorian First Peoples' Assembly Calls for Truth Commission on Path to Treaties with Aboriginal Nations', *ABC News* (online, 18 June 2020) <https://www.abc.net.au/news/2020-06-18/victorian-aboriginal-treaty-body-calls-for-truth-commission/12361496>.

118 Darby Ingram, 'Victoria Launches Country's First Truth-Telling Commission', *National Indigenous Times* (online, 10 March 2021) <https://nit.com.au/victoria-launches-countrys-first-truth-telling-commission/>.

119 Leonie Thorne, 'Victoria to Establish Truth and Justice Process as Part of Aboriginal Treaty Process', *ABC News* (online, 11 July 2020) <https://www.abc.net.au/news/2020-07-11/victoria-truth-telling-process-moment-aboriginal-history/12446102>.

individuals, or implement reforms.[120] This is because its overall mandate is to build a stronger relationship between Aboriginal people of Victoria and the Victorian government, by addressing past and present injustices.[121] The creation of the Yoo-rrook Justice Commission is significant. It serves not only as a mechanism to provide healing for Victoria's Aboriginal people and communities, but if effective, can serve also an example that other states and territories could adopt. Nonetheless, it does not absolve the Commonwealth of its responsibility to engage seriously with the Uluru Statement's call for a Makarrata Commission to supervise regional and local truth-telling around the country.

## Conclusion

In this article, we have outlined the shifting locus of Indigenous law reform in Australia. While Aboriginal and Torres Strait Islander peoples continue to call on the federal government to protect and promote their rights, in recent years the majority of promising law reform has occurred at the subnational level. It is not only that the states and territories have proved more receptive to the aspirations and advocacy of Aboriginal and Torres Strait Islander peoples, but that progress at the subnational level has come at the same time that the federal government has consciously receded from the field. Beginning with the election of the Howard government in 1996, the Commonwealth has determined to adopt a lower profile on legal reform in Aboriginal and Torres Strait Islander affairs. This extends to its muted response to the Uluru Statement from the Heart. As we have documented, the federal government continues to dismiss calls for a constitutionally enshrined First Nations Voice and disclaims any responsibility for treaty-making or truth-telling. In the words of Indigenous Affairs Minister Ken Wyatt, '[i]t is important that state and territory jurisdictions take the lead'.[122]

Three points can be identified in this shift. First, Australia's federal system has often complicated the ability of Aboriginal and Torres Strait Islander peoples to protect and promote their rights. The initial constitutional distribution of legislative powers left the responsibility for Aboriginal and Torres Strait Islander peoples in the hands of the states – a constitutional incapacity that allowed the federal Cabinet to dismiss William Cooper's 1937 petition to the King.[123] The 1967 referendum did not solve this challenge; opaque lines of responsibility continue

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120 Tony Wright, 'The Yoo-rrook Justice Commission: Some Facts About Truth-Telling', *The Age* (online, 14 May 2021) <https://www.theage.com.au/national/victoria/the-yoo-rrook-justice-commission-some-facts-about-truth-telling-20210513-p57rql.html>.

121 Joseph Dunstan, 'What Australia's First Aboriginal Truth and Justice Commission Might Look Like', *ABC News* (online, 12 December 2020) <https://www.abc.net.au/news/2020-12-12/australian-aboriginal-truth-and-justice-commission-what-is-it/12956326>.

122 Quoted in Dan Conifer, 'Indigenous Constitutional Recognition to be Put to Referendum in Next Three Years, Minister Promises', *ABC News* (online, 10 July 2019) <https://www.abc.net.au/news/2019-07-10/indigenous-constitutional-recognition-to-go-to-referendum-wyatt/11294478>.

123 Attwood and Markus (n 38) 58.

to allow federal and state and territory governments to obscure failures within their policy spheres. Notwithstanding these complications, however, we have demonstrated that the federation can also carry considerable benefits. Chief among these is the fact that state and territory governments can engage in significant law reform without waiting for the Commonwealth government to act.

Developments in constitutional recognition, the establishment of Indigenous representative bodies, treaty-making and truth-telling are only occurring because of Australia's federal structure. As we saw in relation to the insertion of preambular statements of constitutional recognition, and may be seeing in relation to treaty-making, efforts by one government are placing pressure on other governments. Proven success in bringing about change at the state and territory level could eventually generate credibility and momentum for reform at the national level.

Second, reform at the state and territory level has not been shared across the federation. As we have seen, Victoria has repeatedly been at the forefront of subnational Indigenous law reform. In our view, this highlights not only the strength of First Nations activism in that State but also the fact that Victoria appears to be a relatively more progressive electorate. One reason for this might involve the way in which Victoria has been associated with extended periods of Labor rule in recent decades – though Queensland and South Australia have seen similar stretches of Labor government.

Third, this positive narrative must be tempered. Even if legal reform in Victoria may place political pressure on the New South Wales government, it does not directly assist Aboriginal people in that State. A treaty between the Wurundjeri people and Victoria will offer little immediate value to the Wiradjuri Nation in NSW. Similarly, the allocation of constitutional powers in the Australian federation means that any reform at the state and territory level remains legally vulnerable. As such, significant downsides and risks are involved in the exclusive pursuit of protections of Indigenous rights at the subnational level.[124] The optimal solution remains the simplest. Contra Ken Wyatt, it is important that the Commonwealth take the lead. The federal government should meaningfully engage with the aspirations of Aboriginal and Torres Strait Islander peoples and listen to their calls for structural reform. It is only by doing so that Aboriginal and Torres Strait Islander peoples' 'ancient sovereignty can shine through as a fuller expression of Australia's nationhood'.[125]

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124 Davis, 'Voice, Treaty, Truth' (n 15).

125 *Uluru Statement from the Heart* (n 16).

# THE LEGALITY OF CALF ROPING IN AUSTRALIA: A *FORD V WILEY* PROPORTIONALITY ANALYSIS

MORGAN STONEBRIDGE*

*Public concern for the welfare of animals used in rodeo events is growing. Much of this concern is directed at the event of calf roping, an event that involves chasing, lassoing and throwing a calf to the ground. In all Australian jurisdictions, pain inflicted on animals is subject to a requirement that the pain not be unjustifiable or unnecessary. Typically, pain caused to animals can be justified if it provides human benefit. Legislatures in Australian states and territories have excluded calf roping from this assessment, which to some extent implies that the practice meets the standard. Accordingly, this article utilises the* Ford v Wiley[1] *proportionality test to determine whether the harm inflicted on calves is justified in the light of the purported benefits of the practice. It argues that the harm caused is not proportionate to the benefits and, as a result, that all Australian jurisdictions should explicitly prohibit the practice.*

## I INTRODUCTION

The scale of rodeo events in Australia has grown substantially in recent decades.[2] Having evolved from 'bushmen's carnivals',[3] it is now a romanticised, albeit Americanised, celebration of rural life that draws crowds of thousands.[4] For regional towns, attracting a crowd that rivals the numbers of its own population brings significant value to the community. For instance, the rural town of Mount Isa in Queensland, with a population under 19,000, is host to the largest rodeo event in the Southern Hemisphere.[5] Just under 40,000 spectators attended the

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1 (1889) 23 QBD 203 (Queen's Bench Division (Divisional Court)) ('*Ford v Wiley*').

2 See, eg, 'Isa Rodeo Breaks Records for Growing Outback Tourism Industry', *Tourism & Events Queensland* (Article, 24 October 2019) <https://teq.queensland.com/news-and-media/latest-news/isa-rodeo-breaks-records-for-growing-outback-tourism-industry>; 'Isa Rodeo Ticket Sales Buck the Record', *Tourism & Events Queensland* (Article, 26 May 2021) <https://teq.queensland.com/news-and-media/latest-news/isa-rodeo-ticket-sales-buck-the-record>.

3 Jim Hoy, '"Bushmen's Carnivals" and "Campdrafts": Rodeo in Australia' (1994) 8(1) *Antipodes* 55, 55.

4 Harriet Tatham, 'Biggest Rodeo in the Southern Hemisphere Brings Big Crowds to Outback Queensland', *ABC News* (online, 13 August 2017) <https://www.abc.net.au/news/2017-08-13/mount-isa-rodeo-biggest-in-southern-hemisphere/8801780>.

5 Ibid.

DOI: 10.38127/uqlj.v41i1.6481

Mount Isa Mines Rotary Rodeo over the four-day event in 2019,[6] contributing $12.4 million to the local economy.[7] Given the typical 'primary industry-focused economies' in rural Australia,[8] the boost from outback tourism provides a diverse contribution to the local economy that has garnered government support. Former Queensland Tourism Minister Kate Jones expressed support for rodeo events, stating they 'support local jobs and generate a strong return for local businesses'.[9]

There is also a strong sense of cultural connection to Australian rodeo. For instance, Gympie MP Tony Perrett described rodeo as 'part of the bush fabric of rural and regional Queensland'.[10] This integration of rodeo with rural Australian identity can, in part, be attributed to rodeo's evolution from the everyday labours of Australian stockmen. Some events featured in modern Australian rodeo have strong links to the skills involved in rural working life. For instance, saddle bronc riding has evolved from the taming or 'breaking in' of rough horses, and camp drafting — which involves a rider on horseback separating a steer from the herd and guiding him around a course — was a common husbandry practice on outback cattle stations, and still features in some rodeos.[11] An excerpt from an Australian magazine published in 1961 portrays this evolution in claiming that, 'above all the rodeo is a playing out of a tradition born from the wide outback stations and the long droving tracks; a tradition of men and horses and stock and hot dry days under a sun-burned Australian sky'.[12] There is clearly some romanticisation of Australian rodeo here, which serves to link the event to an identity of rurality and has likely contributed to its deep integration into rural life.

In Australia and globally, however, rodeo has been subject to increasing criticism based on animal welfare concerns.[13] Animal advocacy group Animals

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6 The Mount Isa Mines Rotary Rodeo was held as a 'virtual rodeo' in 2020 due to the coronavirus pandemic. As such, 2019 is the most recent attendance count.

7 'Isa Rodeo Breaks Records for Growing Outback Tourism Industry' (n 2).

8 Jeremy Buultjens and Grant Cairncross, 'Event Tourism in Remote Areas: An Examination of the Birdsville Races' (2015) 8(1) *Journal of Place Management and Development* 69, 69.

9 'Isa Rodeo Breaks Records for Growing Outback Tourism Industry' (n 2).

10 'Animal Liberationists Call on Ag Minister to Ban Calf Roping', *The Gympie Times* (online, 28 January 2021) <https://www.couriermail.com.au/subscribe/news/1/?sourceCode=CMWEB_WRE170_a_GGL&dest=https%3A%2F%2Fwww.couriermail.com.au%2Fnews%2Fqueensland%2Fgympie%2Fnews-story%2F375497ae8f6231ae20143152e0cb92b7&memtype=anonymous&mode=premium>.

11 Spark, 'Campdrafting: The Unique Australian Cowboy Sport' (YouTube, 4 February 2020) <https://www.youtube.com/watch?v=CoXOhf-ddiU>; Senate Select Committee on Animal Welfare, Parliament of Australia, *Equine Welfare in Competitive Events Other Than Racing* (Report, August 1991) 3.

12 'Rodeo' (September 1961) 14(9) *Mimag* 12, 12 <https://nla.gov.au/nla.obj-305357013/view?sectionId=nla.obj-309666416&partId=nla.obj-305363033#page/n11/mode/1up>.

13 See, eg, 'Act Now to Protect Animals from Rodeos', *Animals Australia* (Web Page, 3 December 2021) <https://www.animalsaustralia.org/take_action/ban-rodeo-cruelty/>; Jo Joyce, 'No Bull? The Great Rodeo Debate', *ABC Local* (online, 20 October 2011) <https://www.abc.net.au/local/stories/2011/10/20/3344249.htm>; Max Towle, 'Calf-Roping at Rodeos Criticised by Govt

Australia describes rodeos as 'a cruel spectator sport, condemned by all animal protection organisations'.[14] RSPCA Australia also opposes rodeos on the basis of 'the potential for significant injury, suffering or distress to the animals involved'.[15] Concern for the welfare of rodeo animals is not new. The 1977 book Rodeo in Australia tells,[16] with some disapproval, of opposition to rodeo based on claims of cruelty to animals, and such opposition has been longstanding.[17] There is particular opposition to the common rodeo event of calf roping, also known as the 'rope and tie' event. Calf roping involves a contestant on horseback chasing and lassoing a calf. The contestant must throw a rope around the calf's neck, bringing him to a halt, and dismount the horse to pick the calf up and throw/force him to the ground onto his side. To finish the event, the contestant will cross tie three of the calf's four legs, and then remount the horse and allow some slack in the catch rope. Calf roping is a timed event, with a judge recording the time once the three-legged tie is complete. Opposition to calf roping is based on the perceived vulnerability of the calves and the potential to cause them harm. For instance, Animal Liberation Queensland's Gayle D'Arcy describes calf roping as an event that 'produces fear and torments vulnerable baby animals'.[18] There is also recent scientific evidence supporting the welfare concerns held by animal protection organisations and the community, specifically regarding the stress the practice inflicts on the calves involved. This research is discussed below.

Given the animal welfare concerns relating to calf roping, this article considers the legality of the event under animal welfare legislation in various Australian jurisdictions. While, as discussed, all rodeo events have given rise to animal welfare concerns, calf roping appears to have received the highest level of community opposition when compared to other rodeo events. It has also been the

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Officials', *RNZ* (online, 23 February 2017) <https://www.rnz.co.nz/news/national/325196/calf-roping-at-rodeos-criticised-by-govt-officials>; Susan Nance, 'Rodeo is a Theatre of Violence and Danger — and It's Not Going Anywhere', *The Conversation* (online, 31 July 2019) <https://theconversation.com/rodeo-is-a-theatre-of-violence-and-danger-and-its-not-going-anywhere-121156>.

14 'Rodeos', *Animals Australia* (Web Page) <https://animalsaustralia.org/our-work/rodeos/background/>.

15 'What are the Animal Welfare Issues with Rodeos?', *RSPCA* (Web Page, 31 January 2020) <https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-rodeos/#:~:text=The%20RSPCA%20is%20opposed%20to,'enjoy'%20the%20rodeo%20experience>.

16 Peter N Poole, *Rodeo in Australia* (Rigby, 1977).

17 See, eg, FR Davey, 'Plea for Animals', (1940) 2(43) *The ABC Weekly* 54 <https://nla.gov.au/nla.obj-1219672737/view?sectionId=nla.obj-1309242700&partId=nla.obj-1219708063#page/n53/mode/1up>; Ron Saw, 'Outrageous Rex at the Rodeo' (1981) 101(5285) *The Bulletin* 40 <https://nla.gov.au/nla.obj-1240806144/view?sectionId=nla.obj-1569563792&partId=nla.obj-1240972783#page/n42/mode/1up>; J Bradshaw, 'Rough on Rodeo' (1982) 102(5303) *The Bulletin* 5 <https://nla.gov.au/nla.obj-1310465129/view?sectionId=nla.obj-1601739528&partId=nla.obj-1310508928#page/n5/mode/1up>; 'Batman's Melbourne: All the Rich Scents of the Bush Rodeo' (1969) 91(4635) *The Bulletin* 5 <https://nla.gov.au/nla.obj-1413139913/view?sectionId=nla.obj-1639627417&partId=nla.obj-1413204397#page/n4/mode/1up>.

18 Derek Barry, 'Push to Ban Calf Roping in Rodeos', *The North West Star* (online, 6 February 2020) <https://www.northweststar.com.au/story/6618444/push-to-ban-calf-roping-in-rodeos/>.

subject of more extensive scientific investigation,[19] and on this basis the welfare concerns associated with the event appear to be more pressing.[20] The analysis of the legality of calf roping also entails consideration of the validity of animal welfare concerns, in the light of the contribution of rodeo to the economy and the cultural connection to the sport, particularly in regional areas.

This article contends that the impact on animal welfare is not proportionate to the economic and cultural benefits of the practice. The next part of the article provides a detailed account of calf roping. Part III of the article engages in a comprehensive and comparative overview of the relevant regulatory framework in Australia. In Part IV, the relevant legal test set out in *Ford v Wiley*[21] — known as the proportionality test — is applied to determine the likely legality of calf roping. Application of this test leads to the conclusion that the beneficial contributions of calf roping do not justify the harm caused to the calves, and that calf roping would therefore likely not be legal if the standard of unnecessary harm applied. Finally, Part V makes recommendations for the reform of laws relating to calf roping and provides some concluding comments.

## II Regulatory Framework Governing Calf Roping

### A *Introduction*

Calf roping has been a standard event in Australian rodeos since the 1960s.[22] It is one of eight events that must be included in a rodeo if any points awarded are to count towards the Australian championship.[23] As such, calf roping is considered to be a key part of rodeo. Further, because calf roping is mandated as a necessary component of Australian rodeo, it is likely that many supporters of rodeo have witnessed it as a fundamental part of the broader sport. Given this, the feelings of cultural connection to rodeo outlined above are also transferrable to calf roping — if not in an individual capacity, certainly in the way it comprises rodeo generally.

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19 There is a scarcity of scientific research regarding the welfare of animals used in all rodeo events, including the rope and tie event. However, as discussed in Part III, two key pieces of Australian research into the welfare of calves used in the calf-roping event provide much needed scientific support for community concern.

20 Further, an analysis of rodeo as a whole is beyond the scope of this article.

21 Despite being decided in 1889, *Ford v Wiley* is still considered good law in the United Kingdom: Meg Lamb, '*Ford v Wiley* Proportionality Analysis of the Castration of Domestic Livestock for Meat Production' (2015) 11 *Australian Animal Protection Law Journal* 20; Mike Radford, *Animal Welfare Law in Britain: Regulation and Responsibility* (Oxford University Press, 2001) ch 10. Further, it has been applied in a 2008 Australian Magistrates decision: *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* (Magistrates Court of Western Australia, Magistrate Crawford, 8 February 2008) ('*Emanuel Exports*').

22 Poole (n 16) 49.

23 Australian Professional Rodeo Association Inc ('APRA'), *By-Laws & Competition Rules* (November 2019) r 18.3 ('*By-Laws & Competition Rules*').

Despite the manner in which calf roping is seen as integral to rodeo, the event has generated some community resistance, and the level of support behind its inclusion in rodeo is unclear. For instance, in Toowoomba, a regional town in Southern Queensland, 82 per cent of voters in a local newspaper supported a ban on calf roping.[24] In 2019, a petition to have calf roping banned in Queensland also garnered 60,000 signatures.[25] Opposition towards the event from animal advocates is clear, with Animals Australia describing the event as one where 'terrified animals are provoked, chased and wrestled to the ground'.[26] The key aspects driving community concern are the risk of physical injury to the calves during the tightening of the rope around their neck, and the impact on their body as the contestant throws or forces them to the ground, as well as the perceived fear they feel while being chased in the arena — likely akin to that of a prey–predator situation.[27]

In the light of the growing animal welfare concerns outlined above, this Part will explore the regulatory framework for calf roping in Australia. The existing framework represents efforts made to address the impact of calf roping on calves in a manner that attempts to appease industry, as well as the expectations of the community.[28] Legislative responsibility here falls to the Australian states and territories. This is because the *Australian Constitution* does not expressly designate power in the regulation of animal welfare to the Commonwealth.[29] A consequence of this is the lack of a consistent, nationwide regulatory framework.[30]

The Australian Professional Rodeo Association ('APRA') is the primary governing body in Australian rodeo competition and sets a series of rules for competitors.[31] These rules will be outlined briefly in order to provide a comprehensive overview of the entire regulatory space. Within the states and territories, the regulatory space is largely made up of legislative instruments, often supplemented with codes and standards that are limited by wide-ranging defences and exemptions for compliance. The framework in each state and territory differs significantly in regards to rodeo, and thus each jurisdiction will be considered in turn below.

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24 'Online Poll', *The Chronicle* (Toowoomba, 3 February 2021) 20.

25 'Animal Liberationists Call on Ag Minister to Ban Calf Roping' (n 10).

26 'End Cruel Calf Roping, *Animals Australia* (Web Page, 30 November 2020) <https://animalsaustralia.org/latest-news/end-calf-roping/>.

27 'What Are the Animal Welfare Issues with Calf Roping in Rodeos?', *RSPCA* (Web Page, 6 March 2020) <https://kb.rspca.org.au/knowledge-base/what-are-the-animal-welfare-issues-with-calf-roping-in-rodeos/>.

28 In regards to legislation reflecting community values concerning animals, see Geeta Shyam, 'Is the Classification of Animals as Property Consistent with Modern Community Attitudes?' (2018) 41(4) *University of New South Wales Law Journal* 1418, 1425.

29 There is no express power as to animal welfare in the *Australian Constitution* s 51. Therefore, it remains the responsibility of states and territories. There are, however, indirect powers that enable the Commonwealth to make laws in certain instances, such as live export. See, eg, Alex Bruce, *Animal Law in Australia: An Integrated Approach* (LexisNexis Butterworths, 2nd ed, 2018) 75.

30 Ibid.

31 'About the APRA', *APRA* (Web Page) <http://www.prorodeo.com.au/About-the-APRA-3/>.

It is relevant to first note that, consistently across all states and territories, the legal classification of animals is as property.[32] Animals are the legal property of their owners in the same manner that one may own a bed or television. However, unlike other forms of legal property, animal sentience is recognised either implicitly[33] or explicitly[34] through the enactment of laws that protect their interest in avoiding suffering.[35] Despite this recognition, the continuing categorisation of animals as legal property facilitates treatment of animals by humans that is reminiscent of the treatment of non-sentient property.

In regards to the APRA competition rules, industry standards require that the calf weigh at least 100 kg. This sets a minimum age of around 12 weeks for all calves used in the event.[36] In order to reduce the impact of calf roping on these calves, the rodeo industry has implemented the use of an approved roping device, called the 'Ropersmate'.[37] All rope and tie events held by an APRA affiliated rodeo must use this device. The Ropersmate is essentially a pulley device designed to act as a 'shock absorber'.[38] It is intended that the pulley operate so as to reduce the force felt by the calf when the lasso catches his neck. The industry's introduction of the Ropersmate device is an effort towards reducing the welfare impact on rodeo calves; however, its impact on the animals requires independent evaluation.[39]

While rodeo regulation varies widely across Australia, a set of standards developed by the National Consultative Committee on Animal Welfare ('NCCAW') do offer some form of consistency. The NCCAW Standards for the Care and Treatment of Rodeo Livestock ('NCCAW Standards') were developed in 2006 by the now defunct NCCAW — a former advisory body to the Department of Agriculture, Fisheries and Forestry.[40] Given the NCCAW's status as a consultative

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32 For instance, animals are included in the definition of 'goods' within s 4 of the *Competition and Consumer Act 2010* (Cth). See Jane Kotzmann, 'Recognising the Sentience of Animals in Law: A Justification and Framework for Australian States and Territories' (2020) 42(3) *Sydney Law Review* 281, 283.

33 See *Animal Welfare Act 1993* (Tas); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1999* (NT); *Animal Welfare Act 2002* (WA); *Prevention of Cruelty to Animals Act 1979* (NSW) ('NSW *POCTA*'); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Care and Protection Act 2001* (Qld). To some extent, the animal welfare legislation within these jurisdictions implicitly recognises sentience by prohibiting certain actions which may cause an animal pain.

34 *Animal Welfare Act 1992* (ACT). The Australian Capital Territory is the only Australian state or territory that explicitly recognises animal sentience within the legislation: see s 4A(1)(a).

35 Kotzmann (n 32).

36 *By-Laws & Competition Rules* (n 23) r 39.7; 'Early Weaning of Beef Calves', *Agriculture Victoria* (Web Page, 25 November 2021) <https://agriculture.vic.gov.au/livestock-and-animals/beef/health-and-welfare/early-weaning-of-beef-calves>; Sally Rizzuto et al, 'Exploring the Use of a Qualitative Behavioural Assessment Approach to Assess Emotional State of Calves in Rodeos' (2020) 10(1) *Animals* 113: 1–18, 3.

37 *By-Laws & Competition Rules* (n 23) r 33.21.

38 Rope It Qld, 'Ropersmate Roping Device (Part # 8700544) — Instructions for Use', *APRA* (Web Page, March 2013) <http://www.prorodeo.com.au/files/uploaded/file/RopersMate%20User%20Instruction%20Manual_final.pdf>.

39 Michelle Sinclair et al, 'Behavioural and Physiological Responses of Calves to Marshalling and Roping in a Simulated Rodeo Event' (2016) 6(5) *Animals* 30: 1–12, 8.

40 Bruce (n 29) 83.

body, the rodeo code is not binding or legally enforceable. Rather, the standards are aspirational benchmarks for the development of state and territory regulations.[41] These standards have been utilised by states and territories, particularly in the case of Tasmania and the Northern Territory, where the standards make up a key part of the government sponsored regulation. Relevantly, the purpose of the NCCAW Standards was to set *minimum* welfare requirements for animals used in rodeos;[42] thus, some states and territories exceed this benchmark.

The NCCAW Standards limit the type of animal used in a rodeo to cattle or horses, and mention 'roping and tying' as one of the events that can define a rodeo.[43] The standards note that the 'optimum weight' for a calf being used in a rope and tie event is 115 kg, and sets a minimum weight of 100 kg.[44] The standards also require that a calf be 'fit, healthy and without defects'.[45] Finally, the standards deem dragging a roped animal, and 'jerking down' — which is the act of abruptly pulling an animal onto his back in the action of roping him — as unacceptable.[46] These standards were developed in consultation with the rodeo industry and make up the entirety of the 'Livestock Welfare Overview' section within the APRA website.[47]

## B *Overview of State and Territory Animal Welfare Regulation*

### 1 *Queensland*

Given the number of rodeo events hosted in Queensland, it could aptly be dubbed the home of rodeo in Australia. For this reason, its legislative protections are particularly relevant. The *Animal Care and Protection Act 2001* (Qld) ('*ACPA*') is limited in its application to rodeos. The *ACPA* outlines a number of prohibited events in s 20, including, in s 20(1)(e), 'an event prescribed under a regulation held for public enjoyment or entertainment, with or without charge to anyone present, at which anyone participating in the event causes an animal pain'.[48] An example of actions that would cause pain is outlined for the purposes of s 20(1)(e) and includes where 'someone does, or attempts to, catch, fight or throw the animal'.[49] Despite the reference to catching and throwing the animal largely capturing the actions of calf roping, this section is not applicable to rodeos, as

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41 Ibid 181.

42 National Consultative Committee on Animal Welfare ('NCCAW'), *Standards for the Care and Treatment of Rodeo Livestock* (Position Statement, 10 June 2006) ('NCCAW Standards').

43 Ibid pt 1.

44 Ibid pt 5.

45 Ibid.

46 Ibid pt 7.

47 'Animal Welfare', *APRA* (Web Page) <http://www.prorodeo.com.au/Livestock-Welfare-Overview-32/>.

48 *Animal Care and Protection Act 2001* (Qld) ('*ACPA*') s 20(1)(e).

49 Ibid.

rodeo is not an event prescribed under a regulation.[50] Further, s 20(2) seems to operate to exclude conduct that would otherwise be prohibited, if that conduct occurs at a rodeo for the purpose of protecting 'a competitor or other person from an animal being used in the rodeo'.[51]

Queensland recently adopted the *Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021* (Qld) ('*Qld Rodeo Code*'), meaning it is no longer the only jurisdiction in Australia without specific regulations relating to rodeos. The *Qld Rodeo Code* sets minimum standards for animal welfare at rodeo events and is a mandatory code under the *ACPA*.[52] The code requires that a calf used in calf roping weigh at least 100 kg and prohibits the use of excessive force when throwing the calf to the ground, as well as dragging the calf more than one metre and throwing the calf onto their spine.[53] The regulations relating to calf roping are to be reviewed in five years, because all four animal welfare groups involved in the consultation process did not support a continuation of the practice.[54]

A consequence of the *Qld Rodeo Code* is that it operates to create an exemption from cruelty provisions under the *ACPA*.[55] For instance, s 18(2)(a), requires that animals be protected from 'unjustifiable, unnecessary or unreasonable' pain.[56] Prior to the introduction of the *Qld Rodeo Code*, rodeo organisers and participants were offered no additional protection from this provision and broader animal welfare requirements in Queensland, aside from the qualification within s 20(2) of the *ACPA*. This exposed calf roping to the question of whether pain felt by the calves — if any — was necessary, justifiable or reasonable.[57] If the pain was found not to be necessary, justifiable or reasonable, the practice would have been in breach of s 18(2)(a) of the *ACPA*. However, with the introduction of the rodeo code of practice, rodeo organisers and participants are now exempt from the requirement not to cause animals unreasonable pain, so long as they have complied with the relevant code of practice.[58]

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50 Bruce (n 29) 182.

51 *ACPA* s 20(2).

52 'About the Rodeo Code of Practice', *Business Queensland* (Web Page, 6 December 2021) <https://www.business.qld.gov.au/industries/farms-fishing-forestry/agriculture/livestock/animal-welfare/codes/rodeo#:~:text=From%201%20January%202022%2C%20the,at%20rodeos%20and%20rodeo%20schools>.

53 *Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021* (Qld) ss 50, 52 ('*Qld Rodeo Code*').

54 Explanatory Notes, Animal Care and Protection (Code of Practice about Rodeos) Amendment Regulation 2021 (Qld) 4.

55 *ACPA* (n 48) s 40(1).

56 Ibid s 18(2)(a).

57 Ibid.

58 Ibid s 40(1).

### 2 *New South Wales*

New South Wales ('NSW') features a more complex state-sponsored regulatory framework than that of Queensland, beginning with the *Prevention of Cruelty to Animals Act 1979* (NSW) ('NSW *POCTA*'). In ss 18 and 18A, the NSW *POCTA* prohibits bull-fighting, baiting an animal or causing an animal to fight.[59] The *NSW Code of Practice for Animals Used in Rodeo Events* (1988) ('*NSW Rodeo Code*') — which is the key regulatory instrument for the welfare of rodeo animals in NSW — provides guidance on the interpretation of ss 18 and 18A by outlining that the sections 'also include the use of cattle when part of an exhibition, spectacle or display where they could be cruelly treated or inflicted with pain and suffering'.[60] Thus it appears that ss 18 and 18A could be applicable to rodeo generally, if the harm caused to animals was not proportionate to the object sought. However, this interpretation is specifically negated by reg 36 of the *Prevention of Cruelty to Animals Regulation 2012* (NSW) ('*Cruelty Regulation*'), which creates a clear exemption from the operation of ss 18 and 18A for rodeos in a manner similar to the framework in Queensland.

This exemption is limited by reg 36(3) of the *Cruelty Regulation*, which sets out that organisers and participants must conduct a rodeo in accordance with the *NSW Rodeo Code* in order to benefit from the exemption.[61] As such, the *Cruelty Regulation* acts to exclude cattle and horses used in rodeo practices from any protection that is not laid out in the *NSW Rodeo Code*, effectively protecting rodeos from prosecution under the welfare legislation. Thus, while failing to adhere to the *NSW Rodeo Code* is not an offence in itself, it may open the relevant person up to prosecution under the NSW *POCTA*.[62] In terms of calf roping, the *NSW Rodeo Code* sets a minimum weight requirement of 100 kg, which is in line with the industry standard.[63] Flipping a calf onto their back when roping, known as 'jerking down', is also prohibited by the code.[64]

### 3 *South Australia*

Unlike Queensland and NSW, South Australia ('SA') does not have a dedicated code of practice regulating rodeos. Rather, the *Animal Welfare Act 1985* (SA) ('SA *AWA*') and the *Animal Welfare Regulations 2012* (SA) form the entirety of the state-sponsored regulatory framework. The SA *AWA* requires organisers to acquire a

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59 NSW *POCTA* (n 33) s 18.

60 Animal Welfare Advisory Council, Department of Primary Industries (NSW), *NSW Code of Practice for Animals Used in Rodeo Events* (30 April 1988) introduction ('*NSW Rodeo Code*'); NSW *POCTA* (n 33) s 2(d).

61 Ibid reg 36(3).

62 Ibid.

63 *NSW Rodeo Code* (n 60) r 2.7; *By-Laws & Competition Rules* (n 23) r 33.3.

64 *NSW Rodeo Code* (n 60) r 4.21.

permit to conduct a rodeo.[65] Part 4 of the *Animal Welfare Regulations* supplements this legislation, providing all other protections for animals used in rodeos within South Australia. Relevantly, the South Australian regulations set a minimum weight of 200 kg for the animals used in all rodeo events, including calf roping.[66] As noted, calves used in rope and tie events must weigh a minimum of 100 kg in accord with industry standard.[67] In terms of the upper weight range, Australia's primary industry body, APRA, indicates within its regulations that a steer weighing 200 kg will be used in steer-roping as opposed to calf-roping events.[68] For the purposes of the rope and tie event, this appears to classify an eligible calf as one weighing between 100 kg and 200 kg. Thus, by setting a minimum weight of 200 kg for the rope and tie, the South Australian regulations effectively prohibit the event.

### 4 *Tasmania*

The starting point of regulation in Tasmania is the *Animal Welfare Act 1993* (Tas) ('Tas *AWA*'). Section 11A(1) of the Tas *AWA* requires that a rodeo be conducted in accordance with a prescribed code of practice.[69] The *Animal Welfare (General) Regulations 2013* (Tas) outlines that the prescribed code of practice for the purposes of s 11A(1) of the Tas *AWA* is the *NCCAW Standards*.[70] While not explicit, s 11A of the Tas *AWA* essentially operates to create an exemption from prosecution under the Act for compliance with the *NCCAW Standards*. Thus, the protection awarded to rodeo animals in Tasmania is largely limited to the *NCCAW Standards* outlined above. This sets a minimum weight of 100kg for calves used in the rope and tie event, which is the industry standard.[71]

### 5 *Victoria*

Victoria has developed one of the strongest state-sponsored regulatory frameworks for rodeos within Australia, contained entirely within the *Prevention of Cruelty to Animals Act 1986* (Vic) ('Vic *POCTA*') and the *Prevention of Cruelty to Animals Regulations 2019* (Vic) ('*Victorian Regulations*'). Part 2 Division 2 of the Vic *POCTA* sets out that it is an offence to conduct a rodeo without a licence or permit.[72] The *Victorian Regulations* are compulsory and participants, such as competitors or employees, who do not comply can be prosecuted.[73] The *Victorian*

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65 *Animal Welfare Act 1985* (SA) s 34 ('SA *AWA*').
66 *Animal Welfare Regulations 2012* (SA) reg 19(1)(a).
67 *By-Laws & Competition Rules* (n 23) r 33.3.
68 Ibid r 40.13.
69 *Animal Welfare Act 1993* (TAS) s 11A(1)(a) ('Tas *AWA*').
70 *Animal Welfare (General) Regulations 2013* (Tas) s 5; NCCAW Standards (n 42).
71 *By-Laws & Competition Rules* (n 23) r 33.33
72 *Prevention of Cruelty to Animals Act 1986* (Vic) pt 2 div 2 ('Vic *POCTA*').
73 *Prevention of Cruelty to Animals Regulations 2019* (Vic) pt 4.

*Regulations* set a minimum weight of 200 kg for all animals used in rodeo events.[74] As outlined above, this operates to prohibit the rope and tie event.

### *6 Western Australia*

The state-based regulation of rodeo in Western Australia ('WA') begins with the *Animal Welfare Act 2002* (WA) ('WA *AWA*'), which permits the making of codes of practice in relation to the welfare of animals.[75] Accordingly, the *Animal Welfare (General) Regulations 2003* (WA) adopts the *Code of Practice for the Conduct of Rodeos in Western Australia* (2003) ('*WA Code*').[76] The *WA Code* thus contains the extent of protection for animals used in rodeo events. The Code itself is based upon the *NCCAW Standards* and is therefore in line with the rodeo industry regulations. Notably, no aspect of WA's regulatory framework requires a permit to conduct a rodeo or sets a minimum weight limit.

In terms of the legal status of the code, the *WA Code* differs from other jurisdictions that have a code of practice proclaimed in the legislation. This is because the *WA Code* is not mandatory and does not offer a clear exemption for compliance. In fact, the preface of the *WA Code* outlines that it has been adopted 'in principle'.[77] Rather, rodeo participants are protected from the full extent of the WA *AWA* through the operation of a defence. Specifically, s 25 of the WA *AWA* provides that it is a defence to s 19(1) of the Act if a person 'was acting in accordance with a relevant code of practice'.[78] Section 19(1) of the WA *AWA* requires that a person not be cruel to an animal, and in s 19(3)(j), 'cruelty' is expanded to include causing an animal unnecessary harm.[79] The defence provided by s 25 of the WA *AWA* essentially operates in the same manner as an exemption. If an animal is caused unnecessary harm in the process of a rodeo, it will not be in contravention of the WA *AWA* if the relevant person acted in accordance with the code of practice. This acts to exclude rodeo animals from the protections awarded in the welfare legislation.

### *7 Australian Capital Territory*

The *Animal Welfare Act 1992* (ACT) operates to completely prohibit rodeos. Section 18 of the Act makes it an offence to conduct or take part in a rodeo, with offenders facing a fine, 'imprisonment for 1 year or both' as a maximum penalty.[80] The Act

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74 Ibid reg 82.

75 *Animal Welfare Act 2002* (WA) s 94(2)(d) ('WA *AWA*').

76 *Animal Welfare (General) Regulations 2003* (WA) sch 1; Department of Local Government and Regional Development (WA), *Code of Practice for the Conduct of Rodeos in Western Australia* (March 2003) ('*WA Code*').

77 *WA Code* (n 76) preface.

78 WA *AWA* (n 75) s 25.

79 Ibid ss 19(1) and 19(3)(j).

80 *Animal Welfare Act 1992* (ACT) s 18(1) ('ACT *AWA*').

defines rodeo as a public exhibition featuring activities such as bareback horse riding and calf roping.[81]

### 8 *Northern Territory*

Regulation of rodeos in the Northern Territory ('NT') is not captured by the *Animal Welfare Act 1999* (NT) or the *Animal Welfare Regulations 2000* (NT) ('*NT Regulations*').[82] The *NT Regulations* refer briefly to rodeos in schedule 1, by permitting the use of electric prodders at rodeos to control horses, although this is the extent of the coverage.[83] In regards to the adoption of a rodeo code of practice, the NT adopted the *NCCAW Standards* in 2007 through a Gazette notice,[84] rather than by incorporating the standards in the animal welfare regulations.[85] The effect of this is that the standards are not mandatory or legally enforceable. The incorporation of the *NCCAW Standards* in the NT operates in the same manner as the *WA Code*. That is, where an animal is caused unnecessary harm in a rodeo activity, it will be a defence to a charge on animal cruelty grounds if the relevant person acted in accordance with the *NCCAW Standards*. However, the status of the standards in the NT is difficult to ascertain given it is not transparent within the legislation. Ultimately, animals used in rodeos are subject to minimal legal protections within the NT.

### 9 *Summary of State and Territory Regulatory Frameworks*

In summary, Australian jurisdictions vary widely in their treatment of calf roping. In the Australian Capital Territory, rodeo is banned completely. In Victoria and South Australia, calf roping is the only rodeo event that is prohibited. Conversely, Queensland, NSW, Western Australia, Tasmania, and the Northern Territory regulate calf roping through a complex and, in some cases, ambiguous set of exemptions or defences to animal welfare protections. Relevantly, the standard of unnecessary, unjustifiable or unreasonable harm is the overarching principle protecting animal welfare in all Australian states and territories; however, as outlined, its application to rodeo is excluded in every jurisdiction.

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81 Ibid s 18(3).

82 The *Animal Welfare Act 1999* (NT) will soon be replaced by the *Animal Protection Act 2018* (NT). The *Animal Protection Act 2018* (NT) also lacks mention of rodeos.

83 *Animal Welfare Regulations 2000* (NT) reg 4 ('*NT Regulations*').

84 'Animal Welfare Act' in Northern Territory, *Northern Territory Government Gazette*, No G23, 6 June 2007, 4.

85 In accordance with s 24 of *Animal Welfare Act 1999* (NT).

## III The Proportionality Test

### A *Introduction*

The standard of unnecessary or unreasonable harm contained in the state and territory animal welfare legislation indicates that harm to animals can be considered legitimate, and therefore legal, depending on its purpose. Typically, the greater the benefit to humans the more harm to animals is permitted.[86] For instance, scientific research has potentially the greatest benefit to human beings and thus would allow the greatest amount of animal suffering. Given calf roping — and rodeo as a whole — is excluded from the general cruelty provisions of animal welfare legislation in all Australian jurisdictions, there is arguably an implicit legitimising of the practices involved by the legislature.[87] That is, by excluding or providing a defence for the practice of calf roping within a rodeo, those jurisdictions may be seen as deeming the harm caused to rodeo animals as reasonable, justifiable, or proportionate in the light of the purpose sought. The effect of this is that the harm caused to animals in calf roping is legitimised by its legality, rather than an objective and considered assessment of the reasonableness of the harm. It could therefore be assumed that the practice of calf roping would not constitute unnecessary harm when assessed against the relevant test.

Against this backdrop, the following sections will consider whether the practice of calf roping meets the relevant standard of reasonableness and therefore justifies its exclusion from the general cruelty provisions. This is particularly important given that Queensland has recently provided rodeo participants with an exemption from general cruelty provisions, despite the increasing controversy surrounding rodeo's impact on animal welfare and the consensus amongst animal welfare organisations that calf roping should be prohibited.

If calf roping was subject to the prohibition against causing an animal unnecessary harm, its legality would likely be determined by reference to the proportionality principle. The proportionality principle was set out in the leading United Kingdom authority of *Ford v Wiley*,[88] and will be drawn upon here to analyse whether calf roping does amount to unnecessary harm. If the practice causes pain to the calves that would be considered unnecessary under the proportionality test, this will mean that, while calf roping is legal, when assessed against the relevant standard, it should not be.

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86 *Ford v Wiley* (n 1) 218 (Hawkins J, Lord Coleridge CJ agreeing at 208).

87 See also Dinesh Wadiwel, 'The War Against Animals' in Helena Pederson and Vasile Stanescu (eds), *Critical Animal Studies* (Brill, 2015) vol 3, 35–9; Gary L Francione, *Animals, Property, and the Law* (Temple University Press, 1995) pt 2.

88 *Ford v Wiley* (n 1).

### *1 Relevance of* Ford v Wiley

The proportionality test espoused in *Ford v Wiley* is utilised here as it was fundamental in the development of the meaning of unnecessary harm in the UK and is the test that is likely to be applied if the issue comes before a court in Australia. Thus, the intent in employing this assessment is to bolster critical legal analysis on the use of animals for entertainment in the context of calf roping, and to address concerns that calf roping is illegitimate due to the potential for animal suffering outweighing the purpose of the practice.

As outlined above, the concept of unnecessary or unjustifiable harm is employed heavily within state and territory legislation and, on this basis, it is clearly the intent of the legislature to prohibit animal suffering that is unnecessary. The difficulty, however, is in determining what constitutes 'unnecessary cruelty' — especially in the light of the significant exemptions and defences to cruelty within the legislation. This question has also seen little judicial interpretation in Australia.[89]

The question of what constitutes unnecessary harm, however, did come before a Magistrate in WA in the case of *Department of Local Government and Regional Development v Emanuel Exports Pty Ltd* ('*Emanuel Exports*').[90] This case involved the live export of a specific type of sheep to the Middle East.[91] The export took place in November — a month where high temperatures increase the risk of harm to the sheep.[92] The defendant in this case was ultimately acquitted on the basis of an inconsistency between the WA *AWA* and the Commonwealth law concerning live export.[93] Magistrate Crawford did, however, find that the export of the sheep was in breach of s 19(1) of the WA *AWA*, in that it caused unnecessary harm.[94] In reaching this conclusion, Magistrate Crawford applied the *Ford v Wiley* proportionality assessment.[95] This case did not reach the consideration of a higher court. As such, the question of what constitutes unnecessary or unjustifiable cruelty has yet to be fully explored by the higher courts within Australia. However, the case of *Emanuel Exports* indicates that the *Ford v Wiley* proportionality assessment remains relevant and is applicable to state and territory legislation. Thus, *Ford v Wiley* is discussed below in order to provide a comprehensive

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89 Dominique Thiriet, 'Out of the "Too Hard' Basket" — Traditional Hunting and Animal Welfare' (2007) 24(1) *Environmental and Planning Law Journal* 59; Katherine E Russell, 'Lawful Cruelty: Six Ways in Which Australian Animal Welfare Laws Permit Cruelty Towards Nonhuman Animals' (PhD Thesis, The University of Adelaide 2017) 103.

90 *Emanuel Exports* (n 21).

91 Ibid [9]–[10].

92 Ibid [96].

93 The livestock export industry is a field within the trade and commerce head of power per s 51(i) of the *Australian Constitution*. Therefore, pursuant to s 109 of the *Australian Constitution*, to the extent that the WA *AWA* is inconsistent with Commonwealth law, the WA *AWA* is invalid; *Emanuel Exports* (n 21) [203].

94 *Emanuel Exports* (n 21) [203].

95 Ibid [98]–[99].

overview of the proportionality assessment. This assessment is then utilised to determine whether calf roping would be considered legal pursuant to the unnecessary harm standard.

## 2 Ford v Wiley — *An Overview*

The seminal case of *Ford v Wiley* provides a comprehensive explanation of the assessment undertaken when determining whether harm can be considered legitimate, and therefore legal, in light of its purpose. In that case, a Magistrate found that a cattle farmer had committed cruelty by dehorning his cattle with a saw.[96] This decision was appealed and Chief Justice Lord Coleridge and Justice Hawkins of the Queen's Bench were required to consider s 2 of the *Cruelty to Animals Act 1849* (UK) ('*1849 Act*').[97] Section 2 of the *1849 Act* made it an offence to 'cruelly beat, ill-treat, over-drive, abuse, or torture' an animal.[98] Thus, the appellant court had to determine whether the farmer had ill-treated, abused or tortured a number of cattle by causing their horns to be sawn off.

The facts of the case further provide that the horns were sawn off cattle aged two years old by the farmer's employees. The dehorning was undertaken with a common flat saw, as close to the head as the saw would allow. Several expert witnesses provided evidence that the practice caused excruciating pain and prolonged suffering to the animals. That the cattle suffered immeasurable pain was not in dispute. The court accepted that the practice inflicted substantial suffering on the cattle, although it also accepted that the respondent did not inflict the pain with malice or cruel intent. Mens rea was not a requirement for the purposes of establishing an offence under s 2 of the *1849 Act*,[99] and thus the finding that the respondent lacked ill-intent was not detrimental to a prosecution on cruelty grounds. Rather, the focus of this case was that the Court interpreted s 2 of the *1849 Act* to require more than that the harm be caused in fact.

Coleridge CJ expressed clearly that '[t]he mere infliction of pain, even if extreme pain, is manifestly not by itself sufficient.'[100] The second element necessary to establish 'cruelty' for the purposes of the Act was that this harm be inflicted without necessity or reasonableness. That is, the pain caused to the cattle would be lawful depending on the means and purpose by which it was inflicted. While ultimately this is a question of fact dependent on the circumstances of the case, it is clear that if the means and purpose are deemed to be legitimate, then so too is the harm. This principle was summarised by Lord Hawkins: 'the beneficial or useful ends sought to be attained must be reasonably proportionate to the extent of the suffering caused, and in no case can substantial suffering be

96 *Ford v Wiley* (n 1) 204.
97 *Cruelty to Animals Act 1849*, 12 & 13 Vict, c 92.
98 Ibid s 2.
99 Ibid.
100 *Ford v Wiley* (n 1) 209.

inflicted, unless necessity for its infliction can reasonably be said to exist'.[101] This is essentially the principle of proportionality as espoused in *Ford v Wiley* — the purpose sought must be reasonably proportionate to the harm caused. As Coleridge CJ explained, this is 'a conclusion not of sentimentalism but of good sense'.[102] This principle necessitates consideration of the respondent's reasons for causing the cattle's horns to be sawn off, in the light of alternative means. The respondent's justifications in this case were that it made the cattle more docile and stopped them from goring, allowing the farmer to keep more cattle within the space.[103] It also caused them to graze better and made them fatten more quickly, all of which contributed to a slightly increased sale price.[104] As to whether this is satisfactory for the purposes of the *1849 Act*, Lord Hawkins outlined the key elements involved in determining whether the harm caused was proportionate to the purpose sought. These elements include the level and duration of the pain and the legitimacy of the object sought to be attained.[105] Relevantly, there were also alternative means which stopped cattle from goring. These were 'tipping', which involved taking only the tip off the horn, or 'budding', which involved cutting the core out of a horn of a calf not more than six months old.[106] Both of these practices caused significantly less harm than dehorning and prevented goring.

Against this backdrop, the Court in *Ford v Wiley* upheld the decision of the Magistrate in finding that dehorning the cattle amounted to cruelty in accordance with s 2 of the *1849 Act*.[107] This is because the practice caused immense and prolonged suffering, and Coleridge CJ and Lord Hawkins did not accept that the farmer's purpose or means in dehorning the cattle were proportionate to the amount of harm caused to the animals. In so doing, both emphasised that profit to man does not in and of itself justify harm to animals. Coleridge CJ highlighted this in stating:

> There is no necessity and it is not necessary to sell beasts for 40s. more than could otherwise be obtained for them; nor to pack away a few more beasts in a farm yard, or a railway truck, than could otherwise be packed; nor to prevent rare and occasional accident from one unruly or mischievous beast injuring others. These things may be convenient or profitable to the owners of cattle, but they cannot with any show of reason be called necessary.[108]

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101 Ibid 219.
102 Ibid 215.
103 Ibid 208.
104 Ibid.
105 Ibid 218.
106 Ibid 203.
107 Ibid.
108 Ibid 209.

### 3 *Critique*

The proportionality test has received some criticism, most prominently from Peter Sankoff, due to an apparent lack of neutrality in the way the test is approached.[109] Sankoff argues that the proportionality assessment is tilted towards human interests. According to Sankoff, because of the anthropocentric nature of the test, almost all instances of animal suffering carried out for the benefit of humans will be considered legitimate. Accordingly, Sankoff argues that for harm to be considered illegitimate, there must be no broader societal benefit — such as an act of cruelty carried out sadistically, or neglect because of laziness.[110] Sankoff identifies various uses of animals that are 'legitimate', such as the use of animals for public entertainment, or mutilation of animals for aesthetic preferences.[111] He argues that because activities such as these are legitimate, it appears that a practice must simply fall within the ambit of what is 'normal' and beneficial to humans to justify any extent of harm to animals. Sankoff expresses particular concern regarding the tendency for economic benefit, of any degree, to justify human harm to animals, particularly in terms of modern farming practices.[112]

However, the cases of *Ford v Wiley* and *Emanuel Exports* suggest that economic gain may not always justify harm. As evidenced in the above statement from Coleridge CJ, their Lordships in *Ford v Wiley* emphasised that profit and convenience will not constitute necessity in every set of facts. In *Emanuel Exports*, Magistrate Crawford explained that the sole motivation behind exporting the sheep in November was the pursuit of profit, and found 'that any harm suffered to fat adult sheep was unnecessary'.[113] Thus, while the proportionality principle may arguably assign more value to human interests in many instances, a proper application of the principle will not always overemphasise economic gain.[114] Ultimately, however, due to the lack of consideration given to the standard of unnecessary harm within Australian courts, it is unclear whether Sankoff's criticisms would be validated if an appropriate case were to come before a court.

More generally, Sankoff's argument forms a broader critique of animal welfarism as a whole. There is an ideological divide among those who advocate for increased animal protection, with some arguing for improvements to animal welfare and others advocating for animal rights.[115] Animal welfarism seeks to

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109 Peter Sankoff, 'The Welfare Paradigm: Making the World a Better Place for Animals?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 21.

110 Ibid 23.

111 Ibid.

112 Ibid.

113 *Emanuel Exports* (n 21) [99].

114 Jed Goodfellow, 'Animal Welfare Regulation in the Australian Agricultural Sector: A Legitimacy Maximising Analysis' (PhD Thesis, Macquarie University, 2015) 111.

115 Jane Kotzmann (n 32) 284–5; Jane Kotzmann and Nick Pendergrast, 'Animal Rights: Time to Start Unpacking What Rights and for Whom' (2019) 46(1) *Mitchell Hamline Law Review* 158, 161–72.

protect animals in the context of an acceptance of human superiority.[116] Welfarism is in fact evident in the standard of unreasonable or unnecessary harm, in that it operates from the assumption that human harm caused to animals can be reasonable depending on the human benefit to be gained. Conversely, animal rights proponents fundamentally disagree with the anthropocentric hierarchy that places humans over animals and the harm this hierarchy permits.[117] For animal rights advocates, human harm to animals cannot be made reasonable by some degree of human benefit.

Sankoff's critique of the proportionality assessment is representative of this ideological divide. By weighing the harm caused to animals against the human benefit that harm provides, the proportionality assessment can be described as a welfarist approach.[118] As Sankoff argues, any assessment undertaken will therefore be informed by an acceptance of human superiority and will support the legal framework that classifies animals as legal property and humans as legal persons.[119] On this basis, an assessment of the legitimacy of human harm to animals is restricted by the confines of the welfarist framework it operates within. It will not prevent the use of animals for human benefit or impact the legal status of animals as property.

Nevertheless, the proportionality assessment achieves a valuable objective by demonstrating that certain treatment of animals is illegitimate even within existing frameworks. This has the potential to influence immediate change,[120] and is perhaps more damning given that the practice would be considered unreasonable against standards that are tilted towards human interests. Thus, it is relevant to note that the ensuing discussion operates within the confines of a welfarist approach and any determination as to the reasonableness of calf roping is made in the context of a framework that supports the continued legal classification, and treatment, of animals as property.

## B *Application*

### 1 *First Limb*

In the light of the *Ford v Wiley* proportionality test, an assessment of the legality of calf roping must begin with a consideration of its purpose and benefit. Given that calf roping has been a long standing and customary inclusion in rodeo, many

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116 Jane Kotzmann (n 32) 284–5.

117 See generally Gary L Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple University Press, 1996).

118 Gary L Francione, 'Animals, Property and Legal Welfarism: "Unnecessary" Suffering and the "Humane" Treatment of Animals' (1994) 46(2) *Rutgers Law Review* 721, 731.

119 Sankoff (n 109) 23; Bruce (n 29) 182.

120 See generally Jane Kotzmann and Gisela Nip, 'Bringing Animal Protection Legislation into Line with its Purported Purposes: A Proposal for Equality amongst Non-Human Animals' (2020) 37(2) *Pace Environmental Law Review* 247, 286–7.

of the benefits of calf roping are linked to the benefits of rodeo generally. As such, this section will consider broadly the purported benefits of rodeo in general.

### *(a) Economic Value*

First, as was the case in *Ford v Wiley*, a primary justification for calf roping and rodeo generally is the economic benefit it offers. Rodeo has been described as offering a 'substantial boost to local economies'.[121] This economic contribution is not exclusive to rodeo organisers. The benefit is also felt in industries such as accommodation, restaurants, pubs and fuel retailing. This provides some diversity in economic input for regional towns, which are generally heavily focused on the agriculture and mining industries. Rodeo constitutes part of the sports and recreation services industry,[122] which is also made up of non-sport activities such as bush walking.[123] This industry directly contributed a total of AUD4 billion towards the Australian economy in the 2017–18 financial year.[124] A study that refined the definition of the sports industry to exclude animal racing activities, as well as amusement and 'other' (non-physical) recreation activities,[125] found that the combined direct and indirect contribution by sport to Australia's gross domestic product was approximately $14.4 billion in 2016–17.[126] However, the actual extent of rodeo's contribution to this total is unclear. Some insight is available when looking to the financial contribution of Australia's 'largest and richest' rodeo, the Mount Isa Mines Rotary Rodeo.[127] In 2019, the Mount Isa Rodeo attracted a record number of attendees over its four days — a total of 39,933.[128] This provided an economic benefit of $12.24 million to the local community through tourist spending.[129] A further example is the rural town of Mareeba, with a population of around 11,000 people. The Mareeba rodeo draws a

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121 'More Than Just a Rodeo', *Wellington Times* (online, 28 September 2017) <https://www.wellingtontimes.com.au/story/4954069/more-than-a-rodeo/>.

122 Australian Bureau of Statistics, *Australian and New Zealand Standard Industrial Classification 2006* (Catalogue No 1292.0, 28 February 2006) div R sub-div 91.

123 Ibid.

124 'State Tourism Satellite Accounts (STSA) 2017–18 Data', *Tourism Research Australia* (Excel Spreadsheet, 2019) Table 5 <https://www.tra.gov.au/search.aspx?moduleid=518&multisite=false&keywords=State%20Tourism%20Satellite%20Accounts%20(STSA)%202017-18%20Da>.

125 Office for Sport, Department of Health, and KPMG Sports Advisory, *Sports Industry Economic Analysis: Exploring the Size and Growth Potential of the Sports Industry in Australia* (Final Report, March 2020) 129 <https://www.health.gov.au/sites/default/files/documents/2020/05/sports-industry-economic-analysis.pdf>.

126 Ibid 5.

127 Stirling Hinchliffe, 'Isa Rodeo Ticket Sales Buck the Record' (Media Release, Queensland Department of Tourism, Innovation and Sport, 26 May 2021) <https://statements.qld.gov.au/statements/92193>.

128 'Isa Rodeo Breaks Records for Growing Outback Tourism Industry' (n 2).

129 Ibid.

crowd of 14,000 people and '[w]ith around 70 per cent of the visitors who attend the event from out-of-town, the economic flow-on effect is significant'.[130]

While exact figures are not available, rodeo clearly injects economic value into rural Australian towns. However, this value appears relatively low when compared to other events that use animals for entertainment, such as greyhound racing. For instance, an industry-developed report found that the total direct and indirect contribution of greyhound racing to the economy was $408.6 million in Victoria alone.[131] Further, when considered in the broader context of the sports industry as aforementioned, the economic benefit of rodeo is arguably not substantial. It is important to note, however, that the economic contribution of rodeo in a national context does not adequately capture the significance it holds to a regional town.

It is also worth noting that states which have effectively banned calf roping, including Victoria and SA, still derive economic benefit from rodeo. Again, exact figures are not available, but anecdotal evidence suggests the direct and flow-on economic impact of rodeo was also appreciated by residents of the South Australian town of Streaky Bay. The 2019 rodeo held in Streaky Bay — a town with a recorded population of 1,378 in 2016[132] — attracted over 2,500 attendees, and a local business owner stated that '[t]he weekend of the rodeo produced one of my largest turnovers for the year … only second to the Christmas holiday period'.[133] Given this, it appears that rodeo as a whole is not dependent on the practice of calf roping to attract spectators and bring economic value. As the profit to be derived from the event is not reliant on calf roping alone, this does serve to detract somewhat from the justification of the practice on the basis of economic benefit.

### *(b) Regional Identity*

The values and belief systems that surround rodeo are a vital layer of the overall picture. Rurality has long been held to be a key part of Australian identity. Keith Stevens explains that '[r]odeo is popular in Australia because it suits our ideas of ourselves. It is rough and tough and we like to think of ourselves that way'.[134] The notion of 'Aussie battlers' overcoming land and animal with grit has been

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130 Mareeba Chamber of Commerce, *Economic Snapshot 2019–2020* (2020) 4 <https://www.mareebachamber.com.au/files/media/original/014/a87/77e/MCOC-Economic-Snapshot-2019-2020.pdf>.

131 'New Report Highlights Greyhound Racing's Economic Contribution to Victoria's Economy', *Greyhound Racing Victoria* (Web Page, 19 June 2019) <https://www.grv.org.au/vgri/#:~:text=The%20report%20found%20that%20greyhound,spending%20and%20profits%20are%20considered.>.

132 '2016 Census Quickstats', *Australian Bureau of Statistics* (Web Page, 23 October 2017) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/SSC41383>.

133 'Streaky Bay Benefits from Rodeo', *Port Lincoln Times* (online, 17 January 2020) <https://www.portlincolntimes.com.au/story/6584592/streaky-bay-benefits-from-rodeo/>.

134 Keith Stevens, 'Foreword' in Poole (n 16).

perpetuated as part of our cultural identity, and a kind of humble superiority still surrounds the notion of bush living versus city living.[135] As mentioned above, there is a strong link between the working life of Australian stockmen and some of the events that feature in modern rodeo. Thus, to some extent rodeo represents a romanticisation of country life and an opportunity to connect with a sense of rurality. It acts as a means for a rural community to express a sense of commonality and shared values and also allows the opportunity to share a narrative of rural experience with outsiders. This strong sense of rural identity offers an explanation for the deep integration of rodeo into the lives of those in some regional communities, and thus also provides an understanding of the resistance shown towards altering or prohibiting the practice.

Despite this intertwining of rodeo with rural Australian identity, however, the event is heavily Americanised. In fact, the Americanisation of rodeo is well represented by the calf roping event in and of itself. Calf roping is not a practice that featured heavily in the lives of Australian stockmen.[136] Rather, its place in early Australian rodeo was as a 'novelty event', likely influenced by the presence of American soldiers in Australia around the time of World War II.[137] As Jim Hoy outlines, 'Australian rodeo has evolved into a nearly exact copy of the North American version, with such introduced events as bulldogging, calf roping and team roping that were not found in earlier versions of the sport "downunder"'.[138] Rather, calf roping became a common feature in Australian rodeo essentially by mandate of the Australian Rough-Riders Association ('ARRA') (now known as APRA). According to an ARRA decree, in order for a rodeo to count towards the annual championship circuit, it must have included calf roping as a standard event.[139] Thus, the notion of calf roping — and rodeo in its current form — as a culturally important representation of rural Australian life, and 'part of the bush fabric' of Australia,[140] is somewhat detached from the reality of its evolution. Despite this, rodeo, of which calf roping is a part, is still regarded as part of Australian identity and is valued by supporters as a cultural connection.

### 2 *Second Limb*

Having considered the 'beneficial or useful' nature of calf roping in Australia,[141] the second limb of the *Ford v Wiley* proportionality assessment necessitates a

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135 Chris Gibson and Deborah Davidson, 'Tamworth, Australia's "Country Music Capital": Place Marketing, Rurality, and Resident Reactions' (2004) 20(4) *Journal of Rural Studies* 387, 390.

136 Hoy, 'Rodeo in Australia' (n 3) 58.

137 Ibid 55.

138 Jim Hoy, 'The Americanisation of the Outback: Cowboys and Stockmen' (2000) 24(66) *Journal of Australian Studies* 205, 208.

139 Hoy, 'Rodeo in Australia' (n 3) 58.

140 'Animal Liberationists Call On Ag Minister to Ban Calf Roping' (n 10).

141 *Ford v Wiley* (n 1) 219 (Hawkins J).

consideration of the harm caused to the calves in calf roping, and whether that harm is proportionate to the object sought to be attained by the event.

### *(a) Animal Suffering*

The suffering experienced by animals in rodeo has long been a contentious issue. Given calf roping reflects a predator–prey situation and features rough handling of calves, some suffering may be apparent. However, proponents of rodeo argue that rodeo animals are well cared for, bonded with and enjoy their role in the event.[142] A number of factors appear to validate this perspective, including an apparently minimal injury rate.[143] The most recent data available from APRA indicates that in Australian APRA-affiliated rodeos, there has been only one injury for every 3,471 times an animal was used, and only one severe injury or euthanasia for every 5,571 uses.[144] However, reporting of injuries is not mandatory in most Australian jurisdictions and there is no independent record of injuries suffered by animals in rodeos. Given this, Walkden-Brown states that 'it is likely that only a small fraction of animal injuries and deaths at rodeos ever become public knowledge'.[145]

Looking instead to the available scientific research, it is clear there is harm caused to the calves in calf roping. As a starting point, scientific evidence is clear that calves are capable of experiencing pain.[146] While not specific to calf roping, evidence suggests that '[a]natomical, physiological, and behavioral similarities across species demonstrate that animals experience pain and distress [including psychological pain and distress] in ways *similar* or *identical* to humans.'[147] Thus, the likely harm caused to calves in the practice of calf roping can to some extent be observed. In this respect, researchers in Canada were granted access to rodeos in order to gather evidence relating to the welfare of rodeo animals.[148] A similar collation of evidence has not been undertaken in Australia. However, the observations and conclusions drawn in this report remain valuable for the purposes of this proportionality assessment given the event is standardised in both Australia and Canada.

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142 Joyce (n 13).

143 Catriona MacLennan, 'The Legal Status of Rodeo in New Zealand' (Paper, New Zealand Animal Law Association, March 2018) 83 <https://nzala.org/w/wp-content/uploads/2020/01/NZALA-Rodeo-Report-2.pdf>; Rizzuto et al (n 36) 3.

144 MacLennan (n 143) 83; Rizzuto et al (n 36) 3.

145 Jackson Walkden-Brown, 'Animals and Entertainment' in Peter Sankoff et al (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd edition, 2013) 129, 133.

146 Kevin J Stafford and David J Mellor, 'Addressing the Pain Associated with Disbudding and Dehorning in Cattle' (2011) 135(3) *Applied Animal Behaviour Science* 226, 226.

147 Hope Ferdowsian and Debra Merskin, 'Parallels in Sources of Trauma, Pain, Distress, and Suffering in Humans and Nonhuman Animals' (2012) 13(4) *Journal of Trauma and Dissociation* 448, 461 (emphasis added).

148 Alain Roy, *Report on the Analysis of the Data Collected During the Montréal and St-Tite Rodeos in Québec (August and September 2017)* (Plaintiff's Report — Part II, February 2018).

First, observers detailed the experience of a calf 'lifted about one meter then hurled to the ground without support in a violent impact to the side of the thorax'.[149] Another calf was witnessed being thrown to the ground with impact to his spine. The observers outlined that this creates 'a risk associated with the sudden increase in intrathoracic pressure upon contact with the ground, which can cause damage (alveolar, pulmonary contusions, pneumothorax, rib fractures)'.[150] They also observed calves being halted abruptly by the rope while mid-run, which 'creates danger of damage to the cervical structures (skin, muscles, larynx, trachea, vertebrae, ligaments, nerves, blood vessels)'.[151] These observations are relevant in an Australian context, where similar physical movements can be observed even with use of the specialised roping device, 'Ropersmate'.[152]

Current scientific evidence also suggests the practice of calf roping is stressful for the animals involved. For instance, a recent study suggests 'that roping events induce an acute stress response in calves'.[153] This was based on the observable differences in the emotional states of calves while being chased and while in a 'recovery phase' post chase.[154] Participants in this study observed calves in the 'chase phase' as 'more agitated, anxious, confused, energetic, frightened and stressed'.[155] This is likely contributed to by the mimicked predator–prey experience.[156] Conversely, participants observed calves in the 'recovery phase' as 'more calm, contented, exhausted, inquisitive and relieved'.[157] A further study concluded that both the marshalling of naïve calves and the roping of experienced calves were likely 'aversive' experiences for the animals.[158] This was suggested by increased blood cortisol, epinephrine and norepinephrine (also known as adrenaline and noradrenaline) in marshalled calves, which are hormones typically associated with stress responses.[159] In the case of roped calves, the stress response was largely shown by behavioural evidence that indicated a 'flight response to the presence of the pursuing rider'.[160] This study was undertaken after the introduction of the Ropersmate device in rodeo competitions. While more research is required to determine what impact this specialised roping device has on the stress responses of calves, it is clear that the animals are still subject to an acute stress reaction when the Ropersmate is used.

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149 Ibid 29.
150 Ibid 513.
151 Ibid 29.
152 Animal Liberation Queensland, '2019 APRA Rope & Tie Events with Ropersmate Devices' (Vimeo, 7 December 2019) <https://vimeo.com/377947145>.
153 Rizzuto et al (n 36) 14.
154 Ibid 1.
155 Ibid 14.
156 Ibid 14.
157 Ibid.
158 Sinclair et al (n 39) 8.
159 Ibid 9.
160 Ibid.

### C *Answer to the Question of Legality*

For this suffering to be legitimate it must be proportionate to the purpose sought by calf roping. The objective of calf roping is ultimately one of recreation. As a contributor to the sports industry, it offers some economic value as well as cultural value for those living in rural Australian towns. However, this economic contribution is arguably not significant, especially in the light of other events within the broader sports industry and when compared to similar events that use animals for entertainment. As emphasised in *Ford v Wiley*, profit to man does not in and of itself justify harm to animals. Here, the profit is arguably not such as to designate the practice necessary.

As demonstrated above, the cultural connection to calf roping is also somewhat tenuous given its American origins. Nevertheless, the relationship to calf roping as a broader element of a culture of rurality must in itself be questioned. That is, how much weight should be given to the protection of cultural traditions that result in some harm to animals? It is relevant to note that a number of traditional uses of animals, such as cockfighting or live baiting, are not permitted in Australia[161] and thus 'tradition' was not seen to justify continuation of these practices. Further, many people in Australia are unlikely to consider practices in foreign jurisdictions, such as bullfighting, dolphin hunting,[162] religious animal sacrifice[163] and the controversial dog meat festival,[164] to be morally justifiable because of the cultural value they hold to their respective cultures. Thus, while calf roping and rodeo may hold significant cultural value for rural communities, it is clear that culture in and of itself is not a justification for the mistreatment of animals.[165] Culture or tradition cannot excuse practices from scrutiny, nor should it be a sole justification for actions that, in other contexts, would not be permissible under animal welfare legislation.[166]

To an extent, the application of the proportionality principle as it relates to the conflict between the interests of animals and the interest of preserving culture

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161 Tas *AWA* (n 68) s 10; SA *AWA* (n 66) s 5(b); *Animal Welfare Act 1999* (NT) s 21; WA *AWA* (n 75) s 32; NSW *POCTA* (n 33) s 21; Vic *POCTA* (n 71) s 13; *ACPA* (n 48) ss 20, 30–32; ACT *AWA* (n 80) s 17.

162 Justin McCurry, '"Not Ashamed": Dolphin Hunters of Taiji Break Silence over Film *The Cove*', *The Guardian* (online, 11 December 2017) <https://www.theguardian.com/world/2017/dec/11/not-ashamed-dolphin-hunters-of-taiji-break-silence-over-film-the-cove>.

163 Arun Budhathoki and Hannah Ellis-Petersen, 'Nepal Animal Sacrifice Festival Pits Devotees against Activists' *The Guardian* (online, 4 December 2019) <https://www.theguardian.com/world/2019/dec/03/nepal-animal-sacrifice-festival-pits-devotees-against-activists>.

164 VICE, 'Dining on Dogs in Yulin: VICE Reports (YouTube, 22 October 2014) <https://www.youtube.com/watch?v=YfaZeIxHFUM>.

165 Kevin Gary Behrens, 'Tony Yengeni's Ritual Slaughter: Animal Anti-Cruelty vs Culture' (Research Report, University of the Witwatersrand, Johannesburg, 2008) <https://core.ac.uk/download/pdf/39665707.pdf>.

166 Jane Kotzmann, 'Animal Welfare: The Hunt for Clarity', *Law Institute of Victoria* (Web Page, 1 September 2020) <https://www.liv.asn.au/Web/Law_Institute_Journal_and_News/Web/LIJ/Year/2020/09September/Animal_welfare___The_hunt_for_clarity.aspx>.

can be seen in existing animal welfare laws within Australia.[167] It can be implied, for instance, in the restriction on Indigenous hunting practices within some jurisdictions in Australia. For example, s 79(2) of the *Animal Welfare Act 1999* (NT) provides that '[i]t is not a defence to a prosecution for an offence under this Act that the act or omission constituting the offence, or an element of the offence, was in accordance with cultural, religious or traditional practices.'[168] Laws that protect cultural practices and laws that protect the welfare of animals must interact in a balanced and considered way, and in this instance, the exercise of culture is somewhat restricted to protect the interests of animals in not suffering.[169] However, some traditional hunting practices that may cause animals to suffer, such as the hunting of dugongs or turtles, are permitted in recognition of the importance of preserving Indigenous Australian culture.[170] Thus, culture — while important — is not an all-prevailing justification and can be restricted or protected depending on a myriad of factors, including the value attributed to it. This creates room for further considerations as to the weight to be attributed to culture in a proportionality analysis, with some cultures and associated traditions likely to be more strongly valued than others.

Turning to *Ford v Wiley* for guidance in this respect, it was relevant in that case that there were alternative means available to stop cattle from goring.[171] In the context of culture, it would therefore be relevant if the practice could be modified without undue impact on the exercise of the cultural practice, or if the practice itself could be removed with little adverse impact on the broader culture. In terms of calf roping, the latter consideration is particularly pertinent. This is because, as demonstrated above, the practice of calf roping can be removed from rodeo with little adverse consequence to a broader culture of Australian rurality — especially given calf roping has been identified as the practice within rodeo with the most tenuous ties to Australian culture. The broader cultural benefits of rodeo can be maintained without calf roping, and given this, the harm caused to calves by calf roping is unnecessary to achieve this objective. Thus, under a proportionality analysis, culture may not always justify harm caused to an animal, and in the context of calf roping it does not.

It is also relevant that a number of practices within the broader sports industry achieve the goal of community connection and entertainment without the use of animals and bring more economic value.[172] Competitive sport in Australia has long been seen as a part of national character. In 2006, journalist Greg Ansley explained, '[t]he Australian psyche is bound in sports, as a passion

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167 Ibid.

168 *Animal Welfare Act 1999* (NT) s 79(2).

169 Kotzmann (n 166).

170 *Native Title Act 1993* (Cth) s 211; 'Can Turtles and Dugongs Be Killed Humanely Using Traditional Hunting Methods?', *RSPCA* (Web Page, 1 May 2019) <https://kb.rspca.org.au/knowledge-base/can-turtles-and-dugongs-be-killed-humanely-using-traditional-hunting-methods/>.

171 *Ford v Wiley* (n 1) 203.

172 For instance, Australian Rules Football, Rugby League and Soccer, among many others.

and as an essential component of national identity.'[173] This extends to regional Australia, where participation in sports such as Rugby League or Australian Rules Football contributes to a sense of community, promotes socialisation and offers residents an opportunity to barrack for their hometowns.[174] Competitive sports also provide considerable economic benefit to Australia, with the Australian Football League ('AFL') generating approximately '$6.80 billion in financial contribution to the Australian economy in 2018'.[175] In terms of national economic contribution, competitive sports such as Australian Rules Football and Rugby League hold more economic value than rodeo and do not involve harm to animals as features of the game.

Further, not all regional towns across Australia host rodeos to achieve the objectives of creating community and attracting the economic benefit of tourism. Rather, they may engage in other pursuits to achieve these objectives, such as ecotourism[176] — including, for instance, bird watching[177] or whale watching[178] — or music festivals.[179] Given this, it is evident that there are many other options available to attract economic benefits to regional towns and create a sense of community — options which do not cause harm to animals.

Against this backdrop, the pain suffered by calves in the practice of calf roping ought to be very low. This is because the degree of legitimacy attributed to the purpose of the practice sets the acceptable range of harm that can be caused — the more legitimate the purpose, the more harm is acceptable.[180] The primary purpose of calf roping is entertainment, and so the level of legitimacy attached to the practice is very low. Accordingly, the degree of harm the practice can justifiably cause is also very low. As outlined, scientific evidence demonstrates that calves can experience pain and distress. When considered in the light of the extensive collation of observational evidence detailing the physical impact of the practice on the calves, as well as evidence demonstrating the acute stress impact, the suffering experienced by the animals arguably exceeds that which would be considered proportionate to obtain calf roping's object of entertainment. This consideration factors in implementation of the Ropersmate device, as this device

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173 Greg Ansley, 'Aussies — Natural Born Winners', *NZ Herald* (online, 25 March 2006) <https://www.nzherald.co.nz/sport/aussies-natural-bornwinners/CATTGOAFVJVKJLCEKSJ4HTLDRA/>.

174 Greg Blood and Christine May, *Sport in Rural and Regional Australia* (Report, 25 May 2021) <https://www.clearinghouseforsport.gov.au/kb/sport-in-rural-and-regional-australia>.

175 Julian Lorkin, 'Economic Windfall Thanks to AFL', *UNSW Sydney Newsroom* (Web Page, 27 September 2019) <https://newsroom.unsw.edu.au/news/business-law/economic-windfall-thanks-afl>.

176 See, eg, South Australian Tourism Commission, 'Sustainable Tourism Experiences in South Australia', *South Australia* (Blog Post, 26 August 2020) <https://southaustralia.com/travel-blog/sustainable-tourism-experiences-in-south-australia>.

177 See, eg, 'Our Tours', *Gondwana Guides* (Web Page, 2022) <https://www.gondwanaguides.com.au/birdwatching-tours/>.

178 See, eg, 'Your Guide to Whale Watching in Dunsborough', *Whale Watch Western Australia* (Web Page, 2022) <https://whalewatchwesternaustralia.com/locations/whale-watching-in-dunsborough/>.

179 See, eg, 'Spring Festival 2021', *Wintermoon Festival* (Web Page, 2021) <https://www.wintermoonfestival.com/>.

180 *Ford v Wiley* (n 1) 218 (Hawkins J).

was in use throughout one of the studies — with the evidence still demonstrating an acute stress response. Further studies investigating the impact of calf roping on the animals are required, especially in light of the contested injury rate put forward by industry. However, on the basis of the evidence available, it is clear that the impact on animal welfare is not proportionate to the objective sought. The economic benefit and the cultural relationship to the practice are not such as to legitimise or necessitate the harm caused.

## IV Recommendations and Concluding Comments

This article has demonstrated that the regulation of calf roping in Australia is inconsistent and contradictory, and that reform is therefore necessary. The manner in which calves are excluded from the protection of animal welfare law by virtue of their status as rodeo animals does not accord with the standard of unnecessary harm in the light of the increasing research confirming the negative impact on their welfare. Given that the standard of unnecessary or unreasonable harm is central within Australian animal welfare regulation, and that the proportionality principle espoused in *Ford v Wiley* remains relevant in Australia and is applicable to state and territory legislation, any reform should be undertaken with both at the forefront.

It is apparent that the harm caused to calves in the rope-and-tie event outweighs the benefits of the practice. Evidently, reform must therefore aim to reduce the harm caused to calves. This can be considered in the light of the finding that the harm suffered by calves should be very low in view of the benefits of the practice. As mentioned, industry has attempted to achieve a reduction in the harm caused to calves through the introduction of the Ropersmate device. However, as outlined, this device appears to have been ineffective in eliminating the acute stress response in calves,[181] and the observable effects of the practice on the animals — including the heavy impact to the side of the calf's body and the abrupt halting of the calf by the rope while mid-run — are still present despite its use.[182] This indicates that attempts to mitigate the level of harm so as to make it proportionate to the benefits of the practice have been futile. It appears that, even with modifications to the practice by industry, the harm caused to calves in the rope-and-tie event cannot be reduced to the very low level required to bring it into proportion with its objects and legitimise the harm.

Reform does appear imminent in some jurisdictions. As mentioned, Queensland recently implemented a code of practice concerning rodeos. The failure to prohibit calf roping may represent a missed opportunity for Queensland to heed the increasing calls for an end to the practice and become a leader in animal welfare matters among Australian jurisdictions. However, the Queensland

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[181] See above Part IIIB(2)(a); Sinclair et al (n 39) 9.

[182] See Animal Liberation Queensland (n 152). See above Part IIIB(2)(a).

government intends to review the calf-roping provisions in five years, which provides a further opportunity to ensure that the code reflects community expectations concerning the treatment of animals. In New Zealand, the New Zealand Animal Law Association ('NZALA') and SAFE have instituted a challenge to rodeo events by filing proceedings against the Minister of Agriculture and the National Animal Welfare Advisory Committee ('NAWAC').[183] They claim that rodeo activities are inconsistent with the *Animal Welfare Act 1999* (NZ) ('NZ *Animal Welfare Act*') and the failure of the Minister of Agriculture and NAWAC to ban rodeo events is in violation of that Act. Debra Ashton, the chief executive of SAFE, explained that 'the real issue here … is that animals should not be put under any unnecessary or unreasonable stress and it is clear that in rodeo this is in fact the case'.[184] Regulation of rodeo in New Zealand takes a similar form to that in Australia, with minimum standards set out in the *Animal Welfare (Rodeos) Code of Welfare* (2018) ('*NZ Code*'). NZALA and SAFE argue that activities such as calf roping, which are permitted by the *NZ Code*, are inconsistent with the NZ *Animal Welfare Act* because they permit the handling of animals in a manner that does not minimise 'the likelihood of unreasonable or unnecessary pain or distress'.[185] Given the apparent similarities to Australia's regulatory framework regarding rodeos, this legal challenge could give rise to similar challenges here.

Further, the prohibition of calf roping in both Victoria and SA implies some recognition by the legislature in those states that the welfare impact of calf roping could not be reduced to the level necessary to legitimise or necessitate the practice. Unfortunately, however, the review of the state and territory regulatory spaces undertaken above made clear that regulation varies widely between jurisdictions. Thus, while the unnecessary or unreasonable harm caused to calves in the rope-and-tie event may be recognised in one jurisdiction, similar reform in another jurisdiction may lag far behind.

This inconsistency is undesirable. Many animal welfare organisations have long advocated for national consistency in animal welfare legislation. For instance, RSPCA Australia states that 'Australia is greatly disadvantaged due to a lack of guidance and oversight on animal welfare at a national level.'[186] The need for consistency was also recognised by a review commissioned by the Commonwealth Government in 2005, which spurred the introduction of the

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183 Jacqueline So, 'NZ Animal Law Association Challenges Agriculture Minister on Rodeo Ban Inaction' *NZ Lawyer* (News, 20 July 2021) <https://www.thelawyermag.com/nz/news/general/nz-animal-law-association-challenges-agriculture-minister-on-rodeo-ban-inaction/291799>.

184 *The AM Show* (Newshub, 20 July 2021) 0:01:21–0:01:35 <https://www.newshub.co.nz/home/new-zealand/2021/07/two-animal-welfare-groups-taking-govt-to-court-over-failure-to-ban-rodeo.html>.

185 *Animal Welfare Act 1999* (NZ) ss 4(d), 10, 12(a). See So (n 183).

186 'Should Australia Have a National Body to Oversee Animal Welfare?', *RSPCA* (Web Page, 24 February 2021) <https://kb.rspca.org.au/knowledge-base/should-australia-have-a-national-body-to-oversee-animal-welfare/>.

Australian Animal Welfare Standards and Guidelines.[187] These Guidelines are set to replace a number of existing codes of practice and aim to provide national consistency in the regulation of animal welfare. While the process has faced numerous delays, the *Australian Animal Welfare Standards and Guidelines for Cattle* ('*Cattle Standards*') are complete and were agreed upon by states and territories in 2016.[188] However, the status of each state and territory in implementing the *Cattle Standards* is significantly varied. For instance, the *Cattle Standards* have yet to be implemented in the Australian Capital Territory ('ACT'), NT, Tasmania or Victoria.[189] The *Cattle Standards* were implemented in NSW in 2017, however adherence is not mandatory.[190] In WA, the *Cattle Standards* have been adopted as a code of practice but are yet to be implemented as regulations,[191] and in SA the *Cattle Standards* have been mandated since 2017.[192] Queensland regulated the standards under the *ACPA* as a code of practice in July 2021, making compliance with the standards mandatory.[193] Interestingly, the standards outline that 'a person handling cattle must not … drop cattle except to land and stand on their feet'[194] — a standard clearly inconsistent with the practice of calf roping. As outlined above, SA has effectively banned calf roping, however the impact of mandating the *Cattle Standards* has yet to be seen in states and territories that still permit calf roping, such as Queensland. Thus far, it appears that inconsistency is still a feature of the regulatory space concerning rodeos — a feature that must be addressed with reform.

Against this backdrop, reform should take the form of a ban on calf roping. This is necessary given that the harm caused to calves is not proportionate to the benefits of the practice, and that modifications are unlikely to bring the harm to the proportionate level of 'very low'.[195] In order to ensure a consistent and coherent approach to calf roping, all jurisdictions in Australia should prohibit the practice. A ban on calf roping would bring other jurisdictions to the same standard of welfare as the ACT, Victoria and SA, achieving national consistency in relation to calf roping. However, it is suggested that other jurisdictions should not follow

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187 Geoff Neumann & Associates Pty Ltd, *Review of the Australian Model Codes of Practice for the Welfare of Animals* (Final Report, 9 February 2005).

188 Animal Health Australia, *Australian Animal Welfare Standards and Guidelines for Cattle* (1st ed, January 2014) <http://www.animalwelfarestandards.net.au/files/2011/01/Cattle-Standards-and-Guidelines-Endorsed-Jan-2016-061017_.pdf>.

189 'Cattle', *Australian Animal Welfare Standards and Guidelines* (Web Page, 2 July 2021) <http://www.animalwelfarestandards.net.au/cattle/>.

190 Ibid.

191 Ibid; Department of Primary Industries and Regional Development (WA), 'Animal Welfare Codes of Practice', *Agriculture and Food* (Web Page, 5 October 2020) <https://www.agric.wa.gov.au/animalwelfare/animal-welfare-codes-practice>.

192 'Cattle' (n 189).

193 Ibid.

194 Animal Health Australia (n 188) S5.2.

195 It must be noted that the legality of rodeo broadly is not being assessed here. This does not mean its legality is accepted or contested. In order to determine the legality of rodeo generally, it would also need to be assessed through the *Ford v Wiley* proportionality assessment.

Victoria and SA in prohibiting the practice by setting a minimum weight limit of 200 kg. This article advocates for an explicit ban of the practice. This is important because it will provide clarity to industry, signal a clear alignment of the legislation with community expectations, and generate increased public awareness of the issues with calf roping. Thus, all states and territories in Australia — including Victoria and SA — should explicitly prohibit calf roping within their respective animal welfare legislation.

# Navigating Dual Legal Systems: Islamic Inheritance Law in Australia's Secular Legal Framework

Brooke Thompson*

*This article explains the distinctive nature of Islamic inheritance law and considers the extent to which Muslim residents in Australia can assimilate their faith-based obligations with their country-based obligations in matters of inheritance. The article identifies conflict in the Islamic and Australian intestacy rules and sets out three ways that Muslims can manage this conflict. The article considers the scope for, and feasibility of, the execution of Islamic wills in Australia to demonstrate how they assist Muslims to comply with their religious inheritance obligations. While there is no manifest inadequacy in the current legal framework that impedes Muslims from maintaining an Islamic inheritance, the article establishes two instances where Muslims remain at a disadvantage and adds to calls for reform in the area of family provision.*

## I Introduction

In 2012, the Australian Capital Territory Supreme Court considered an inheritance case, *Omari v Omari* ('*Omari*'),[1] involving a Muslim family where the testator had made a will devolving her estate according to Islamic principles. Mariem Omari (the deceased, who was a non-English speaking Muslim migrant) executed a will in which she appointed her two sons as executors. At the time, Mariem Omari was illiterate, and so she executed her will by making a thumbprint on each page.[2] The will followed a precedent available for adherents of the Muslim faith, provided by a former *imam*, and was prepared by one of Mariem Omari's sons. The will left the estate to eight children and provided that each son was to receive a full share and

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1 [2012] ACTSC 33 ('*Omari*').

2 Ibid [1].

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each daughter a half share, in accordance with Islamic inheritance principles.[3] On Mariem Omari's death, the executors (being Mohamed and Mustapha Omari) applied for probate of the will. Before this application was lodged, the defendant (one of the deceased's daughters) lodged a caveat, alleging that the testator was suffering from dementia at the time the will was made.[4] The Court stated that '[t]he basis for the caveat was expressed to be the fact that the will was made at a time when the testator was suffering from dementia, and that it did not express her wishes.'[5]

The case was resolved as a probate case and the court applied the common law test developed in *Banks v Goodfellow*.[6] The court accepted the evidence of a local *imam* as to the expectations within Islam regarding the disposition of an estate by will where the testatrix had children. However, after hearing the testimony of medical witnesses, the court concluded that, against a background of the testatrix's diagnosed dementia, the deceased did not have the requisite testamentary capacity at the time the will was made.[7] As such, the court appointed the Public Trustee to administer the estate according to the relevant intestacy provisions contained in the *Administration and Probate Act 1929* (ACT) ('*ACT Administration Act*'), in the light of the probability of dispute between the deceased's surviving children.[8] The intestacy provisions contained in the *ACT Administration Act* meant that the result of a distribution in *Omari* under those provisions would deliver a different result to that contemplated by Mariem Omari's will, and would require the estate to be distributed equally between her children. The decision was subsequently upheld in a 2016 appeal.[9]

This article explores the issues highlighted by *Omari* where resident Muslims seek to maintain an Islamic inheritance. First, the article explains the distinctive nature of Islamic inheritance law in Australia and explains, within a framework of legal pluralism, how many Muslims are able to skilfully navigate their way through dual legal systems. Secondly, the article discusses the limits of religious freedom as it relates to Islamic inheritance in Australia. The article then clarifies the extent to which resident Muslims can maintain an Islamic inheritance through a comparative analysis of the Australian and Islamic inheritance laws. In particular, the article identifies intestacy conflicts between the two systems and considers how Muslims can manage and navigate these conflicts by examining the scope for, and feasibility of, the execution of Islamic wills in Australia. This discussion illustrates that will-making can assist Muslims to maintain an Islamic inheritance but cautions that wills require careful legal drafting to ensure compliance with both legal systems. The article then considers how Islamic wills

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3 Ibid [8].
4 Ibid [9].
5 Ibid.
6 (1870) LR 5 QB 549, 565 (Cockburn CJ for the Court).
7 *Omari* (n 1) [65].
8 Ibid [67]–[68].
9 *Omari v Omari* (2016) 14 ASTLR 23.

can be challenged in Australian courts and how these challenges are likely to be resolved according to principles of Australian law.

The article establishes the ways that Muslims can navigate both official Australian inheritance laws and unofficial Islamic inheritance laws to assimilate their faith-based obligations with their country-based obligations in matters of inheritance. However, some areas of legal complexity remain for Muslims, particularly relating to family provision. Specifically, the article questions whether the interpolation of morality by reference to prevailing community standards in the construction of family provision legislation is at odds with the principle of testamentary freedom.

## II Islamic Inheritance Law in Australia

The question whether Muslims can maintain an Islamic inheritance in Australia is closely connected to the existence and operation of unofficial law in the Australian legal structure, and more specifically, its interaction with official law. Legal pluralism 'is generally defined as a situation in which two or more legal systems coexist in the same social field' or jurisdiction.[10] Legal pluralism may be contrasted with legal centralism, which commits one to the ideal of 'one law for all and no exceptions',[11] and acknowledges, for example, that members of minority faith groups may wish to abide by faith-based obligations that are not recognised by the official (ie national) legal system. This article borrows from Chiba's model of legal pluralism to set out the structural position and function of Islamic law within the broader Australian legal framework and to demonstrate its significance to Muslims in matters of inheritance and its relationship with the official legal system.[12]

### A *The Validity of Islamic Inheritance Law in Australia*

Chiba's three-level structure of law theorises that the whole structure of law encompasses three levels: official law; unofficial law; and legal postulates.[13] Official law is said to encompass state law and any laws officially authorised by the state.[14] In Australia, the succession laws of each state and territory form the

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10 Sally Engle Merry, 'Legal Pluralism' (1988) 22(5) *Law & Society Review* 869, 870. See also John Griffiths, 'What is Legal Pluralism' (1986) (24) *Journal of Legal Pluralism and Unofficial Law* 1, 3; MB Hooker, *Legal Pluralism: An Introduction to Colonial and Neo-Colonial Laws* (Clarendon Press, 1975); Brian Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(3) *Sydney Law Review* 375; Brian Z Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (2000) 27(2) *Journal of Law and Society* 296.

11 Jeremy Waldron, 'One Law For All? The Logic of Cultural Accommodation' (2002) 59(1) *Washington and Lee Law Review* 3, 3.

12 Masaji Chiba, *Asian Indigenous Law: In Interaction with Received Law* (KPI, 1986) ('*Asian Indigenous Law*').

13 Ibid 5–7.

14 Ibid 5.

foundation of official laws relating to inheritance. Unofficial laws refer to any laws that are not officially sanctioned by the state but are nonetheless valid outside of official law.[15] These laws are 'sanctioned in practice by the general consensus of a certain circle of people, whether within or beyond the bounds of a country'.[16] While there is broad agreement among scholars that law encompasses more than just state law, Merry questions how far the concept of non-state law extends. As she puts it, '[w]here do we stop speaking of law and find ourselves simply describing social life'?[17]

Chiba limits unofficial law to 'those unofficial practices which have a distinct influence upon the effectiveness of official law; in other words those which distinctively supplement, oppose, modify, or undermine any of the official laws, including state law'.[18] As such, not all unofficial practices should be included in the definition of 'unofficial law', where it is necessary to distinguish between religious laws (as unofficial laws) and religious practices, because not all aspects of religion are legal.[19] Tamanaha observes that,

> [a]lthough customary and religious sources of normative ordering are usually seen in terms distinct from and broader than official legal systems, they also can contain a subset of norms that have specifically 'legal' status, in two different senses: (1) through recognition by the official legal system; or (2) on their own terms.[20]

Thus, religious laws can be official law, by way of recognition by the official legal system, or unofficial law, where they retain legal status on their own terms outside the realm of official law.

In Australia, parts of the *Shari'a*[21] can be said to have legal status on their own terms because Muslims can view these norms as inherently legal, even though

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15 Ibid 6.

16 Ibid.

17 Merry (n 10) 878. Tamanaha argues that the inability of legal pluralism to delineate law from social control has resulted in scholars 'drowning' in legal pluralism: Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (n 10) 393. Santos also concedes that perceiving law too broadly can trivialise the concept and remarks that 'if law is everywhere it is nowhere': B de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in the Paradigmatic Transition* (Routledge, 1995) 429, quoted in Brian Tamanaha, 'A Non-Essentialist Version of Legal Pluralism' (n 10) 298. See also B de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (Reed Elsevier, 2nd ed, 2002); John Griffiths, 'The Idea of Sociology of Law and its Relation to Law and to Sociology' in Michael Freeman (ed), *Law and Sociology* (Oxford University Press, 2006) 49, 63–4; Sally Falk Moore, 'Certainties Undone: Fifty Turbulent Years of Legal Anthropology, 1949–1999' (2001) 7(1) *Journal of the Royal Anthropological Institute* 95, 106.

18 Chiba, *Asian Indigenous Law* (n 12) 6.

19 However, it is important to note that religious practices can assume normative functions, especially in the realm of unofficial ordering.

20 Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (n 10) 398.

21 *Shari'a* is also spelt *Sharī'a, Sharia, Shariah, Shari'ah, Syariah* and *Shariat*. Arabic words can legitimately be spelled in English in several ways. For example, the holy book of Islam, the *Qur'an*, can also be spelled *Qur'ān, Quran* or *Koran*. The spelling of certain words can also change depending on the geographical context in which a particular word is used. For consistency, the article uses the

they are not officially recognised by the national legal system. Translated, *Shari'a* traditionally meant 'the path to be followed to reach a watering place in the desert'.[22] It is now understood to mean 'the path upon which the believer has to tread'.[23] Muslims believe that the *Shari'a* is the ultimate path ordained by Allah that must be followed.[24] It is a fully integrated value system and prescribed way of being that regulates all facets of a believer's life.[25]

Islamic laws (*fiqh*) are extracted through Islamic jurisprudence (*usul al-fiqh* from both primary and secondary sources, which have four basic constituents: the *Qur'anic* rules and injunctions; the *Sunnah* (which is derived from the traditions of the Prophet Mohammad, known as *hadith*); consensus of opinion among the jurists (*ijma*); and analogical deduction (*qiyas*).[26] Kamali explains that Islamic inheritance law is 'very much embedded in the clear Qur'anic text and bears therefore an obligatory character', and that '[t]he category of recipients and the quantum of their shares in the estate of their deceased relatives are stipulated in the Qur'an and make the whole schema of Qur'anic inheritance law internally self-contained'.[27] Islamic inheritance law, in this sense, can be said to have legal status on its own terms because it is contained in the *Qur'an*, which is viewed by Muslims as the primary and most authoritative source of Islamic law.[28] In countries where Islamic inheritance law is not officially recognised, like Australia, the basis for authority lies not in any state-based law or legal instrument, but rather is divine in nature and emphasises the extent of the follower's spiritual beliefs.

As discussed above, Chiba limits unofficial laws to those practices with a distinct influence upon the effectiveness of official law. Some studies indicate that Islamic inheritance legal rules influence the operation of official law and can be said to fall within Chiba's structural definition of unofficial law. One study that involved a series of interviews with 16 members of Islamic communities in Sydney and Melbourne, focusing on the principles underlying estate distribution, found that most interviewees sought to draft wills that comply with the Islamic rules of inheritance, in some cases 'leading to unequal distribution to children based on

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transliterations provided in Aisha Bewley, *A Glossary of Islamic Terms* (Ta-Ha Publishers, 1998). However, to keep the text uncluttered, very few diacritical marks (other than apostrophes) are used in the article when transliterating words from Arabic. Any variations in the spelling of Arabic transliterations used in the article come about because of citations from different authors and sources.

22 Shaheen Saradar Ali, *Modern Challenges to Islamic Law* (Cambridge University Press, 2016) 23.

23 Irshad Abdal-Haqq, 'Islamic Law: An Overview of its Origins and Elements' (2002) 7(1) *Journal of Islamic Law and Culture* 27, 33.

24 Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 3rd ed, 2011) 32.

25 See, eg, Carole Hillenbrand, *Islam: A New Historical Introduction* (Thames & Hudson, 2015) 114.

26 For a detailed account of the methods used to deduce Islamic laws (*usual al-fiqh*) and the four main sources of law, see Mohammad Hashim Kamali, *Principles of Islamic Jurisprudence* (Islamic Texts Society, 3rd ed, 2003).

27 Mohammad Hashim Kamali, *Shariah Law: Questions and Answers* (Oneworld Publications, 2017) 143–4.

28 Muslims believe that the *Qur'an* is the word of God as revealed to the Prophet Muhammad, and it cannot be disputed because its authority is infallible: Hamid Khan, *The Islamic Law of Inheritance: A Comparative Study of Recent Reforms in the Muslim Countries* (Oxford University Press, 2007) 5.

gender'.[29] That study also sought to assess participants' views on whether conflicts arise between the two inheritance legal systems, finding that '[m]any respondents discussed needing to accommodate both Australian law and religious and cultural values when making their will.'[30] Within this group, there were some who 'perceived a conflict between their beliefs and those of the broader Australian community' and some who did not.[31] The study also considered the impact of family provision on Islamic wills, citing some respondents' 'concerns about possible contestation by their children. There was some discussion of potential issues with Australian-born children whose values may not exactly match their parents'.[32]

A separate group of scholars examined Islamic inheritance within a broader study on legal pluralism and *Shari'a* law.[33] That study involved fieldwork conducted in Sydney between 2014 and 2015, where 57 respondents were interviewed about their experiences living as Muslims and applying *Shari'a* in Australia.[34] Consistently with findings of the previous study, the researchers identified that 'many respondents believe that family property should devolve to family members as set out in the Quran'.[35] The study also highlighted the presence of strong beliefs regarding female entitlement in inheritance, namely 'that women's place is in the home, that women should receive less than the sons, and that women's proportion should be less because they do not have to contribute to the family by engaging in outside work'.[36] A minority of interviewees 'expressed more liberating ideals for women, such as the idea that women cannot expect to be supported by extended family and that most women prefer to be independent in any event'.[37] Importantly, this study suggests that Muslims appear to be navigating their religious inheritance obligations within the current Australian legal framework:

> Interviewees for this study showed how Muslims work out the issues in their lives within a framework of religion, family, and personal economic circumstances. On most occasions, their actions related to their understandings of Sharia law as regards family property and inheritance.[38]

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29 Jill Wilson et al, 'Cultural Considerations in Will-Making in Australia: A Case Study of Islamic or Sharia-Compliant Wills' (2016) 41(1) *Alternative Law Journal* 23, 25.

30 Ibid.

31 Ibid 25–6.

32 Ibid.

33 Malcolm Voyce et al, 'Islamic Inheritance and Sharia Wills: The Recognition of Muslim Inheritance Traditions in Australia' in Eric Kolig and Malcolm Voyce (eds), *Muslim Integration: Pluralism and Multiculturalism in New Zealand and Australia* (Lexington Books, 2016) 211.

34 Ibid 214. However, the study uses terms such as 'many', 'the majority', 'a few', and 'some' in its conclusions, which makes it difficult to quantify the numbers on which its conclusions are based.

35 Ibid 211. The study also noted that some interviewees saw Islamic family law 'as a bastion against corrupting secular values': at 218.

36 Ibid 218.

37 Ibid.

38 Ibid 221.

These studies demonstrate the influence that Islamic inheritance practices can have on official (or state-based) inheritance laws, illustrating how some resident Muslims seek to abide by Islamic inheritance practices within the official Australian legal framework. They also point to a diversity in opinion as to how assets should be distributed.

The third tier of Chiba's three-level structure of law comprises legal postulates, which are value principles or value systems 'specifically connected with a particular official or unofficial law, which act to found, justify and orient' the law.[39] Specifically, legal postulates are taken to consist of established legal ideas (eg, equity, justice, natural law etc); religious precepts; social and cultural postulates related to the fundamental social structure; and political ideologies.[40] The Islamic inheritance law system is based on the security and preservation of an extended family unit and a belief that society requires property to be devolved to those who are naturally entitled to it, rather than according to the testator's personal wishes.[41] Accordingly, the *Qur'anic* inheritance laws distribute estates through a system of forced succession and fixed shares.[42] In contrast, modern Australian inheritance laws are based on the underlying principle of testamentary freedom, which allows people to dispose by will of any property to which that person is entitled. The principle of testamentary freedom is codified in all Australian jurisdictions.[43] Where a person dies without a will, the intestacy rules apply to the distribution of the estate, and those rules preference the deceased's nuclear family, being the spouse and issue, to the exclusion of all other family members.[44]

### B *Muslims as Skilled Legal Navigators*

Legal pluralism thus provides a framework within which to conceptualise the operation of unofficial Islamic inheritance law vis-a-vis official Australian inheritance law. Research on Islamic law in common law countries such as Australia demonstrates the ways in which the *Shari'a* for Muslims 'provides a moral compass as they navigate their way through the formal legal system and informs their choices open to them within the formal law. It does not operate in

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39 Chiba, *Asian Indigenous Law* (n 12) 6. See also Masaji Chiba, 'Other Phases of Legal Pluralism in the Contemporary World' (1998) 11(3) *Ratio Juris* 228, 241 ('Other Phases of Legal Pluralism').

40 Chiba, *Asian Indigenous Law* (n 12) 6.

41 Mohammad Mustafa Ali Khan, *Islamic Law of Inheritance: A New Approach* (Kitab Bhavan, 3rd ed, 2005) 2.

42 See below Part IVB(2).

43 *Succession Act 1981* (Qld) s 8(1); *Succession Act 2006* (NSW) s 4(1); *Wills Act 1968* (ACT) s 7(1); *Wills Act 1997* (Vic) s 4(1); *Wills Act 1936* (SA) s 4(1); *Wills Act 2008* (Tas) s 6(1); *Wills Act 1970* (WA) s 6; *Wills Act 2000* (NT) s 6(1).

44 *Succession Act 1981* (Qld) s 35, sch 2; *Succession Act 2006* (NSW) ch 4; *Administration and Probate Act 1929* (ACT) pt 3A ('*ACT Administration Act*'); *Administration and Probate Act 1958* (Vic) pt IA; *Administration and Probate Act 1919* (SA) pt 3A; *Intestacy Act 2010* (Tas); *Administration Act 1903* (WA) s 14; *Administration and Probate Act 1969* (NT) s 66, sch 6.

parallel or in necessary contestation to the formal law.'[45] As Krayem observes, Muslims in Australia may choose to deal with two relevant legal systems and 'comply with the requirements of both of the official legal systems as well as relevant Islamic principles and values'.[46]

In this way, it can be said that 'Muslims recreate, redefine and reconstruct their laws and customs as "skilled legal navigators"', and that 'they develop strategies to satisfy the requirements of both official legal systems of modern nation-states and their "Muslim law"'.[47] For example, studies have examined how Muslims can abide by their faith-based obligations in Australia in matters of family law[48] and banking and finance.[49] However, there are relatively few studies that have examined this phenomenon with respect to Islamic inheritance in Australia.[50] The article proceeds to examine the Australian and Islamic inheritance laws to demonstrate how Muslims wanting to maintain an Islamic inheritance can navigate their way through official and unofficial inheritance laws in Australia. First, however, it necessary to briefly explore the limits of religious freedom in Australia in the context of Islamic inheritance.

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45 Salim Farrar and Ghena Krayem, *Accommodating Muslims under Common Law: A Comparative Analysis* (Routledge, 2016) 45. See also Ann Black, 'Accommodating Shariah Law in Australia's Legal System: Can We? Should We?' (2008) 33(4) *Alternative Law Journal* 214; Hossein Esmaeili, 'Australian Muslims: The Role of Islamic Law and Integration of Muslims into Australian Society' (2015) 17(1) *Flinders Law Journal* 69; Ann Black, 'In the Shadow of Our Legal System: Shari'a in Australia' in Rex Ahdar and Nicholas Aroney (eds), *Shari'a in the West* (Oxford University Press, 2010) 239.

46 Ghena Krayem, 'Australian Muslim Women: Skilful Legal Negotiators in a Plural Legal World' in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Publishing, 2013) 70, 71.

47 Ihsan Yilmaz, *Muslim Laws, Politics and Society in Modern Nation States: Dynamic Legal Pluralisms in England, Turkey and Pakistan* (Ashgate Publishing, 2005) 6.

48 Ann Black, 'Legal Recognition of Sharia law: Is This the Right Direction for Australian Family Matters?' (2010) 84 *Family Matters* 64; Ismail Essof, 'Divorce in Australia from an Islamic Law Perspective' (2011) 36(3) *Alternative Law Journal* 182; Ghena Krayem, *Islamic Family Law in Australia: To Recognise or Not to Recognise* (Melbourne University Publishing , 2014); Anisa Buckley, *Not 'Completely' Divorced: Muslim Women in Australia Navigating Muslim Family Laws* (Melbourne University Publishing, 2019); Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Publishing, 2013); Archana Parashar, 'Australian Muslims and Family Law: Diversity and Gender Justice' (2012) 33(5) *Journal of Intercultural Studies* 565; Jenny Richards and Hossein Esmaeili, 'The Position of Australian Women in Polygamous Relationships under the Family Law Act 1975 (Cth): Still "Taking Multiculturalism Seriously"?' (2012) 26(2) *Australian Journal of Family Law* 142; Malcolm Voyce and Adam Possamai, 'Legal Pluralism, Family Personal Laws, and the Rejection of *Shari'a* in Australia: A Case of Multiple or "Clashing" Modernities?' (2011) 7(4) *Democracy and Security* 338.

49 Ann Black and Kerrie Sadiq, 'Good and Bad Sharia: Australia's Mixed Response to Islamic Law' (2011) 34(1) *University of New South Wales Law Journal* 383; Ann Black and Kerrie Sadiq, 'Embracing Sharia-Compliant Products through Regulatory Amendment to Achieve Parity of Treatment' (2012) 34(1) *Sydney Law Review* 189; Salim Farrar, 'Accommodating Islamic Banking and Finance in Australia' (2011) 34(1) *University of New South Wales Law Journal* 413.

50 See above Part IIA for studies on Islamic inheritance law in Australia.

## III The Limits of Religious Freedom

In *Omari*, one of the deceased's sons (who was a plaintiff in the case) argued that his mother's estate should be distributed according to Islamic law, regardless of whether her will was valid, on the basis, it seems, that this is necessary to ensure religious freedom:

> He went on to say that if a will was not made by a Muslim, this did not excuse them from applying the Islamic inheritance system. He said that if a Muslim died without a will, his or her sons and daughters were obliged to distribute the estate according to the Muslim faith. The defendant put to him that this applied in Muslim countries but not in Australia. His response was that this was not necessarily the case. The principle applied everywhere, except in countries with specific laws prohibiting Muslims from practising their faith. Thankfully, he said, Australia had no such law and allowed freedom of worship to people of various faiths.[51]

This argument hints at some sort of guaranteed right to religious freedom that would operate so as to defeat the relevant state or territory legislation and mandate the default distribution of an intestate Muslim estate according to the Islamic legal rules. This is incorrect. Section 116 of the *Australian Constitution* prohibits the Commonwealth from 'establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion'. The 'free exercise of any religion' as protected under s 116 of the *Australian Constitution* has been interpreted narrowly by the High Court of Australia in the few cases that have considered the issue. In *Adelaide Company of Jehovah's Witnesses Inc v Commonwealth*,[52] Latham CJ remarked that the purpose of s 116 is to 'protect the religion (or absence of religion) of minorities',[53] and that this purpose extends to protect the right to have no religion,[54] as well as 'acts done in pursuance of religious belief as part of religion'.[55] However, on the limits of the exercise of religion, Latham CJ asked:

> Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?
>
> It has already been shown that beliefs entertained by a religious body as religious beliefs may be inconsistent with the maintenance of civil government. The complete protection of all religious beliefs might result in the disappearance of organized society, because some religious beliefs, as already indicated, regard the existence of organized society as essentially evil.[56]

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51 *Omari* (n 1) [42].
52 (1943) 67 CLR 116.
53 Ibid 124 (Latham CJ).
54 Ibid 123 (Latham CJ).
55 Ibid 124 (Latham CJ).
56 Ibid 126 (Latham CJ).

In discussing what freedom means, Latham CJ opined that 'in all these cases an obligation to obey the laws which apply generally to the community is not regarded as inconsistent with freedom'.[57] He also cited John Stuart Mill's distinction between liberty and licence, in which Mill 'recognized that liberty did not mean the licence of individuals to do just what they pleased, because such liberty would mean the absence of law and of order, and ultimately the destruction of liberty'.[58] To that end, Latham CJ concluded that it 'is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.'[59]

In a later case, *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*,[60] Mason ACJ and Brennan J affirmed the fundamental importance of freedom of religion.[61] However, their Honours also affirmed previous statements to the effect that there are limits on the free exercise of religion:

> But the area of legal immunity marked out by the concept of religion cannot extend to all conduct in which a person may engage in giving effect to his faith in the supernatural. The freedom to act in accordance with one's religious beliefs is not as inviolate as the freedom to believe, for general laws to preserve and protect society are not defeated by a plea of religious obligation to breach them.[62]

More recently, in *Kruger v Commonwealth*,[63] the High Court determined that it is the purpose of the act in question that will be relevant in considering whether it has breached s 116.[64] The case also confirmed that s 116 of the *Australian Constitution* only acts to limit Commonwealth legislative power and does not confer a constitutionally guaranteed right to freedom of religion:

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57 Ibid 126–7 (Latham CJ).

58 Ibid 131 (Latham CJ).

59 Ibid. In this way, liberalism acknowledges that, although there is a place for freedom of religion in society that must be protected, it must be balanced against competing freedoms and priorities, for example protecting freedom from religion and the need to establish civil order and governance. See generally Paul Babie and Neville Rochow, 'Protecting Religious Freedom under Bills of Rights: Australia as Microcosm' in Paul Babie and Neville Rochow (eds), *Freedom of Religion under Bills of Rights* (University of Adelaide Press, 2012) 1. Harrison argues that this approach places religious liberty claims within a framework of concern for personal autonomy in which claims to religious freedom are more often than not rejected in favour of competing individual interests: Joel Harrison, *Post-Liberal Religious Liberty* (Cambridge University Press, 2020).

60 (1983) 154 CLR 120.

61 'Freedom of religion, the paradigm freedom of conscience, is of the essence of a free society. The chief function in the law of a definition of religion is to mark out an area within which a person subject to the law is free to believe and to act in accordance with his belief without legal restraint. Such a definition affects the scope and operation of s 116 of the Constitution and identifies the subject matters which other laws are presumed not to intend to affect. Religion is thus a concept of fundamental importance to the law': *Church of the New Faith v Commissioner of Pay-Roll Tax (Victoria)* (n 60) 130 (Mason ACJ and Brennan J).

62 Ibid 135–6 (Mason ACJ and Brennan J).

63 (1997) 190 CLR 1.

64 Ibid 128 (Gaudron J) and 160 (Gummow J).

> [Section] 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, 'in form, a constitutional guarantee of the rights of individuals'. It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power.[65]

Importantly, s 116 of the *Australian Constitution* does not apply to legislation enacted by the Australian states. There is some argument as to whether the provision might operate to restrict legislation passed by the Australian Capital and Northern Territories (which rely on Commonwealth legislation).[66] Nonetheless, it is inaccurate to say that there is a constitutionally guaranteed right to freedom of religion, as suggested in *Omari*, that would defeat state or territory legislation to mandate distribution of an estate according to the Islamic legal rules. In any event, Mariem Omari had the right to exercise her testamentary freedom to make a will in accordance with her religious principles. She was found unable to do so, not for any reason relating to her religious beliefs, but because she lacked testamentary capacity. In this respect, 'legal documents are not held invalid because they are drafted in accordance with the tenets of a religion, but because of legal impropriety'.[67]

## IV Comparative Analysis of Islamic and Australian Inheritance Laws

The result of *Omari* meant that Mariem Omari's estate was distributed according to the intestacy rules under the *ACT Administration Act*, as opposed to the Islamic distribution rules as outlined in her will. The article now turns to consider whether there are conflicts in the Islamic and Australian intestacy rules and explores how some resident Muslims navigate dual legal systems in order to

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65 Ibid 124–5 (Gaudron J) (citations omitted).

66 In favour of the proposition that the Australian Territories fall outside the purview of s 116, see Holly Randell-Moon, 'Section 116: The Politics of Secularism in Australian Legal and Political Discourse' in Basia Spalek and Alia Imtoual (eds), *Religion, Spirituality and the Social Sciences: Challenging Marginalisation* (Policy Press, 2008) 51, 54; Michael Hogan, 'Separation of Church and State: Section 116 of the Australian Constitution' (1981) 53(2) *Australian Quarterly* 214, 216–17; Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207. Cf Beck who argues that, unlike the state Governments, the Australian territories (eg the Australian Capital Territory and the Northern Territory) are bound by the s 116 restrictions by virtue of s 122 of the *Australian Constitution*: Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 170–4.

67 Margaret Beazley, 'The Intersection of the Australian Law and the Islamic Faith: A Selection of Cases' (2015) 12(2) *The Judicial Review* 147, 150.

maintain an Islamic inheritance. It undertakes this examination by way of comparative analysis.

## A *The Comparative Method*

There is little agreement in comparative-method legal scholarship as to the process of comparison.[68] Rather, there are a multitude of processes of comparison that can be drawn upon to undertake a comparative analysis. The comparative analysis undertaken in this article draws on a five-step process set out by Paris, which includes identifying the legal problem; setting out the choice of comparators; discussing the research material (sources of law) used; outlining the comparative method; and evaluating the findings.[69]

The legal question being examined here is whether Muslims in Australia can assimilate their faith-based obligations with their country-based obligations in matters of inheritance, such that they can maintain an Islamic inheritance if they choose to do so. As regards the choice of comparators, the article uses the Australian and Islamic inheritance rules. However, each Australian state and territory is governed by a different legislative framework,[70] and while the inheritance laws across these jurisdictions espouse the same principles, there are differences in their application.[71] The intestacy rules also differ between the states and territories. A deceased person who has a connection with one or more jurisdictions may have their estate distributed according to multiple systems of succession law.[72] Additionally, if the deceased person's parents wanted to make a

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68 See, eg, Catherine Grubb, 'The Implications of Postmodernism on Comparative Methodology' [2003] *UCL Jurisprudence Review* 13, 13–14; Otto Kahn-Freund, 'Comparative Law as an Academic Subject' (1966) 82(1) *Law Quarterly Review* 40, 41; Vernon Valentine Palmer, 'From Lerotholi to Lando: Some Examples of Comparative Law Methodology' (2005) 53(1) *American Journal of Comparative Law* 261, 290.

69 Marie-Luce Paris, 'The Comparative Method in Legal Research: The Art of Justifying Choices' in Laura Cahillane and Jennifer Schweppe (eds), *Legal Research Methods: Principles and Practicalities* (Clarus Press, 2016) 39. This method contains both intellectual and practical steps and is inspired by de Cruz's more detailed method of comparison: Peter de Cruz, *Comparative Law in a Changing World* (Cavendish Publishing Ltd, 2nd ed, 1999) 235–9.

70 *Probate and Administration Act 1898* (NSW); *Trustee Act 1925* (NSW); *Succession Act 2006* (NSW); *Trustee Act 1925* (ACT); *ACT Administration Act* (n 44) ; *Wills Act 1968* (ACT); *Family Provision Act 1969* (ACT); *Administration and Probate Act 1958* (Vic); *Trustee Act 1958* (Vic); *Wills Act 1997* (Vic); *Administration and Probate Act 1919* (SA); *Wills Act 1936 (SA)*; *Trustee Act 1936* (SA); *Inheritance (Family Provision) Act 1972* (SA); *Trustee Act 1898* (Tas); *Testator's Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1935* (Tas); *Wills Act 2008* (Tas); *Intestacy Act 2010* (Tas); *Administration Act 1903* (WA); *Trustees Act* 1962 (WA); *Wills Act 1970* (WA); *Family Provision Act 1972* (WA); *Administration and Probate Act 1969* (NT); *Public Trustee Act 1979* (NT); *Family Provision Amendment Act 1980* (NT); *Wills Act 2000* (NT); *Trusts Act 1973* (Qld); *Succession Act 1981* (Qld).

71 For example, a will may be admitted to probate in some states and territories but not others because of different execution formalities.

72 Because if a person dies domiciled in one state or territory, but leaves real property in a different state or territory, *lex situs* will apply to the deceased's real property (being the law of the

family provision application with respect to the estate, they could do so in Queensland,[73] but not in Victoria.[74] The article uses the *ACT Administration Act* as the Australian basis for comparison, because the only case to consider Islamic inheritance laws in Australia, *Omari*, concerned the application of that Act.

Unlike the Australian legal system, which is based on secular norms, the Islamic legal system is religious in nature with eschatological connotations (ie relating to death, judgement and the final destiny of the soul and of mankind).[75] The Islamic legal rules are also not applied uniformly across particular jurisdictions.[76] This is not to say, however, that the two legal systems are incomparable, because 'no subject matter and no legal system can, on a priori grounds, be excluded as beyond the domain of comparative law. The only requirement is that the material studied be compared — that is to say, approached in the context of two or more different legal orders.'[77] The multiplicity of jurisdictions in Islamic law is that of legal schools of thought (*madhhabs*), rather than of national or state legal systems.[78] As no *madhhab* is regarded as hierarchically superior to another,[79] it is necessary to choose either a particular *madhhab*, or a jurisdiction in which Islamic law is officially applied, as the basis for comparison.

Importantly, Australia's Muslims are not homogenous and do not adhere to one branch of Islam or one *madhhab*.[80] All the major *madhhabs* are represented in Australia. According to Saeed, however, the three most followed *madhhabs* are the *Hanafi, Shafi'i,* and *Ja'fari*.[81] In a recent national survey on Islam in Australia, 1034 Muslim Australian citizens and permanent residents were asked with which

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jurisdiction in which the real property lies) and *lex domicilii* will apply to the deceased's personal property or chattels (being the law of the jurisdiction in which the deceased lived on their death): Michael Tilbury, Gary Davis and Brian Opeskin, *Conflict of Laws in Australia* (Oxford University Press, 2002) ch 25.

73 See *Succession Act 1981* (Qld) s 40 (definition of 'dependant').

74 Where they are not included in the definition of 'eligible person' under s 90 of the *Administration and Probate Act 1958* (Vic).

75 Hamid Harasani, 'Islamic Law as a Comparable Model in Comparative Legal Research' (2014) 3(2) *Global Journal of Comparative Law* 186, 188.

76 Malcolm Voyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (2018) 12(3) *Contemporary Islam* 251, 253.

77 Arthur von Mehren, 'An Academic Tradition for Comparative Law?' (1971) 19(4) *American Journal of Comparative Law* 624, 624.

78 Islam's followers are traditionally divided into two denominations: *Sunni* and *Shi'a.* Initially a matter of pure political succession, the differences between the two branches of Islam grew wider over the centuries and now span legal, theological and ideological divergences. They are further broken down into legal schools of thought (*madhhabs*), each of which has developed its own body of jurisprudence and interpretation of the Islamic legal rules. The four major *Sunni madhhabs* are *Hanafi; Maliki; Shafi'i;* and *Hanbali.* There are three main *Shi'a madhhabs*, being *Ja'fari* (or *Ithna Ashari* or Twelvers); *Ismaili* (or Seveners); and *Zaydi.*

79 Harasani (n 75) 194.

80 This is in contrast to some other Muslim minority countries, such as the United Kingdom, where over 75 per cent of Muslims come from the South Asian countries of Pakistan, India and Bangladesh. See Yilmaz (n 47) 57.

81 Abdullah Saeed, *Islam in Australia* (Allen & Unwin, 2003) 69.

school of religious thought, group, or Islamic tradition they most identify.[82] A majority of 63.6 per cent answered '*Sunni*', followed by 34 per cent who answered 'just Muslim' and 18 per cent who answered '*Hanafi*' (being one of the *Sunni madhhabs*).[83] For the sake of simplicity, therefore, the following analysis draws on the *Hanafi madhhab* of *Sunni* Islamic jurisprudence.[84]

However, it is important to acknowledge that, while the Islamic inheritance laws are similar as between the *Sunni madhhabs*, there are nuances between the *madhhabs* that result in different legal rulings on some points and the devolution of an estate according to the Islamic inheritance laws will differ depending on the *madhhab* to which the deceased ascribed. The greatest differences appear between the *Sunni* and *Shi'a madhhabs*. The agnatic heirs, who were the principal heirs before Islam, continue to remain the principal heirs in the *Sunni madhhabs* (subject to the rules of the *Qur'an*), who layer the Islamic inheritance legal rules on top of pre-Islamic Arabian inheritance customs.[85] In contrast, the *Shi'a madhhabs* do not have as sharp a distinction between agnate and cognate heirs and use the *Qur'anic* rules as 'illustrations of general principles underlying therein.'[86] Thus, it must be acknowledged that the results of the comparative analysis would differ if an alternative *madhhab* was selected as the basis for comparison.

With respect to ACT law, the *ACT Administration Act*, the *Wills Act 1968* (ACT) ('*Wills Act*') and the *Family Provision Act 1969* (ACT), collectively set out the legal rules relating to inheritance, which are supplemented by established common law principles. The *Qur'an* and *Sunnah* form the primary sources of Islamic law, with each *madhhab* promulgating its own distinct set of legal rules that have been developed by the *madhhab's* legal scholars from the primary sources. The study

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82 Halim Rane et al, 'Islam in Australia: A National Survey of Muslim Australian Citizens and Permanent Residents' (2020) 11(8) *Religions* 419:1, 6.

83 Ibid 6–7. Other responses included Ahl Sunnah Wal Jamaa (12.6 per cent), Shafi'i (6.7 per cent), Sufi (6.5 per cent), progressive (5.2 per cent), Shiite (4.1 per cent) and Salafi (2.8 per cent).

84 The article refers to 'Islamic inheritance legal rules' and '*Hanafi* inheritance legal rules' and uses these terms interchangeably.

85 See Mohammad Mustafa Ali Khan (n 41) 72. Khan highlights that '[t]he Sunnis take the specific provisions of the Holy Quran applicable to and affecting the individuals mentioned therein without disturbing the pre-Islamic customary laws and usages. They restrict the effect of specific provisions of the Quran only to the cases specified therein and do not generalize them to extract general rules. … They interpret these provisions simply as amendments relating to the individual instances and not repealing the customary provisions in general': 173–4. See also Asaf A A Fyzee, *Outlines of Muhammadan Law* (Oxford University Press, 5th ed, 2008) 314–22; N J Coulson, *Succession in the Muslim Family* (Cambridge University Press, 1971) 30.

86 Mohammad Mustafa Ali Khan (n 41) 174. Coulson provides that '[f]rom a comparative standpoint the outstanding characteristic of the Shi'i law of inheritance is its refusal to afford any special place or privileged position to agnate relatives as such – a fundamental distinction which is somewhat graphically expressed in the alleged dictum of the Shi'i Imam, Ja'far al-Sadiqu: "As for the *asaba,* dust in their teeth."': Coulson (n 85) 108. For a more detailed discussion of the differences between the *Sunni* and *Shi'a* laws of inheritance, see Mohammad Mustafa Ali Khan (n 41) 173–84; Fyzee (n 85) 364–6; Coulson (n 85) 108–34; Shahbaz Ahmad Cheema, 'Shia and Sunni Laws of Inheritance: A Comparative Analysis' (2012) 10 *Pakistan Journal of Islamic Research* 69; Lucy Carroll, 'The Ithna Ashari Law of Intestate Succession: An Introduction to Shia Law Applicable in South Asia' (1985) 19(1) *Modern Asian Studies* 85.

relies on the *Qur'anic* verses; relevant *hadith*; and, the *Hanafi* inheritance laws as set out in Fyzee's *Outlines of Muhammadan Law*,[87] supplemented by other scholarly commentary on Islamic law. Given the heterogeneity of Australia's Muslim communities, the article also points to some relevant similarities and differences between the different *Sunni madhhabs*.

There are numerous techniques by which comparison can occur, including historical; functional; evolutionary; structural; thematic; empirical; and statistical comparisons.[88] The most prevalent is the functional method developed by Zweigert and Kötz.[89] The functional method of comparison presupposes that the legal systems being examined are only comparable if they 'fulfil the same function'.[90] Broadly, the inheritance laws of both the Islamic and Australian legal systems are functionally equivalent, in that their function is the orderly devolution of property upon a deceased's death. The analysis can proceed at a macro or micro level, or both.[91] The study applies the functional method of comparison to analyse the inheritance legal rules at a micro level.

The comparative study is split into two parts: intestate succession and testate succession.

## B *Intestate Succession*

It is necessary to outline the process for intestate distribution under each inheritance legal system. Also of relevance is the distinction in Islamic law between the laws pertaining to inheritance (*mirath*) and the laws pertaining to wills (*wasiyyah*). Islamic law does not explicitly distinguish between testate and intestate succession. Rather, the inheritance laws as set out under the *Qur'an* are intended to apply to every deceased Muslim's estate. For the purpose of the article, the Islamic laws not relating to wills are referred to as the intestacy rules.

### 1 *Australian Intestacy Rules*

While the intestacy rules vary across the Australian States and Territories, they all prioritise the beneficial rights of the deceased's nuclear family (being the spouse and issue). Only where there is no spouse or issue will the deceased's next of kin be entitled to the estate.

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87 Fyzee (n 85).
88 Palmer (n 68) 263.
89 Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, tr Tony Weir (Clarendon Press, 3rd ed, 2011).
90 Ibid 43.
91 Ibid 4–5.

Using the ACT as an example, where a Muslim dies intestate,[92] pt 3A of the *ACT Administration Act* applies to the intestate's estate.[93] The property available for distribution is the property of the intestate left over after payment of all debts.[94] The partner of the intestate inherits the entire estate if the deceased had no children, [95] and also where the deceased had children if the estate's total value is less than $200,000.[96] Where the intestate is survived by both a partner and issue and the estate exceeds $200,000, the partner inherits the first $200,000, plus 8 per cent interest for every year that they have to wait for their inheritance, plus a portion of the remaining balance of the estate (the 'remainder').[97] For example, if there was one child, the partner inherits one-third of the remainder, and the children inherit equal shares of the remainder. If the deceased had no partner but did have children, then the children inherit the whole of the estate in equal shares.[98]

Interestingly, s 45A of the *ACT Administration Act* contemplates the potential for an intestate to be survived by a spouse, civil union partner or civil partner, as well as an eligible partner. In such cases, where the eligible partner and the intestate had been domestic partners[99] continuously for less than five years when the intestate died, the partnership share[100] is distributed equally between the spouse, civil union partner or civil partner and the eligible partner.[101] Where the domestic partnership had been in place continuously for five years or more when the intestate died, however, the eligible partner is exclusively entitled to the partnership share.[102]

It is only where the deceased leaves no partner/s and no children that other family members inherit. In such cases, the surviving parent or parents are entitled

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92 Being 'a person who dies on or after 1 July 1967 and either does not leave a will or leaves a will but does not dispose effectively, by the will, of the whole or part of his or her real or personal property': *ACT Administration Act* (n 44) s 44 (definition of 'intestate').

93 Where the deceased's real property is situated in the ACT and they are taken to have been domiciled in the ACT upon their death.

94 *Act Administration Act* (n 44) s 41A.

95 Under s 44 of the *ACT Administration Act* (n 44), 'an intestate's 'partner' is either of the following: (a) the spouse, civil union partner or civil partner of the intestate when the intestate died;' or '(b) the eligible partner of the intestate' (definition of 'partner'). The 'eligible partner' of 'an intestate means someone, other than the spouse, civil union partner or civil partner of the intestate who — (a) was the intestate's domestic partner when the intestate died; and (b) either — (i) had been the intestate's domestic partner continuously for 2 or more years when the intestate died; or (ii) is the parent of the intestate's child, if the child was under 18 years old when the intestate died' (definition of 'eligible partner').

96 *ACT Administration Act* (n 44) sch 6 pt 6.1.

97 Ibid item 2.

98 Ibid sch 6 pt 6.2 item 1.

99 See *Legislation Act 2001* (ACT) s 169(1)–(2): being a reference to someone who lives with the person in a domestic partnership, and includes a reference to a spouse, civil union partner or civil partner of the person. Domestic partnership is the relationship between 2 people, whether of a different or the same sex, living together as a couple on a genuine domestic basis. .

100 Being, in relation to an intestate estate, 'the share of the estate to which the intestate's partner is entitled' under div 3A.2 of the *ACT Administration Act* (n 44): s 45A(2).

101 *ACT Administration Act* (n 44) s 45A(1)(a).

102 Ibid s 45A(1)(b).

to the whole of the intestate estate in equal shares.[103] If no parent survives the intestate, then 'next of kin'[104] inherit in the following order of succession (each among whom excludes the next): brothers and sisters; grandparents; aunts and uncles; and cousins.[105] Where the intestate is not survived by any partner, children, parent or next of kin, the ACT is entitled to the intestate estate.[106]

There are limited bars to inheritance under general Australian intestacy rules. For example, women under Australian law in all jurisdictions have the same inheritance entitlements as men. There are no faith-based restrictions on inheritance to an estate. The intestate's children are treated equally in inheritance entitlements, regardless of whether they are born in or outside of a marriage.[107] Similarly, adopted children inherit from the adoptive parent as issue of the adoptive parent.[108] It is also immaterial whether the relationship is one of whole blood or half blood.[109] One recognised bar to inheritance is that a person cannot generally inherit from a deceased person if that person contributed to the deceased's death under the common law forfeiture rule.[110]

### 2 *Islamic Intestacy Rules*

Similarly to the Australian intestacy rules, any distribution of an estate under Islamic law occurs only after the payment of debts.[111] However, the Islamic intestacy rules are more complex and cover a comprehensive range of circumstances. They are contained in a series of *Qur'anic* verses,[112] which detail succession entitlements according to a system of fixed shares. The *Qur'anic* rules are supplemented by various *hadith*, and a Muslim's estate is generally devolved according to the *madhhab* to which the deceased belonged at the time of death.[113]

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103 Ibid sch 6 pt 6.2 item 2.

104 Ibid s 49(5).

105 Ibid sch 6 pt 6.2 item 3.

106 Ibid item 4.

107 For example, the *ACT Administration Act* does not distinguish between children born in or outside of marriage: *ACT Administration Act* (n 44).

108 Once a child is legally adopted, it ceases to be the child of any person who was its parent previously and becomes the lawful child of the adoptive parent: *Adoption Act 1993* (ACT) ss 43(1)(a)–(b). Note, however, that s 43(2) provides that 'an adoption order does not exclude any right of inheritance that the adopted person might otherwise have from or through a deceased person if — (a) 1 of the birth or former adoptive parents of an adopted person has died; and (b) an adoption order is made in favour of a step-parent after that death.'

109 *ACT Administration and Probate Act* (n 44) s 44A.

110 Note, however, that the Supreme Court has the power to modify the forfeiture rule in the ACT where the justice of the particular case requires it to do so (apart from cases which involve a person who stands convicted of murder): *Forfeiture Act 1991* (ACT) ss 3–4.

111 '(The distribution in all cases is) after the payment of legacies and debts': *Qur'an* 4:11. However, the wife's *mahr* (being the dowry paid to the wife upon marriage under Islam) is regarded as a debt and must be paid out of the estate with priority as such: see, eg, Hamid Khan (n 28) 31; Abdur Rahman I Doi, *Shari'ah: Islamic Law* (Ta-Ha Publishers, 2nd ed, 2008) 256.

112 *Qur'an* 4:11–12, 4:176.

113 See, eg, Hamid Khan (n 28) 35.

*The Hanafi* inheritance rules[114] retain elements of the pre-Islamic customary law system.[115] The *Hanafi* inheritance legal system is classified by reference to seven classes of heirs:[116]

1. the Qur'anic heirs ('Sharers');
2. the agnatic heirs ('Residuaries');
3. the uterine heirs ('Distant Kindred', who, together with the Sharers and Residuaries, are the 'Principal Classes');
4. successor by contract;
5. the acknowledged kinsman;
6. the sole legatee; and
7. the state, by escheat (which, together with successor by contract, the acknowledged kinsman, and the sole legatee, are the 'Subsidiary Classes').[117]

The *Qur'anic* verses[118] establish the five Sharers ('Primary Sharers') who are never excluded from inheritance, being (where relevant) the deceased's husband; wife; father; mother; and daughter. While a Primary Sharer will always inherit, his or her beneficial entitlement may be reduced due to the existence of another heir. A number of other Sharers (the 'Substitute Sharers' and 'Secondary Sharers') will only inherit in the absence of the Primary Sharers. The Substitute Sharers include the deceased's paternal and maternal grandmother; agnatic grandfather; and agnatic granddaughter. The Secondary Sharers are the deceased's full sister; agnate sister; uterine brother; and uterine sister.

Where there are no Sharers, or where distribution to the Sharers results in a leftover sum (the residue), the Residuaries will inherit any portion of the estate leftover. While the term 'residuary' implies such shares are nominal, the Residuaries (of whom the most important class are the male agnatic heirs, including the father (in certain cases), son, brother, paternal uncle and nephew) 'were the principal heirs before Islam; they continue to remain in Sunni law the principal heirs provided always that the claims of nearer relations mentioned in the Qur'an are satisfied' first.[119] This class of heirs reflects a continuation of pre-Islamic Arabian customary law that prioritised the deceased's male relatives.[120]

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114 Along with the majority of the *Sunni madhhabs*.

115 Pre-Islamic Arabian inheritance law was based on the principle that only a male who could fight in battle was entitled to inherit. Women were prohibited from inheriting and were themselves property to be inherited upon the death of their male guardian.

116 Fyzee (n 85) 314–45.

117 Ibid 320.

118 *Qur'an* 4:11–12.

119 Fyzee (n 85) 322.

120 Jurists rely on a *hadith* to support this class of heirs that mandates Muslims to distribute the shares of inheritance 'to those who are entitled to receive it. Then whatever remains, should be given to the closest male relative of the deceased.': Sahih Al-Bukhari, 'Laws of Inheritance (Al-Faraa'id)',

Only when there are no Sharers or Residuaries will the estate devolve to the Distant Kindred.[121] Where none of the Principal Classes exist, the deceased's estate is devolved to the Subsidiary Classes, 'among whom each class excludes the next'.[122]

Table 1 sets out the Primary Sharers' beneficial entitlements.[123]

*Table 1: Primary Sharers' Beneficial Entitlements under Hanafi Rules*

| Heir | Shares | | When entirely excluded | When share may be affected | How share is affected |
|---|---|---|---|---|---|
| | One | Two or more | | | |
| Wife | 1/4 | Equal share of 1/4 (no children) or 1/8 (children) | Never | Child or child of son hls[124] | Reduced to 1/8 |
| Husband | 1/2 | - | Never | Child or child of son hls | Reduced to 1/4 |
| Daughter | 1/2 | Equal share of 2/3 | Never | Son | Becomes residuary heir and takes 1/2 share of son as residuary |
| Mother | 1/3 | - | Never | Male descendant (son, son's son hls) | Reduced to 1/6 |
| | | | | 2 Siblings | Reduced to 1/6 |
| Father | 2/3 | - | Never | Male descendant (son, son's son hls) | Reduced to 1/6 |
| | | | | Female descendant (daughter, son's daughter hls, but absence of male descendant) | Share reduced to 1/6, but also inherits residue |
| | | | | No descendant | Inherits entire residue |

*Sunnah.com* (Web Page) Volume 8, Book 80, Hadith 724 <https://sunnah.com/bukhari/85/9>. The *Shafi'i madhhab* also recognises, for example, that 'inheritors by right of agnation are understood the legitimate inheritors to whom the Koran does not assign a definite fraction of the estate, but who, in default of persons entitled to such fraction, share amongst them the entire succession, and who, if there are persons so entitled, can claim only the remainder, after deducting the portions prescribed in the Book of God': Abu Zakaria Yahya Ibn Sharaf An Nawawi, *Minhaj et Talibin: A Manual of Muhammadan Law, According to the School of Shafii*, tr E C Howard (Independently Published) 251.

121 Fyzee (n 85) 323. The Distant Kindred are related to the deceased through one or more female links.

122 Ibid.

123 Based on the *Hanafi* jurisprudence under the *Sunni* law of inheritance, as expounded by Fyzee (n 85) 314–45.

124 Meaning 'how low soever'.

Unlike the Australian intestacy rules, there are five generally recognised bars to inheritance under Islamic law. First, non-Muslims are generally proscribed from inheriting from Muslims, and vice versa.[125] Second, illegitimate children can inherit from their mother, but not from their father.[126] Half-siblings may not inherit from one another if one is classed as illegitimate. Third, adopted children are not permitted to inherit from adoptive parents because Islam does not legally recognise adoption.[127] Fourth, full blood relations are entitled to greater beneficial shares from one another than those who are not full blood relations.[128] Fifth, and similarly to Australian law, a person cannot inherit from a deceased if that person killed the deceased.[129]

Importantly, Islamic law directs that a male takes double the inheritance of a female in the same degree of relationship (known as the 'half rule').[130] Additionally, ascendants of the deceased inherit simultaneously with the spouse and issue, and may never be excluded.[131]

### 3 *Comparative Analysis of the Intestacy Rules*

There are significant differences in the distribution of an estate under the Australian and Islamic intestacy rules, which evidence a broad incompatibility

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125 Usama bin Zaid narrated, the Prophet said, 'A Muslim cannot be the heir of a disbeliever, nor can a disbeliever be the heir of a Muslim':Sahih Al-Bukhari, 'Laws of Inheritance (Al-Faraa'id)', *Sunnah.com* (Web Page) Volume 8, Book 80, Hadith 756 <https://sunnah.com/bukhari:6764>. See also An Nawawi (n 120) 253.

126 See, eg, Fyzee (n 85) 320; Hamid Khan (n 28) 29.

127 The *Qur'an* states that Allah has not 'made your adopted sons your sons. Such is (only) your (manner of) speech by your mouths': 33:4. See also Fyzee (n 85) 344. The only circumstances in which adopted children may inherit from adoptive parents is where the adoptive parent provides for the child in the one third of the estate that is permitted to be bequeathed under the Islamic legal rules (discussed later in this article).

128 The *Qur'an* states that 'kindred by blood have prior rights against each other in the Book of Allah': 8:75.

129 See Sunan Ibn Majah, Chapters on Shares of Inheritance', *Sunnah.com* (Web Page) Volume 4, Book 23, Hadith 2735 <https://sunnah.com/ibnmajah/23> where it is narrated that '[t]he killer does not inherit'. See also Fyzee (n 85) 344. While the *Sunni maddhabs* agree on the general principle that a killer cannot inherit from his or her victim, there is divergence among the schools as to the exact circumstances in which homicide does constitute a bar to inheritance. For example, the *Shafi'i madhhab* applies the rule absolutely, regardless of moral culpability: Mohammad Mustafa Ali Khan (n 41) 50. Of the *Shafi'i* application of the rule, An Nawawi writes that '[a] person who has killed another cannot success to the estate of the person killed: though some authorities admit an exception to this rule in the case of a homicide for which the perpetrator was not in any respect to blame': An Nawawi (n 120) 253. In contrast, the *Hanbali madhhab* provides that a homicide that is justified and not punishable at law will not constitute a bar to inheritance: Mohammad Mustafa Ali Khan (n 41) 50; Coulson (n 85) 180. *Hanafji* and *Maliki* jurisprudence place importance on causation and hold that only a direct, unlawful killing is a bar to inheritance: Mohammad Mustafa Ali Khan (n 41) 50. See also Syed Ameer Ali, *The Law Relating to Gifts, Trusts, and Testamentary Dispositions Among the Mahommedans, According to the Hanafi, Maliki, Shâfeï, and Shiah Schools* (Thacker, Spink and Co, 1885) 459–61.

130 See, eg, Fyzee (n 85) 318. 'The only exception is the relatives connected through the mother only, like uterine brothers and sisters, when inheriting from each other, take equally, regardless of sex.': Hamid Khan (n 28) 43.

131 Qur'an 4:11. There is a general duty in Islam to provide for one's parents as they age: Mohammad Mustafa Ali Khan (n 41) 12.

between the two systems of intestate succession. For example, the general bars to inheritance under Islamic law highlight the significance that is placed on certain beneficiary characteristics, including their religious affiliation, blood relation to the deceased, adoptive status, and gender. Perhaps the greatest difference between the two legal systems is their application with respect to female beneficiaries. Australian law provides women the same inheritance entitlements as men, echoing the prevailing belief that everyone should be treated equally before the law. Conversely, the Islamic rules show a clear preference for male entitlement over female entitlement. This gender differentiation is traced back to the influence of pre-Islamic Arabian customary law, which preferred male entitlement over female entitlement. It was only the later *Qur'anic* provisions that allowed females to inherit for the first time, and then to a lesser degree than their male counterparts.[132] Mariem Omari ostensibly wanted her estate distributed in accordance with the *Qur'anic* provisions, because she sought to leave a full share to each of her sons and a half share to each of her daughters.[133] This distribution accords with the *Qur'anic* system of forced succession, which requires the estate be devolved to those whom Islam considers to be naturally entitled to it. Nonetheless, due to the unofficial nature of Islamic law in Australia, Muslims who die intestate or, as in Mariem Omari's case, whose wills are found to be void, cannot have their estate distributed according to Islamic law.

The conflicts in intestacy provide a basis from which to evaluate whether Muslims can otherwise assimilate their faith-based obligations with their country-based obligations in matters of inheritance within the current legal framework. Specifically, there are three ways that Muslims can manage the intestacy conflicts.

### *(a) Unofficial Redistribution of the Estate*

Firstly, where a Muslim dies intestate in Queensland, the deceased's family may choose to re-distribute the estate according to the unofficial Islamic rules after it passes through the official legal system. In such instances, however, it is the living family members' religious beliefs that will determine whether or not distribution occurs according to Islamic law, not the beliefs of the deceased.[134]

### *(b)* Inter Vivos *Gifts*

Secondly, Muslims who do not want their estate distributed under the intestacy legal rules may make *inter vivos* gifts during their lifetime, if they satisfy the

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132 Although males and females do not have equal rights in inheritance, Fyzee argues that '[m]ales and females have equal rights over property' where females, by reason of their sex, do not 'suffer from any disability to deal with [their] share of the property': Fyzee (n 85) 318.

133 *Omari* (n 1) [8].

134 Who may, or may not, have wanted their estate distributed according to the Islamic legal rules.

relevant common law rules and the Islamic rules relating to gifts. There are three requirements to be met under the common law rules for gifts: intention to give the gift to the donee; delivery of the gift to the donee (or declaration of trust, or embodiment in a deed); and acceptance of the gift by the donee.[135] *Hiba* is the legal concept in *Hanafi* jurisprudence that refers to an immediate and unqualified transfer. There are three conditions to a valid *hiba*: the declaration of the gift by the donor; the acceptance of the gift by the donee; and delivery of possession to the donee.[136]

Gifting allows Muslims to distribute their estates in accordance with the Islamic rules during their lifetime. However, it also provides them with flexibility to foreshadow and deal with any issues prior to death.[137] This is because, in contrast to the stricter Islamic inheritance legal rules, the Islamic rules relating to *inter vivos* gifts do not impose restrictions on beneficiaries, or limits on the quantum that may be transferred. Practically, however, *inter vivos* gifts can also attract significant stamp duty and other costs.

### *(c) Testamentary Instruments*

Alternatively, Muslims can make wills that are valid under Islamic law and the laws of the relevant Australian jurisdiction. In fact, will-making is actively encouraged by Australian *imams* and Australian Muslim communities. The Australian National Imams Council website states that '[a]s Australian Muslims, it is our duty to ensure that we have a Will in place which conforms with Islamic

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135 See *Re Cole* [1964] 1 Ch 175, CA; LexisNexis, *Halsbury's Laws of Australia* (online at 17 June 2017) [315] Personal Property, '4 Transfer of Ownership' [315]–[415].

136 Imam Abu'l-Husayn Ahmad Ibn Muhammad Ibn Ahmad Ibn Ja'far Ibn Hamdan Al-Quduri, *The Mukhtasar of Al-Quduri: A Manual of Islamic Law According to the Hanafi School*, tr Tahir Mahmood Kiani (Ta-Ha Publishers, 2010) 315. The *Shaf'i madhhab* similarly prescribes that a gift is valid whether the object is brought by the donor and taken possession of by the donee, where ownership is transferred upon the donee taking possession with the consent of the donor: An Nawawi (n 120) 234. It appears that *inter vivos* gifts may also be used to remedy some of the injustices of the distribution rules, where parents, for example, may make *inter vivos* gifts to their children to ensure daughters are adequately provided for: Ali (n 129) 45. Note, however, that the *Shafi'i madhhab* explicitly notes that there is uncertainty as to whether parents should be allowed to distribute *inter vivos gifts* equally among their children so as to circumvent the laws of inheritance that provide that sons receive double the share of inheritance as daughters: An Nawawi (n 120) 234–5; Ali (n 129) 176. The *Shi'a madhhabs* condone gifts to relatives, in particular the donor's direct descendants, mother and father, and recommend equal distribution among the children: Ali (n 129) 171. There are different rules relating to gifts made in anticipation of death, both under Australian common law and Islamic law. Holmes JA sets out the three threshold requirements for the constitution of a *donatio mortis causa* (deathbed gift) under the common law in *Dufficy v Mollica* [1968] 3 NSWR 751, 758. For the rules relating to deathbed gifts (*marad al-mawt*) under Islamic law, see Hiroyuki Yanagihashi, 'The Doctoral Development of "*Maraḍ al-Mawt*" in the Formative Period of Islamic Law' (1998) 5(3) *Islamic Law and Society* 326; Ali (n 129) 58–64; Doi (n 111) 514; Abdur Rahim, *The Principles of Muhammadan Jurisprudence According to the Hanafi, Maliki, Shafi'i and Hanbali Schools* (Cosmo Publications, 2010) 254–60.

137 For example, where they wish to ensure their children will receive equal shares regardless of gender, or they wish to provide financial support to a friend.

guidelines and Australian law.'[138] As Voyce observes,[139] a number of religious organisations[140] and legal providers[141] offer services relating to drafting Islamic wills. Additionally, the Queensland-based Lambat Trust, in a four-part publication titled *Australian and Islamic Laws of Inheritance*, advise that Muslims 'do not have a choice' in following the Islamic distribution rules, directing that 'it is imperative or obligatory for you, as a Muslim, to make a last will in which you clearly state that your assets/wealth must be distributed in accordance with the Islamic law of succession/inheritance.'[142] The limited research in this area suggests that Australian Muslims are heeding this guidance.[143] It is important to determine, therefore, whether a comparative analysis of the rules relating to testate succession support the claim that Muslims can simultaneously comply with both sets of legal rules relating to wills.

### C *Testate Succession*

Wills are generally encouraged in Australia because they outline how a person wishes their assets to be distributed on death and appoints the person who will be responsible for administering the estate. Importantly, it is either the intestacy rules or the rules relating to wills that will apply to an estate. Conversely, the Islamic inheritance rules outlined above are intended to apply to all Muslim estates, regardless of whether the deceased left a will. While there are Islamic laws relating to will-making, they operate so as to supplement the general rules of distribution, rather than to replace them.[144]

A threshold question arises as to whether Muslims in Australia are allowed to make wills under Islamic law. In pre-Islamic times, men were free to dispose

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138 'Islamic and Legal Wills', *Australian National Imams Council* (Web Page) <https://www.anic.org.au/islamic-and-legal-wills/>.

139 Voyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (n 76) 255–6.

140 For example, the Australian National Imams Council ('ANIC').

141 A search on Google for 'Islamic wills Brisbane' brings up numerous legal and religious providers offering services relating to preparing wills in accordance with Islamic inheritance laws.

142 Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (Lambat Trust, 2005) 4.

143 In a broader study on will-making in Australia, 16 members of Islamic communities were interviewed, where 11 had made wills and all five non-will-makers 'intended to make a will and simply had not yet done so'. Additionally, the study found that '[m]ost asset distribution either followed prescribed Islamic distribution guidelines (leading to unequal distribution to children based on gender) or reflected broader principles of "fairness" seen as the underlying intent of Sharia-compliant wills. Use of prescribed Islamic distribution principles was slightly more common': Wilson et al (n 28) 24–5. See also Cheryl Tilse et al, *Having the Last Word? Will Making and Contestation in Australia* (Report, March 2015) 6–7.

144 '[I]t is ethically incumbent upon a man to make moral exhortations and give spiritual directions to his close relatives, and incidentally, to indicate within the limits laid down by the law what should be done regarding his property': Fyzee (n 85) 289.

of their property according to their personal wishes.[145] When the *Qur'an* explicitly set out the inheritance distribution rules, 'it was thought undesirable for man to interfere with God's ordinances'.[146] As such, Fyzee reports that 'Muslim sentiment is in most cases opposed to the disposition of property by will'.[147] Despite this, there are multiple *hadith* indicating it is incumbent on Muslims to provide directions to their close relatives as to their property on death within the bounds of Islamic law by will.[148] Doi remarks that, in light of these *hadith*, 'the making of a will is specifically recommended' (*mustahabb*).[149] Although the rules relating to inheritance (*mirath*) are prescribed in the *Qur'an*, the will (*wasiyyah*) remains a way for Muslims to 'leave something for those who are helpless but are not recipients of *Qur'anic* shares'.[150] Therefore, testamentary freedom and a lack of any prohibition on will-making under Islamic law suggests that Islamic wills[151] would be valid under Australian law. It is relevant, then, to comparatively analyse the legal rules relating to wills.

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145 Individual ownership was well established in Arab tribes, and men were able to make *inter vivos* gifts and testamentary dispositions to those who would otherwise receive nothing (eg wives and daughters): Alexander David Russell and Abdullah Al-Ma'Mun Suhrawardy, *Muslim Law: An Historical Introduction to the Law of Inheritance* (Routledge, 2013) 38–9.

146 Fyzee (n 85) 289.

147 Ibid. Coulson also notes that traditional *Sunni* jurisprudence 'approves of bequests only where the residue of the testator's estate is substantial enough to constitute a real benefit for his legal heirs. If this is not the case, then bequests, even for charitable or other worthy purposes, are generally disapproved. … Certainly, in the majority view, the duty to make a bequest as laid down in the earliest Qur'anic regulations had lapsed in all cases except where the bequest was designed to discharge a legal duty of the deceased — to pay a debt, for example, which could not otherwise be discharged because of the lack of legal proof.': Coulson (n 85) 215. See also Ali (n 129) 436–8, who discusses the different possible constructions of whether wills are lawful under Islamic law.

148 Fyzee (n 85) 289–90. 'It is the duty of a Muslim who has something which is to be given as a bequest not to have it for two nights without having his will written down regarding it': Sahih Muslim, 'The Book of Wills', *Sunnah.com* (Web Page) Book 13, Hadith 3987 <https://sunnah.com/muslim/25>. See also Imam Malik Ibn Anas, *Al-Muwatta*, tr Aisha Abdurrahman Bewley (Madinah Press, 2004) 314, ch 37.1. There is also the *hadith*: 'A man may do the deeds of the people of goodness for seventy years, then when he makes his will, he is unjust in his will, so he ends (his life) with evil deeds and enters Hell. And a man may do the people of evil for seventy years, then he is just in his will, so he ends (his life) with good deeds and enters Paradise': Sunan Ibn Majah, 'The Chapters on Wills', *Sunnah.com* (Web Page) Volume 3, Book 22, Hadith 2704 <https://sunnah.com/ibnmajah/22>. Al-Quduri also confirms that while making a will is not obligatory, it is recommended: Al-Quduri (n 136) 694.

149 Doi (n 111) 503.

150 Ibid 502.

151 The article refers to wills made by Muslims that distribute their estates according to the Islamic legal rules as 'Islamic wills' or 'Muslim wills'. It is acknowledged that all wills made by Muslims (whether they devolve an estate according to Islamic law or not) could be referred to as Islamic wills. Hussain acknowledges that 'there is nothing to prevent a Muslim from making a will which directs that his or her estate is to be distributed according to Islamic law, although the effect of doing this should be carefully considered in the context of current social conditions.': Hussain (n 24) 259.

### 1 *Formal validity of wills*

Australian laws relating to making a will are stricter than those under Islamic law. For example, in the ACT wills must be in writing and signed by the testator or someone else in the presence of, and by the direction of, the testator.[152] Wills must be attested to, and witnessed by, two witnesses in the presence of the testator.[153] The threshold age for making a will is 18 years old, although there are some circumstances in which the Supreme Court can enable a child to make a will.[154] A will is revoked by the marriage of the testator unless explicitly made in contemplation of marriage,[155] and the termination of marriage also generally revokes a testator's disposition to the former spouse.[156] Additionally, a later will revokes a prior will.[157]

In contrast, the threshold for making a will under Islamic law is 16,[158] there is no prescribed form for the drafting of wills, and a will need not be in writing, signed or attested.[159] Gestures, if comprehended, may form part of a will.[160] There are no rules relating to the effect of marriage or divorce on a will, because a testator's spouse is provided for as a Primary Sharer and, similarly, there is no general provision for an ex-spouse. As under Australian law, however, a later will revokes a prior will.[161]

While there are differences in the rules relating to the formal validity of wills under the two legal systems, they are procedural in nature and Muslims can satisfy their obligations under both legal systems by complying with the stricter state and territory laws. Even where Muslims fail to adhere to the formality requirements, the court may, through its dispensing powers, admit a document, or part of a document, purporting to embody testamentary intentions of a

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152 *Wills Act 1968* (ACT) ss 9(1)(a)–(c).

153 Ibid ss 9(1)(c)–(d).

154 Ibid ss 8, 8A, 8B.

155 Ibid s 20(1). However, see ss 20(2)–(3) for circumstances where a marriage will not revoke a will.

156 Ibid s 20A.

157 Ibid s 21(b).

158 Under Islamic law, 'majority' is attained at puberty, and the presumption is that a Muslim attains majority on completion of their fifteenth year': Ali (n 129) 48. The *Sunni* schools diverge in their opinions here, and the *Shaif'i, Maliki* and *Hanbali madhhabs* will consider the will of a discerning child as valid. As to the *Shi'a maddhabs*, Ali writes that they hold 'that perfect intellect and freedom are indispensably requisite to the validity of a bequest, and the will of a *majnun* and of a *sabi* (youth or child) under ten years of age is not valid; when he has attained to that age all bequests by him for proper purposes in favour of his relatives and others are lawful according to the most common and approved doctrine, *if he is capable of discernment*': Ali (n 129) 453–4.

159 Fyzee (n 85) 291. However, the *Maliki madhhab* requires that a will must take the form of a written document. As oral wills have difficulties of proof, 'most modern Muslim countries require by legislation that a will be in writing or be capable of proof by writing': Hussain (n 24) 141.

160 Fyzee (n 85) 141.

161 Hussain (n 24) 143. 'Where a testator makes a will, and by subsequent will gives the same property to someone else, the prior bequest is revoked': Fyzee (n 85) 297. Islamic wills are also revoked where the testator acts inconsistently with a bequest.

deceased person, notwithstanding that it has not been executed in accordance with the formal legislative requirements.[162] As Hallen J observes:

> It is not necessary that the document said to be a Will should assume any particular form, or be couched in language technically appropriate to its testamentary character. It is sufficient if it is intended to dispose of property, or of rights of the deceased, in a disposition that is to take effect upon death, but until then is not to take effect but is to be revocable. Although usual, it is not legally essential to find a clear statement identifying the document as a Will.[163]

It is, however, preferable that Muslims comply with the formal requirements of will-making under the relevant Australian state or territory legislation.[164] Where they do so, the formal validity of wills is not an area of legal conflict for Muslims.

### 2 *Substantive Validity of Wills*

In Australia, a will may only be made by a person with testamentary capacity, which is determined according to the common law principles set out in *Banks v Goodfellow* (the '*Banks v Goodfellow* Test'):

> It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.[165]

The testator is presumed to be of sound mind until that fact is proven otherwise.[166] There is a general preference for upholding validly made wills over court made dispositions. As Cockburn CJ has stated, 'the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself.'[167]

Under Islamic law, the testator must simply have capacity, meaning he or she must be 'a major' of sound mind, be 'sane and rational' and exercise free will.[168] Accordingly, while the threshold for capacity is lower under Islamic law,

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162 *Wills Act 1968* (ACT) s 11A.

163 *Re Estate of Angius* [2013] NSWSC 1895, [242] (citations omitted).

164 See, eg, Ben McEniery, 'Succession Law Keeping Pace with Changes in Technology and Community Expectations: Informal Wills' (2014) 12(1) *Journal of New Business Ideas and Trends* 1.

165 *Banks v Goodfellow* (n 6) 565 (Cockburn CJ for the Court). However, where a person is alive and is found to be without testamentary capacity, the court may authorise the making of a will with certain provisions, or that a will or part of a will be revoked or amended on behalf of a person: *Wills Act 1968* (ACT) s 16A.

166 *Re Estate of Hodges* (1988) 14 NSWLR 698, 706 (Supreme Court of New South Wales).

167 *Banks v Goodfellow* (n 6) 565 (Cockburn CJ for the Court).

168 Fyzee (n 85) 292. The *Shafi'i madhhab* provides that capacity to make a will is also afforded to 'a person otherwise incapable by reason of imbecility': An Nawawi (n 120) 259.

the principle under both legal systems is intended to achieve the same purpose: that wills are made by capable persons exercising free will. Muslims can thus comply with both legal systems by following the stricter Australian laws.

### 3 *Disposition of Property by Will*

While Muslims can comply with the rules relating to the formal and substantive validity of wills, there are differences in the two legal systems with respect to the property that may be disposed of by will. As an embodiment of the principle of testamentary freedom, Australian law enables the disposition of property according to the deceased's personal wishes, subject to any application for family provision. Using the ACT as an example, s 7(1) of the *Wills Act* provides that '[a] person may, by his or her will, devise, bequeath or dispose of any real or personal property to which he or she is entitled at the time of his or her death, whether he or she became entitled to the property before or after the execution of his or her will.'[169]

In contrast, testamentary freedom under Islamic law is limited in two respects. First, Muslims are limited in the quantum of the property they may devolve by will to one third of their net estate.[170] Secondly, Muslims are proscribed from making a beneficial disposition under the one third legacy to a Sharer.[171] Additionally, the testator must not dispose of property in a way that contravenes the *Shari'a* (eg bequests to a mistress, church, synagogue etc).[172] Yet Muslims can also manage these conflicts by using their testamentary freedom to make a will that devolves one third of their estate in the manner of their choosing[173] and then set out the fixed share entitlements of each heir for the remaining two thirds of the estate. In this way, although testamentary freedom is contradictory to the Islamic fixed share succession system, it is in fact integral to enabling Muslims to comply with their religious obligations in Australia.

The half rule dictates that a female will receive half the share of a male in the same degree of relationship. Research has found that some Muslim will-makers, however, would prefer to distribute assets 'to reflect their personal views of fairness (eg equal allocation regardless of gender, unequal distribution based on

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169 *Wills Act 1968* (ACT) s 7(1).

170 See, eg, Hamid Khan (n 28) 244–5; Mohammad Mustafa Ali Khan (n 41) 26; Hussain (n 24) 141.

171 Unless, in certain circumstances, consent of all the Sharers is obtained for a testamentary bequest to a Sharer and such bequest does not exceed one-third of the estate. See Sunan an-Nasa'i, 'The Book of Wills', *Sunnah.com* (Web Page) Volume 4, Book 30, Hadith 3673, <https://sunnah.com/nasai/30/33>. The opinion that a gift to an heir is valid if it falls within one-third of the estate and if the other heirs consent is 'held by the majority of the schools, other than the Ithna-Asharis, Zahiris and Zaidis': Hussain (n 24) 142. The *Shafi'i madhhab*, for example, provides that testamentary dispositions must not exceed one third of the estate and a legacy in favour of an heir 'is valid only if unanimously approved by the coinheritors, after the succession has been opened': An Nawawi (n 120) 260.

172 Hussain (n 24) 141.

173 Provided it remains within the *Shari'a* guidelines for the one third disposition (ie, no gift to an heir, no gift to a mistress etc).

need)'.[174] Technically, a deviation from the Islamic rules would void the will under Islamic law. In its direction to Muslim will-makers on similar matters, the Lambat trust quotes Sheikh Al-Qaradawi:

> If it happens that a man has made a will for one of his heirs, this will should be executed if endorsed by the rest of the heirs. This opinion is held by the majority of 'Ulama (Muslim scholars). But if any of the heirs object to that will, the will should be executed without tampering with the right of the dissenting heir.[175]

Effectively, a variation to the rules via the one third distribution is acceptable if all the Sharers agree. As such, Muslims may use the one third allowance to increase the beneficial shares of some heirs (for example, a daughter or wife), or provide assistance to other dependants as required (for example, an adopted child) who would not otherwise inherit under the Islamic legal rules.

### *4. Muslim Wills Must be Specific*

The decision to make a will is an active choice to have an estate distributed in a certain way, and there are some drafting considerations that need to be addressed for Islamic wills to be valid under Australian law. Specifically, Muslims must ensure their wills clearly set out how their estates are to be devolved. Due care must be taken with respect to 'the construction of the will and its voidness for uncertainty'.[176] Stating that a deceased's estate is to be devolved, for example, 'according to the *Qur'an*', 'according to *shari'a* law', or even 'according to the *Hanafi* school of inheritance law' may be too uncertain for a court to enforce.

As a minimum, Muslim wills should reference a particular document that sets out the rules the testator wishes the estate devolution to follow. The common law doctrine of incorporation by reference establishes that such a document 'may be included in a will by reference, and may be admitted to probate together with the will, provided it existed at the date of the will' and is sufficiently identified.[177] Where the document fails to meet the requirements of the doctrine of incorporation by reference, it may nevertheless be admitted through the court's power to admit informal documents to probate.[178] Nonetheless, best practice would encourage Muslims to explicitly set out in their will the fixed shares to be received by each beneficiary.

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174 Wilson et al (n 29) 25.
175 Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (n 142) 12.
176 P A Buttar, 'Muslim Personal Law in Western Countries: The Case of Australia' (1985) 6(2) *Institute of Muslim Minority Affairs Journal* 271, 275.
177 John K De Groot, *Wills, Probate and Administration Practice* (de Groots Publishing, 1985), pt 2.
178 *Wills Act 1968* (ACT) s 11A.

### 5 *Islamic Will Kits*

It has been suggested that Muslims can use pro forma will kits to assist in complying with the legal rules of both inheritance legal systems.[179] There are also resources that provide detailed guidance on will-making for Australian Muslims who subscribe to the *Hanafi madhhab*.[180] While pro forma will kits can assist Muslims of a particular *madhhab*, the diversity of Australia's Muslim communities and the subtle legal divergences between *Sunni* and *Shi'a* jurisprudence make a single pro forma will kit impractical, because distribution under the different Islamic legal schools 'would yield very different results'.[181] In other words, Muslims who wish to use a pro forma Islamic will kit must ensure that it follows a formula consistent with the legal rules of the particular *madhhab* to which they subscribe, in addition to the relevant Australian State or Territory laws relating to wills.

In summary, comparative analysis indicates there are few legal conflicts between the two legal systems with respect to testate succession as to wills. As such, Muslims may make valid wills under Australian law and simultaneously comply with their obligations arising under Islamic law. However, as *Omari* illustrates, even where legal will kits and other templates are available, 'such tools generally do not provide testators and their families with the advice and guidance necessary in some of the more technical and complicated aspects of effective estate planning'.[182]

## V Challenging Islamic Wills

While Muslims can maintain an Islamic inheritance by making a will that devolves their estate according to Islamic law, such wills may nonetheless face challenges in Australian courts that will be decided according to established principles of Australian law. *Omari* attracted media attention, much of which incorrectly assumed that the will was being challenged on the basis that Islamic law should not apply to the distribution of the deceased's estate because the principle of a son

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179 Asmi Wood, 'Splitting Heirs — Succession between Two Worlds: Australian Law and the Sharia' in Abdullah Saeed and Helen McCue (eds), *Family Law and Australian Muslim Women* (Melbourne University Press, 2013) 150, 150–1.

180 Lambat, *Australian and Islamic Laws of Inheritance: Part I: Drafting a Will* (n 142); Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part II: What to Include in an Estate* (Lambat Trust, 2005); Ebrahim Iqbal Lambat, *Australian and Islamic Laws of Inheritance: Part III: Inheritance Shares per the Shariah* (Lambat Trust, 2005).

181 Wood (n 179) 159.

182 Shelley Mulherin, 'Where There's a Will, There's Not Always a Way…' (2013) 227 *Ethos* 17, 17.

inheriting twice that of a daughter was unfair.[183] While that might well have been Mariem Omari's daughter's motivation in lodging the caveat and requiring the executors to prove the validity of the will, vague notions of unfairness do not in and of themselves constitute a cause of action. Media coverage of the case exposed a generally negative attitude towards what is the legal reality in Australia: that Muslims can make valid wills under Australian law that also comply with Islamic inheritance obligations. What is interesting, however, is the assumption that such a will could be challenged on the basis that the testator's wishes were unfair, or in other words, against prevailing community standards that emphasise equality between the sexes.

### A *Prevailing Community Norms within a Majority Culture Legal System*

The court heard evidence from the Imam of the Canberra Islamic Centre on the process for estate distribution according to Islamic principles, who 'confirmed that the standard expectation is that a Muslim will leave full shares to sons and half shares to daughters. He said that one boy is equal to two girls.'[184] On this basis, Mariem Omari's sons pursued *Shari'a* arguments, essentially seeking that the official legal system facilitate discrimination against their sisters on the basis of gender. They would have undoubtedly fared better if the dispute was resolved informally within the Muslim community according to these Islamic principles. Mariem Omari's daughter (presumably also a Muslim) clearly did not agree with this position and pressed her rights under official law to have the will proven in an Australian court. This was despite evidence suggesting it was her mother's intention and desire to have her estate distributed according to *Shari'a* law.

Accepting that Mariem Omari did not have testamentary capacity at the time she made her will, the court opined that, notwithstanding this, Mariem Omari 'might well have decided to make a will in the same or similar terms'.[185] The court believed that the sons, in wanting to distribute the estate according to the terms of their mother's will, had acted in good faith and with the genuine belief that it was both their mother's duty to make a will according to the Islamic rules, and their duty to distribute the estate according to such rules.[186] Yet neither of these facts entitled the court to distribute the estate according to the unofficial Islamic

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183 See, eg, Sophie Gosper, 'Respect our Way on Wills, Say Muslims', *The Australian* (online, 15 March 2012) <https://www.theaustralian.com.au/business/legal-affairs/respect-our-way-on-wills-say-muslims/news-story/0ef657df7d03f52f81843a05c04bb27a>; Caroline Overington, 'Daughter Disputes Muslim Will That Gave Brothers Twice As Much', *The Australian* (online, 14 March 2012) <https://www.theaustralian.com.au/business/legal-affairs/daughter-disputes-muslim-will-that-gave-brothers-twice-as-much/news-story/4d4df0ee4a7c2c0521a15a58af83bcf3>; Patricia Karvelas, 'Roxon Baulks at Role for Sharia', *The Australian* (online, 17 March 2012).

184 *Omari* (n 1) [49].

185 Ibid [65].

186 Ibid [63].

intestacy rules in the face of established common law doctrine relating to testamentary capacity. In this way, it can be said that testators such as Mariem Omari are somewhat disadvantaged in a legal system where, upon the application of common law legal doctrine, wills can be invalidated and courts required to distribute an estate contrary to the testator's intentions. Spitko frames this disadvantage in the language of the 'majority-culture' that undermines the ability of minority-group testators to exercise their testamentary freedom:

> [C]ultural minorities have cause to fear adjudication of their legal rights and responsibilities in a legal system dominated by majority-culture personnel (most notably including judges and jurors). This is particularly true when cultural minorities attempt to use formal legal processes to give effect to choices which are inconsistent with prevailing community norms. In such cases, the substantive merit of their legal claims is at risk of being subjugated to majoritarian values, through a process that relies on members of the majority culture to vindicate the substantive rights at issue.[187]

The court in *Omari* decided the validity of the will using established legal principles relating to testamentary capacity, and in doing so, was not required to opine on, interpret, or apply, religious rules to the matter. Assuming Mariem Omari had testamentary capacity, she could have made a will which complied with the relevant state-based succession rules to give effect to her religious beliefs. In those circumstances, Mariem Omari's daughter would have needed to pursue a family provision claim. The impact of the family provision rules on Islamic wills is examined below.

## B *Family Provision*

A moral duty to provide for one's dependants, enshrined in family provision legislation, can restrict a testator's testamentary freedom in certain circumstances. The class of persons entitled to make an application for family provision varies across the Australian states and territories. In the ACT, the persons so entitled are the deceased's partner; a person other than a partner who was in a domestic relationship with the deceased for 2 or more years continuously at any time; a child; a stepchild; a grandchild; and a parent.[188] In some other jurisdictions, anyone who was dependent on the deceased during their lifetime and has not been adequately provided for after their death may make a family provision application.[189] Courts assess the validity of a family provision claim by reference to a two-stage test:

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187 E Gary Spitko, 'Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration' (1999) 49(2) *Case Western Reserve Law Review* 275, 275.

188 *Family Provision Act 1969* (ACT) s 7(1). However, the circumstances in which a stepchild, grandchild and parent of the deceased may make an application for provision out of the estate are limited: ss 7(2)–(4).

189 For example, in Queensland see *Queensland Succession Act 1981* (Qld) s 41(1).

> The first stage calls for a determination of whether the applicant has been left without adequate provision for his or her proper maintenance, education and advancement in life. The second stage, which only arises if that determination be made in favour of the applicant, requires the court to decide what provision ought to be made out of the deceased's estate for the applicant.[190]

A testator's dispositions in a family provision claim are measured by reference to 'that which a just and wise father would have thought it his moral duty to make in the interests of his widow and children had he been fully aware of all the relevant circumstances',[191] measured objectively against prevailing community standards (the 'moral duty test').[192] In this way, courts can alter a will or void a testator's wishes 'where moral rights and obligations of support' have been discarded.[193] However, courts cannot rewrite a will,[194] and intervention should only be to the minimum 'extent necessary to ensure adequate provision for the proper maintenance education and advancement' of an applicant.[195]

There is no legal rule per se regarding family provision under Islamic law, because Islam ingrains family provision into the prescribed shares that are set aside for each close family member, where shares cannot be altered by the deceased based on personal preference. The general rule that there can be no bequest to an heir reflects the underlying belief that the *Qur'anic* system provides appropriately for all of the deceased's heirs, and members cannot apply to have an estate redistributed on a needs basis. Islamic law would oppose a family

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190 *Singer v Berghouse* (1994) 181 CLR 201, 208 (Mason CJ, Deane and McHugh JJ) ('*Singer*'). See also *Vigolo v Bostin* (2005) 221 CLR 191, 230–1 [122] (Callinan and Heydon JJ) ('*Vigolo*'), doubting whether the two-stage test is appropriate in all contexts.

191 *Re Allen (deceased)* [1922] NZLR 218, 220–1 (Supreme Court). This was accepted as the correct approach to the exercise of jurisdiction in respect of family provision applications in *Singer* (n 190) 209 (Mason CJ, Deane and McHugh JJ).

192 Pauline Ridge, 'Moral Duty, Religious Faith and the Regulation of Testation' (2005) 28(3) *University of New South Wales Law Journal* 720, 720. All members of the High Court in *Vigolo* (n 190) accepted that such determination will be made by reference to prevailing community standards. Prior to *Vigolo*, there had been some level of disagreement as to whether it was correct to use a moral duty test. Courts had previously considered such applications by placing themselves in the testator's position. In *Re Allardice* (1910) 29 NZLR 959, 972–3 (Court of Appeal), Edwards J stated:

> It is the duty of the Court, so far as is possible, to place itself in all respects in the position of the testator, and to consider whether or not, having regard to all existing facts and surrounding circumstances, the testator has been guilty of a manifest breach of that moral duty which a just, but not a loving, husband or father owes towards his wife or towards his children, as the case may be.

This approach has been described as a mere 'gloss' that is 'likely to obscure rather than clarify the legislation': *Re McNamara* (1938) 55 WN (NSW) 180, 181 (Jordan CJ, Nicholas and Owen JJ) (Supreme Court of New South Wales (Full Court)). See also R Atherton, 'The Concept of Moral Duty in the Law of Family Provision: A Gloss or Critical Understanding?' (1999) 5(1) *Australian Journal of Legal History* 5. However, the High Court has upheld considerations of moral claims and moral duty as a 'guide to the meaning of the statute. They are not meant to be a substitute for the text. They connect the general but value-laden language of the statute to the community standards which give it practical meaning.': *Vigolo* (n 190) 204 [25] (Gleeson CJ).

193 *Barns v Barns* (2003) 214 CLR 169, 173 [2] (Gleeson CJ).

194 *Pontifical Society for the Propagation of the Faith v Scales* (1962) 107 CLR 9, 19 (Dixon CJ).

195 *Permanent Trustee Co Ltd v Fraser* (1995) 36 NSWLR 24, 43 (Sheller JA) ('*Permanent Trustee*').

member making a family provision claim, because the estate is to be distributed according to the established *Qur'anic* legal rules.

### 1 *The Religiously Motivated Testator*

This article has so far established that there are legal complexities in making a will that is compliant with both the Australian and Islamic inheritance legal rules. If these complexities are overcome, then Muslims can make valid wills under Australian law, which devolve their estates according to the Islamic inheritance legal rules. Such wills are undoubtedly motivated by religious values and principles. When determining the validity of a family provision claim, Australian courts have developed a moral duty test that measures the testator's dispositions against those of an objective just and wise testator who acts in accordance with prevailing community standards. Currently, there is no judicial precedent as to how courts would decide a family provision application with respect to an Islamic will. However, other case law in this area suggests that courts will apply the same moral duty test to Islamic wills as they do in other family provision applications.[196]

For example, the case of *Wenn v Howard* considered the issue of multiple family provision claims made against the will of a religiously motivated testator.[197] In that case, a number of the testator's children had been excluded from his will for not acting in accordance with the Catholic faith (specifically, marrying outside the Catholic Church or failing to attend church services on a regular basis). The executor of the will argued that, because the testator's religious beliefs were so central to his life, the children's actions were a repudiation of the Catholic faith and justified their exclusion from any testamentary entitlement. The court rejected this argument and did not consider it appropriate to measure the testator's actions against those of other devout Catholics. Rather, the court reiterated that the testator's actions should be judged according to prevailing community standards:

> [T]he matter to be resolved is whether the conduct of the applicant is such as would, in the eyes of the right thinking and reasonable members of the community, disentitle the applicant to relief: it is not to be tested solely by reference to the question whether it evoked or was likely, having regard to [the] testator's own character and antecedents, to evoke his disapproval. It is not to be tested by whether the applicant's conduct would incur the disapprobation not only of the testator but also of all sincere and reasonable people of his Church.[198]

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196 See generally Ridge (n 192); Rosalind F Croucher, 'Conflicting Narratives in Succession Law: A Review of Recent Cases' (2007) 14(2) *Australian Property Law Journal* 179; Voyce, 'Islamic Inheritance in Australia and Family Provision Law: Are Sharia Wills Valid?' (n 76).

197 [1967] VR 91 (Supreme Court of Victoria).

198 Ibid 95.

A separate line of cases involve family provision claims in rural Queensland farming families, where primogeniture (the right of a firstborn son to inherit their parent's entire or main estate) continues to be a popular concept. Farm families have traditionally embodied a distinct rural ideology that reinforces conventional gender roles:

> Farming has always been construed as a man's occupation in Australia and women are usually regarded as inherent dependent farmers' wives and daughters. … Patriarchy is underpinned by rural cultural norms where, under notions of public and private spheres, men are seen as responsible for the hard and physical work while rural women are seen as the bearers and nurturers of children and responsible for the cultivation of a stable and supportive homelife.[199]

Voyce explores the impact of family provision legislation on this rural ideology, arguing that in previous times courts were sympathetic to testators' wishes that gifted the family farm to a son, provided a life estate for the testator's widow, and presumed that daughters would be provided for in other ways.[200] As such, family provision claims by daughters were often rejected where they had married into families and were sufficiently provided for, 'hence relieving the farm of its obligation to support them'.[201] However, Voyce explores a new group of cases that indicate modern interpretations of family provision legislation no longer endorse the principle that favours the right of sons to inherit farms to the detriment of the testator's other children.[202] Voyce notes that these recent cases show 'decreasing judicial sentiment to accommodate the strong rural norm that sons should automatically inherit a farm to the detriment of those with competing claims' and further, that 'married daughters are decreasingly being deprived of awards because they have married well'.[203]

These decisions highlight that the set of values used to determine whether the testator has fulfilled their moral duty are those of the community at large, as opposed to the values of the community to which the deceased belonged. Such an approach inevitably impacts minority groups whose values diverge from those of the majority.[204] It has been stated more broadly that 'it is unlikely that the standard will be met by a person with religious convictions … especially if he or she belonged to a minority religious group'.[205] With respect to wills made by Muslims who devolve their estates according to the Islamic legal rules, it is unlikely that some provisions of such wills[206] would meet the standard of the

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199 MB Voyce, 'The Impact of the Testator's Family Maintenance Legislation as Law and Ideology on the Family Farm' (1993) 7(3) *Australian Journal of Family Law* 191, 193–4 (citations omitted).
200 Ibid 206.
201 Ibid.
202 Ibid 208.
203 Ibid 208–9 (citations omitted).
204 Ridge (n 192) 721.
205 Ibid 726.
206 For example, bequeathing a daughter half the amount of inheritance as a son, or bequeathing only one-quarter (or one-eighth) of an estate to a surviving wife (or wives).

moral duty test, and courts will be reluctant to deny family provision claims by dependants left in need, regardless of the testator's religious beliefs. The fact that a will has been made in accordance with religious legal rules that do not match broader community values might also be used as a bargaining chip in pre-litigation mediation or settlement negotiations relating to family provision (for example, by a deceased's daughter or wife) even where the applicant has not necessarily been left in financial need.

### 2 *Criticisms of the Current Family Provision Legislation*

Australia's inheritance law emphasises testamentary freedom and provides all citizens the ability to make a will devolving their estate according to their personal wishes. For Muslims, testamentary freedom is critical to facilitating their ability to abide by religious laws. Yet testamentary power is not unfettered, and successful family provision applications will override a testator's personal wishes. Two criticisms are made with respect to the impact of family provision laws on Islamic wills. First, it is questioned whether the moral duty test remains the most appropriate approach to assessing a family provision claim made by a testator from a minority community. Second, broader discontent with family provision legislation argues it is corroding the principle of testamentary freedom.

#### *(a) The Moral Duty Test in a Pluralist and Multicultural Society*

The moral duty test has been criticised as 'unsatisfactory and inappropriate',[207] 'fundamentally flawed',[208] 'problematic in a pluralist and multicultural society'[209] and as 'too vague to ensure that the purpose, meaning and effect of the law are clearly communicated'.[210] As Perry ACJ has stated:

> I tend to think that in the pluralist, multicultural society in which we now live, it is difficult to identify a single, commonly accepted set of moral precepts. Differing cultural, religious and other beliefs and practices may well give rise to quite different but honestly held views as to what may be regarded as the appropriate manner in which a testator should make provision for his family.[211]

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207 Virginia Grainer, 'Is Family Protection a Question of Moral Duty?' (1994) 24(2) *University of Wellington Law Review* 141, 161.

208 Ridge (n 192) 739.

209 Ibid 738.

210 New Zealand Law Commission, *Succession Law: Testamentary Claims* (Preliminary Paper 24, August 1996) 14 [50]. For criticism of the 'moral duty' test in Australian courts, see, eg, *Coates v National Trustees Executors & Agency Co Ltd* (1956) 95 CLR 494, 512 (Williams J), 522 (Fullagar J); *Hughes v National Trustees, Executors & Agency Co of Australasia Ltd* (1979) 143 CLR 134, 158 (Murphy J); *Goodman v Windeyer* (1980) 144 CLR 490, 504–5 (Murphy J); *Singer* (n 190) 209 (Mason CJ, Deane and McHugh JJ); *Permanent Trustee* (n 195), 44 (Sheller JA). The High Court, however, reversed its attitude towards the moral duty test in *Vigolo* (n 190).

211 *Drioli v Rover* [2005] SASC 395, [144].

Indeed, Ridge observes there is a 'danger of injustice' when judges applying the moral duty test in family provision claims 'make assumptions regarding the content of community standards without clearly articulating the bases on which these assumptions are made and without referring to supporting evidence'.[212] The New Zealand Law Commission takes the view that using prevailing community standards to judge testators' dispositions

> might have been acceptable when people had a common (if gendered and monocultural) vision of the family. But we now accept that families are different and should not be treated all in the same way. They differ in their ethnic and cultural backgrounds … We now believe that the value systems of a prevailing culture or a particular type of family should not be applied indiscriminately to others who do not share that system …[213]

Reference has also been made to *inter vivos* gifts,[214] and the New Zealand Law Commission recognises that 'no-one making a gift to one of their adult children is legally required to consider whether they are being fair to their other children. But when applying the [family provision legislation], courts often question the fairness of wills as between two or more children'.[215] The interpolation of morality by reference to prevailing community standards into the construction of family provision legislation is at odds with the principle of testamentary freedom. Consequently, Muslim will-makers who wish to abide by their religious obligations may be disadvantaged with respect to a family provision claim, because their dispositions will be judged against the values of the broader community.

### *(b) An Erosion of Testamentary Freedom?*

More broadly, scholarly commentary suggests that family provision no longer fulfils its original intent and is eroding testamentary freedom.[216] Jurisprudence in this area has developed 'to the point where disinheritance is almost impossible within a family circle if recourse is had to mediation or the courts'[217] under family provision legislation where 'the pendulum has swung too far in favour of family provision applicants'.[218] This argument stems from the significant number of

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212 Ridge (n 192) 728.

213 New Zealand Law Commission (n 210) 2 [9].

214 Where testamentary freedom was seen 'as a natural extension of the rights of disposition of property *inter vivos*': Rosalind F Croucher, 'How Free Is Free? Testamentary Freedom and the Battle between "Family" and "Property"' (2012) 37 *Australian Journal of Legal Philosophy* 9, 11.

215 New Zealand Law Commission (n 210) 2 [7].

216 See generally Sylvia Villios and Natalie Williams, 'Family Provision Law, Adult Children and the Age of Entitlement' (2018) 39(2) *Adelaide Law Review* 249; Myles McGregor-Lowndes and Frances Hannah, 'Reforming Australian Inheritance Law: Tyrannical Testators vs Greying Heirs?' (2009) 17(1) *Australian Property Law Journal* 62; Croucher, 'How Free is Free? Testamentary Freedom and the Battle between "Family" and "Property"' (n 214).

217 McGregor-Lowndes and Hannah (n 216) 62–3.

218 Ibid 71.

successful family provision claims made by financially comfortable applicants that go directly against the testator's wishes. Villios and Williams argue that

> family provision laws have broadened substantially through judicial interpretation and legislative amendments. What started out as a protective measure to ensure adequate provision for dependent widows and orphans has transformed into a rigid entitlement to inheritance rights for financially comfortable applicants. The current law faces heavy criticism over its excessive encroachment on testamentary freedom and encouragement of opportunistic claims …[219]

With respect to Islamic wills, a disregard for the testator's wishes in a family provision claim has the potential to disrupt estate devolution according to the Islamic legal rules and render the distribution void under Islamic law. Practically, however, there have been no cases in Australia that consider a family provision application with respect to an Islamic will.[220] One study opines that, because Muslim families do not appear to contest wills, the current legal framework 'has had little impact on the inheritance practices of Muslim families'.[221] Other research validates some Muslim concerns about possible estate contestation by their children, whose values may not match those of their parents.[222] It is true that there may be a failure by Muslims to engage with the official legal system even though family provision claims have a high likelihood of success. However, without further research this claim remains unsubstantiated. For example, given that '[a]lmost all family provision claims settle at mediation, including those that might not have succeeded at trial',[223] a lack of case law does not mean that Islamic wills are not contested. Alternatively, it might be representative of a broader desire by Muslim communities to accommodate both legal systems and respect a testator's wishes to have their estate devolved according to their religious beliefs, even where a beneficiary may have a valid family provision claim.

## VI Conclusion

This article has established that, although there is inflexibility in the Australian intestacy rules, Australian inheritance law can otherwise accommodate Islamic inheritance law through the use of testamentary instruments, such that Muslims are largely able to assimilate their faith-based legal obligations with their

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219 Villios and Williams (n 216) 249.

220 This is contrary to commentary in the United States context, which claims that 'due to the religious nature of the will bequests, Sharia-compliant wills are often more likely to be challenged. Bequests under the Sharia law tend to distribute the wealth to a larger number of individuals, forcing several family members to receive a lesser share than they would otherwise receive under state intestacy laws. Thus, certain family members have a greater incentive to contest the will': Omar T Mohammedi, 'Sharia-Compliant Wills: Principles, Recognition, and Enforcement' (2012–2013) 57(2) *New York Law School Law Review* 259, 281.

221 Voyce et al (n 33) 221.

222 Wilson et al (n 29) 25–6.

223 Victorian Law Reform Commission, *Succession Laws* (Report, August 2013) xvii [24].

country-based legal obligations. It is important for practitioners to be aware of the complexity inherent in drafting a will that needs to comply with two legal systems. While Islamic will kits go some way to providing Muslims the ability to draft *Shari'a*-compliant wills, specific legal advice is recommended to ensure compliance with the relevant State and Territory legislative framework.

While Muslims must carefully navigate the complexities of dual inheritance legal systems, this article has not identified any manifest inadequacy in the current legal framework that hinders Muslims in maintaining an Islamic inheritance. There are, however, two instances where Muslims remain at a disadvantage under state succession laws: first, a successful challenge to the validity of an Islamic testamentary instrument will result in the default application of the intestacy legal rules where courts cannot account for a testator's intention to distribute their estate according to religious principles, as illustrated by *Omari*; and second, Islamic wills are at heightened risk of successful family provision claims because the imposition of prevailing community norms to judge testator dispositions inevitably disadvantages Muslim will-makers whose views might diverge from the majority.

As regards the second instance, this article has found that evaluating an Islamic testator's dispositions against those of a just and wise testator according to prevailing community standards is not completely compatible with a pluralist and multicultural society such as Australia. Accordingly, further research into how family provision legislation might be reformed is necessary to ensure it meets the needs of all Australians and upholds the guiding principle of testamentary freedom, while remaining a safeguard for those who have not adequately been provided for out of an estate.

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