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A Critique of the Theory of Comparative Propensity

Peter M Robinson*

The law of propensity evidence is in a state of flux in Australia as various State jurisdictions decide on their responses to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. Controversy persists about the probative value of such evidence, not limited to child sexual assault cases. An influential theory in this area is the theory of comparative propensity, advocated by Professor Hamer, and approved in a qualified way by the Royal Commission. The theory employs a mathematical model based on Bayes' equation to estimate the probative value of such evidence. This article critiques the theory and concludes that it does not reflect the real-world factors that impact the probative value of such evidence.

I Introduction

The law of propensity or tendency evidence in Australia is in a state of flux, thanks in part to the varied responses of the states to recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse. The Royal Commission concluded that evidence of prior conduct is generally undervalued.[1] While the Royal Commission formed this conclusion with respect to all types of case, its final recommendations were limited to its precise remit of child sexual assault cases. It recommended admission of tendency evidence in such cases if 'relevant to an important evidentiary issue' in the proceeding — which specifically included the 'propensity of the defendant to commit particular kinds of offences'— unless it is likely to result in unfairness to the defendant, which cannot be alleviated by an appropriate jury direction.[2]

Addressing the *Uniform Evidence Acts* ('*UEA*'),[3] the Council of Attorneys-General declined to follow this recommendation, instead adopting a Model Bill, which takes the assessment of probative value largely out of the hands of judges. Under that Bill, it is presumed in trials of child sexual offences that tendency

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1 *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, Executive Summary and Parts II–III, August 2017) 70.

2 Ibid 72, 128.

3 *Evidence Act 1995* (Cth); *Evidence Act 2011* (ACT); *Evidence Act 1995* (NSW); *Evidence (National Uniform Legislation) Act 2011* (NT); *Evidence Act 2001* (Tas); *Evidence Act 2008* (Vic).

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evidence about a defendant's sexual interest in children has significant probative value under s 97 of the *UEA* even if the defendant has not acted on that interest, subject to the court's power to overturn this presumption on sufficient grounds.[4] However, in considering whether sufficient grounds exist, the Bill precludes (except in exceptional circumstances) consideration of a number of factors that have historically been regarded as important in assessing the probative value of such evidence (eg, dissimilarity and distance in time between the past conduct and the alleged offences, and the generality of the supposed tendency). These changes only relate to child sexual offences, but the removal of the word 'substantially' from the requirement in s 101 that the probative value of evidence must substantially outweigh its prejudicial effect applies to all tendency and coincidence evidence.

At the time of writing, the model reforms have already been enacted in two jurisdictions (New South Wales and the Australian Capital Territory),[5] but are expected to be implemented in other *UEA* States.[6] However, the model legislation has already been heavily criticised by Hamer as poorly designed, 'paradoxical and ill-conceived', and propagating 'myths and misconceptions' about the probative value of propensity evidence.[7]

The non-*UEA* states (South Australia, Queensland and Western Australia) are yet to respond to the Royal Commission's recommendations, but it has been suggested that these states are unlikely to follow the *UEA* model, since they have previously been critical of the uniform legislation.[8]

In Queensland, the common law test of *Pfennig*'s case — that there must be no 'rational view of the evidence that is consistent with the innocence of the accused'[9] — still applies, subject to two qualifications contained in the *Evidence Act 1977* (Qld):

- *Hoch v The Queen*[10] is overruled by s 132A such that the possibility of collusion or suggestion is not a ground for exclusion; and

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4 Council of Attorneys-General, 'Communiqué', *Attorney-General's Department* (Statement, 29 November 2019) <https://www.ag.gov.au/sites/default/files/2020-03/Council-of-Attorneys-General-communique-November-2019.pdf>; Parliamentary Counsel's Committee, *Uniform Evidence Law (Tendency and Coincidence) Model Provisions 2019*, Draft d15, s 97A <https://pcc.gov.au/uniform/2019/29%20November%202019%20amendments.pdf>.

5 *Evidence Act 1995* (NSW) s 97A; *Evidence Act 2011* (ACT) s 97A.

6 Andrew Hemming, 'Is There Any Prospect of a Model Provision for Similar Fact/Propensity Evidence or the Coincidence/Tendency Rules in Australia?' (2020) 44(4) *Criminal Law Journal* 207, 225; David Hamer, 'Myths, Misconceptions and Mixed Messages: An Early Look at the New Tendency and Coincidence Evidence Provisions' (2021) 45(4) *Criminal Law Journal* 232, 233 ('Myths, Misconceptions and Mixed Messages').

7 Hamer, 'Myths, Misconceptions and Mixed Messages' (n 6) 252.

8 Hemming (n 6) 231.

9 *Pfennig v The Queen* (1995) 182 CLR 461, 483 (Mason CJ, Deane and Dawson JJ) ('*Pfennig*').

10 (1988) 165 CLR 292.

- Section 132B permits the admission of evidence of prior domestic violence on certain charges involving homicide or serious assault.

The *Evidence Act 1929* (SA) echoes common law concepts of impermissible reasoning from general propensity and permissible reasoning about a 'particular propensity' directed to a fact in issue, but lowers the admissibility threshold for 'discreditable conduct evidence' to 'strong probative value', which 'substantially outweighs any prejudicial effect'. This appears to be a higher threshold than that of 'significant probative value' under the *UEA*.[11]

The Western Australian legislation provides that, to be admissible, propensity or relationship evidence must not only have significant probative value but the public interest in its admission must also, in the minds of 'fair-minded people', have priority over the risk of an unfair trial.[12] The issue of probative value is therefore common across jurisdictions, and conflicting views about the probative value of propensity evidence are evident in both common law cases[13] and cases on identical legislation.[14] Such conflicts no doubt impact policy and induce hesitancy in implementing reform.

The Royal Commission's conclusion about the probative value of tendency evidence was strongly influenced by submissions from Hamer and earlier work by the late Mike Redmayne in the United Kingdom. Hamer and Redmayne both employed a form of mathematical probability theory, known as Bayesian analysis, to argue that evidence of prior conduct and convictions is substantially more probative than is traditionally appreciated.[15] This approach was a fundamental plank in Hamer's submissions to the Royal Commission and in the Commission's conclusion that evidence of prior conduct was often undervalued.[16] However, while the Royal Commission clearly embraced much of the work of Redmayne and

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11 *Evidence Act 1929* (SA) s 34P. Cf *UEA* s 97.

12 *Evidence Act 1906* (WA) s 31A(2).

13 See, eg, *Phillips v The Queen* (2006) 225 CLR 303 ('*Phillips*'); and the strident criticism of it by: David Hamer, 'Similar Fact Reasoning in *Phillips*: Artificial, Disjointed and Pernicious' (2007) 30(3) *University of New South Wales Law Journal* 609 ('Similar Fact Reasoning in *Phillips*'); Jeremy Gans, 'Similar Facts after *Phillips*' (2006) 30(4) *Criminal Law Journal* 224; and Annie Cossins, 'Similar Facts and Consent in Sexual Assault Cases: Filling in the Gap Left by the High Court in *Phillips*' (2011) 37(2) *Monash University Law Review* 47 ('Similar Facts and Consent').

14 See the conflict between Victorian and New South Wales authorities in *Hughes v The Queen* (2017) 263 CLR 338; Peter M Robinson, 'Reasoning About Tendency: What Does *Hughes v The Queen* Really Tell Us?' (2019) 45(1) *Monash University Law Review* 98 ('Reasoning About Tendency').

15 David Hamer, 'The Significant Probative Value of Tendency Evidence' (2019) 42(2) *Melbourne University Law Review* 506, 508, 530, 548; Mike Redmayne, 'The Relevance of Bad Character' (2002) 61(3) *Cambridge Law Journal* 684; Mike Redmayne, *Character in the Criminal Trial* (Oxford University Press, 2015) 36.

16 See David Hamer, Submission to Royal Commission into Institutional Responses to Child Sexual Abuse (28 October 2016) 5–6; David Hamer, 'Proof of Serial Child Sexual Abuse', in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015), 242, 253–5, cited in *Royal Commission into Institutional Responses to Child Sexual Abuse* (Criminal Justice Report, Parts III–VI, August 2017) 604–7 ('*Royal Commission*, Parts III–VI'); Redmayne, 'The Relevance of Bad Character' (n 15); Redmayne, *Character in the Criminal Trial* (n 15), cited in *Royal Commission*, Parts III–VI (n 16) 604–5.

Hamer in this area,[17] it reserved its opinion on the mathematical calculations that flow from it:

> We have not sought to test the validity of Redmayne's calculation of comparative propensity, so we do not place weight on a numerical proof of the relevance of prior convictions. However, it is interesting work and we note that it may warrant further consideration by law reform commissions if they consider these matters at some time in the future.[18]

Hamer has expounded his views on comparative propensity in a number of publications, most elaborately in 2019, when he asserted that the 'implications [of the analysis in his article] extend beyond child sex offence cases to criminal cases more broadly'.[19] The theory therefore has the capacity to influence judicial thinking about the probative value of prior conduct evidence in all areas of law and in all forms of factual decision-making — not simply with respect to admissibility. The purpose of this article is to undertake the analysis suggested by the Royal Commission, and more generally, to critique the Bayesian approach to propensity evidence as implemented in the theory of comparative propensity.

This article has the following structure.

Part II introduces the mathematics on which the theory of comparative propensity is based. It first introduces some basic mathematics of probability with associated terminology and symbols, showing (among other things) the relationship between Bayes' equation and the legal concept of coincidence. It then proceeds to explain how Hamer's theory of comparative propensity fleshes out this equation with crime statistics to model the probative value of propensity evidence in terms of a 'likelihood ratio'. It then presents example calculations that lead to implausibly high estimations of the probative value of a record.

Part III considers the importance of the other evidence in the case apart from the propensity evidence. In the Bayesian model, prior odds of guilt are assessed without the propensity evidence, and I explain how these prior odds interact with the likelihood ratio. This creates problems for Hamer's model, because the model disregards the other evidence. I argue that Hamer's statistical approach of treating a hypothetical innocent defendant as if he or she were a random member of the general public fails to address the reality that the other evidence in the case is already likely to contain evidence adverse to the defendant's character (making a record more likely) and an innocent defendant may well have been wrongly charged for the very reason that he or she had a record. The problem is to find an appropriate reference class to statistically model the defendant, and I argue that the general population is not an appropriate class.

Part IV discusses how probative value might be affected by the size of the suspect pool. A limited suspect pool may point to the defendant as a potential

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17 *Royal Commission*, Parts III–VI (n 16) 604–7.
18 Ibid 607.
19 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 508.

perpetrator without detracting from his or her character. The example is somewhat theoretical, but it is pertinent because Hamer rejects the relevance of the suspect pool on the basis that it involves a separate issue from propensity. This highlights his insistence that the probative value of propensity evidence must be considered without regard to the other evidence.

Part V introduces a related concept of redundancy. Since the other evidence is likely to lead to adverse inferences about the defendant's character and capacity to commit the crime, propensity evidence will only be corroborative of those inferences and therefore partially redundant. This raises questions about whether the Bayesian model can, from a mathematical point of view, properly represent the situation being modelled.

Part VI raises the theoretical question of whether a Bayesian model that disregards the other evidence can ever be appropriate, since Bayes' equation is designed to evaluate the coincidence of events and, if no other event is stipulated, there is no coincidence at all. I further argue that unlikely coincidence rather than predictive tendency is usually the basis upon which propensity evidence may have probative value.

For similar reasons, Part VII questions whether the Bayesian model can in any event be regarded as a model of propensity, rather than coincidence, reasoning. I consider the distinction between propensity and coincidence reasoning and provide examples to show how the probative value of motive evidence, which Hamer uses as an analogy to propensity, is more readily explained by coincidence.

Part VIII then proceeds to compare comparative propensity and coincidence reasoning, arguing that coincidence reasoning has the capacity to solve some difficult cases. However, this raises a further problem — that a similarity of uncommon offences can give rise to an unlikely coincidence with substantial probative value but nevertheless offend the law's prohibition on evidence of rank propensity. This is a policy matter that can only be addressed by the courts, but a clearer picture of the reasoning processes can illuminate the issues.

Part IX briefly considers how the theory of comparative propensity interacts with the presumption of innocence.

Part X concludes.

II The Theory of Comparative Propensity

The theory of comparative propensity posits that the probative value of propensity evidence can be determined by comparing the likelihood that a

hypothetical *guilty* defendant would have the record in question,[20] to the likelihood that a hypothetical *innocent* defendant would have such a record. It would be hard to quibble with this generalisation, but in itself it adds little to the rationale of proof. However, the theory goes further and asserts that this comparison can be mathematically calculated as a 'likelihood ratio' by means of a mathematical model in which an equation known as Bayes' theorem is fleshed out with general population and crime statistics. Within this mathematical model, the likelihood ratio is a multiplier that multiplies the prior odds of guilt (absent the propensity evidence) to arrive at the posterior odds of guilt (after adding the propensity evidence). The size of this multiplier is therefore said to reflect the probative value of the propensity evidence, and evidence will have probative value favouring guilt if the likelihood ratio is greater than one.

A *Bayesian Model of the Probative Value of Propensity Evidence*

Bayes' equation is based on a simple proposition, which is expressed in Equation 1.

Equation 1

$$\frac{P(G) \times P(E|G)}{P(I) \times P(E|I)} = \frac{P(E) \times P(G|E)}{P(E) \times P(I|E)}$$

P(G) is in the standard notation for representing a probability, in this case the probability ('P') of guilt ('G'). Where it appears on the left-hand side ('LHS') of the equation, it represents the probability of guilt based on the other evidence on the charge ('the hard evidence'), without knowledge of the propensity evidence — in other words, where the defendant's record is simply unknown. Similarly, P(I) represents the probability of innocence ('I') based on the hard evidence alone. 'G' and 'I' are in fact complementary terms — 'I' could be expressed as 'not G', and in mathematical forms it often would be, but I have used the initials of the common terms for purposes of greater clarity.

'E' represents the propensity evidence. P(E|G) is in the conventional form for representing a conditional probability, in this case the probability of the propensity evidence ('E') given that the defendant is guilty ('G'). Conditional probabilities are important because they attempt to take into account the fact that many real-world events are interdependent — the occurrence of one makes the

[20] For ease of discussion, the term 'record' is used to refer to past criminal conduct, whether or not it has resulted in a conviction and a criminal record. In the theoretical discussions of both Redmayne and Hamer, they use conviction rates as indicators for rates of offending, so in most contexts the record referred to will be an actual criminal record, and that will be clear from the context. In practice, offending may often go unreported. In the Bayesian analysis, under-reporting of offences would cut both ways (though not necessarily equally). Both guilty and innocent defendants would be more likely to have past offences than statistics would suggest.

other more or less likely. This is fundamental to the theory of comparative propensity because the theory rests on the premise that a record is more likely if a defendant is guilty than if the defendant is innocent.

The multiplication operations are a variation of the product rule, which is used to calculate the overall probability of a conjunction, or coincidence, of events based on their individual probabilities. If events are wholly independent, then the probability of their coincidence is simply the product of their individual probabilities. For example, coin tosses are wholly independent events in that the outcome of one coin toss has no effect on the outcome of the next coin toss. The probability of two coin-tosses being heads is 0.5 x 0.5, or 25%. On the other hand, if the outcome of one event has implications for the probability of the other event, then the events are said to be dependent, and conditional probabilities are required when using the product rule. P(G) x P(E|G), for example, represents the probability of the coincidence of guilt (calculated without knowledge of the propensity evidence) and the propensity evidence.[21] Because the probability of the propensity evidence is affected by whether the defendant is guilty of a similar crime, 'G' and 'E' are dependent. The probability of the two events occurring together is the probability of one event occurring multiplied by the probability of the other event occurring, assuming that the first event has occurred. This can be expressed in reverse order: P(G) x P(E|G) expresses the same combination of events as P(E) x P(G|E). From this observation, one can see that the numerators and denominators on the LHS of the equation equate to the corresponding numerators and denominators on the right-hand side ('RHS'), and so the equation is obviously true. The key point of this analysis is that Bayes' equation is founded on the co-occurrence of events within a given scenario, which has ramifications for how it can be applied. It also provides a link between the probability concept of conjunctions and the legal concept of coincidences.

On the RHS of the equation, the terms P(E) on the top and bottom cancel each other out. By then splitting the expressions on the LHS, one arrives at the odds version of the Bayesian equation that Redmayne and Hamer employ in their Bayesian model, as set out in Equation 2.[22]

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21 This variation of the product rule is known as the General Conjunction Rule.

22 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 530, prefers to break the parts of the equation into separate representations, but I have expressed them together to preserve the concept of the conjunctions underpinning the equation. The representation used here matches that of Redmayne, *Character in the Criminal Trial* (n 15) 35.

Equation 2

$$\frac{P(G)}{P(I)} \times \frac{P(E|G)}{P(E|I)} = \frac{P(G|E)}{P(I|E)}$$

Prior odds of guilt ('the prior')		Likelihood ratio ('LR')		Posterior odds of guilt ('posterior odds')

The probabilities are expressed in odds form so if, for example, the prior probability of guilt were 0.75 (or 75%), the probability of innocence would be 0.25 (or 25%), and the prior odds of guilt would be a ratio of three to one, or in gambling terms, 'three to one on'. Therefore, odds of three to one on equate to a probability of three out of four (¾ or 75%).

The prior odds represent the odds of guilt based on the hard evidence only. The posterior odds represent the odds of guilt based on both the hard evidence and the record. The LR therefore is supposed to reflect the increase in the overall odds of guilt achieved by adding the propensity evidence to the hard evidence.[23] For that reason, it is seen as a measure of the probative value of that evidence. However, it is expressed as a multiplier rather than an actual increase in probability, so the actual increase in probability by adding the propensity evidence depends on what the LR is multiplying.

In both Redmayne's and Hamer's application of the model, the numerator of LR, P(E|G), is based on recidivism statistics, which reflect the likelihood of a guilty person being a past offender. The denominator, P(E|I), is based on the crime rate in the general population, which is said to reflect the likelihood of an innocent person having a record. They both regard the LR derived from this statistical methodology as a metric for determining the probative value of propensity evidence; Redmayne refers to it as a 'rough approximation'.[24] Hamer has recently reiterated his belief in this approach.[25] For any serious offence, since the likelihood of a person randomly selected from the general population having a record is extremely small, the LR calculated by this means will always be large (so large that Hamer concludes that propensity evidence 'will generally not struggle to achieve the … threshold' of significant probative value under s 97 of the *Uniform Evidence Acts*).[26]

By focusing on the LR only and deriving it by reference to general crime and population statistics, the effect is to derive a generic probative value of propensity

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[23] It is pertinent here to clarify what the LR is in odds terms. It is not the odds of finding the evidence — that would be P(E)/P(not E), which is the odds of finding the evidence relative to not finding it. The LR assumes the existence of the evidence and is the relative likelihood of finding the evidence if the defendant is guilty, compared to if he is innocent.

[24] Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 544–5; Redmayne, 'The Relevance of Bad Character' (n 15) 693.

[25] Hamer, 'Myths, Misconceptions and Mixed Messages' (n 6) 238.

[26] Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 549–50.

evidence without regard to the other evidence in the case or to the actual increment to the probability of guilt contributed by the propensity evidence. Hamer confirms his belief in this approach by rejecting a 'strongly contextual model' and asserting that, in assessing the probative value of propensity evidence, the other evidence should only be considered for identifying the issue to which the evidence is to be applied or to corroborate the tendency.[27]

B *Applying the Formula*

Despite expressing reliance on the theories of Redmayne and Hamer, the Royal Commission declined to adopt the calculations derived from those theories. The calculations referred to by the Commission appear to be those set out by Hamer as follows:

> Someone with a prior conviction is far more likely to offend than someone without a prior conviction. Drawing on conviction statistics for England and Wales, Redmayne suggests that 'violent offenders in the 2009 cohort were 98 times more likely to commit an offence of violence than a member of the general population'. The comparative propensity figure for sexual offences is 2,353.[28]

If one applied the figure for sexual offences to the Bayesian model, it would mean that a prosecution case with only a 2% probability of guilt based on the hard evidence would be catapulted to a near mathematical certainty by learning that the defendant had previously done something similar on some remote occasion:

Equation 3

$$\frac{0.02}{0.98} \times 2{,}353 = \frac{47.06}{0.98}$$

Odds of 47.06 to 0.98 approximate to 48 to one on, which represents a probability of 48 out of 49, or 98%. Although both Redmayne and Hamer promote such calculations as showing that evidence of prior conduct is undervalued,[29] the calculations should raise warning flags about the Bayesian model itself and the theories of comparative propensity flowing from it. Quite apart from the fact that the suggested effect of the record evidence is wildly implausible, the idea that any case with such doubtful hard evidence could achieve such a degree of certainty is completely far-fetched.

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27 Ibid 526–8.

28 Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 253, cited in *Royal Commission*, Parts III–VI (n 16) 606. See Redmayne, *Character in the Criminal Trial* (n 15) 24, Table 2.7.

29 Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 253–4; Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 549; Redmayne, *Character in the Criminal Trial* (n 15) 23.

Lest it be thought that this result is an artefact of an unusually high LR, it should be noted that if the LR were halved, the posterior probability of guilt would be 24 to one or a probability of 24 out of 25 or 96%. Thus, halving the LR equates to only a 2% decrease in probability — a demonstration of why using the LR as a numerical gauge of probative value is, at best, deceptive. This arises from the fact that, not only is the LR a multiplier rather than a quantity, but what it is multiplying is an odds ratio, which is also not a quantity. Hence, the LR's relationship to any actual probability is obscure, especially if it is promoted as a free-standing measure of probative value to be used without regard to the prior, as Hamer suggests.

Redmayne himself gives an example of a burglary case with a prior probability of guilt of 50%, which was elevated (by an LR of 125) to a 99% certainty by the revelation of a similar record.[30] In the following discussion, I will explain why these calculations fail to reflect the real-life scenario being modelled.

III The Importance of the Evidence on Which the Prior Is Based

Hamer asserts that the LR is the Bayesian measure of the probative value of the propensity evidence,[31] but that is somewhat misleading. The LR is a multiplier, not a probability. The actual probability it indirectly reflects depends on what it is multiplying, namely, the prior. The problem can be illustrated by elaborating Hamer's own model. One of the insights that Equation 1 gives us is that the Bayesian equation is actually evaluating a coincidence of events. It is only valid if the events are based on the same scenario, which means that the 'givens' of the model must be the same for both the prior and the LR (except that the LR adds the propensity evidence). In Hamer's model, there are no givens specified for the prior. In fact, the prior is simply ignored. However, the denominator of the LR is based on a randomly selected person from the general population. If the defendant really were a randomly selected individual from the general population, then the prior would also be based on the same assumption. It would be assessing the odds of a random individual being guilty of a specific alleged crime on a particular occasion in the absence of any evidence against him or her at all. It would calculate to an infinitesimally small number approaching zero. (Since legal verdicts must be based on evidence, in a trial context it would actually be zero). The LR would then tell us how much that infinitesimal number would increase if one learns that the random person has a record. Apart from the fact that an assumption of no hard evidence bears no resemblance to the real-life scenario being modelled, the exercise would in any case be futile because the

30 Redmayne, 'The Relevance of Bad Character' (n 15) 695-6.
31 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 531.

increase in actual probability by adding the record would be tiny. Thus, to have any authenticity and utility, the Bayesian model needs some plausible hard evidence so that the LR has something meaningful to multiply.

Although Hamer does not explain why he treats the defendant as a random person, it would be wrong to suggest that, in applying random selection to the denominator of the LR, he implies that defendants are randomly selected. There is another way that random selection could be justified. It could be argued that, although the defendant is not randomly selected in terms of the likelihood of having a record, an innocent defendant is no different from a member of the general population, and therefore general population statistics can be used as a proxy to estimate the denominator. This is called using the general population as a reference class. In order to justify such an approach, it would be necessary to identify the characteristics of the defendant to justify applying such a reference class. Despite much literature emphasising the reference class problem in this context, Hamer makes no attempt to do this.

To correctly assign a reference class, it would be necessary to take into account the givens of the problem, which include the hard evidence. Alternatively, if one were attempting to create a generalised model, as Hamer appears to be doing, it would be necessary to construct a typical defendant, including any adverse conclusions drawn from the typical sort of evidence against him or her. When one considers the nature of the hard evidence, there is no basis for suggesting that a typical defendant who has been wrongly charged is similar to a person randomly selected from the general population. The hard evidence is likely to contain much evidence that is adverse to the defendant's character even if he or she is innocent. That may well be why he or she was wrongly charged. As Redmayne said in this context, the trial is likely to be 'awash with character inferences'.[32] The facts of the *res gestae* might suggest adverse character inferences, and the defendant may appear to fall into a number of socioeconomic categories with a higher than normal incidence of crime. The general population is not an appropriate reference class for a typical defendant, as a number of commentators have noted.

A leading American author, Ronald Allen, when criticising the application of Bayes' theorem to legal cases in general, argued that the problem of identifying an appropriate reference class in real-life cases is inscrutable, because an event will fall into an infinite number of real-life classes, which would provide different reference rates:

> Here is the critical point. The event under consideration … is a member of an infinite number of reference classes, the boundary conditions of which can be gerrymandered in countless ways, some of which lead to the inference that the agent is reliable and some to the inference that he is unreliable, given that particular class. And — outside

[32] Redmayne, *Character in the Criminal Trial* (n 15) 61.

> of the reference class consisting only of the event itself — nothing in the natural world privileges or picks out one of the classes as the right one …[33]

Richard O Lempert, an American evidence scholar who is an advocate for the use of Bayesian analysis in law, rejects its use with respect to propensity evidence for the very reason that a typical defendant is not like a random person plucked from the general population. He points to a number of factors that would suggest that an innocent defendant, wrongly charged, is much more likely to have a prior record than a randomly selected person:

- the tendency of police to pursue 'the usual suspects' and to use mug shots of prior offenders in identifying a perpetrator;
- the tendency of prosecutors to try a weaker case if it is supported by a prior record, which is more likely if the defendant is innocent because innocent defendants tend to generate weaker cases; and
- the tendency of guilty defendants with prior records to accept a plea bargain, thus increasing the proportion of innocent defendants with records going to trial.[34]

Lempert's arguments are based on a systemic bias in the justice system towards selecting defendants with records, and he specifically rejects the approach adopted by Hamer for those reasons.[35] This issue has also been raised by Allen[36] and Mosteller.[37] While the first of Lempert's criticisms would apply more strongly to identification cases, in which a crime is known to have been committed and the question is who did it, selectivity is also present in commission cases, where the defendant is identified but the question is whether he or she did it. Where there is doubt about the strength of the prosecution's case — eg, where the complainant is a minor or testifying many years later, or where, on a sexual offence charge, it is one person's word against another — a prosecution is more likely to be commenced and pursued against someone with a prior record than, for example, a Catholic priest.

Dahlman went further. He incorporated selectivity into a Bayesian model to argue that learning of a prior record actually increased the likelihood of innocence rather than guilt, a conclusion which has also been canvassed by Lempert.[38] He argued that the correct reference class is the population of defendants, not the

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33 Ronald J Allen and Michael S Pardo, 'The Problematic Value of Mathematical Models of Evidence' (2007) 36(1) *Journal of Legal Studies* 107, 112. See also Ronald J Allen et al, *An Analytical Approach to Evidence* (Wolters Kluwer, 6th ed, 2016) 181–4.

34 Richard O Lempert et al, *A Modern Approach to Evidence: Text, Problems, Transcripts and Cases* (West Academic Publishing, 5th ed, 2014) 353–5.

35 Ibid 353.

36 Ronald J Allen et al, *Evidence: Text, Cases, and Problems* (Aspen Publishers, 2nd ed, 1997) 303.

37 Robert P Mosteller, 'Pernicious Inferences: Double Counting and Perception and Evaluation Biases in Criminal Cases' (2015) 58(2) *Howard Law Journal* 365; Lempert (n 34) 354.

38 Christian Dahlman, 'The Felony Fallacy' (2015) 14(3) *Law, Probability and Risk* 229; Lempert (n 34) 354.

general population, and that wrongly charged defendants were more likely to have a record than guilty ones. While Dahlman's precise modelling can be questioned,[39] it is undoubtedly the case that the class of defendants is quite different from the general population with respect to prior offending. Indeed, this was acknowledged by Park,[40] from whom Redmayne derived the theory of comparative propensity.[41] In a footnote, Hamer acknowledges that the Bayesian odds should be conditioned on the other evidence, but failed to recognise the implications for his model: '[s]trictly speaking, all of the probabilities and odds in Bayes' theorem should be conditioned on background knowledge and other previously considered evidence. … However, for brevity and simplicity, this condition has been omitted from the equations'.[42]

IV The Relevance of the Suspect Pool

The problem of the prior has led some advocates of Bayesian methods to attempt a generic model by framing the prior in terms of the size of the potential suspect pool. Their reasoning only applies to identification cases. If there is no hard evidence at all, the prior likelihood of guilt approximates zero, but if one knows that a crime has definitely been committed, the probability of any particular person committing the offence rises to one divided by the size of the entire population. If hard evidence can be added that restricts the suspect pool to something much less than the general population, the prior might attain a level whereby the value of the LR becomes significant.

This scenario has been the subject of a classic debate around a hypothetical scenario known as the 'island problem', in which it is postulated that a crime is known to have been committed on an island with a limited population.[43] Walsh, Buckleton and Triggs proposed a solution to the problem by weighting a suspect's probability of committing the crime by reference to statistics on the geographical location of known offenders relative to the location of the crimes.[44] In effect, suspects who resided in the locality of the crime received a greater weighting than more distant potential suspects. Fenton et al more recently developed the concept

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39 Peter M Robinson, 'Incorporating Implicit Knowledge into the Bayesian Model of Prior Conviction Evidence: Some Reality Checks for the Theory of Comparative Propensity' (2020) 19(2) *Law, Probability and Risk* 119.

40 Roger C Park, 'Character at the Crossroads' (1998) 49(3) *Hastings Law Journal* 717, 742.

41 Redmayne, 'The Relevance of Bad Character' (n 15) 684, 693.

42 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 530 n 133.

43 For early examples, see David J Balding and Peter Donnelly, 'Inference in Forensic Identification' (1995) 158(1) *Journal of the Royal Statistical Society. Series A, (Statistics in Society)* 21; AP Dawid and J Mortera, 'Coherent Analysis of Forensic Identification Evidence' (1996) 58(2) *Journal of the Royal Statistical Society. Series B, (Methodological)* 425.

44 KAJ Walsh, JS Buckleton and CM Triggs, 'Assessing Prior Probabilities Considering Geography' (1994) 34(1) *Journal of the Forensic Science Society* 47.

of the 'opportunity prior' to address this issue.[45] Their idea is that in identification cases the suspect pool can be restricted to the estimated number of people who had the opportunity to do it, taking into account their proximity to the crime scene within the relevant time span of the crime.

Hamer is dismissive of the concept of a restricted suspect pool, asserting that the size of the suspect pool 'has nothing to do with the probative value of tendency evidence'.[46] This is symptomatic of his approach that the probative value of the record should be assessed without regard to the other evidence.

In practice, it is difficult to see how the restriction of the suspect pool would assist in a decision at trial unless the pool were limited to a rather small number of suspects whose backgrounds and other involvement could be investigated and laid before the court. The tendency of a criminal trial to focus on the defendant alone makes this kind of case rare, although there are some examples in the case law.[47]

V Dependencies Between the Prior and the Likelihood Ratio

Analysis to this point has centred on the failure of the Bayesian model to address the evidence on which the prior is based in estimating the LR. That failure in itself undermines the utility of the model because correcting it places the calculation outside the realms of statistical analysis. However, the model has a further related problem, which undermines its mathematical soundness. One of the preconditions for application of the product rule, on which Bayes' equation is founded, is that the probabilities of the coinciding events must be wholly independent. The test for this is to ask, 'does the probability of one event imply anything about the probability of the other event?' If the answer is 'yes', then the assumption of independence fails.

The conditional probabilities of the LR, P(E|G), and P(E|I), are designed to take into account the dependency between guilt/innocence and the existence of a record. The trouble is that guilt/innocence is not an indivisible variable representing only a single finding of fact. It is a composite consisting of multiple factual findings on a range of variables that could influence the likelihood of a record, eg, all the intermediate facts which may affect the conclusion on the defendant's general character or disposition. It also includes findings on intermediate facts that may affect the significance of general character to the overall finding of guilt, such as findings on the defendant's immediate mental state at the time of the alleged crime. The conditionals represented in the LR are inadequate to account for such multiple dependencies. Although the fact finders

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45 Norman Fenton et al, 'The Opportunity Prior: A Proof-Based Prior for Criminal Cases' (2019) 18(4) *Law, Probability and Risk* 237.

46 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 527.

47 *Lowery v The Queen* [1974] AC 85; *R v Randall* [2003] UKHL 69.

may have doubts about guilt, they may have no doubt at all that the defendant had the character necessary to commit such an offence. Propensity evidence will only ever be corroborative of, and incremental to, the evaluation of character already incorporated into the prior. In certain circumstances, the adverse conclusions about character made in the prior may be sufficient to completely exhaust the utility of the propensity evidence.[48]

The adverse effect of redundancy on Bayesian models of evidence has been previously noted by Lempert.[49] Redmayne also recognised that the propensity evidence must be contributing something completely new,[50] but failed to recognise that, since the intermediate fact sought to be proven by the propensity evidence is not the record itself but the character or disposition attributed to it, the contribution of the propensity evidence will never be entirely new, at least not in the sense required to justify the mathematics of his model. In particular, the multiplication operation of the product rule, which is what supposedly demonstrates the power of propensity evidence,[51] is unwarranted.

Hamer acknowledges (in a cursory manner) the possibility of redundancy, but fails to recognise its impact on the validity of his mathematical model,[52] instead providing an analysis that is misleading. He says that as corroborative evidence is added, its probative value decreases until, at a certain point, it 'falls off a cliff'.[53] Here, Hamer is assuming that there is a single stream of proof towards guilt, so that probative value only expires when the case as a whole is proven beyond reasonable doubt.[54] However, because propensity evidence is only probative of the intermediate fact of character (or perhaps, disposition), the ceiling of probative value may fall well short of the point where overall guilt is established.

Within Hamer's model, the point at which the LR falls off a cliff is as soon as the first piece of evidence adverse to character is presented as part of the hard evidence (assuming it is given some credit). This first piece of credible evidence transforms that defendant from a random citizen to a person with a probability of having the character necessary to commit that type of crime. This step will invariably be achieved by the hard evidence (unless the hard evidence is totally disbelieved).

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48 As Lempert has observed, if the evidence were merely corroborating the ultimate fact of guilt, no harm would be done by admitting redundant evidence because it would only become wholly redundant when guilt is established. However, because the evidence is used to prove an intermediate or constituent fact (namely character), the redundant evidence can prejudice the assessment of the ultimate fact of guilt, which may still be in substantial doubt despite the adverse character inferences: Richard O Lempert, 'Modeling Relevance' (1977) 75(5–6) *Michigan Law Review* 1021, 1048 n 63.

49 Ibid 1041–2, 1051–2.

50 Redmayne, *Character in the Criminal Trial* (n 15) 37.

51 Ibid 15.

52 This criticism could also be made of Redmayne, *Character in the Criminal Trial* (n 15).

53 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 527.

54 Ibid 521–2.

VI Theoretical Problems with the Bayesian Approach

At a more theoretical level, there are fundamental problems with a Bayesian model in this context. It is a model specifically based on the coincidence of evidence, but Hamer specifies no such coincidence. In his model, the evidence on which the prior is based is unspecified, yet the model assumes that the defendant has been individually selected at random. This random selection of a specific individual is what generates high figures for the LR. In practice, it is the hard evidence that selects a particular defendant for prosecution and creates the coincidence to which Hamer would apply the Bayesian equation.

The significance of this can be seen by assuming that an offence is known to have been committed, but that there is no evidence pointing to a particular person — a so-called 'identification case'. This is actually more hard evidence than Hamer specifies in his model. If a crime is known to have been committed, but there is no evidence pointing to a particular defendant, how likely is it that the offender had a prior record? The following table provides some insight. It sets out historical data from New South Wales on the prevalence of prior records among persons convicted of the more common types of offences against other persons.[55]

Table 1: Prior Offences of Persons Convicted of Offences Against Other Persons

Jurisdiction/Type of offence	No prior record (%) (of any type)	Prior record (%) Same offence type	Prior record (%) Different offence type[56]
Homicide-related (murder, attempted murder and manslaughter)	45.3	1.2	53.4
Assault (non-sexual)	45.7	27.2	27.1
Sexual assault (not involving a child)	54.2	6.3	39.5
Child sexual assault	63.8	8.3	27.9

Note: prior record is based on record for previous five years. [57]

55 These are sources which Hamer has cited, along with figures from other jurisdictions: Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 545.

56 In the sources, similarity of offence type was based on the offence type described. For example, a prior offence of assault would be regarded as different from a homicide-related offence.

57 These figures are derived from a series of crime and justice statistics published by the NSW Bureau of Crime Statistics and Research: Isabel Taussig, 'Sentencing Snapshot: Homicide and Related Offences' (Issue Paper No 76, February 2012); Isabel Taussig, 'Sentencing Snapshot for Assault' (Issue Paper No 66, February 2011); Clare Ringland, 'Sentencing Snapshot: Sexual Assault, 2009–2010' (Issue Paper No 72, January 2012); Jessie Holmes, 'Sentencing Snapshot: Child Sexual Assault, 2009–2010' (Issue Paper No 68, May 2013). For homicide-related offences, I have not included the reported figures for driving offences causing death, and for assault, I did not include the reported figures for stalking.

Table 1 shows that for sexual offences, the party convicted was more likely to have no record of any kind than to be a previous offender, whereas for non-sexual offences, they were only slightly more likely to have a record. If the offender did have a record, dissimilar records were much more prevalent than similar ones, except with respect to non-sexual assault, where similar and dissimilar records were virtually tied. Despite the known biases in the system towards pursuing suspects with prior records, such figures suggest that, if a serious crime is known to have been committed, it is no better than a toss-up whether the offender had a record or not.

So, how can these figures be reconciled with the idea that previous criminal records are probative of guilt? The answer lies in base rates. A specific individual with a prior record may be more likely to commit a crime than a randomly selected individual without a record, but the number of people without a record is much higher than the number of previous offenders; so, overall, the commission of serious crimes tends to be balanced fairly evenly between prior offenders and first offenders (at least based on conviction records). Accordingly, if one were to attempt a generic model of the probative value of record evidence on the assumption that there is no hard evidence pointing to a particular defendant, or as Hamer has done, on the basis that such evidence should be disregarded, then the record would have no probative value at all. However, if there is hard evidence pointing to a particular defendant, or at least to a limited suspect pool, then the coincidence of the hard evidence and the record may provide a valid basis for reasoning about this unlikely coincidence.

The analysis above assumes that a crime has been committed. If no such assumption is made, one is left with a bare allegation of a crime accompanied by no evidence apart from the record. This is the scenario that would flow from Hamer's rejection of a 'strongly contextual model'.[58] If no other evidence is taken into account, a coincidence model is inappropriate, and the problem becomes one of simple prediction. How well does a record predict a specific crime on a particular occasion in the absence of any other evidence? Hamer recognises that 'past offending … provides a poor basis for predicting future offending'.[59] It is even worse for predicting re-offending on a specific occasion. The reason again relates to base rates. Recidivism statistics only predict repetition of behaviours over large time spans — one year, three years, perhaps longer. If an offender has multiple opportunities to re-offend over a lengthy period of time, the fact that they have some probability of re-offending on a couple of those occasions tells you only that they are *unlikely* to re-offend on most occasions when given the opportunity. The sort of behavioural evidence that is soundly based on prediction

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58 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 526–7.

59 Hamer, 'Myths, Misconceptions and Mixed Messages' (n 6) 238; See also David Hamer, '*Before the High Court*: Tendency Evidence in *Hughes v The Queen*: Similarity, Probative Value and Admissibility' (2016) 38(4) *Sydney Law Review* 491, 495–6 ('Tendency Evidence in *Hughes v The Queen*'); Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 252–3.

is evidence of habit or regular business practice, where behaviours are repeated like clockwork in particular circumstances.

Park, the originator of the idea of comparative propensity, recognised that the value of record evidence depends on its co-occurrence with evidence specifically pointing to the defendant.[60] Similarly, Redmayne seems to recognise that the predictive power of propensity evidence is weak and that its value depends on other evidence pointing to the guilt of the specific defendant.[61] Hamer has acknowledged on many occasions that coincidence plays a role in propensity reasoning but nevertheless argues that his approach to comparative propensity provides a distinct form of propensity reasoning, even though it disregards the very evidence that creates the coincidence.[62]

VII The Distinction between Tendency Evidence and Coincidence Evidence

Much of the confusion in this area, I would argue, derives from the entrenchment in Australia of two notionally distinct forms of reasoning: (1) tendency or propensity reasoning, and (2) coincidence or probability/improbability reasoning, with tendency or propensity reasoning apparently holding sway when the coincidence involves similarities in conduct or disposition. Hamer distinguishes the holistic nature of coincidence reasoning, based on the unlikely coincidence of events, from the sequential nature of propensity reasoning, which proceeds as follows:[63]

1 The defendant committed other similar misconduct.

2 This demonstrates that the defendant has a propensity to commit this kind of misconduct.

3 This increases the probability that the defendant committed the charged offence.

This structure, by its very nature, focuses on the predictive effect of a known propensity, and it is the form of reasoning that is generally impermissible under the common law.

Hamer maintains that the probative value of tendency evidence is not based on its predictive power but rather on comparative propensity.[64] However, as will

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60 Park (n 40) 723–4.

61 Redmayne, 'The Relevance of Bad Character' (n 15) 692.

62 Hamer, 'Tendency Evidence in *Hughes v The Queen*' (n 59) 496, 499; Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 526–8.

63 David Hamer, 'The Legal Structure of Propensity Evidence' (2016) 20(2) *International Journal of Evidence & Proof* 136, 145.

64 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 544; Hamer, 'Tendency Evidence in *Hughes v The Queen*' (n 59) 499.

appear, reasoning based on his Bayesian model bears no real resemblance to the sequential structure set out above. Furthermore, Bayes' equation does not provide any distinct form of propensity reasoning. It is simply a mathematical means of calculating a coincidence of events. To the extent that propensity is relevant, it is not due to reasoning from propensity; it is due to the fact that a surmised propensity may be a more likely explanation of an unlikely coincidence of offences (or allegations of offences) than the alternative that an innocent person, wrongly charged, happened to have such a record. If any proper distinction were to be drawn between the two forms of reasoning, it would be that when coincidence reasoning is applied to tendency evidence, there will inevitably be substantial dependencies between the hard evidence and the tendency evidence rendering the mathematics of Bayes' equation unsound.

Recognising that tendency evidence is generally not predictive, and that its probative value depends on coincidence reasoning, has the potential to simplify reasoning in this area. Coincidence reasoning is in fact at the heart of all reasoning about evidence. Typically, when we are considering the value of evidence, we weigh up competing theories of the case. These theories represent alternative narratives connecting events suggested by the evidence. In other words, they are elaborate conjunctions of events, and we weigh them up by assessing which conjunction is more plausible. Additional evidence will only contribute probative value if it distinguishes between one theory of the case (the theory leading to guilt) and another theory (the theory suggesting innocence).[65]

This idea can be seen in an analogy previously adopted by Hamer — motive evidence.[66] He asserts the power of motive evidence as follows:

> Motive evidence … is valued very highly. This does not reflect a view that a person with a motive to murder is highly likely to murder, or that motive evidence by itself would constitute proof. The point is that someone with a motive is far more likely to commit murder than someone without a motive.[67]

Using this as an analogy with propensity evidence involves a subtle misconception. Within the Bayesian model, the comparison is not between a defendant with a record and a defendant without a record. It is a comparison between a defendant with a record and a defendant whose record is unknown. Juries draw adverse conclusions about the defendant based on the hard evidence alone, including the possibility that he has done the same sort of thing before. Propensity evidence is merely supplementary to, and corroborative of, those conclusions.

Turning to the motive analogy, let us take an example of a husband accused of the murder of his wife. We learn that he is the beneficiary of a life policy taken

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65 Of course, this is simplified. There can be multiple theories of the case leading to guilt or innocence.

66 Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 253; Hamer, 'Tendency Evidence in *Hughes v The Queen*' (n 59) 496.

67 Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 253.

out on his former wife's life. One should note at the outset that, unlike propensity evidence where a single act may be assumed to show an enduring character disposition, motive evidence does not of itself bespeak any mental state. No one would suggest that the presence of a life insurance policy on a spouse's life evidences, even weakly, any actual mental disposition in a person to murder their spouse. In assessing the probative value of the evidence of the life policy, these are the two alternatives posed for comparison:

1. How likely is it that a husband guilty of murdering his wife would be the beneficiary of such a policy?
2. How likely is it that an innocent husband wrongly charged with murdering his wife would be the beneficiary of such a policy?

This comparison bears little resemblance to Hamer's argument that someone with a motive is far more likely to commit a murder than someone without a motive. It is a good example of why the value of new evidence should be assessed in the context of the hard evidence already accounted for. Once one knows from the hard evidence that the defendant is the husband of the deceased, it becomes clear that an innocent defendant is very likely to be the beneficiary of such a policy, because spouses often make financial provisions of this type. Such motive evidence has little or no probative value because there is no unlikely coincidence in a husband potentially gaining financially from the death of their spouse, whether he is guilty or not.

Additional hard evidence may cast a different light on the evidence of a life policy — say, for example, the husband had actively negotiated the policy shortly before the wife's death, when there was no such insurance before. That would be a considerable coincidence. The two questions would then become:

1. How likely is it that a guilty husband would negotiate life insurance on his wife for the first time shortly before he killed her?
2. How likely is it that an innocent husband would happen to negotiate new life insurance on his wife's life shortly before she was killed by someone else?

The value of the evidence in this revised example is not based on any change in the probative value of the policy itself. It is based on the unlikely coincidence of the contemporaneous negotiation of the policy and the killing. One further caution could be added. If there is already evidence of a mental state sufficient to commit the murder, then evidence of motive may be substantially redundant (though unlike tendency evidence, its admission may not be regarded as prejudicial).

In earlier work, Hamer used the case of *R v Baden-Clay*[68] to demonstrate the power of motive evidence. In that case, a husband, under pressure to end his marriage due to an extramarital relationship and unable to afford a divorce, was convicted of murdering her on circumstantial evidence. Unlike the example of the life policy, there was clear evidence of motivational state because the defendant had promised his lover that he would end the marriage, but had not fulfilled that promise.[69] Hamer supported his argument by a quote from the High Court that reflected pure coincidence reasoning:

'it tested credulity too far to suggest that his evident desire to be rid of his wife was fortuitously fulfilled by her unintended death'.[70] In the following discussion, I will compare how Hamer's approach to the probative value of propensity evidence differs from the coincidence approach.

VIII Assessing the Probative Value of the Record

A *Hamer's Approach*

Hamer's application of the LR involves comparing the consistency of the record with guilt (the numerator P(E|G)) and the consistency of the record with innocence (the denominator P(E|I)).[71] I will refer to these as the guilt hypothesis and the innocence hypothesis, respectively.

1 The Guilt Hypothesis

Hamer asserts that, for determining consistency with guilt, 'the predictive characterisation broadly captures the strength of the consistency element', and he describes it in terms of 'the predictability of an offender reoffending'.[72] This appears to underpin his assertion that his approach represents a distinct form of reasoning based on propensity. Elsewhere, he recognises that this approach involves a reversal of the proper logic. The correct approach to the numerator of the LR is not to reason whether the record predicts guilt, but rather whether guilt predicts the record, but Hamer does not regard the reversal of the 'prediction' as problematic.[73] However, the two forms are conceptually very different and would attract different statistics. If one wishes to assess statistically whether generic

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68 (2016) 258 CLR 308.

69 Ibid [22]. Despite the fact that financial gain was also canvassed as a motive, the prosecution specifically declined to argue that a life policy on the wife's life was evidence of a motive: at [29].

70 Ibid [69]; Hamer, 'Tendency Evidence in *Hughes v The Queen*' (n 59) 496. Hamer followed this case with a reference to *Pfennig* (n 9), which was also clearly based on coincidence reasoning: Hamer, 'Tendency Evidence in *Hughes v The Queen*' (n 59) 497.

71 In fact, Hamer more often refers to inconsistency with innocence, which is the complement of the denominator.

72 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 535.

73 Ibid 535 n 150.

guilt predicts a record, Table 1 provides an appropriate reference class, namely a sample of guilty defendants. The figures reflect the likelihood of a guilty defendant having a record for particular types of offence, and they do not support the view advocated by Hamer that similarity of features, or even similarity of offences, increases consistency with guilt, since guilty defendants were more likely to have dissimilar past offences than similar ones.[74] Again, one sees the importance of base rates. Serious offences are much less common than lesser offences, so guilt may be more likely to coincide with lesser, dissimilar offences than similar ones. To the extent that distinctive or unusual similarity is relevant, it is not because it strengthens any supposed propensity, but because it makes an innocent coincidence more unlikely.

2 *The Innocence Hypothesis*

With respect to the innocence hypothesis, Hamer does not suggest the same reversal of logic, which is just as well because a criminal record predicts far more innocent behaviour than guilty behaviour. The LR would be less than one, and the record would predict innocence rather than guilt. Instead, he asks whether generic innocence (as represented by a randomly selected citizen) predicts the record.[75] I have already addressed two factors which undermine this approach:

a) Unlike randomly selected individuals, people who are wrongly charged with serious offences may well have a record; and

b) if the hard evidence is at all credible, it will already incorporate adverse conclusions about the defendant's character, rendering the record to a significant extent redundant.

However, there is another factor that must be taken into account. While coincidences of unusual events may be rare as isolated combinations, when they have manifold opportunities to occur, they may be quite common. This is what Murphy J was driving at in the following oft-quoted passage:

> Common assumptions about improbability of sequences are often wrong. A suggested sequence, series or pattern of events is often incorrectly regarded as so extremely improbable as to be incredible. However highly improbable, as well as merely improbable, sequences and combinations are constantly occurring. In random tossing the occurrence of a run of ten consecutive heads or tails is generally regarded as highly improbable. But this will occur on the average once in every 512 tosses, and the lesser sequences more frequently (2 runs of 9; 4 runs of 8; 8 runs of 7). If one randomly tosses a coin 257 times, more likely than not there will be a sequence of ten heads or tails.

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74 Ibid 532.

75 See Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 533, 544–5.

> Although it is extremely improbable that any particular ticket will win a large lottery, it is certain that one will.[76]

Murphy J was highlighting another issue of base rates. The conventional, simplistic concept of probability is an average probability based on a single random selection, but the true likelihood of something occurring in the real world depends not only on that average but also on the number of opportunities the event (or combination of events) has to occur. This principle is particularly important when the system is not based on random selection but on selecting particular types of unusual case, eg, serious crimes. Given sufficient opportunities, rare combinations do occur on a regular basis. The case with which Murphy J was dealing involved a female defendant who had a surprising number of male relatives who died from arsenic poisoning. Apart from that coincidence, there was no hard evidence inculpating the defendant in their demise.[77] The coincidence of those deaths in a randomly selected family would be highly unlikely, but when one considers the infinite variety of life (and death) and the infinite opportunities for such a coincidence to occur, the fact that one such case arose and arrived at the courts is perhaps not as surprising as it may seem.

3 Issues

The divergence between the Bayesian model and coincidence reasoning comes into focus when Hamer considers how probative value varies depending on the issue in the case. In two places, he considers the example of a sexual assault case in which the complainant describes an unusual or peculiar predilection of the perpetrator and there is evidence that the defendant has displayed that predilection on previous occasions.[78] He expresses the argument in terms of coincidence. If identity is the issue, 'it would be quite a coincidence for the complainant to report on the defendant's predilection if it were someone other than the defendant who committed the assault'.[79] However, if the defendant admitted the sexual acts and simply put consent in issue, then evidence of the predilection would no longer be 'an incriminating coincidence'.[80]

This is very different from the Bayesian model in which the LR is conditioned on a generic proposition of guilt or innocence. Hamer provides no explanation of how the Bayesian model is to be adjusted to account for these varying probative values. In fact, the propositions of generic guilt or innocence in the model are effectively replaced by much more specific propositions derived from the hard evidence. For the guilt hypothesis, Hamer says that '[t]he consistency element

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76 *Perry v The Queen* (1982) 150 CLR 580, 594 [11] ('*Perry*').
77 Ibid 591 [1] (Murphy J).
78 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 523, 533–4.
79 Ibid 524.
80 Ibid.

would be at a moderate level in line with recidivism data',[81] but what needs to be assessed is the likelihood of a person, guilty of the acts with the predilection described in the hard evidence, having a history displaying that same predilection. That assessment has nothing to do with recidivism statistics. Assuming that Hamer adopted a consistent approach for the innocence hypothesis, its likelihood would be informed by crime statistics for the general population, but the likelihood of an innocent person having a matching predilection also has nothing to do with such statistics.

By defining the case as one in which identification is the only issue, the coincidence of the particular alleged conduct and the past predilection is conflated with the general concept of guilt versus innocence. The logic of coincidence is directed to specific factual propositions involving a coincidence between the hard evidence and the propensity evidence, not to generic guilt or innocence. The fact that the answer to those propositions may lead to an inference of guilt does not alter the more specific nature of the logic. In cases where multiple issues are outstanding, a proper focus on the precise coincidence would be essential.

In the identification example, the hard evidence is important not only to define the precise act itself but also to point to the defendant as a potential perpetrator. Without this selection of the defendant, the innocence hypothesis poses the following question: how likely is it that *somebody* from the general population other than the guilty party had a history of the same predilection? Unless the predilection were extraordinarily unique, the probability of the innocence hypothesis would likely be high, possibly higher than the guilt hypothesis. Thus, the detail of the hard evidence, rather than the issue itself, frames the LR.

The need to assess the propensity evidence by reference to its precise coincidence with the hard evidence is not something that arises from a refinement of the issue. The same analysis would apply if all the issues were at large. In the variation where the defendant admits the act but argues consent, Hamer discounts the predilection evidence as it does not give rise to an incriminating coincidence. That is true, but the same logical inference is available as in the identification example — it is just that the admission of the act makes evidence of the specific predilection redundant. However, even in a consent case, the defendant's more general character or disposition to commit non-consensual sex is also in issue, and propensity evidence may be relevant to that issue. I consider the relevance of a more general propensity to the question of consent when I discuss the case of *Phillips v The Queen* below.

To adjust the Bayesian model to accommodate the particular issue, it would be necessary to abandon the generic model and reframe the prior as a more specific factual proposition defined by the hard evidence, rather than simple guilt

[81] Ibid 533.

or innocence. In effect, this is what Hamer partially did when he expressed his conclusions in terms of a more specific coincidence of predilections. In the identification case, the prior would represent the odds of the defendant being the person who committed the act absent the predilection evidence. If the hard evidence did not in some way identify the defendant as a potential perpetrator, at least as a member of a limited suspect pool, then the prior would be close to zero and the LR would be largely irrelevant. If the hard evidence did provide some identification evidence pointing to the defendant, then there would be a potential coincidence to assess. The LR would compare the likelihood of the defendant having displayed the same predilection if they had or had not committed the act. The result would be an assessment of the odds of the defendant having committed the act, given the predilection evidence. If identification were the only issue, commission of the act would conflate with guilt, but otherwise it would simply be a factor to be assessed along with the evidence on the other issues in determining overall guilt.

This approach would more closely align with that of forensic scientists who advocate for a Bayesian evaluation of forensic evidence. In their approach, the forensic scientist is presented with specific alternative propositions for the prosecution and the defence and also the background of the other evidence ('a framework of circumstances') to enable an assessment.[82] For example, evidence may show a coincidental match between a partial DNA trace at the crime scene and the defendant's DNA. The prosecution proposition is that it was the defendant's DNA at the crime scene. The defence proposition is that it was somebody else's. Even with these very narrowly defined propositions, one must be mindful of the other hard evidence. For example, if the innocent defendant were modelled as a random person, the probability of the defence hypothesis may be, say, one in one million. But if the hard evidence shows that a relative of the defendant (with a similar DNA profile) was also a suspect, the defence hypothesis might jump to a 50/50 proposition. The result of the assessment would be evaluated by the fact finder along with the other evidence to determine guilt. For example, there may be possible scenarios in which an innocent defendant's DNA could have found its way to the crime scene (or to the crime lab by contamination) that the fact finder would have to assess.

If that approach were applied to propensity evidence, in addition to the usual problems of dependencies and redundancy (which are *less* if the factual propositions are expressed more narrowly), there would be the added problem of incorporating a Bayesian LR on one factual issue into non-Bayesian findings on other issues. Hamer's assertion that probative value depends on the issue impliedly concedes that propensity evidence is only probative of certain issues. This means that one cannot automatically convert a Bayesian finding on a specific

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[82] Charles EH Berger et al, 'Evidence Evaluation: A Response to the Court of Appeal Judgment in *R v T*' (2011) 51(2) *Science & Justice* 43, 44.

fact into a corroborative finding on overall guilt. The specific fact may not advance the proof of other issues. Given that (unlike DNA evidence) the results of such an analysis do not seem to be calculable in any event, it is difficult to see what the Bayesian paradigm contributes over and above ordinary coincidence reasoning.

In the following explanation of coincidence reasoning, the question of the issue is dealt with by framing the factual propositions specifically and by taking account of redundancy. If there is no issue on which the propensity evidence would be relevant, then it is redundant.

B *Assessing Probative Value Based on Coincidence*

I would argue that, to reason soundly about propensity in this way, the numerator and denominator of the likelihood ratio should be replaced by a comparison of the following probabilities representing coincidences of the hard evidence with the record:

> *The guilt hypothesis*
> How likely is it that a person who is guilty in the circumstances defined by the hard evidence would have the record alleged?
>
> *The innocence hypothesis*
> How likely is it that an innocent person, wrongly charged in the circumstances described by the hard evidence, would have the record alleged?

In weighing up these alternative hypotheses, one must also take account of the following factors:

- any adverse assessments of character drawn from the hard evidence that would make a record more likely, and possibly wholly or partially redundant;
- any conclusions about the immediate *mens rea* that would make general character wholly or partially redundant;
- the fact that innocent defendants with records tend to be much more common than random individuals with records; and
- the fact that unusual combinations of circumstances have multiple opportunities to occur in real life, rendering them more common than is often thought.

Selection bias should be treated with caution. Selection of a case for prosecution does not in itself alter the probative value of the evidence, but it can have practical implications for assessing that value. Selection bias increases the probability of a record for both guilty and innocent defendants. Figures like those in Table 1,

which incorporate systemic selection bias, therefore overstate the association of guilt with a record, while subjective intuitions that an innocent coincidence would be remarkable may be exaggerated because selection bias systematically picks out unusual cases from the multiplicity of human activity. If the evaluation of the guilt hypothesis uses biased statistics like those in Table 1, then the evaluation of the innocence hypothesis must also account for the same bias.

Although coincidence reasoning is well known in similar fact cases, it is useful to consider how it applies in practice to propensity. The two hypotheses simply represent competing explanations for the coincidence of the record and hard evidence tending to inculpate the defendant (if only by placing him or her in a limited suspect pool in an identification case). They are not considered separately from the hard evidence and the ratio of their probabilities is not treated as a multiplier to be applied to a discrete assessment of the hard evidence on its own. They are simply weighed against each other, taking into account the factors outlined above, to form part of the overall assessment of the case. The initial premise is that the coincidence of the record and the hard evidence would be unlikely if the defendant were innocent. If the hard evidence does not tend to inculpate the defendant (similar to the situation in Equation 3), then there is no incriminating coincidence to consider, and it would look very much as if the defendant had been charged simply because of his or her record. However, contrary to cases that distinguish coincidence reasoning from propensity reasoning on the basis of the need for similarities,[83] similarity of the events is not required to give rise to an unlikely coincidence. In the motive example, the unlikely coincidence arose from the negotiation of a life insurance policy shortly before the wife was killed. The two events bear no resemblance to each other, apart from proximity in time.

The basis for asserting probative value toward guilt is that a criminal propensity is a more plausible explanation of the coincidence than an innocent interpretation. Unlike reasoning that focuses on the strength of the propensity, often by reference to similarities that may or may not affect its predictive power, the focus is on explaining the coincidence, and the propensity may be wholly inferred as the most likely explanation. This avoids arguments about circularity of reasoning that arise in the serial form of propensity reasoning, where the propensity has to be established by contested evidence before it can be used to predict the offence under charge.[84]

The hard evidence is important in generating hypothetical scenarios supporting guilt or innocence. For example, the plausibility of the propensity explanation may be undermined by evidence showing that the charge relates to a different victim or class of victims to the record or that the charged events (if they

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83 *R v PWD* (2010) 205 A Crim R 75, 91 [79], approved in *Saoud v The Queen* (2014) 87 NSWLR 481, 491 [46].

84 See, eg, *Sutton v The Queen* (1984) 152 CLR 528, [5] (Gibbs CJ), [20] (Brennan J); *Thompson v The Queen* (1989) 169 CLR 1, 5; Annie Cossins, 'Similar Facts and Consent' (n 13) 60.

occurred) were the result of some more immediate mental state unrelated to general character. The record itself may also weaken the inference of propensity if it does not show repetitive behaviour over a length of time — for example, if it is only one instance or if it relates to the distant past. The tendency towards recidivism is known to subside as criminals age, and a lengthy period of time without re-offending is somewhat inconsistent with a persistent propensity. (As mentioned earlier, under the recent reforms of the *UEA*, some of these arguments are severely curtailed with respect to child sexual assault cases).

In considering the innocence hypothesis, as Hamer has pointed out,[85] the rarity of the offence is important. Prima facie, it would be a considerable coincidence if hard evidence wrongly inculpated an innocent defendant in a serious crime and he or she happened to have a known record for similar offences (unless the witnesses' evidence were tainted by collusion or knowledge of the record). Unusual similarities between the record offences and the charged offence may heighten the coincidence, but features that are commonplace for innocent behaviours, such as an institutional setting or geographical location close to home, do not.

The unlikelihood of innocent coincidence may be diluted in a number of ways. If the hard evidence detracts from character — for example, if the circumstances relate to people who frequent criminal classes, or if they are members of socio-economic groups with a higher than usual crime rates — the record might not be so unexpected compared to an average person selected from the general population. Innocent people who have been wrongly charged are much more likely than ordinary citizens to have a record.

One must also consider the fact that the record will only ever be corroborative of other findings on character or disposition. This does not render record evidence irrelevant, but it means that exaggerated calculations of unlikely coincidence generated mathematically by the product rule or by an intuitive assumption that the record evidence provides something entirely new are unwarranted. When considering the admission of record evidence, it should be remembered that, if the record is not admitted, the jury will be presented with a defendant whose record is simply unknown. They will not automatically assume that he or she has no record. This is particularly so if there is hard evidence detracting from character, but even without that, juries approaching their task with an open mind will be alive to the possibility that the defendant may have a chequered past. As such, they will already be accounting for the possibility that the defendant has the character or disposition capable of committing the crime. The record may be relevant to confirm their suspicions, but when the effect of the evidence is merely confirmatory rather than wholly new, it will to some extent be redundant. It will be less redundant if the defendant appears to fall into a class among whom criminal records would be highly unlikely, such as priests.

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[85] Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 532.

It is in this context that one can also consider the actual issues in the case. As seen in Hamer's predilection example, admissions by the defendant may also render the propensity evidence either wholly or partially redundant.

Finally, any assessment of the plausibility of the innocence explanation must take into account the fact that combinations of events that may be unlikely on a randomly selected occasion are regularly occurring in everyday life. In this respect, the degree of unusualness will again be a practical consideration. For example, if the history involves multiple discrete coincidences and/or the similarities between the charged events and the criminal history are particularly unusual and specific, chance coincidence may still seem implausible. On the other hand, if the similarities between the past and charged events are only generic, the possibility that the coincidence occurred by chance is much more real when one considers the multiplicity of human affairs.

Case law has long acknowledged an overlap between propensity and coincidence reasoning.[86] Recognition that the probative value of propensity evidence lies in coincidence reasoning would provide a more transparent evaluative process than the current preoccupation with the distinctiveness of similarities. While Hamer's mathematical methodology exaggerates the probative value of propensity evidence, it is nevertheless true that in many case contexts, a serious criminal record would be substantially more likely in a guilty defendant than an innocent one. However, in order to adopt this approach, the courts would have to accept that a generalised character tendency, or 'rank propensity', may have substantial probative value.

The preoccupation with a distinct form of propensity reasoning has led (I would argue) to an exaggerated focus on the modus operandi of criminals, in particular sexual offenders. Hamer presages a detailed analysis of this issue with the following comment:

> [T]he higher admissibility threshold appears to reflect an assumption that child sexual offenders are relatively unlikely to reoffend, but if they do, the offences will all share distinctive similarities. As legal commentators have recognised, this assumption can be tested against empirical data.[87]

That may be a logical surmise from a preoccupation with the distinctiveness of similarities, but one would be hard-pressed to find in the historical reasoning of judges much evidence that they are making either of these assumptions. In focusing on distinctiveness, judges seem to be attempting to analyse, however misguidedly, the capacity of past behaviour to predict the alleged offence, by finding a precisely matching propensity. The theory, as I perceive it, is that in order to predict specific behaviour on a particular occasion, it is necessary to find a propensity sufficiently specific to match it. A rank propensity is insufficient.

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[86] See, eg, *KJR v The Queen* (2007) 173 A Crim R 226, 236 [43], [46]; *Saoud v The Queen* (n 83) 491 [43]; *Hoyle v The Queen* (2018) 339 FLR 11, 39 [165]–[169]; *R v WBN* (2020) 5 QR 566, 604 [112].

[87] Hamer, 'Proof of Serial Child Sexual Abuse' (n 16) 251.

If one recognised that a rank propensity can have substantial probative value by reason of coincidence reasoning, it would become clear that similar features would only add to probative value if they heightened the coincidence by rendering it even more unlikely in an innocent defendant than the coincidence of the bare offences (or allegations of offences) themselves. This would provide some support for judicial arguments that one must examine whether the behaviour is unusual *for the type of offence*, but only if one simultaneously conceded that the rank similarity of offences supplies most of the unlikelihood.

I would argue that the problem with adopting the coincidence approach is not logical or mathematical, but philosophical. The controversial common law case of *Phillips v The Queen* ('*Phillips*') provides some insight.[88] Phillips was charged with a series of seven offences involving rape and indecent assault of five complainants between August 2000 and November 2001, when he was 16–17 years of age. While he was on bail for those charges, he was accused of another assault with intent to rape in May 2003, which became an eighth count in the indictment. The trial judge declined several applications to sever the trials and all counts were heard together on the basis that the evidence of all complainants was cross-admissible on the other complaints, leading to convictions on six of the eight counts, with lesser verdicts of unlawful carnal knowledge on two of those six. These convictions were upheld by the Queensland Court of Appeal,[89] but overturned by the High Court on the basis that the evidence was cross-admitted on the limited issue of consent, but evidence of one complainant's failure to consent could not be relevant to the issue of whether another complainant consented.[90] In other words, although there was a remarkable coincidence of allegations, since the stated issue was the complainants' consent rather than the defendant's behaviour, it was difficult to frame a propensity to explain it. The fruitless search for an applicable propensity, rather than an unlikely coincidence, was therefore the stumbling block to cross-admissibility.

The trial judge's decision was clearly founded on coincidence reasoning:

> So you ask yourselves this, what are the probabilities that all six girls have lied when they say they did not consent … If you think it could possibly be just an unlucky coincidence then you consider each incident and the evidence of each girl's completely separately and you reach your verdicts in light of your view of the evidence relating to each incident completely separately. But if you are satisfied that the only reasonable conclusion to be drawn is that they are all telling the truth when they say they did not consent … then you may use that conclusion in your thinking along the path to deciding whether [the defendant] is guilty or not guilty of each of the offences.[91]

The trial judge was not reasoning *from* propensity. His Honour was not inferring the girls' consent from the defendant's inferred propensity. If anything, his

88 *Phillips* (n 13).
89 *R v PS* [2004] QCA 347.
90 *Phillips* (n 13).
91 Ibid [67].

Honour was doing the reverse. The multiplicity of similar allegations made the innocence hypothesis (that they were all lying) unlikely. This led to consideration of the alternative guilt hypothesis, that the girls had not consented and that the defendant had acted on an illicit propensity. This balancing of alternative hypotheses relates to a specific coincidence, not to overall guilt. The plausibility of the hypotheses would have to be weighed up alongside assessments of the other evidence in each particular case, which may support or detract from the inferences of guilt or innocence derived from the multiplicity of similar allegations.

The High Court's reasoning indicates why courts that are minded to admit tendency evidence often engage in a gymnastic search for similarities:[92]

> Criminal trials in this country are ordinarily focused with high particularity upon specified offences. They are not, as such, a trial of the accused's character or propensity towards criminal conduct. That is why, in order to permit the admission of evidence relevant to different offences, the common law requires a high threshold to be passed. The evidence must possess particular probative qualities; a really material bearing on the issues to be decided. That threshold was not met in this case.[93]

Elsewhere, the Court emphasised that this threshold could only be achieved by evidence that had a 'sufficient nexus' or 'specific connexion' with the issues in the subject case.[94]

The first two sentences of the extract from *Phillips* seem to suggest a philosophical argument rather than a logical or mathematical one, namely, that a defendant should be tried on evidence specific to the offence, not on evidence of his or her character or past. This argument is closely aligned with the presumption of innocence. However, the subsequent sentences imply that the problem with such evidence is that it lacks probative value, which is true if one reasons from propensity, but not if one argues from coincidence. The coincidence of rapes or rape allegations may be unlikely even if the modus of the rapes differs.

The decision in *Phillips* was not well-received in the academic world. Hamer described it as 'artificial, disjointed and pernicious'.[95] Gans said the Court's reasoning was 'at odds with reality'[96] and 'a poor, and possibly counterproductive response to the significant risks of miscarriage of justice arising from joint trials'.[97] Perhaps the unkindest challenge to the Court's objectivity came only slightly more subtly from Cossins, who presaged one criticism with the words: '[t]he High Court, comprised of five male judges', etc.[98]

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92 See, eg, the review of authorities in Robinson, 'Reasoning About Tendency' (n 14).
93 *Phillips* (n 13) 327–8 [79].
94 Ibid 321 [55], citing *Pfennig* (n 9) 483 (Mason CJ, Deane and Dawson JJ).
95 Hamer, 'Similar Fact Reasoning in *Phillips*' (n 13).
96 Gans, 'Similar Facts after Phillips' (n 13), 230.
97 Ibid 233.
98 Cossins, 'Similar Facts and Consent' (n 13) 72.

It is open to the law to privilege past conduct and convictions from admission if they merely represent a generalised, 'rank' tendency, but the only basis for doing so is that they are either too prejudicial or that their admission would offend a sacrosanct right to the presumption of innocence. Suggestions that a rank tendency cannot have significant probative value are, I submit, unsupportable.

IX Comparative Propensity and the Presumption of Innocence

Coincidence reasoning about rank propensity is at least based on the conduct of the defendant himself or herself, so one could argue that adverse conclusions about the defendant drawn from such conduct do not offend the presumption of innocence. On the other hand, the theory of comparative propensity presents a greater challenge to that presumption. Within that theory, propensity evidence is evaluated without reference to the hard evidence, by assuming that an innocent defendant must be a randomly selected individual from 'the general law-abiding population'.[99] This means that the defendant is fixed with a predetermined, generic LR — a multiplier — which attaches to him or her statistically before he or she enters the courtroom. Whatever hard evidence is led of the crime, its probative value will automatically be escalated by that multiplier, and as we have seen, the multiplier calculated in this manner will always be very substantial — so substantial that the flimsiest case can be promoted to a near certainty by admitting the defendant's record.

The approach in which the probative value of the record is predetermined by some generic calculation could hardly be more at odds with the presumption of innocence. It goes further than simply raising a 'highly suspicious, prejudicial atmosphere' as feared by Murphy J,[100] but rather puts the defendant with a record in a position where he or she would be lost at the outset. The only way that such an outcome could be averted is by rejecting not only the calculations derived from the theory of comparative propensity, but also any 'rough' approximations derived from it.[101]

X Conclusions

This article analysed the Bayesian model, which is the foundation for the theory of comparative propensity. That theory has held some sway in Australian jurisprudence in recent times. The analysis demonstrates that both the model's statistical assumptions and mathematical foundations fail to reflect the real-world scenario it purports to depict. In addition, the Bayesian model does not

99 Hamer, 'The Significant Probative Value of Tendency Evidence' (n 15) 513, 528, 545, 547, 549.
100 *Perry* (n 76) 594 [11] (Murphy J).
101 See, eg, Redmayne, 'The Relevance of Bad Character' (n 15) 693.

represent a distinct form of propensity reasoning but rather a mathematical representation of coincidence reasoning. The analysis provides some insight into the issues that arise when applying such coincidence reasoning to real world cases, and indicates that the logic of reasoning about propensity would be better served by recognising that the probative value of propensity evidence derives from the coincidence between the hard evidence inculpating the particular defendant and his or her record, than by reasoning *from* propensity. In doing so, however, one would also have to acknowledge that the 'rank' coincidence of uncommon offences (or alleged offences) is inherently unlikely in an innocent defendant even if those offences have no distinctive features. If that were acknowledged, courts could address the real question of whether rank propensity should continue to be privileged from admission despite its coincidental probative value.

I am conscious that the criticisms made in this article might seem strident, and that those criticisms are primarily directed at the theories of one of Australia's leading evidence scholars — I would say, *the* leading evidence scholar. These criticisms are not intended to diminish Professor Hamer's contributions in this area. Nevertheless, I believe that it would dangerous to allow exaggerated 'approximations' of probative value, generated by the Bayesian model, to pervade legal thinking about prior conduct evidence. In many ways, the problems of dependencies and composite variables described in this article are symptomatic of a wider problem with applying mathematical formulae, which tend to be based on independent, one-dimensional variables or simple dependencies, to the complex combinations of interacting factors involved in human behaviour. There seems to be a trend in modern society for numbers generated by such mathematical approaches to be given much greater credence than their rudimentary nature warrants.

NATIVE TITLE RIGHTS TO TAKE RESOURCES: EMERGING ISSUES IN RELATION TO COMMERCIAL RIGHTS

CATRIONA STRIDE*

Native title rights to take resources for unconstrained or commercial purposes were first recognised almost a decade ago, but the significance and uptake of such rights in Australia is now heightened. Resource ownership and management are critical components of global sustainable development and Indigenous interest holders play a key role in that space. The gradual acceptance of resource use by traditional owners in a modern economy reflects more developed trends overseas such as in Canada. Reluctance to concede the commercial exercise of native title rights may be due not only to evidential thresholds (required by state governments to enter consensual determinations), but also concerns about the possible consequential legal impacts for those governments and other interest holders. This article considers potential consequences of recognising native title rights to take resources for any purpose in several developing areas of native title jurisprudence including: quantum of native title compensation, the regulation of native title under resource management legislation enacted since the Native Title Act 1993 (Cth), competing claims to resource ownership and use, and the risks for government where prior assumptions of resource ownership are displaced by determined native title..

I INTRODUCTION

Native title content is sourced in the traditional laws and customs of the relevant First Nations group. Section 223 of the *Native Title Act 1993* (Cth) ('*NTA*') captures the findings of the High Court majority in *Mabo v Queensland [No 2]* ('*Mabo*')[1] regarding 'connection', including that rights and interests in relation to lands and waters are possessed under traditional laws and customs.[2] That provision also includes some examples of the exercise of native title rights and interests (hunting, gathering and fishing) without reference or restriction in respect of the purpose for which the rights can be exercised.[3] Factual findings about native title

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1 (1992) 175 CLR 1 ('*Mabo*').

2 *Native Title Act 1993* (Cth) s 223(1) ('*NTA*').

3 Ibid sub-s(2).

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rights and interests are ascertained by the court from evidence led by the parties. However, the ambit of those rights and interests is a finding of law.[4] While it is not the common law that creates native title rights and interests, it is the court's role to make a declaration of those rights comprehensible to the common law. One commentator has observed that, in the context of litigation, 'it is only when a remedy is sought that the rights are enumerated'.[5]

When negotiating determinations by consent, it is the relevant state that is the arbiter of whether claims of specific rights and interests have been demonstrated to a 'credible evidence' standard by the applicant's connection material. This assessment should be primarily guided by the jurisprudence. However, there are inevitably other considerations that affect whether a beneficial or restrictive interpretation of the jurisprudence is adopted for the purpose of negotiation. This article considers whether some of these considerations may be impeding governments and other respondents from adopting a more expansive and beneficial approach to recognising unrestricted or commercial rights to take resources, despite recent jurisprudential precedent that would provide a legal platform on which to do so.

The article considers the courts' developing approach to evidencing and recognising native title rights generally (and to natural resources specifically) and compares that approach with analogous Canadian jurisprudence. This article also closely examines integrally linked jurisprudence on extinguishment, which is central to the extinguishment or survival of native title rights in the face of extensive regulation around natural resource management. It is appropriate in this context to have some regard to the undesirable litigation arising from fishing prosecutions whereby a limited defence is available to native title holders under s 211 of the *NTA* for cultural take that would otherwise contravene fishing legislation. Despite jurisprudential development allowing for a more expansive approach to native title resource rights, and the evident tensions where Indigenous people are constrained under mainstream resources regulation, advancement remains slow. The remainder of the article considers some factors that may contribute to a continuing conservatism in the negotiation of consent determinations. These include the implications of the emerging native title compensation regime, including those that might arise if the Crown's assumed right to benefit commercially from natural resources is displaced. More generally, governments may apprehend the potential for unanticipated court decisions about the application of resource management regimes, where determined native title holders hold commercial rights to resources.

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4 *Yanner v Eaton* (1999) 201 CLR 351, 396 [109].

5 Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act' (2003) 27(2) *Melbourne University Law Review* 523, 536.

II The Legacy of *Ward*: A Heightened Bar in Order to Establish a Bundle of Native Title Rights

The High Court decision in *Western Australia v Ward* ('*Ward*')[6] is a seminal native title case insofar as it contributes to an enduring understanding of the content and character of native title. At trial,[7] Lee J found native title rights to be holistic and exclusive in nature, allowing for a modern form of exercise and, conceivably, for commercial exercise.[8] On appeal, the Full Court of the Federal Court ('FCAFC') adopted a more prescriptive approach to evidencing rights and interests, rejecting rights to resources (other than traditionally used materials such as ochre) and finding for a much higher level of extinguishment.[9] The High Court upheld the FCAFC findings regarding extinguishment and the need to particularise each element of each right held under identified law and customs.[10] Further, the High Court expressly excluded rights to minerals in Western Australia and instituted what has been criticised as a 'frozen in time' approach to proof of native title rights and interests.[11] Kirby J, in dissent, drew from Canadian jurisprudence to find that rights and interests could develop over time and still be recognised by the common law.[12]

The dual requirements initially established in *Ward* — (1) a high level of particularisation of rights that (2) stem from tradition — necessitates detailed evidence, which is costly both financially and in terms of preparation time. An even more devastating consequence of *Ward* is that it is often difficult if not impossible for native title applicants to produce contemporary evidence to the requisite standard of proof. Evidencing commercial rights against this bar is particularly challenging.[13] The Australian Law Reform Commission ('ALRC') intended to ameliorate this impact of *Ward* in its recommendation that s 223 of the *NTA* should be amended to allow for native title rights and interests to be possessed under traditional laws and customs expressly stated to be able to adapt, evolve, or otherwise develop.[14] That recommendation has not been subject to legislative amendment to date.

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6 (2002) 213 CLR 1 ('*Ward*').

7 *Ward v Western Australia* (1998) 159 ALR 483, 485.

8 See Graham Neate (ed), *Native Title Casenotes, 1971–2007* (LexisNexis, 2009) 67–8.

9 *Western Australia v Ward* (2000) 99 FCR 316.

10 Ibid 333–5 [40]–[43]

11 Richard Bartlett, *Native Title in Australia* (LexisNexis, 4th ed, 2020) 74.

12 *Ward* (n 6) 242 [567], 244 [574].

13 Patrick McCabe, '*Pilki* and *Birriliburu*: Commercial Native Title Rights after *Akiba*' (2015/2016) 19(2) *Australian Indigenous Law Review* 64, 67.

14 Australian Law Reform Commission, *Connection to Country: Review of* the Native Title Act 1993 *(Cth)* (Report No 126, April 2015) 29, recommendations 5-1, 5-5.

III Inconsistency of Incidents Test and Extinguishment of Native Title Rights and Interests

The other relevant aspect of the *Ward* decision was the conceptual development of native title as a collection of discrete rights, each of which was vulnerable to permanent and partial extinguishment by the valid grant of an inconsistent non-native title right under the *NTA*. As a consequence, robust, meaningful native title could be incrementally diminished right by right and element of right by element of right. This approach meant that, even if commercial rights under traditional law and custom could be established, there was a strong chance of that aspect of the right being found to be inconsistent with a non-native title interest. The 'inconsistency of incidents' test has become the accepted means by which extinguishment of native title is assessed. It necessitates a detailed, legalistic consideration of the incidents of any tenure to ascertain, first, whether it is exclusive in nature (if not covered by and expressly deemed to be so by the *NTA*),[15] thus extinguishing all native title rights and, second, if not exclusive, which native title rights are entirely inconsistent. This susceptibility to irreversible extinguishment has been described as the central weakness of native title rights and interests.[16]

Prior to *Ward*, the High Court in *Fejo v Northern Territory* reinforced both the 'bundle of rights' analogy and the vulnerability of native title against non-indigenous rights of access and control.[17] It was held that all native title rights were validly and permanently extinguished by a freehold granted prior to the introduction of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). The High Court rebuffed the relevance of overseas jurisprudence that offered heightened protection for Aboriginal title, including that relating to Canadian Aboriginal Law, due to differences in relevant historical, legal and constitutional circumstances.[18] The legacy of *Ward* heightened inherent fragilities of native title already evident in *Mabo* and has long rendered Australian native title a fragile and fragmented thing: it is difficult to prove due to the legal requirements for precision and establishing a continuing link to pre-sovereignty practices and easy to fracture and extinguish.[19]

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15 *Native Title Act 1993* (Cth) ss 14–15, 23B, 23C, 24JB, 24ID(1)(b), 24MD, 228, 229, 232B.

16 Kate Stoeckel, 'Case Note — *Western Australia v Ward & Ors*' (2003) 25(2) *Sydney Law Review* 255, 259.

17 (1998) 195 CLR 96.

18 Ibid 111.

19 Simon Young, 'The Increments of Justice: Exploring the Outer Reach of *Akiba*'s Edge towards Native Title Ownership' (2019) 42(3) *University of New South Wales Law Journal* 825, 826.

IV *Akiba*: A Turning Point for a More Robust View of Native Title Rights and Suppression over Extinguishment

The recognition of commercial rights received a setback in *Commonwealth v Yarmirr*,[20] in that the High Court decided that rights to trade and exchange fishing resources could only be recognised if exclusive native title were established.[21] At trial, Olney J held that exclusive native title in the territorial sea was necessarily inconsistent with the public rights of navigation and fishing and the obligation at international law to provide an innocent right of passage.[22] This finding was subsequently upheld on appeal.[23] Despite evidence of fishing for economic purposes having been given, the Court refused to recognise non-exclusive native title rights to trade and exchange fishing resources and found it appropriate to add a 'personal, domestic and non-commercial' qualifier to the right to take resources in the determination.[24] Rights to exploit seabed resources were also claimed unsuccessfully with Olney J noting that no evidence had been led in support.[25] In another early case, Mansfield J at first instance found in favour of commercial rights in *Alywarr v Northern Territory*.[26] However, that aspect of the decision was overturned on appeal.[27]

Recognition of native title rights to resources for trade, commercial or any purpose have slowly gained greater recognition in the courts since *Akiba v Queensland [No 2]*.[28] At first instance in that case, Finn J held that rights existed to access resources and use them for any purpose (including commercial purposes), based on strong evidence of both ancient and modern use of sea resources for trade in a non-exclusive native title determination. Further, he considered that the commercial element of the right to take could be severed from the head right so that only the commercial aspect could be the subject of extinguishment while the head right could continue.[29] The FCAFC overturned the decision on the basis that the fishing legislation entirely extinguished native title fishing rights.[30] However, the High Court preferred Finn J's view that the fishing legislation regulated traditional fishing rights without extinguishing them. It took a different (and more beneficial) view to Finn J regarding the purposive aspect of a native

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20 *Commonwealth v Yarmirr* (2001) 208 CLR 1.

21 Ibid 75–6 [123]–[128].

22 *Yarmirr v Northern Territory [No 2]* (1998) 82 FCR 53, [80].

23 *Commonwealth v Yarmirr* (2001) 208 CLR 1, 61–2 [77] (Gleeson CJ, Gaudron, Gummow and Hayne JJ), 94–8 [188]–[202] (McHugh J).

24 Ibid 83–4 [154]–[155] (McHugh J).

25 Ibid 84–5 [158]–[159] (McHugh J), *Yarmirr v Northern Territory* (2001) 208 CLR 1, [117]; *Yarmirr v Northern Territory* [No 2] (1998) 82 FCR 53,[158].

26 *Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory* (2004) 207 ALR 539.

27 *Northern Territory v Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group* (2005) 145 FCR 442.

28 (2010) 204 FCR 1.

29 Ibid, [842], [847].

30 *Commonwealth v Akiba* (2012) 204 FCR 260.

title right, being a separate or severable incident of the head right, stating that '[t]he purpose which the holder of that right may have had for exercising the right on a particular occasion was not an incident of the right; it was simply a circumstance attending its exercise.'[31] Underpinned by these two important findings (lack of extinguishment and relevance of right over exercise), the High Court found it appropriate to recognise a broad native title right to take resources for any purpose.

Subsequent cases in the Western Desert[32] and remote Northern Territory[33] followed from *Akiba v Commonwealth* ('*Akiba*'),[34] with the trial judges in those cases also recognising broad non-purposive rights to take resources based on more limited lay Indigenous and expert anthropological evidence than in *Akiba*. The decision of North J in *Willis v Western Australia* in particular,[35] which was upheld on appeal,[36] should herald a less onerous approach to obtaining recognition of an unrestricted right to take resources. These decisions emphasise the importance of the evidence of traditional laws and customs to establish the existence of rights. However, they also pertain to areas of Australia where traditional systems are more intact than in many other parts, which points to the need for further jurisprudence in an urbanised context before unconstrained and commercial rights are likely to be embraced more generally.[37] These decisions also reflect the majority view in *Akiba*[38] that evidence of the activities themselves (including commercial activities) is not necessary, although it may assist in proving the existence of the right. Further, the mere fact that a right has not been exercised in a particular way previously, does not mean there is no capacity for it to be exercised in such a way.[39] Where the traditional laws and customs evidence is not as strong, governments are likely to seek a higher level of evidence specific to the right and exercise of the right, thus reverting back to a *Ward*-like approach, despite the jurisprudential progress. McCabe comments that '[t]hese decisions represent the first fruit of the tortuously slow development of the jurisprudence in this area.'[40]

The ALRC's *Connection to Country: Review of the* Native Title Act 1993 *(Cth)* was written after *Akiba* but prior to the three subsequent decisions discussed.[41] It recommended statutory clarification be provided for s 223(2) to expressly refer to

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31 *Akiba v Commonwealth* (2013) 250 CLR 209, 241 [66] (Hayne, Kiefel and Bell JJ) ('*Akiba*').
32 *Willis v Western Australia* [2014] FCA 714; *BP (Deceased) v Western Australia* [2014] FCA 715.
33 *Rrumburriya Borroloola Claim Group v Northern Territory* (2016) 255 FCR 228.
34 *Akiba* (n 31).
35 [2014] FCA 714.
36 *Western Australia v Willis* (2015) 239 FCR 175 ('*Willis*').
37 Richard Bartlett, *Native Title in Australia* (Lexis Nexis, 4th ed, 2020) 93–4.
38 *Akiba* (n 31) 244–5 [75]–[76] (Hayne, Kiefel and Bell JJ).
39 *Willis* (n 36) 187–8 [34]–[38], 190 [43]–[44] (Dowsett J), 215–6 [99]–[101] (Jagot J).
40 McCabe (n 13) 64.
41 Australian Law Reform Commission, *Connection to Country: Review of* the Native Title Act 1993 *(Cth)* (Report No 126, April 2015).

trade in the non-exhaustive list of activities conducted under native title rights and interests, making clear that native title rights can be exercised for any purpose (both commercial and non-commercial).[42] However, those proposed amendments have also not been made since the ALRC Report and were not canvassed in the suite of *NTA* amendments enacted in March 2021. Recognition of broader native title rights to take resources therefore continues to be addressed on a case-by-case basis by governments and certain other respondent parties. In at least some states, respondent parties tend to emphasise that rights to take resources for commercial purposes will be difficult to establish and not a default position.

The recent decision of Rares J in *Rainbow v Queensland* covered a limited number of litigated matters that could not be agreed between all parties.[43] Queensland had accepted connection for the purpose of entering a consent determination, except in relation to the inclusion of certain apical ancestors in the claim-group description, a question regarding succession and the inclusion of a right to take resources absent the usual non-commercial, personal use qualifier. Those matters (among others) were litigated with evidence given on-country in the Gulf of Carpentaria an hour or so south-west of Karumba. Relevantly, Rares J referred to *Akiba*, noting that it involved a question of extinguishment whereas the relevant issue in the present case was how a pre-sovereignty right to take resources should be expressed by the common law in a determination under s 225(b) of the *NTA*.[44] His Honour noted that evidence of exchange transactions using resources of the claim area occurred traditionally both for maintaining relationships with other groups and to obtain a reciprocal benefit.[45] In a contemporary sense, Rares J considered evidence of commercial exploitation of sandalwood and development of a cattle station to be acceptable adaptations of those traditional rights.[46]

Rares J rejected a broad anthropological construct proposed by the State's expert, which did not distinguish between the right and its exercise but incorporated both in a proposed expression of the interest. His Honour drew on the comments of the FCAFC in *Commonwealth v Akiba*,[47] stating that ss 211 and 227 of the *NTA* make it clear that there is a distinction between the right and its manner or proscriptions on exercise. Moreover, Rares J considered that s 225(b) of the *NTA* requires the detail of the right, rather than the exercise of it, for the purposes of the determination, and that more detailed regulation is a matter for the internal operation of traditional laws and customs.[48] His Honour proposed

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42 Ibid 261 [8.166].
43 *[No 2]* [2021] FCA 1251 ('*Rainbow v Queensland*').
44 Ibid [311].
45 Ibid [313].
46 Ibid [322].
47 (2012) 204 FCR 260.
48 Ibid 102–3 [320]–[321].

that the determination included a 'right to access and to take for any purpose resources in the [determination area]',[49] consistent with the terminology used by the High Court in *Akiba* and by the Federal Court in *Rrumburriya Booroloola Claim Group v Northern Territory* ('*Rrumburriya Borroloola*).[50] At the time of writing, the parties are settling an agreement under s 87A of the *NTA* to give effect to Rares J's findings.

The High Court's decision in *Akiba* also marked the beginning of a trend for higher courts to prefer an interpretation that favours suppression of native title rights rather than extinguishment.[51] A more beneficial application of the 'inconsistency of incidents test' not only allows native title to continue to exist in general but provides a greater opportunity for broader rights and interests to be recognised. In recent years, the FCAFC heard the first two extinguishment cases in New South Wales (*Roberts v Attorney-General (NSW) [No 2]* and *Ohlsen v Attorney-General (NSW)*)[52] since the High Court decision in *Wilson v Anderson,*[53] in which certain leases were held to have entirely extinguished native title. [54] Unfortunately, on appeal, the Full Court decided that the largely beneficial decision of Rangiah J in *Roberts v Attorney-General (NSW) [No 2]*,[55] which held that s 47B of the *NTA* could apply where a particular type of reserve was in place at the date of claim, was not an appropriate separate question candidate. The effect of this decision was to negate the precedential value of the decision at first instance.[56] However, Griffiths J in *Ohlsen v Attorney-General (NSW)*[57] found that none of the eight different statutory interests considered entirely extinguished native title. The Attorney-General of NSW sought leave to appeal the decision to the FCAFC, which unanimously dismissed the appeal, upholding the findings of Griffiths J.[58] These decisions are reflective of a developing jurisprudence framing the content of native title as a broader, more resilient right in the context of potentially inconsistent state acts.

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49 *Rainbow v Queensland* (n 43) [306].

50 (2016) 255 FCR 228.

51 *Yanner v Eaton* (1999) 201 CLR 351 ('*Yanner*'); *Queensland v Congoo* (2015) 256 CLR 239; *Western Australia v Brown* (2014) 253 CLR 507.

52 *Roberts v A-G (NSW)* [2019] FCA 1158; *Ohlsen v A-G (NSW)* [2021] FCA 169.

53 (2002) 213 CLR 401, [179], [206].

54 See *Western Land Act 1901* (NSW) regarding leases that were not included as the extinguishing Scheduled Interests in the *Native Title Act 1993* (Cth).

55 [2020] FCAFC 128.

56 *Roberts v A-G (NSW) [No 2]* [2020] FCAFC 128.

57 [2021] FCA 169.

58 *A-G (NSW) v Ohlsen* [2022] FCAFC 38.

V Post-*Akiba* Parallels in Canadian Jurisprudence and Potential for Further Flexibility

Canadian jurisdiction distinguishes the requirements and tests for evidencing particular usufruct Aboriginal rights compared to those for comprehensive Aboriginal title. In relation to the former, a Canadian corollary to the High Court's findings in *Akiba*, which distinguished between the existence of a right and its exercise, is found in *R v Van der Peet* ('*Van der Peet*').[59] However, the *Van der Peet* test demonstrates a greater tolerance for a more tenuous link to past practices without the same need to demonstrate generation-to-generation continuity as in the Australia cases, at least up until the recent decision of Rares J in *Rainbow v Queensland.*[60] To ascertain whether Indigenous people hold an existing Aboriginal right capable of being protected under s 35(1) of the *Canadian Constitution*,[61] the *Van der Peet* test has been restated in subsequent cases as requiring the following:

1. Characterisation of the right;
2. determination, whether on the evidence, a relevant pre-contact practice, tradition or custom existed that was integral to that culture; and
3. determination whether the modern right is demonstrably connected to and reasonably regarded as a continuation of the pre-contact practice.[62]

The most restrictive aspect of the *Van der Peet* test, being the requirement for evidence that a practice was 'integral to that culture', was reconceptualised by the decision in *R v Sappier*.[63] In that case, the Supreme Court of Canada expressly recognised contemporary uses of resources for commercial and survival purposes. The Canadian jurisprudence has proven flexible enough to recognise particular rights where their exercise has been the subject of significant periods of hiatus, by use of contemporary methods or indeed entirely exercised through contemporary uses. The development of the jurisprudence has been overlooked by certain Australian courts, which have relied on the original *Van der Peet* test in the context of s 211 prosecutions,[64] on which more shortly.

Recently, in the context of a prosecution case, the Canadian Supreme Court upheld protection of hunting rights by a citizen of the USA under the Canadian

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59 *R v Van der Peet* (1996) 137 DLR (4th) 289 (Supreme Court of Canada).

60 *Rainbow v Queensland* (n 43).

61 *Canada Act 1982* (UK) c 11, sch B ('*Constitution Act 1982*'); Constitution Act 1867 (Imp), 30 & 31 Vict, c 3 ('*Constitution Act 1867*').

62 *Lax Kw'alaams Indian Band v A-G (Canada)* [2011] 3 SCR 535, 580. The original test was set out by Lamer J in *R v Van der Peet* (1996) 137 DLR (4th) 318–9.

63 [2006] 2 SCR 686.

64 Steven Churches, 'Aboriginal Fishing under the Native Title Act: An Illusion' (Law Society Paper, 27 July 2021) 17.

Constitution.[65] That citizen was held to come within the term 'Aboriginal peoples of Canada, despite the relevant group having been progressively moved south of the USA–Canadian border and their hunting rights not having been exercised in Canada for some 90 years. While this demonstrates a level of flexibility yet to be seen in Australia, the majority in *R v Desautel* emphasised that the final two aspects of the adapted *Van der Peet* test are highly fact specific and, therefore, the trial judge is best placed to determine those matters.[66] This echoes the views of the Australian higher courts in *Akiba*, *Birriliburu* and *Rrumburriya Borroloola,* that due to the fact-specific nature of the inquiry, the trial judge is best placed to decide the issue. This necessitates an ongoing need to prepare comprehensive and focussed evidence of the particular traditional laws and customs in both countries. While there are commonalities between the two countries in the understanding of Aboriginal rights, and both share a quite mechanistic approach to non-exclusive rights, the Canadian test is a little more forgiving in relation to the extent of rights to resources, including contemporary exercise of the rights.

However, that is not the full extent of the more benevolent approach adopted in Canada, as recognition of Aboriginal title in that country (encompassing rights to resources) is squarely contextualised in the context of reconciliation and formal recognition of an Indigenous right to self-government.[67] Since *Delgamuukw v British Columbia,*[68] a distinct test has been employed by the Canadian courts for establishing Aboriginal title (as opposed to usufructuary rights), which is more akin to exclusive possession native title in Australia. If title is established, the holders are not limited to recognition of traditional uses of the land, and automatically have the exclusive rights to control and benefit from the land in respect of all resources,[69] including for commercial purposes,[70] subject only to an inherent limit on uses that are irreconcilable with continuing Aboriginal title into the future.[71] In contrast to Australia, even mineral rights remain intact for the benefit of First Nations groups where Aboriginal title is established.[72] The Canadian articulation of Aboriginal title content has been described as more expansive and culturally sensitive than its Australian counterpart.[73] Australian jurisprudence, while accepting that commercial rights

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65 *R v Desautel* [2021] SCC 17, [38].

66 Ibid [55].

67 Larissa Behrendt, 'The Protection of Indigenous Rights: Contemporary Canadian Comparisons' (Research Paper No 27 1999–2000, Parliamentary Library, Parliament of Australia, 27 June 2000), 9-10.

68 (1997) [1997] 3 SCR 1010.

69 Kent McNeill, 'The Post-*Delgamuukw* Nature and Context of Aboriginal Title' (Paper, Osgoode Hall Law School Toronto, May 2000) 17 <https://fngovernance.org/wp-content/uploads/2020/09/content.pdf>.

70 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

71 Ibid 1088 [125].

72 *Delgamuukw v British Columbia* (1993) 104 DLR (4th) 470, 530 (British Columbia Court of Appeal).

73 Larissa Behrendt, 'The Protection of Indigenous Rights: Contemporary Canadian Comparisons' (Research Paper No. 27 1999–2000, Parliament of Australia, 27 June 2000).

may exist in relation to a non-exclusive right to take resources, does not apply any differing legal test or automatic beneficial consequence for exclusive native title. Generally, there has been a concerted attempt by government and mining parties to limit native title rights to resources. Mineral and petroleum resources in Australia have long been held to be absolutely owned by the Crown and that vesting extinguished any native title.[74]

VI Cautionary Lessons From S 211 *NTA* Litigation

Much of the litigation concerning resource use by First Nations People in Australia has arisen in the context of s 211 of the *NTA*. These protracted state-driven prosecutions may well contribute to widespread reluctance by governments to readily accept commercial rights to take resources where the exercise of non-commercial rights already generates concern about exploitation of resources and consistency with traditional practice. Section 211 provides a defence for native title holders exercising a limited suite of native title rights and interests for personal, domestic, non-commercial communal purposes, where those activities are otherwise prohibited or restricted without a statutory permission. As noted previously, s 211 clearly contemplates that the native title right may continue to exist despite regulatory regimes impacting the exercise of such rights. This defence is only available where the relevant legislation has not extinguished native title rights in respect of the subject resource but merely regulates the taking of the resource.[75] This issue in relation to marine resources was definitively clarified by the High Court in *Karpany v Dietman*.[76] In that case, the High Court unanimously held that the South Australian State fisheries legislation had not extinguished native title. Furthermore, by operation of s 109 of the *Australian Constitution*, any state legislation purporting to prohibit such activity will be rendered invalid where the activity is conducted in the exercise of native title rights.[77]

As s 211 does not extend to commercial uses, litigation has predominantly focussed on either the threshold to establish common law native title prior to a determination being made,[78] or, whether the use was for the limited purposes protected under s211 or for commercial purposes.[79] Related debate has also occurred about whether s 211 should apply to traditional hunting of threatened

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74 *Ward* (n 6) 273 [640] (Callinan J).
75 *Yanner* (n 51).
76 (2013) 252 CLR 507.
77 Ibid 518 [19].
78 *Mason v Tritton* (1994) 34 NSWLR 572.
79 Ibid; *Stevenson v Yasso* [2006] 2 Qld R 150; *Fisheries Act 1994* (Qld) s84; *Wanganeen v Dietman* (2021) 139 SASR 170; *Fisheries Management Act 2007* (SA) s74.

species, or whether such hunting amounts to unacceptable animal cruelty.[80] Following detailed consideration of fishing prosecutions in which a s 211 *NTA* defence has been deployed, Churches outlines the complex issues around sufficiency of evidence and onus of proof, which are not clarified in the *NTA*. In the South Australian context, he particularly addresses onus where there is a statutory presumption of intent about the reasons for resource take in the relevant state legislation.[81] He concludes 'that the application of the NT Act to ascertaining native title as it relates to fishing rights as performed by the courts has deprived the NT Act of any realistic utility. The result is that State Fisheries Departments are free to run their "one size fits all" approach to regulating State fisheries, exactly not what the NT Act intended.'[82]

In New South Wales and South Australia there have been extensive prosecutions where abalone have been taken (including in large quantities) by Indigenous people, generating alternative commentary about both the scope of taking for communal and traditional purposes and consideration of whether the defence allows a loophole for poaching.[83] In *Wanganeen v Dietman*,[84] the South Australian Supreme Court considered an appeal from the decision of a magistrate who found that abalone taken by three Narungga men, purportedly for a 21st birthday party, to be outside the scope of s 211. In distinguishing between cultural and commercial use, the Court found that the purpose of the take is a relevant consideration and quashed the Magistrate's finding that the take was necessarily for commercial purposes, clarified matters of who bears the onus of proof to what standard, and remitted other counts to the Magistrate for a fresh trial.[85] The years and costs involved in these prosecutions to achieve glacial clarification of the law would seem better expended on developing a positive statutory inclusion in state legislation expressly permitting cultural take. Amendments were made in 2009 to the *Fisheries Management Act 1994* (NSW) ('*FMA*'), including a provision authorising take for cultural fishing purposes, however this provision has still not commenced.[86] There is also a very real issue about whether the *FMA* can regulate the proprietary interests of native title holders at all given that s 287 expressly

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80 Dominique Thiriet and Rebecca Smith, 'In the Name of Culture: Dugong Hunting is Simply Cruel', *The Conversation* (Article, 8 April 2013) <https://theconversation.com/in-the-name-of-culture-dugong-hunting-is-simply-cruel-12463>.

81 Churches (n 64); *Wanganeen v Dietman* (2021) 139 SASR 170; *Fisheries Management Act 2007* (SA) s 72(3)(a).

82 Churches (n 64).

83 Elizabeth Harvey, 'Hunting, Shooting, Fishing: The Content of Native Title Rights and the Right to Take and Use Resources for Commercial Purposes' (Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Conference, 7 June 2017) <https://aiatsis.gov.au/publication/116630>.

84 (2021) 139 SASR 170 (Full Court).

85 Ibid 200–1 [154]–[164], 215 [245].

86 *Fisheries Management Act 1994* (NSW) s 21AA.

states that the *FMA* does not affect the operation of the *NTA*.[87] This is a frequently employed device where the government introduces legislation that would otherwise constitute a future act under the *NTA*.[88] The consequence, however, is that the legislation cannot bind native title holders, and this complex legal position is not well understood by those responsible for implementing the legislation. It seems to be a mechanism that delays reckoning with impact on native title rights to another day. That day may be approaching.

Many s 211 cases do not proceed to court, are settled prior to hearing[89] or do not pertain to situations where there is a pre-existing native title determination, let alone one recognising native title rights to use resources for unconstrained purposes. It will be interesting to watch this issue evolve in the assessment of connection evidence in *NSD1331/2017 South Coast People v Attorney-General (NSW)*,[90] which covers the area in which most of the NSW prosecutions have occurred. There are a number of fishing prosecutions running in parallel with the native title application in this area.[91] The Australian Institute of Aboriginal and Torres Strait Islander Studies ('AIATSIS') has published a study of mutton fish (abalone) traditionally taken for subsistence and trade between the Indigenous groups and historically with the Chinese on the South Coast of NSW. This one source, at least, appears supportive of the existence of a native title right to fish commercially in the region.[92]

The s 211 experience has probably had some bearing on the reservation of some state governments to recognise native title rights to resources on an unrestricted basis. In consent determination negotiations on the East Coast, there

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87 See ibid s 287. Section 287 states that this 'Act does not affect the operation of the *Native Title Act 1993* of the Commonwealth or the *Native Title (New South Wales) Act 1994* in respect of the recognition of native title rights and interests within the meaning of the Commonwealth Act or in any other respect.'

88 See *Native Title Act 1993* (Cth) s 233. Section 233 defines a 'future act' in relation to land or waters. There is some complexity to the definition but generally it refers to legislation (post 1 July 1993) or other acts (post 1 January 1994) that affect native title.

89 Kate Lockley, '"They Call It Black Market, We Call It Survival": Far South Coast Fishermen Denounce Abalone Arrests', *Illawarra Mercury* (online, 11 February 2017) <https://www.illawarramercury.com.au/story/4461326/they-call-it-black-market-we-call-it-survival-south-coast-fishermen-denounce-abalone-arrests/>.

90 *South Coast People v A-G (NSW)* (Federal Court of Australia, NSD1331/2017, commenced 3 August 2017).

91 Ibid; *Lavender v Commonwealth* (Federal Court of Australia, NSD1590/2019, commenced 26 August 2017); *Lavender v Director of Fisheries Compliance, Department of Industry Skills and Regional Development* (2018) 359 ALR 96; Lilli Ireland, 'Under the Sea: Sea Country Connections on the South Coast of New South Wales' [2021] (1) *AIATSIS Native Title Newsletter* 1, 4; Joshua Becker and Adriane Reardon, 'Indigenous Cultural Fishers Call for Immediate Suspension of Fishing Prosecutions amid Native Title Claim', *ABC* (Article, 22 October 2021) <https://www.abc.net.au/news/2021-10-21/indigenous-fishers-in-nsw-south-coast-targeted/100555658>; Nicola Pain and Georgia Pick, 'Balancing Competing Interests in the Criminal Justice System: Aboriginal Fishing Rights in Coastal New South Wales' (2020) 43(4) *University of New South Wales Law Journal* 1383, 1395.

92 Beryl Cruse, Liddy Stewart and Sue Norman, *Mutton Fish: The Surviving Culture of Aboriginal People and Abalone on the South Coast of NSW* (Aboriginal Studies Press, 2005) [27]-[28].

is a commonly employed default qualifier that rights to take and use natural resources be for 'personal, domestic, non-commercial communal' purposes only. This qualification replicates the type of rights already protected by s 211 of the *NTA*, allowing no further expansion.

All s 87 (or s 87A agreements) in support of a consent determination include a clause under s 225(d) of the *NTA* (regarding the relationship between native title and non-native title rights and interests) that the determined native title rights are subject to the laws of the State and the Commonwealth. However, there is limited jurisprudence about how that takes effect in practice. The assumption is that the native title rights and interests concede to valid non-native title interests included for the purpose of s 225(d).[93] In relation to statutes enacted prior to the NTA future act regime taking effect, generally it is accepted that those statutes will either extinguish or regulate relevant native title rights and interests depending on the extent of inconsistency. However, where a native title right is affected by a statute enacted after 24 December 1993, (unless the statute expressly states that it does not affect native title rights and interests or has been subject of future act processes), relevant provisions will either be invalid for native title purposes[94] or, if s211 of the NTA applies, the native title right can still be exercised without the need to obtain any interest required by regulation. As the *NTA* was enacted, in part, to give effect to *Mabo*, s 225(d) was intended to clarify the situation where there is no extinguishment but where there is temporal suppression or regulation of native title by co-existing non-native title rights and interests.[95]

Therefore, if there were a determined commercial right to take and use resources and a particular resource was subject to a valid statutory commercial exploitation regime, then any native title holder would need to comply with that regime in the same way as a non-naïve title holder does or be entirely prevented from exercising the native title right in that manner for the period the regime is in place. It seems increasingly inappropriate for a hard-won native title right to use resources for any, or commercial, purposes to be incapable of exercise. While there are broader public interest and sustainability considerations for government, the determined native title holders should hold a unique place in the

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93 Robert Hudson, 'The Jurisprudential Basis to the Common Law Notion of Indigenous Title: Some Comparisons' (2018) 18(2) *Global Jurist* 29170037:1–19, 16; Tran Tran and Claire Stacey, 'Wearing Two Hats: The Conflicting Governance Roles of Native Title Corporations and Community/Shire Councils in Remote Aboriginal and Torres Strait Islander Communities' (2016) 6(4) *Land, Rights, Laws* 1, 6, 11, 17.

94 See *Native Title Act 1993* (Cth) s 24OA. Section 24OA provides that if a future act is not covered by a preceding provision of division 3, it is invalid for native title purposes. This would cover legislation that affects native title rights and interests but is not covered by s 24MD (ie the legislation does not disadvantage native title holders to any greater extent than if they were freehold owners of the land or adjoining land).

95 *Mabo* (n 1) 76, 79, 81; *Native Title Act 1993* (Cth) ss 23G(1)(b)(ii), 238 (non-extinguishment principle).

resource management arena in recognition of their relationship to country and lengthy exclusion from economic exploitation of resources. Not only does the jurisprudential development increase pressure on state governments to amend legislation to facilitate Indigenous rights to resources without needing to have recourse to s 211, but it raises the type of issues expanded upon below. The validity and application of certain legislation under both general law and for native title purposes is increasingly likely to be tested in the courts if used to constrain exercise of a First Nations right to take and use of resources.[96]

VII Commercial Native Title Resource Rights and Existing Statutory Regimes

The interface between native title rights recognised under the *NTA* and state resource management legislation more generally is a largely unaudited matter that may also contribute to government hesitancy in recognising commercial native title rights. While consent determinations contain the clauses under s 225(d), as referred to above, this will be of little comfort should the practical effect of such a relationship clause regarding resources ever be litigated and found to be inadequate or be interpretated to have an unanticipated effect. Governments have traditionally managed and profited from commercial exploitation of certain natural resources as the assumed owner under state legislative regimes.

There are many cases where statutes are ambiguous about whether natural resources (apart from minerals or petroleum) are vested in the Crown absolutely or just for the management purposes. As outlined above, this factor is critical to whether native title rights in those resources continue to exist. Where the Crown does not have absolute ownership but has benefited from royalties and licence fees, a question arises about not only the native title holders' future act rights, but potentially financial recompense if they held commercial rights to those resources. An example for consideration is raised in the *Forestry Act 1959* (Qld) ('*FA*'), which provides for the issue of sales permits for the commercial sale of 'Forest Products' including quarry materials and sandalwood throughout Queensland.

The Chief Executive of the relevant department is empowered to sell any Forest Products where they are the 'absolute property of the Crown' and to grant licences and permits to others under s 56 of the *FA*, subject to fees and royalty arrangements. The status of the Crown as absolute owner is a rebuttable presumption. No doubt exclusive native title over the Crown land would disprove that presumption and possibly non-exclusive native title would also suffice. If

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[96] See *Native Title Act 1993* (Cth) s 24OA. Section 24OA provides that a future act is invalid unless covered by a provision of the Act. Section 233 of the NTA defines a 'future act' to include the making, amendment or repeal of legislation that takes place after 1 July 1993.

that is the case, then can the State validly grant those permits at all and would native title holders also be entitled to royalties?

This issue was raised by an application filed in the Federal Court on 30 June 2020 by the Registered Native Title Body Corporate ('RNTBC') for the determined Kowanyama native title holders. The RNTBC sought declaratory relief and damages for the issue of sales permits by the Queensland Government over the determined area, on the grounds that it did not hold absolute property in the quarry resources allowing it to issue the permits. The 2014 Kowanyama determination included some areas of exclusive native title, but only rights for personal, domestic, non-commercial communal purposes in the non-exclusive areas.[97] The matter has been settled and discontinued after the State, Applicant and Local Council negotiated a confidential ILUA, which avoids such vexed issues being considered by the Court. However, the recognition of commercial rights to take resources would inevitably seem to amplify the consequences in such situations.

VIII Compensation Considerations Arising from Recognised Commercial Rights to Take Resources

Another line of jurisprudence that may be contributing to the slow and conservative recognition of commercial rights to take resources is native title compensation and potential implications for commercial rights. This is an emerging area of jurisprudence, many aspects of which, including compensation quantum for exclusive and commercial native title rights to resources, remain untested. An entitlement to compensation on just terms for loss, diminution, or impairment of native title is provided for in pt 2 div 5 of the *NTA*. The *NTA* provides little guidance, however, regarding methodology to determine quantum of the compensation or how it is to be calculated for different types of native title rights and interests that have been determined. Section 61 of the *NTA* requires that there be an approved determination of native title in place before a determination of native title compensation can be made.[98]

Despite connection assessment by the state or territory as first respondent in all native title claims applications being explicated purely on evidentiary grounds, it is difficult to accept that there is no correlation between government reticence to accept commercial (and exclusive) native title rights and the advent of compensation litigation.

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97 National Native Title Tribunal, 'Extract from the National Native Title Register', *National Native Title Register Details:* Daphney v Queensland (NNTT Register Extract, 11 March 2015) <http://www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/NNTR_details.aspx?NNTT_Fileno=QCD2014/016>.

98 *Jango v Northern Territory* (2006) 152 FCR 150, 165–6 [40]–[41] (Sackville J).

In *Mabo*, the High Court was clear that the Crown has the power to extinguish native title by clear and plain legislation.[99] It was also accepted by the majority that any compensation for loss or impairment of native title relied on the enactment of the *RDA*, rather than being available at common law,[100] as reflected in the *NTA* compensation regime. Whether native title rights in natural resources have been extinguished, impaired or merely suppressed, relies upon the clear and plain intent of the relevant legislation as to its impact on native title rights on the relevant resource. Bartlett summarises the impact of all state minerals and petroleum legislation, which had, by the late 19th century, vested those resources in the Crown. In doing so, any native title rights to those resources were extinguished prior to 1975 and any claim to native title compensation for the loss of the resource itself is precluded.[101]

However, much of the legislation involving non-mineral resources is more recent, including post-1975 and post-1994 statutes that will squarely raise these compensation and future act considerations, engendering some uncertainty for governments in respect of other types of resources. Compensation may be payable for suppression of rights to those resources where the Crown merely regulates use, or for loss or impairment of rights to resources where there has been some level of legislative extinguishment by application of the inconsistency of incidents test. It is a matter of logic that compensation for commercial rights to these resources would be at a higher quantum than for non-commercial purposes.

IX *GRIFFITHS*

In a first hearing in relation to whether (under three separate applications that proceeded together to trial) the Ngaliwurru and Nungali People held native title in accordance with s 223 of the *NTA*, Weinberg J held, contrary to the Applicants' submissions, that they had established non-exclusive and non-commercial native title rights and interests.[102] These findings were reflected in the resulting determination, which was subsequently appealed to the Full Federal Court. The appeal was successful. The Full Federal Court found that exclusive native title existed over parts of the determination area,[103] and confirmed a non-exclusive right to 'share or exchange subsistence and other traditional resources obtained on or from the land or waters (but not for any commercial purposes)' in the non-exclusive areas.[104]

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99 *Mabo* (n 1) 75–6, 195 (Brennan J), 214–6 (Toohey J).

100 Ibid 84 (Brennan J); Richard Bartlett, *Native Title in Australia* (LexisNexis, 4th ed, 2020) 25; *Native Title Act 1993* (Cth) s 7.

101 Bartlett (n 104) 412–3.

102 *Griffiths v Northern Territory* (2006) 165 FCR 300, 374–5 [795]–[798] (Weinberg J).

103 *Griffiths v Northern Territory* (2007) 165 FCR 391, 428–9 [127]–[128] (French, Branson and Sundberg JJ).

104 Ibid annexure 1, 441 [5(h)].

A series of applications collectively known as the '*Griffiths* compensation' litigation ensued, resulting in findings about what could be claimed and consequential amendments to the compensation application,[105] questions of extinguishment by non-native title interests and liability,[106] and the quantum of compensation arising.[107] His Honour determined that the loss of rights by compensable acts was compensable against economic and non-economic (cultural loss) heads to which interest was applied. The decision only applied to non-exclusive native title to which Mansfield J ascribed 80% of the total freehold value when considering economic loss. On appeal, the Full Court generally endorsed the methodology employed and the evidentiary findings of the primary judge, while reducing the total quantum including by adjusting the economic value of non-exclusive native title to 65% of the freehold value.[108]

Two of the three appeals from the Full Court decision were heard by the High Court. The grounds of appeal from the Commonwealth and Northern Territory Governments included that the compensation award was 'manifestly excessive'.[109] In brief, the High Court found that Mansfield J demonstrated no legal error in the approach taken in applying s 51(1) of the *NTA* and agreed that the effect of the compensable acts was incremental and cumulative.[110] Rather than considering compensation quantum for the loss or impairment of each native title right, at all levels, the Court adopted a more formulaic and holistic approach to valuing loss of non-exclusive rights and interests. The High Court ultimately decided that the suite of non-exclusive rights in *Griffiths* attracted 50 per cent of the freehold economic value. Adopting the 'intuitive' approach of Mansfield J (valuing cultural loss, having regard to the evidence of the nature of the group's connection and the effect of the compensable acts on that connection within the broader area held by the group), the High Court did not disturb the amount of $1.3 million endorsed by the Full Federal Court.[111] The quantum method in this case did not have to cover commercial rights to take resources, as the determined rights and interests were expressly limited to exclude commercial uses. Although it is likely that existence of recognised commercial rights to resources would increase the quantum in some manner, there is no clarity to guide quantum of that additional liability. The High Court did however expressly uphold the Full Federal Court's findings that commercial contracts entered into in relation to use of land and resources in that case were immaterial to the compensation assessment but could be considered 'pre-estimates' of compensatory value.[112]

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105 *Griffiths v Northern Territory [No 2]* [2006] FCA 1155 (Weinberg J).

106 *Griffiths v Northern Territory* [2014] FCA 256 (Mansfield J).

107 *Griffiths v Northern Territory [No 3]* (2016) 337 ALR 362 (Mansfield J).

108 *Northern Territory v Griffiths* (2017) 256 FCR 478, 520 [139], 589 [465] (North ACJ, Barker and Mortimer JJ).

109 *Northern Territory v Griffiths* (2019) 269 CLR 1, 102–3 [211] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

110 Ibid 105–6 [223]– [224], 109–10 [237].

111 Ibid 87–9 [161]–[165].

112 Ibid 108 [233].

At first instance, Mansfield J referred to the potential for evidence to justify the application of compound, rather than simple, interest as from the date of the compensable act, if the native title holders could establish that they were likely to have used any compensation monies paid contemporaneously with the act for commercial activities or investment.[113] The High Court agreed that compound interest may be appropriate in some cases, but not on the facts in *Griffiths*.[114] Eddie Cubillo has commented that this preference for simple interest as a default position is an act of thinly-veiled racism, again missing an opportunity for Aboriginal People to participate in economic growth. He observes that Australians routinely benefit from compound interest simply from the compulsory contributions to superannuation and yet, in *Griffiths*, there was an assumption made that the group would not have invested any monies owed and are therefore only entitled to simple interest.[115]

It seems somewhat self-evident that, if native title rights to take resources include commercial uses, and particularly if the exercise of them was profitable, that it would be easier to mount a case for compound interest to apply. Given the extreme difference in the ultimate award depending on which type of interest applied, potential liability for compound interest to apply is something governments would understandably be cautious about facilitating and native title parties understandably interested in exploring further.

X Current Position in Consent Determinations

Having regard to the variety of potential factors of both a jurisprudential and risk-management character, the cautious take up of commercial rights to resources in consent determinations is perhaps unsurprising. However, it also somewhat parsimonious in the context of more progressive Canadian and New Zealand developments in this space, some of which have been discussed in this article. By 2019, there were still relatively few consent determinations that include unlimited or commercial rights to take and use natural resources, despite the jurisprudential advances post-*Akiba*. This prompted Young to observe that 'the tighter knots in the Australian doctrine will take some untying'.[116] In the context of a consent determination where the existence of commercial rights is the final outstanding matter in dispute, it is difficult, if not impossible, for the court to make a decision solely about the sufficiency of evidence without it amounting to

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113 *Griffiths v Northern Territory* (2016) 337 ALR 362, 413 [275]–[277] (Mansfield J).

114 *Northern Territory v Griffiths* (2019) 269 CLR 1, 76–7 [133] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

115 Eddie Cubillo, 'An Indigenous View on the Timber Creek Decision — The Trauma that is Native Title', *Linkedin* (Web Page, 24 March 2019) <https://www.linkedin.com/pulse/indigenous-view-timber-creek-decision-trauma-native-cubillo-eddie>.

116 Simon Young, 'The Increments of Justice: Exploring the Outer Reach of *Akiba*'s Edge Towards Native Title Ownership' (2019) 42(3) *University of New South Wales Law Journal* 825, 828.

a judicial advisory opinion. Moreover, there is no legal standard for the court to decide whether the 'credible evidence' standard used for consent determinations has been reached and it cannot compel a state to settle a native title application by entering into a consent determination pursuant to a s 87 agreement where it asserts the credible evidence standard has not been achieved.[117] Obiter from North J[118] and Jagot J[119] about evidentiary requirements to underpin a consent determination were made in the context of an early evidence hearing in *Lovett* and the parties having already reached the necessary agreement on all rights and interests in *Widjabul*.[120]

Recently, and prior to *Rainbow v Queensland*,[121] the Queensland Government and other respondent parties entered a first consent determination in favour of the Waanyi people over an area including part of the Doomadgee DOGIT, which includes a right to 'take Natural Resources from the area' absent the usual restrictive qualifier.[122] There are no NSW determinations to date that include an unrestricted non-exclusive right to take resources. In contrast, most recent Western Australian consent determinations since *Atkins v Western* Australia[123] include a non-exclusive right to take resources 'for any purpose' [124] or without any qualifier.[125] A Northern Territory determination has also included recognition of rights to 'access and to take for any purpose the resources of the area'.[126]

Recently, an application to vary the existing determination in *Ngajapa v Northern Territory*,[127] under ss 13(1)(b) and 16(1) of the *NTA*, was successfully made in the Northern Territory to remove the qualifier on the right to take and use resources only for personal, communal, domestic and non-commercial purposes and replace it with 'for any purpose.'[128] This application was made with the consent of the Northern Territory Government, which, with the applicant, jointly sought that the Court adopt the findings in *Rrumburriya Borroloola Claim Group v Northern Territory*[129] in support of the variation, as the claim groups in both matters had substantial overlap and were subject to the same system of laws and customs. Jagot J was satisfied, on the basis of the adopted findings and evidence in the matter, that 'it is unjust for the MacArthur River Pastoral Lease …

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117 *Widjabul Wia-Bal v A-G (NSW)* (2020) 274 FCR 577 [44],[73] (Reeves, Jagot and Mortimer JJ); *Malone v Queensland* (2021) 287 FCR 240 [231] (Rangiah, White and Stewart JJ).

118 *Lovett v Victoria* [2007] FCA 474 [18]-[19],[37]-[38].

119 *Western Bundjalung People v A-G (NSW)* [2017] FCA 992 [44]-[45].

120 Aaron Moss, 'Reconceptualising Current Issues in the Law and Practice of Consent Determinations under the *Native Title Act 1993* (Cth)' (2018) 41(4) *University of New South Wales Law Journal* 1187, 1208.

121 *Rainbow v Queensland* (n 43).

122 *Rockland v Queensland* [2021] FCA 1139.

123 *Atkins v Western Australia* [2017] FCA 1465.

124 See, eg, *Forrest v Western Australia* [2021] FCA 1489.

125 *Gilla v Western Australia [No 3]* [2021] FCA 1338.

126 *Wavehill v Northern Territory* [2018] FCA 1602.

127 [2015] FCA 1249.

128 *Top End Aboriginal Corporation RNTBC v Northern Territory* (2022) 403 ALR 666.

129 [2016] FCA 776.

determination to remain on terms preventing the members of that claim group from using resources on their claim area for any purpose'.[130] The variation application was also brought as a precursor to the hearing of the compensation application brought by the same group, which would appear to lend credence to the proposition that the resource issue and native title compensation considerations are closely linked.

Although difficult to precisely ascertain the outstanding matters impeding finalisation of a consent determination, there are a number of recent mediation referrals and filed case-management timetables that refer to certain rights being an outstanding subject of controversy in current native title applications. This provides some indication that natural resource issues remain something about which some governments are holding firm.[131] It seems likely that a more beneficial approach to recognising unconstrained native title rights to natural resources would be accompanied by an Indigenous Land Use Agreement ('ILUA') addressing practical implementation issues. These negotiations necessarily frontload the financial and time investment, which may also be a deterrent given court timeframes and the limited resources of all parties in the system.

Of note is the approach of the Victorian Government in the *Traditional Owner Settlement Act 2010* (Vic) ('*TOSA*') that was introduced as a more inclusive, less legalistic, alternative to the *NTA*. An agreement between the State and the traditional owner group under the *TOSA* may or may not be supported by a native title determination. Traditional owner rights that may be recognised include 'the ability to take natural resources on or depending on the land' without any further qualification on those rights.[132] It may include a natural resource agreement[133] in relation to a defined suite of natural resources that does not include minerals.[134] Regarding the type of activities and use of resources in a natural resource agreement, the *TOSA* provides a similar approach to the Canadian jurisprudence

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130 *Top End Aboriginal Corporation RNTBC v Northern Territory* (2022) 403 ALR 666, 671–2 [20] (Jagot J).

131 Angela Braun and Others on behalf of the Jirrbal People, 'Joint Progress Report', Filed Document (18 March 2021) in *Braun v Queensland [No 4]* (Federal Court of Australia, QUD983/2015, commenced 22 October 2015) [8]; Order of Reeves J in *Braun v Queensland [No 4]* (Federal Court of Australia, QUD983/2015, 26 March 2021) — Order 3 refers outstanding issues between the applicant and the State of Queensland to mediation; Order of Registrar Stride in *Rockland v Queensland [No 2]* (Federal Court of Australia, QUD747/2018, 17 December 2020) — Order 2 requires a notice to be filed regarding native title rights and interests still in dispute and proposed orders for the hearing of any separate questions; Order of Jagot J in *Widjabal Wia-Bal People v A-G (NSW)* (Federal Court of Australia, NSD1213/2018, 6 May 2021) annexing a timetable that includes resolution of commercial native title rights and interests as the last remaining connection dispute; Elaine Ohlsen & Others on behalf of the Ngemba/Nyiyampaa People, 'Joint Progress Report', Filed Document (12 December 2018) in *Ohlsen v A-G (NSW)* (Federal Court of Australia, NSD415/2012, 14 December 2018); Order of Griffiths and Jagot JJ in *Ohlsen v A-G (NSW)* (Federal Court of Australia, NSD415/2012, 14 December 2018) referring outstanding connection issues (explained in the Joint Report as regarding commercial and exclusive native title rights and interests) to mediation.

132 *Traditional Owner Settlement Act 2010* (Vic) s 9(1)(f).

133 Ibid s 80.

134 Ibid s 79.

outlined previously, where use of resources is only subject to an inherent restriction consistent with enduring title and, in the Victorian case, 'commercial purposes that are consistent with the purpose for which the land is managed'.[135]

XI Conclusion

There may be instances where determined native title covers areas and resources over which native title rights were assumed to be extinguished by other interests or legislative regimes, but which, on a contemporary application of 'the inconsistency of incidents' test, would continue to exist. There are also many statutes that either expressly or impliedly state that they do not affect native title rights and interests.[136] Extant native title may displace a government's assumed ability to deal with the resource and benefit commercially from it. What further impact determined rights to use that resource for all or commercial purposes could have in such situations, and for the purpose of assessing compensation awards and damages, is uncertain but raises complex and real questions for governments and First Nations parties to be alive to in their negotiations.

In addition to the evidentiary hurdles of proving traditional commercial rights to take under Australian native title jurisprudence, it seems likely that the issues canvassed in this article currently have a bearing on the continuing conservative assessments of commercial rights for the purpose of entering into consent determination negotiations. Absent progressive policy developments, this approach is likely to continue until there is an authoritative, litigated outcome of broader application embracing the more forgiving and contemporary approaches evident in comparative Canadian law and the *TOSA*. At that point, if not before, it is clearly a more productive use of parties' resources to negotiate meaningful resource-sharing regimes and agreements, rather than pursue protracted legal wrangling as evidenced in the s 211 prosecutions. Alternatively, express provision for cultural take of resources outside of existing state statutory management regimes and consistent with the increasingly expansive tenor of emerging native title jurisprudence, could provide a clearer and fairer path forward.

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135 Ibid s 84(b).

136 See, eg, *Fishing Management Act 1994* (NSW) s 287.

RENEGOTIATION IN THE REAL WORLD: A STUDY OF AUSTRALIAN SMALL TO MEDIUM-SIZED ENTERPRISES, CONTRACT VARIATION, AND THE LAW

MARK GIANCASPRO*

The small to medium-sized enterprise ('SME') sector is the largest and most productive in Australia. Like all established market-based economies, ours is characterised by the use of contracts as a mechanism for exchange. Contracts often require variation in response to variables such as under-pricing, resource availability, changes in scope, and rising product costs, so SMEs (and larger businesses) will frequently encounter the process of renegotiation. The rules applicable to contract renegotiation seldom receive attention in academic writing. Moreover, the attitudes toward, understandings of, and experiences with the doctrine of renegotiation among Australian SMEs are scarcely researched. This article expounds the law of renegotiation before reporting on selected findings from a largescale empirical study designed to fill these knowledge gaps, among others, in the literature. The results provide invaluable insight into how this critically important sector perceives and deals with contract law and the doctrine of renegotiation, and underscores potential areas for improvement.

I INTRODUCTION

Of the 2.4 million actively trading businesses in Australia, 99.8 per cent are small to medium-sized enterprises ('SMEs').[1] This sector contributes approximately 55 per cent to Australia's GDP,[2] underscoring its importance to our national economy, particularly in this difficult fiscal climate. Like all businesses, SMEs operate within the complex legal framework that governs economic activity throughout the country. Commerce in Australia, as in most established market-

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1 Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits, July 2017 to June 2021* (Catalogue No 8165.0, 24 August 2021) ('ABS'); Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts* (December 2020) 7 ('ASBFEO').

2 Information Resources Management Association, *Start-Ups and SMEs: Concepts, Methodologies, Tools, and Applications* (IGI Global, 2020) 69–70; ASBFEO (n 1) 8.

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based economies, is driven by contractual exchange; the contract is the chief mechanism through which bargains are concluded and risks are allocated.[3] Given the popularity of contracts in this jurisdiction and the size and significance of the SME sector, it is quite astonishing, as Janet Steverson observes, that very little has been written concerning the relevance of contracts and contract law to SMEs.[4]

The empirical study behind this article sought to comprehensively examine the understandings of, and experiences with, contracts and the law within the Australian SME sector.[5] It was primarily designed to assess whether the seminal findings from Stewart Macaulay's famous 1963 analysis of Wisconsin businesses held true in the Australian context.[6] Macaulay's study focussed on whether businesspeople used contract law and, if so, when and how they did so. His paper opened with a simple but vexing enquiry: 'What good is contract law?'[7] His findings were both intriguing and unexpected. It was found that parties conducting business generally did not structure or administer their agreements according to the law of contract and seldom engaged its processes when disputes arose. Instead, business relationships were found to mostly operate on informal norms and customs or non-legal rules.[8] Lawyers were typically not invited to resolve disagreements between commercial parties. Indeed, the legal process of the state was essentially seen by the majority of businesspeople interviewed as counterproductive.

The results of the present study were most intriguing.[9] Those SMEs surveyed appeared to regard the contract as more than a mere manifestation of their agreement. Instead, it was seen as the basis for their broader commercial

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3 Philip Clarke and Julie Clarke, *Contract Law: Commentaries, Cases and Perspectives* (Oxford University Press, 3rd ed, 2016) 4–5; PS Atiyah and Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (Oxford University Press, 6th ed, 2006) 3–5; Janet W Steverson, 'I Mean What I Say, I Think: The Danger to Small Businesses of Entering into Legally Enforceable Agreements that May Not Reflect Their Intentions' (2003) 7(2) *Journal of Small and Emerging Business Law* 283, 287–9.

4 Steverson (n 3) 283–4.

5 The study covered a wide range of topics including SME experiences with contract law, contracting practices, attaining legal advice and information, renegotiation, contractual breaches, dispute resolution, engagement with lawyers, and perceptions of the legal system.

6 Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28(1) *American Sociological Review* 55.

7 Ibid 55.

8 A swathe of subsequent studies has delivered similar results. See, eg, Hugh Beale and Tony Dugdale, 'Contracts Between Businessmen: Planning and the Use of Contractual Remedies' (1975) 2(1) *British Journal of Law and Society* 45; James J White, 'Contract Law in Modern Commercial Transactions, an Artifact of Twentieth Century Business Life?' (1982) 22(1) *Washburn Law Journal* 1; Thomas M Palay, 'Comparative Institutional Economics: The Governance of Rail Freight Contracting' (1984) 13(2) *Journal of Legal Studies* 265; Lisa Bernstein, 'Opting out of the Legal System: Extralegal Contractual Relations in the Diamond Industry' (1992) 21(1) *Journal of Legal Studies* 115; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms and Institutions' (2001) 99(7) *Michigan Law Review* 1724.

9 The full results are detailed in Mark Giancaspro, 'Testing Stewart Macaulay's Theory Down Under: A Study of Australian Small to Medium-Sized Enterprises' Understandings of, and Experiences with, Contract Law' in John Eldridge and Timothy Pilkington (eds) *Australian Contract Law in the 21st Century* (Federation Press, 2021) ch 13 ('Testing'). The results pertaining to SME perceptions of contract law and the broader legal system will be the subject of the author's forthcoming work.

relationship, with attendant expectations of honesty and fair dealing, in conformity with Macaulay's findings.[10] Most respondents had never experienced 'foul play' from their counterparties and, as will be discussed in greater depth shortly, some even tended to unilaterally vary an agreement for the benefit of their counterparty (and to their own detriment) to guarantee performance and strengthen commercial relationships. The SMEs surveyed also revealed a preference to consult the internet before a lawyer when seeking out information about contract law. The vast difference in cost was primarily what drove this decision.

An interesting point of difference between the present study and Macaulay's is in the preference for formality when contracting. Unlike Macaulay's sample, the overwhelming majority of SMEs surveyed in the present study regularly utilised formal contracts in their business dealings and preferred to do so. Traditional written agreements and email were the most popular forms. Where the studies did overlap was in the respondents' reported motivations for choosing between legal and non-legal measures. The samples in both studies primarily tended to contract informally whenever they were in a relationship of trust with the other party, to save time and money, or to avoid lawyers. Formality was generally reserved for higher-value transactions of greater significance. One outcome of note was that the SMEs surveyed typically did not simply overlook contractual breaches but would often attempt to resolve any disputes informally through negotiation or via the imposition of non-legal sanctions (such as embargoes on future dealings, and the spread of negative gossip). Those SMEs that did turn a blind eye mainly did so in order to preserve the working relationship, or because legal action was too expensive. Less than a fifth of SMEs went as far as initiating legal proceedings.

This article focusses specifically upon the present study's findings with respect to SME understandings of, and experiences with, contractual renegotiation.[11] Despite its fundamental importance to contract law, the doctrine of renegotiation receives very little attention as an individual phenomenon in legal textbooks and academic literature.[12] The relevant rules or principles are scarcely discussed. Additionally, there is a dearth of research into how and why businesses, particularly SMEs, renegotiate their agreements. This is concerning given the scale of the sector and the fact that an unsuccessful renegotiation

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10 Macaulay (n 6) 61, 64.

11 The study's other findings with respect to Australian SME understandings of, and experiences with, contract law generally are detailed in Giancaspro, 'Testing' (n 9). The findings concerning SME attitudes towards the legal system will be the subject of the author's forthcoming works.

12 There are some notable exceptions: see, eg, J W Carter, *Carter's Guide to Australian Contract Law* (LexisNexis, 3rd ed, 2015) ch 3; Andrew Stewart, Warren Swain and Karen Fairweather, *Contract Law: Principles and Context* (Cambridge University Press, 2019) ch 13; J W Carter, 'The Renegotiation of Contracts' (1998) 13(3) *Journal of Contract Law* 185; Mark Giancaspro, 'The Rules for Contractual Renegotiation: A Call for Change' (2014) 37(2) *University of Western Australia Law Review* 1 ('The Rules for Contractual Renegotiation').

invariably leads to disputes, which, in turn, fosters litigation. Court battles are costly and time-consuming, and SMEs generally lack the time and resources necessary to resolve disputes through formal channels.[13] Moreover, disputation inhibits economic efficiency, as the allocation of resources between traders is stalled.[14] Understanding the renegotiation process in greater detail therefore equips us with the knowledge to optimise the legal system and assist SMEs with the contract modification process to prevent disagreements brewing.

Before the present study and its results regarding contractual renegotiation are discussed, some key aspects of the largely unspoken doctrine of renegotiation are canvassed.

II The Doctrine of Renegotiation

Renegotiation is a concept central to the law of contract. Put simply, the term describes the process of amending the terms of an existing contract, typically to make them more favourable to the party seeking the variation(s). While it is conceivable that parties might seek to renegotiate without any pressing need to do so, it will more often be the case that the obligations of the party seeking the variation have in time become more difficult or near impossible to fulfil as originally envisaged. Ideally, a renegotiation would occur prior to breach. However, it might also be compelled in response to an actual or alleged breach by the party requesting the variation. In other cases, it may be more practical simply to agree to do away with the original contract and start again. Accordingly, as John Carter explains, renegotiations can generally be said to occur in three contexts:

> (1) before performance is complete, the parties agree to vary the contract but neither party is in breach of contract;
>
> (2) after breach (or an allegation of breach) of the contract by one of the parties, they agree to deal with that specific issue; and
>
> (3) an agreement to cancel (rescind or terminate) the contract.[15]

Explicating the precise legal rules of renegotiation is difficult given that the courts have tended, rather unhelpfully, to use it as an umbrella term encompassing other doctrines such as waiver and estoppel.[16] This tendency undoubtedly stems from the fact those doctrines also seemingly result in the alteration of the obligations

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13 Australian Small Business and Family Enterprise Ombudsman, *Access to Justice: Where Do Small Businesses Go?* (November 2018) 9–10.

14 '[T]he simple activity of exchange of goods and services, whether on organised exchanges or outside a market setting, is the basic first step in any production or allocation of resources': Patrick Bolton and Mathias Dewatripont, *Contract Theory* (MIT Press, 2005) 1.

15 Carter, *Carter's Guide to Australian Contract Law* (n 12) 58.

16 Sean Wilken and Karim Ghaly, *The Law of Waiver, Variation, and Estoppel* (Oxford University Press, 3rd ed, 2012) 12.

assumed under a contract.[17] For example, the waiver doctrine permits a party to voluntarily or intentionally abandon or relinquish a 'known right, claim or privilege'.[18] A common situation in this regard is where a contingent condition in a contract is waived by the party in whose favour the condition operates. This then abrogates that party's right to insist upon the other party's performance of the condition.[19] Of course, this only modifies how the contract is performed; it does not change the terms of the contract itself.[20]

Similarly, an estoppel could arise where a contracting party made a representation to their counterpart that induced in the latter an assumption as to how a contractual right or obligation would be enforced. If the counterpart relied on the representation to their detriment, such that it would be unconscionable for the representor to renege on the representation, estoppel can enforce the representation and indirectly effect a variation to the contract that fulfils the counterpart's expectations.[21]

Unlike waiver or estoppel, an orthodox variation to a contract requires consideration.[22] So much is clear from leading authorities on point. The High Court in *Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd* stated: '[w]hen the parties to an existing contract enter into a further contract by which they vary the original contract, then, by hypothesis, they have made two contracts.'[23] Accordingly, as later authorities have confirmed, both the existing contract and the contract to vary are subject to the ordinary rules governing contract formation, including the requirement that the parties exchange legally sufficient consideration.[24]

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17 But see *Inness v Waterson* [2006] QCA 155, where the Queensland Court of Appeal observed that an extension of time for performance does not amount to a variation of contract. Instead, it was suggested that such an act might amount to a waiver or give rise to a promissory estoppel claim. The logic behind this suggestion is that an extension of time merely limits the exercise of the consequential power to terminate the contract for breach of an essential term, as opposed to postponing the time for completion generally: *Howe v Smith* (1884) 27 Ch D 89, 103–4; *Tropical Traders Ltd v Goonan* (1964) 111 CLR 41, 55.

18 *Pacific Brands Sports & Leisure Pty Ltd v Underworks Pty Ltd* (2006) 149 FCR 395, 421 [113]; *Banning v Wright* [1972] 1 WLR 972, 979. In *Commonwealth v Verwayen* (1990) 170 CLR 394, 473, Toohey J clarified the need for 'intention' in this context: '[t]hat is not to say that there must be an intention to bring about the consequences of waiver; rather, the conduct from which waiver may be inferred, must be deliberate'.

19 *Gange v Sullivan* (1966) 116 CLR 418; *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537.

20 *Enrico Furst & Co v W E Fischer Ltd* [1960] 2 Lloyd's Rep 340, 349; *Flacker Shipping Ltd v Glencore Grain Ltd* [2002] EWCA Civ 1068, [61]; *Phillips v Ellinson Bros Pty Ltd* (1941) 65 CLR 221, 233–4, 243–4; *Badat v DTZ Australia (WA) Pty Ltd* [2008] WASCA 83, [55]; *Watson v Healy Lands Ltd* [1965] NZLR 511, 513. Cf *Watkins & Son v Carrig* 91 NH 459 (1941).

21 *Je Maintiendrai Pty Ltd v Quaglia* (1980) 26 SASR 101; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Collier v P & M J Wright (Holdings) Ltd* [2007] EWCA Civ 1329.

22 An exception to this rule is where the contract permits variation. This will be discussed later in the article.

23 (2000) 201 CLR 520, 533 [22].

24 *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1, 63. See also *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570, 587; *Slipper v Berry Buddle*

It is this requirement that has caused considerable difficulties in the renegotiation context and inspired an enormous amount of literature. It is well-established that the promise to perform, or actual performance of, a legal duty owed under a pre-existing contract is not consideration.[25] The rationale is that it is illogical and contrary to the notion of reciprocal bargain to receive more in return for the same.[26] The 'existing legal duty rule', as it has come to be known, derives from the old case of *Stilk v Myrick*.[27] In that case, two sailors aboard a ship travelling from London to the Baltic deserted and so the captain, unable to obtain replacements during a stopover in Sweden, promised the nine remaining crew-members that he would divide the deserters' wages equally among them if they remained aboard. The remaining crew agreed but, when the ship arrived in port, the captain refused to pay. The plaintiff, one of the sailors, sued to recover his share. Lord Ellenborough held that the captain's promise of additional wages was not supported by consideration from the sailors as they had merely promised to perform their existing legal obligation (under their contracts of employment) to 'do all they could under the emergencies of the voyage' to ensure the ship returned safely.[28]

The existing legal duty rule can clearly cause problems where, as in *Stilk v Myrick*, commercial parties are unaware of their legal rights and the applicable legal rules that govern their renegotiations. On one view, it can sanction and even encourage unscrupulous behaviour from parties who deceitfully promise more, knowing they may be shielded from liability.[29] There is no question such conduct runs contrary to popular sentiment, which favours the enforcement of fairly-made mutual promises. As Morris Cohen writes:

> It is generally considered unfair that after *A* has given something of value or rendered *B* some service, *B* should fail to render anything in return. Even if what *A* did was by way of gift, *B* owes him gratitude and should express it in some appropriate way. And if, in addition, *B* has promised to pay *A* for the value or services received, the moral sense of the community condemns *B*'s failure to do so as even more unfair. The

Wilkins Lawyers Pty Ltd [2015] NSWSC 810, [42]; *Cellarit Pty Ltd v Cawarrah Holdings Pty Ltd* [2018] NSWCA 213, [232]; *Dunkirk Property Development Pty Ltd v Mosman & Co Pty Ltd* [2019] NSWSC 73, [82].

25 *Wigan v Edwards* (1973) 1 ALR 497, 512 (High Court).

26 As such, a variation that exclusively benefits one party but not the other, even where mutually agreed, lacks consideration: *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 (discounted rent payable under a commercial lease). As will be explained shortly, however, the practical benefit principle may now make it easier to establish reciprocal benefits.

27 (1809) 2 Camp 317; 170 ER 1168.

28 Ibid 2 Camp 317, 319; 170 ER 1168, 1169. For later applications of the existing legal duty rule, see *Sundell & Sons Pty Ltd v Emm Yannoulatos (Overseas) Pty Ltd* (1956) 56 SR (NSW) 323; *Cook Islands Shipping Co Ltd v Colson Builders Ltd* [1975] 1 NZLR 422.

29 Of course, other doctrines, such as promissory estoppel (where it could be shown that the promise was relied upon to the promisee's detriment and where it would be unreasonable for the promisor to renege in the circumstances) could aid the aggrieved promisee in such situations.

> demand for justice behind the law is but an elaboration of such feelings of what is fair and unfair. [30]

The rule also causes trouble by introducing an unnecessary procedural formality into the renegotiation process. The pace of modern commerce demands that parties be permitted to freely amend their agreements, particularly where they are in longer-term relationships (in which we can safely assume the impersonal 'arm's-length' phase is over).[31] Times have changed dramatically from when *Stilk v Myrick* was decided and shipmasters were routinely held to ransom in life-threatening situations on the high seas.[32] There are now many established legal methods and doctrines — such as economic duress and promissory estoppel — which would serve to ensure that fairly made unilateral promises are kept and unfairly extorted promises are invalidated. Moreover, empirical studies show that commercial parties often adjust their agreements and make additional promises to one another on a whim and with little to no regard for the formalities of contract law.[33] The emphasis is on the efficient completion of the exchange, not the technical legal rules that inform the process.

Notwithstanding its criticisms, by emphasising the requirement for consideration at the renegotiation phase, the existing legal duty rule serves to highlight one of the chief roles of consideration: to signify the 'seriousness' of the transaction. That is, the doctrine recognises and enforces those obligations solemnly made and deserving of such legal treatment.[34] Lon Fuller famously described this as the 'channelling function' of consideration in that it signals an earnestly made promise, which anticipates legal consequences and also provides an external test of enforceability.[35] It might be said that formal abolition of the

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30 Morris R Cohen, 'The Basis of Contract' (1933) 46(4) *Harvard Law Review* 553, 580–1. See also where the author discusses the inherent despicability of a party not keeping their promise and the need for a 'properly organized society' to be intolerant of such behaviour: at 571. Similarly, Willis notes that there exists a 'social interest in being able to rely upon [the] promise[s]' of others: Hugh E Willis, 'Rationale of the Law of Contracts' (1936) 11(3) *Indiana Law Journal* 227, 230.

31 Cheng Han Tan, 'Contract Modifications, Consideration and Moral Hazard' (2005) 17(2) *Singapore Academy of Law Journal* 566, 578–9. See also Australian Government, 'Improving Australia's Law and Justice Framework: A Discussion Paper to Explore the Scope for Reforming Australian Contract Law' (Discussion Paper, Attorney-General's Department, 2012) 1, 1: 'It is … of the utmost importance that Australian contract law maximise the simplicity, efficiency and utility of market interactions for the benefit of all Australians'.

32 It was common during that era for seamen aboard ships ready for departure or only a short distance into their journey to refuse 'to proceed with them without coming to new agreements for increasing their wages': Preamble to the *Merchant Seamen Act 1729* 2 Geo 2, c 36. Reproduced in Sir William D Evans, *Collection of Statutes Connected with the General Administration of the Law* (W H Bond, 1836) vol 2, 77. See also *Harris v Watson* (1791) Peake 102; 170 ER 94, 94.

33 Macaulay (n 6) 60–1.

34 This is a point Patrick Atiyah has made in several of his seminal works. See, eg, P S Atiyah, *Essays on Contract* (Clarendon Press, 1986) ch 8. See also Stephen A Smith, *Atiyah's Introduction to the Law of Contract* (Clarendon Press, 6th ed, 2005) 106–30.

35 Lon L Fuller, 'Consideration and Form' (1941) 41(5) *Columbia Law Review* 799, 801. Fuller also noted that the consideration doctrine has two other functions: it is *evidentiary*, in that is serves as

existing legal duty rule would therefore downplay the consideration doctrine's significant and longstanding roles as yardstick of enforceability and gatekeeper against improvident transactions.

Although the existing legal duty rule is an established feature of Australian contract law,[36] its obvious impracticalities can be overcome in a number of ways, such as through the use of deeds or the offer of additional 'fresh' consideration.[37] In other cases, the courts have manufactured new exceptions to overcome the rule. Perhaps the best example is the practical benefit principle, derived from the English case of *Williams v Roffey Bros & Nicholls (Contractors) Ltd* ('*Williams v Roffey*').[38] No discussion of the renegotiation doctrine would be complete without reference to this case and its profound effects upon the doctrine of consideration.

In *Williams v Roffey*, the defendants, building contractors, subcontracted the plaintiff to complete some carpentry work in a block of London flats they were hired to renovate for a housing association. Approximately two months into the subcontract, after being paid £16,200 of the £20,000 initially agreed, the plaintiff fell into financial difficulty — due primarily to his initial under-pricing and poor management — and was at risk of defaulting. To avoid triggering a penalty clause under their head contract (for delay), the defendants verbally agreed to pay the plaintiff an additional £10,300. After substantially completing work on eight more flats and receiving only one further payment of £1,500, the plaintiff ceased work and sued to recover the additional money promised.

Despite acknowledging that the existing legal duty rule was bedrock law and appeared to apply on the facts,[39] the Court of Appeal held that the plaintiff had provided consideration for his reiterated promise to complete the work in the form of the 'practical' or 'factual' benefits he conferred upon the defendants by doing so. Those benefits included the fact the defendants did not have to obtain substitute workers to complete the job and avoided liability under their head contract with the housing association.[40] In his leading judgment, Glidewell LJ expressed the now infamous practical benefit principle:

> (i) [I]f A has entered into a contract with B to do work for, or to supply goods or services to, B in return for payment by B; and (ii) at some stage before A has completely performed his obligations under the contract B has reason to doubt whether A will, or will be able to, complete his side of the bargain; and (iii) B thereupon promises A an

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evidence of the existence and content of a contractual agreement, and it is *cautionary*, in that it deters parties from acting maliciously in their contractual dealings by imposing a requirement of bargain: at 800.

36 See, eg, *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 738; *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680, 722 [234]; *Francis v South Sydney District Rugby League Football Club Ltd* [2002] FCA 1306, [241]; *Re Secretary, Dept of Social Services and Simonelli* [2015] AATA 901, [36]; *Young v Smith* (2015) 18 BPR 35,101, 35,109.

37 A full discussion of the exceptions to the rule, or other instances where it will not apply, is beyond scope. For a thorough treatment, see Giancaspro, 'The Rules for Contractual Renegotiation' (n 12).

38 [1991] 1 QB 1 ('*Williams v Roffey*').

39 Ibid 16 (Glidewell LJ), 18–19 (Russell LJ), 23 (Purchas LJ).

40 Ibid 10–11, 16 (Glidewell LJ), 19 (Russell LJ), 20, 22–3 (Purchas LJ).

> additional payment in return for A's promise to perform his contractual obligations on time; and (iv) as a result of giving his promise, B obtains in practice a benefit, or obviates a disbenefit; and (v) B's promise is not given as a result of economic duress or fraud on the part of A; then (vi) the benefit to B is capable of being consideration for B's promise, so that the promise will be legally binding.[41]

The decision in *Williams v Roffey* has inspired swathes of academic and judicial commentary, much of it criticising the practical benefit principle.[42] Perhaps the most powerful criticism is that the principle dramatically eases the task of identifying consideration to support unilateral (one-sided) variations. Practical benefit could feasibly be detected in anything. As the Singapore Court of Appeal observed in *Sunny Metal & Engineering Pte Ltd v Ng Khim Ming Eric*:

> [T]he combined effect of *Williams v Roffey* … (to the effect that a *factual*, as opposed to a legal, benefit or detriment is sufficient consideration) and the well-established proposition that consideration must be sufficient but need not be adequate … is that … it will, absent exceptional circumstances, be all too easy to locate some element of consideration between contracting parties.[43]

Moreover, the principle appears entirely incompatible with the bargain theory of consideration, which posits that one party's act or forbearance (or promise thereof) must be given in exchange for that of the other party; it must represent 'the price for which the promise of the other is bought'.[44] Put another way, 'there must subsist, so to speak, the relation of a *quid pro quo*'; the consideration must be the subject of a reciprocal bargain between parties.[45] The factual benefits identified in *Williams v Roffey* were consequential and were never proffered in exchange for the defendants' promise of additional funds.[46]

For all its controversies, the practical benefit principle was applied (with some refinement) by the Supreme Court of New South Wales in *Musumeci v*

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41 Ibid 15–16.

42 See, eg, Brian Coote, 'Consideration and Benefit in Fact and in Law' (1990) 3(1) *Journal of Contract Law* 23; Mindy Chen-Wishart, 'Consideration: Practical Benefit and the Emperor's New Clothes' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (OUP, 1995) 123; *South Caribbean Trading Ltd v Trafigura Beheer BV* [2005] 1 Lloyd's Rep 128, 149 (Colman J); *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205, [42] (Donaldson DJ).

43 [2007] 1 SLR 853, 866. See also *Adam Opel GmbH v Mitras Automotive (UK) Ltd* [2007] EWHC 3205, [41] (DJ Donaldson): '*Williams v Roffey* would seem to permit *any* variation of a contract, even if the benefits and burdens of the variation move solely in one direction' (emphasis added); Dan Halyk, 'Consideration, Practical Benefits and Promissory Estoppel: Enforcement of Contract Modification Promises in Light of *Williams v Roffey Brothers*' (1991) 55 *Saskatchewan Law Review* 393, 398; Dilan Thampapillai, 'Practical Benefits and Promises to Pay Lesser Sums: Reconsidering the Relationship between the Rule in *Foakes v Beer* and the rule in *Williams v Roffey*' (2015) 34(2) *University of Queensland Law Journal* 301, 308.

44 *Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd* [1915] AC 847, 855.

45 *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424, 456–7.

46 This discrepancy is raised by Carter, Phang and Poole, who assert that the order of the practical benefit test — positioning B's consideration (the promise of something more) before A's (the benefits received by virtue of A's reiterated promise) — offends the longstanding common law principle that the consideration proffered by each party be the price for which the other is bought: J W Carter, Andrew Phang and Jill Poole, 'Reactions to Williams v Roffey' (1995) 8(3) *Journal of Contract Law* 248, 253–4.

Winadell Pty Ltd.[47] More recently, despite some doubts as to its place within the Australian law of contract,[48] the principle has generally been accepted by numerous appellate courts and routinely applied.[49] The most notable endorsement, albeit in obiter, was that of the High Court in *Director of Public Prosecutions (Vic) v Le*.[50] It would seem that practical benefit now forms part of the renegotiation doctrine in Australia and considerably mitigates the rigidity of the consideration requirement to support variations. As such, there is a risk that it gives rise to a 'moral hazard' problem by discouraging prudent pricing and performance.[51]

A close cousin of the practical benefit principle is the rule relating to part-payment of debts. This rule arises in the common commercial scenario of debtors negotiating with creditors to pay a smaller sum than what is due in full satisfaction of the larger amount owing. Simply stated, subject to some exceptions,[52] a debtor's promise to pay part of a debt is not good consideration for the creditor's reciprocal promise to discharge the debt in full.[53] Whereas the Australian courts have reiterated the correctness of this rule,[54] the English courts have more recently suggested that it should be re-examined.[55] This rule has also been heavily criticised.[56] This criticism is entirely justified because, from a commercial perspective, the rule is absurd. Lord Blackburn said it best in *Foakes v Beer*, when his Lordship observed that all businesspeople recognise that prompt

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47 (1994) 34 NSWLR 723.

48 See, eg, *Schwartz v Hadid* [2013] NSWCA 89; *Ailakis v Olivero [No 2]* (2014) 100 ACSR 524.

49 See, eg, *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 86; *Tinyow v Lee* [2006] NSWCA 802; *Silver v Dome Resources NL* (2007) 62 ACSR 539; *Vella v Ayshan* [2008] NSWSC 84; *Wolfe v Permanent Custodians Ltd* [2012] VSC 275; *Cohen v iSoft Group Pty Ltd* [2012] FCA 1071; *Troutfarms Australia v Perpetual Nominees Ltd* [2013] VSC 228; *Slipper v Berry Buddle Wilkins Lawyers* [2015] NSWSC 810; *Hill v Forteng Pty Ltd* (2019) 138 ACSR 344. For international examples, see *Teat v Willcocks* [2014] 3 NZLR 129; *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553; *Northwest Developments Ltd v Xue* [2019] NZHC 1042; *Gloria Jean's Coffees International Pty Ltd v Daboko Ltd* [2020] 2 NZLR 488. Some international courts, however, have rejected the practical benefit principle. See, eg, *NAV Canada v Greater Fredericton Airport Authority Inc* (2008) 290 DLR (4th) 405; *Rosas v Toca* [2018] BCCA 191.

50 (2007) 232 CLR 562, 576–7 [43] (Gummow and Hayne JJ). Referring to this comment, the Full Court of the Federal Court of Australia in *Hill v Forteng Pty Ltd* (2019) 138 ACSR 344 stated: '[t]heir Honour's pithy summary is a useful statement of the general law, if not binding authority in its own right. It indicates that *Musumeci* has some authoritative weight in assessing the presence or absence of consideration for general law purposes': at 349 [17].

51 Han Tan (n 31) 583; Halyk (n 43) 404.

52 For a useful summary of some of the key exceptions and relevant authorities, see Mark Giancaspro and Colette Langos, *Contract Law: Principles and Practice* (LexisNexis, 2022) 57.

53 *Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237; *Foakes v Beer* (1884) 9 App Cas 605.

54 See, eg, *Musumeci v Winadell Pty Ltd* (1994) 34 NSWLR 723, 739; *Pioneer Credit Acquisition Services Pty Ltd v Hayes* [2017] FCA 124, [26]; *Dunkirk Property Development Pty Ltd v Mosman and Co Pty Ltd* [2019] NSWSC 73, [80].

55 See, eg, *Rock Advertising Ltd v MWB Business Exchange Centres Ltd* [2018] 2 WLR 1603.

56 See, eg, *Couldery v Bartrum* (1881) 19 Ch D 394, 399; Thampapillai (n 43) 311: '[t]he existence of so many well defined exceptions to the rule should be sufficient to suggest that the rule itself requires a rethink.'; Merton L Ferson, 'The Rule in Foakes v Beer' (1921) 31(1) *Yale Law Journal* 15, 15: '[t]his doctrine is not only patently absurd but is inconvenient in commercial dealings, and, accordingly, distasteful to the courts'.

payment of a portion of a debt owed to them may be more beneficial than to insist on their rights and enforce payment of the whole.[57] This is particularly so where the debtor's credit is doubtful and when enforcement costs are factored into the equation. For SMEs, for whom cashflow is especially critical, the priority will often be to ensure they recover something rather than (potentially) nothing.

In spite of its inadequacies, there are many exceptions to the part-payment of debt rule. Where debts cannot be repaid in full and the debtor seeks to renegotiate by offering a lower sum in full settlement, the simplest ways to ensure the part-payment agreement is enforceable are to: (1) capture it in a deed; (2) offer something token in addition to the money owed; or (3) conclude the settlement agreement prior to the due date for repayment of the debt.[58] Of course, as John Cartwright has observed, when numerous exceptions to a rule are developed, we must begin to reconsider the validity of the rule itself.[59]

Another key question in the renegotiation context is whether parties have actually *replaced* — rather than *modified* — their agreement when a modification has been attempted. The outcome from a legal perspective will sometimes be unclear, and a court's determination may be contrary to what the parties themselves believed to have occurred. This objective perspective of renegotiation and contract law more generally would undoubtedly be met with confusion and perhaps disdain from commercial parties, who will no doubt believe forcefully in their subjective views of what they intended. Indeed, in some cases, the courts have bound parties to an interpretation that both have jointly disputed.[60] The outcome could also have considerable commercial consequences, such as in *Concut Pty Ltd v Worrell*, where a written employment contract alleged by the plaintiff to supersede the previous oral agreement between the parties was instead found to merely supplement and vary it.[61] The result was that Concut's termination of the plaintiff's employment for misconduct occurring prior to entry into the written contract was justified as it preserved both parties' rights and merely formalised the existing employment relationship.

Whether a contract has been varied or replaced, either expressly or by implication, is determined through an analysis of the intentions of the parties as disclosed by the later agreement.[62] Much may turn upon the time, place or form of the renegotiated contract.[63] According to *Varga v Karam*, there are essentially

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57 *Foakes v Beer* (n 53) 622.

58 *Pinnel's Case* (n 53) 237–8.

59 John Cartwright, 'The English Law of Contract: Time for Review?' (2009) 17(2) *European Review of Private Law* 155, 175.

60 See, eg, *Muriti v Prendergast* [2005] NSWSC 281. Speaking in the context of interpretation of contract terms, White J observed that the parties could not 'tie the court's hands' by agreeing as to their common intentions and framing their submissions on this basis: at [58].

61 (2000) 176 ALR 693.

62 *Morris v Baron & Co* [1918] AC 1; *British & Benningtons Ltd v North Western Cachar Tea Co Ltd* [1923] AC 48; *Tallerman & Co Pty Ltd v Nathan's Merchandise (Vic) Pty Ltd* (1957) 98 CLR 93.

63 *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520, 533 [22].

two stages to the inquiry.[64] First, it is necessary to determine whether there is an express agreement to rescind and replace the original contract. If such an agreement is lacking, it is then necessary to determine whether it can be inferred that the parties intended to replace the original contract. This is a question of fact answered by comparing both contracts and assessing the significance (if any) of the disparities between them in substance rather than form.[65] Factors such as the language used in each contract, and the surrounding circumstances in which each was made, will be crucial. The most telling factor, however, is the extent to which the contracts deal with the same subject matter in different and inconsistent ways.[66] In practice, it will seldom matter whether a renegotiation varies or replaces a contract, as it will not substantially affect its operation or become the subject of dispute.

What is clear is that circumstances often change and necessitate modification to the terms as originally agreed. Moreover, as Stewart, Swain and Fairweather explain, many commercial contracts are not discrete one-off transactions, but rather longer-term arrangements characterised by a relationship of trust and cooperation between the parties.[67] For this reason, many commercial contracts contain clauses that anticipate the future need for change and permit one or both of the parties to vary the terms.[68] Such clauses may provide a *mechanism* for variation (such as a writing requirement) or define the *type* of variation that may occur (such as a provision permitting the parties to initiate renegotiation with respect to one or more features of the contract after a specified date).

These clauses are conceptually problematic, are not always guaranteed to successfully facilitate renegotiations, and will not always be routinely enforced. Moreover, as the case law readily demonstrates, an 'agreement' to vary the terms of a contract may be *inferred* from the conduct of the parties, as opposed to being unequivocally expressed. In *Commonwealth v Crothall Hospital Services (Aust) Ltd*,[69] for example, the Commonwealth engaged Crothall to clean buildings occupied by the Department of Defence in Canberra. The contract contemplated variations in

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64 [2018] QDC 242 [22]–[29], affd *Karam v Varga* [2019] QCA 82.

65 *Varga v Karam* [2018] QDC 242 [23].

66 *Balanced Securities Ltd v Dumayne Property Group Pty Ltd* (2017) 53 VR 14, 32 [78].

67 Stewart, Swain and Fairweather (n 12) 250. Ian Macneil's relational contract theory sees contracts as existing on a spectrum with discrete transactions at one end and relational contracts at the other. Unlike discrete transactions, which are often simultaneous and concluded without any kind of meaningful relationship forming between the parties, relational contracts operate within a normative framework in which both parties perform their obligations and develop their relationship over time and by reference to informal norms and implicit understandings. See Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law' (1978) 72(6) *Northwestern University Law Review* 854.

68 A unilateral variation not otherwise permitted by the contract may amount to a repudiation: *Gibson Motor Sport Merchandise Pty Ltd v Robert James Forbes* [2005] FCA 749, [226], [248]; *Re Hadrian Fraval Nominees Pty Ltd and Federal Commissioner of Taxation* (2013) 94 AT 102, 135 [134]. The parties must agree to the variation where no discretion to vary exists: *Fairlie v Christie* (1817) 4 Taunt 416, 420; 129 ER 166, 168.

69 (1981) 36 ALR 567.

the contract price due to variances in wages paid and areas cleaned. Over several years, Crothall submitted claims for payment calculated at a higher rate, doing so without following the variation procedure stipulated in the contract. The Commonwealth routinely made the payments claimed before terminating the contract and seeking to recover what it claimed were 'overpayments', which were wrongly calculated without reference to the mechanism provided in the contract. Notwithstanding that the contract provided a means for calculating the payments due, the Commonwealth had, by its conduct in making the payments claimed by Crothall, knowing that they were calculated in a manner other than provided for in the contract, impliedly agreed to vary the agreement.[70]

A normal qualification on an otherwise broad provision permitting the parties to vary the terms of their agreement at any stage is that any variations be made in writing. Such clauses, sometimes branded 'no oral modification' or 'NOM' clauses, typically stipulate that no variations are valid or effective unless reduced to writing and signed by the parties. Another peculiar rule of renegotiation that will likely surprise many businesspeople is that such clauses are not, in Australia at least, decisive. If parties verbally agree to vary a contract then, notwithstanding a NOM clause contained therein, it may be so varied.[71] This, of course, tends to catch market players out, who have a natural tendency to read the terms of their agreement literally without understanding the nuances of the law.

The presence of a stipulation in the parties' agreement that any variations be made in writing may, however, be important in establishing whether an implied variation has taken place. As Black J explained in *Mathews Capital Partners Pty Ltd v Coal of Queensland Holdings Ltd*, the existence of a NOM clause makes it more difficult to draw an inference that the parties intended to vary the terms of their agreement informally.[72] George Pasas correctly observes that this position 'elevates the evidentiary hurdle which must be surpassed before finding that a variation was agreed in a form that is not writing'.[73] The evidentiary strength of NOM clauses will depend, in part, on how they are drafted and the regularity with which they are utilised by the parties. These factors were instructive in the case of *Rema Tip Top Asia Pacific Pty Ltd v Grüterich*,[74] where the presence of an unambiguously worded NOM clause, viewed in the context of the entire suite of

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70 Ibid 578–9 per Ellicott J (Blackburn J agreeing at 568, Deane J agreeing at 571).

71 *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251; *Elvidge Pty Ltd v BGC Construction Pty Ltd* [2006] WASCA 264; *Alstom Ltd v Yogokawa Australia Pty Ltd [No 7]* [2012] SASC 49; *Cenric Group Pty Ltd v TWT Property Group Pty Ltd* [2018] NSWSC 1570; *Sara Stockham Pty Ltd v WLD Practice Holdings Pty Ltd* [2021] NSWCA 51; *Re Rapsey, Australasian Mortgage Finance Ltd (admin apptd)* [2021] FCA 189.

72 [2012] NSWSC 462 [39].

73 George Pasas, 'No Oral Modification Clauses: An Australian Response to *MWB Business Exchange Centres v Rock Advertising* [2018] 2 WLR 1603' (2019) 45(1) *University of Western Australia Law Review* 141, 146.

74 [2019] NSWSC 1594.

written agreements between the parties, was regarded as strongly indicative of a mutual intent for any variations to be made in writing.[75]

The position under English law with respect to the role of NOM clauses is quite different to that in Australia, following the Supreme Court of the United Kingdom's decision in *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* ('*MWB*').[76] In that case, an oral agreement to vary a payment schedule under a commercial lease was held to be unenforceable by virtue of a NOM clause in the lease. While the Supreme Court accepted that the notion of contractual autonomy favoured the freedom for parties to override their own self-imposed limitations, it considered this notion to be limited. As Lord Sumption stated in his plurality judgment:

> Party autonomy operates up to the point when the contract is made, but thereafter only to the extent that the contract allows. Nearly all contracts bind the parties to some course of action, and to that extent restrict their autonomy. The real offence against party autonomy is the suggestion that they cannot bind themselves as to the form of any variation, even if that is what they have agreed. There are many cases in which a particular form of agreement is prescribed by statute: contracts for the sale of land, certain regulated consumer contracts, and so on. There is no principled reason why the parties should not adopt the same principle by agreement.[77]

There is certainly an argument that the Australian courts should follow the approach in *MWB*. The Supreme Court offered some compelling reasons for strictly enforcing NOM clauses. For example, this approach prevents written agreements from being undermined and therefore guards against potential abuses. It also avoids disputes stemming from misunderstandings or crossed purposes flowing from an oral discussion. However, as McDougall J recently observed in *Cenric Group Pty Ltd v TWT Property Group Pty Ltd*, the consistent weight of authority in Australia favours the ability for verbal renegotiations to override NOM clauses.[78]

Notwithstanding the occasional difficulties with the process, and as mentioned earlier, most businesspeople will readily agree that renegotiation is common. Despite this, there is no known reliable measurement of its incidence in commerce, at least within the Australian context. This must be due, in part, to the sheer volume of contracts that are made every day, and the infinite differences in form and substance between them. An extensive study by Guasch in 2001, examining a thousand utilities and transport contracts between private industry and government in Latin America and the Caribbean from 1985–2000, found that

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75 Ibid [297]–[337].
76 [2018] 2 WLR 1603 ('*MWB*').
77 Ibid 1608–9 [11].
78 [2018] NSWSC 1570 [103]. His Honour did not consider the Supreme Court's views on this issue to be 'particularly persuasive'.

renegotiation occurred in around 30 per cent of cases on average.[79] Indeed, for some industries, the rate of incidence was exceptionally high, with transportation (55 per cent) and water and sanitation (74 per cent) contracts being the most commonly varied post-formation.[80] Most contracts were renegotiated a little over two years from commencement.[81] More recent data drawn from analyses of global public-private partnership ('PPP') contracts pertaining to economic infrastructure from 2005–2015, similarly suggests that renegotiation occurs in around a third of cases, with almost a fifth of ongoing contracts being renegotiated by their fourth year and nearly half by their tenth year.[82]

A study by Roberts and Sufi, examining the incidence of renegotiation of private credit agreements between lenders and businesses in the US between 1996 and 2005, found that over 90 per cent were renegotiated prior to their stated maturity.[83] Of course, such contracts are more amenable to renegotiation because of frequent fluctuations in credit market conditions, the common acquisition and disposal of assets (and, thus, collateral) by debtors, and the relative financial health of borrowing businesses. Provisions permitting or mandating renegotiation are therefore not unorthodox.

Again, countless variables will inform the need to vary a contract. It can perhaps only be said with confidence that renegotiation will likely occur more commonly in *longer-term* contracts, which are especially susceptible to changing circumstances. There are no known Australian studies measuring the incidence of contract renegotiations. Some do, however, speak to the volume and significance of variations. In the construction industry, it has been suggested that contract prices often vary by up to 60 per cent of the originally agreed sum, and sometimes more.[84] Of course, as with some other industries, construction is one industry where contracts have evolved to routinely include provisions that permit price variations without renegotiation.[85] While price might be the archetypal term to change as a contract progresses, others might also warrant variation. For instance, the scope of required works for a services contract may change, as may the quantity of goods required under a sale agreement.

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79 José Luis Guasch, *Granting and Renegotiating Infrastructure Concessions: Doing it Right* (World Bank Publications, 2004) 12–13. See also Antonio Estache and Lucia Quesada, *Concession Contract Renegotiations: Some Efficiency Versus Equity Dilemmas* (Policy Research Working Paper No 2705, World Bank Publications, 2001) 2. More recent studies of some of the same regions have similarly demonstrated a high incidence of renegotiations. See, eg, Dimas de Castro e Silva Neto, Carlos Oliveira Cruz and Joaquim Miranda Sarmento, 'Understanding the Patterns of PPP Renegotiations for Infrastructure Projects in Latin America: The Case of Brazil' (2018) 18(3–4) *Competition and Regulation in Network Industries* 271.

80 Guasch (n 79) 12–13.

81 Ibid.

82 Global Infrastructure Hub and Turner & Townsend, *Managing PPP Contracts After Financial Close* (Report, 2018) 153.

83 Michael R Roberts and Amir Sufi, 'Renegotiation of Financial Contracts: Evidence from Private Credit Agreements' (2009) 93(2) *Journal of Financial Economics* 159.

84 Anne McDonell, 'Excessive Variation Work — A Risk to be Considered' (1990) 13 *Australian Construction Law Newsletter* 50.

85 Michael Sergeant and Max Wieliczko, *Construction Contract Variations* (CRC Press, 2014) [1.81].

Having detailed various aspects of the law of renegotiation and provided important context, attention now turns to the empirical study underpinning this article; a study which sought to examine how these aspects operate among SMEs trading in the 'real world'.

III The Australian SME Study

The study behind this article was designed in the first half of 2017.[86] Extensive consultation with businesses, commercial industry stakeholders, economists, lawyers, academics, and statisticians was undertaken to ensure that it asked the right kinds of questions to properly understand, among other things, how, when and why market players renegotiated their agreements. A voluntary and anonymous survey of 61 questions was constructed using the online platform SurveyMonkey,[87] with optional follow-up focus interviews being conducted after the closure of the survey.[88] All questions were optional, with the exception of the opening request for participant consent. The survey ran from September 2017 to February 2018, with 257 eligible responses being returned. The weblink to the survey was distributed electronically via personal networks, industry contacts, government and representative bodies, and an online research panel.[89]

The survey was purposely designed to screen out those who: (1) did not consent to participating in the survey; (2) were not the owner of, or a senior worker within, the respective business; (3) were under 18 years of age; or (4) were a large business (200+ employees). Only SMEs, and those who have managerial or decision-making power within the same, were targeted to ensure that the data was as accurate and truly representative of the sector as possible. The Australian Bureau of Statistics ('ABS') scale of business sizes was utilised in the study. Sole traders were classified as those being self-employed only, small businesses as those having between 2–19 employees, medium businesses having between 20–49 employees, and mid-large business having between 50–200 employees.[90] The majority of businesses surveyed identified as sole traders (31.6 per cent, n=75) or

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86 University of Adelaide Human Research Ethics Committee (HREC) Ethics Approval No. H-2017-125. Approval granted July 2017.

87 A copy of the survey questions is available at https://doi.org/10.25909/5e3b5e9d1123d.

88 The focus interviews were conducted throughout December 2018.

89 The government and representative bodies which assisted in the distribution include: Australian Small Business and Family Enterprise Ombudsman ('ASBFEO'); Australian Competition and Consumer Commission ('ACCC'); Small Business Commissioner (SA); Small Business Champion (Qld); Small Business Commissioner (Vic); Small Business Commissioner (WA); Small Business Commissioner (NSW); Business SA; Brand South Australia; and SA Department of State Development.

90 ABS (n 1). See also ASBFEO (n 1) 7.

traditional small businesses (41.4 per cent, n=98),[91] operated in the private sector (96.3 per cent, n=183),[92] and had an average age of 15 years.[93]

Before the results of the present study are detailed, its limitations are acknowledged. The relatively small size of the sample means the study cannot be truly representative of the Australian SME sector as a whole. Nonetheless, the data provide invaluable insight into the sector's interactions with, and uses and perceptions of, contract law and the renegotiation doctrine. An opportunity for improvement upon this study therefore presents itself. Examination of a larger sample would make it more representative, and the data could be appropriately tailored to account for differences in individual populations (ie weighted samples).

The present study revealed some fascinating insights with respect to contractual renegotiation within the Australian SME sector. Most of the SMEs sampled, it would seem, understand the concept of renegotiation but are less clear on the legalities surrounding the process. Many also seem to encounter difficulties when varying their agreements. The incidence of unilateral (one-sided) variations benefiting only one of the parties appears to be quite low, but those SMEs willingly agreeing to such variations do so mainly to guarantee performance and maintain good relations. The results to follow provide us with a starting point for understanding how we might improve our legal and regulatory frameworks to support the SME sector and others.

IV Results

An important starting point for this study was to discern what Australian SMEs understood the very concept of 'renegotiation' to mean. As businesses today are becoming increasingly globalised and engaging in an increasing number of contracts, the importance of them understanding the contracting process and the content of their agreements is proportionately rising.[94] Accordingly, respondents were asked simply if they knew what the term 'renegotiation' meant. Of the 155 respondents who responded to this question, 61 (39.4 per cent) indicated that they did comprehend what renegotiation was, compared to 59 (38 per cent) who said that they did not. A small number (22.6 per cent, n=35) were unsure,

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91 237 respondents indicated their business size.

92 243 respondents indicated the sector(s) in which they were operating.

93 189 respondents indicated the age of their business. This finding was particularly impressive given that a third of SMEs in Australia fail within five years of commencement: ASBFEO (n 1) 17; Australian Government, Department of Industry, Innovation, Science, Research and Tertiary Education, *Australian Small Business: Key Statistics and Analysis* (Report, December 2012) 42.

94 '[I]f contract-related decisions are to be taken *knowingly*, contracts need to be read. But mere reading is obviously not enough — contracts need to be understood as well. To succeed in today's networked business, managers need to be *contractually literate*': Helena Haapio and George J Siedel, *A Short Guide to Contract Risk* (Routledge, 2016) 29 (emphasis in original).

suggesting they did have an idea but lacked confidence in the accuracy of their understanding.

The follow-up qualitative question invited those respondents claiming to know what renegotiation was to provide a brief explanation. 62 valid responses were returned,[95] with some respondents offering definitions crossing multiple broad categories. All but one respondent broadly described renegotiation as the process of varying existing contractual terms. The exception, uniquely, instead described renegotiation as a tool of manipulation to force a party's hand and shape a more favourable deal under duress. The majority of responses (51.5 per cent, n=35) characterised renegotiation as the general process of varying the terms. Others, however, characterised it according to the attitudes of the parties, ie 11 responses (16.2 per cent) described renegotiation as the process of mutually agreeing to make a modification.

A smaller number again described renegotiation in terms of the underlying motivation for the process, such as circumstantial changes (10.3 per cent, n=7), or the party for whom the variation was being initiated, ie for one party (4.4 per cent, n=3) or for both (8.8 per cent, n=6). A handful of respondents (5.9 per cent, n=4) described renegotiation as the process of mutually agreeing to substitute an existing contract for a new one, although of course renegotiation can be of any scale, from variation of one term to complete replacement of all terms. Finally, one response appeared to regard renegotiation as something that occurs in response to a dispute. In reality, of course, renegotiations may occur at any stage of a contract's life post-formation and may well be driven not by dispute but by reasons of practicality or preference.

Two further questions invited respondents to utilise a slider bar to indicate by way of placement of a cursor along a spectrum of responses how strongly they agreed or disagreed with the statement provided. The slider bar had three broad options: 'strongly disagree', 'neutral', and 'strongly agree'. Respondents were not told that the slider bar correlated to a 100-point scale, with zero points (cursor placement farthest left of the slider bar) translating to 'strongly disagree', 50 points (cursor placement in middle of slider bar) translating to 'neutral' and 100 points (cursor placement farthest right of the slider bar) translating to 'strongly agree'. Respondents were instructed to leave the question blank and skip if they were unsure. Asked whether they found it relatively easy to vary their contracts, 144 respondents answered the question with the average response score being 53

[95] More respondents (109) than answered 'yes' in Question 36 (61), which asked whether respondents understood what the term 'renegotiation' meant, opted to answer this question. Notwithstanding the obvious technical fault in the inbuilt survey logic which should have disqualified those who responded 'no' or 'unsure' to Question 36 from answering this question, the data has not been compromised given the present question invited qualitative input and the fact 47 responses were deemed to be invalid. Several respondents, for example, mistakenly responded by saying they had 'not said "yes"' to Question 36. 62 valid responses were received, which is only one more than those who responded 'yes' in Question 36. As such, the data can confidently be described as accurate and representative of the sample.

(median=53), equating most closely to a general response of 'neutral'. This outcome certainly suggests that the SMEs sampled are ambivalent as to the ease with which they can renegotiate their business agreements.

The survey regrettably did not seek explanation for the relatively low average response score for this question. It might be that the uncertainty reflected in this result derives from the difficulty SMEs experience when encouraging counterparties to agree to proposed modifications, or in agreeing to changes proposed to them. A plausible explanation lies in the prevalence of standard form contracts ('SFCs'); agreements which are pre-prepared by one party without any negotiation with the other party, such that the terms are presented on a 'take it or leave it' basis.[96] These arrangements are often characterised by a distinct imbalance of bargaining power, where the drafting party (normally a larger business trading in goods or services, or some representative body of the same) has the upper hand over their counterpart (normally a smaller business or consumer).

SFCs are now an established feature of the commercial world.[97] The imbalance of power they inherently generate is offset by the efficiency they offer; being pre-prepared, they obviate the transaction costs associated with detailed negotiations and expedite the formation process. They are also helpful for repeat business in that they promote consistency and cultivate familiarity with the terms binding the parties. Unsurprisingly, SMEs commonly have trouble negotiating variations to agreements in standard form.[98] Of the 155 respondents in the present study who were willing to indicate whether they utilised standard form contracts, close to half (46.4 per cent, n=71) stated that they did.

Building further on the renegotiation theme, participants were asked whether they were familiar with the legal requirements to facilitate a valid contract variation. They were once more asked to utilise a slider bar to indicate how strongly they agreed or disagreed with the statement that they *were* familiar. 138 responses were received, with the average response score being 52 (median=51), equating once again to a general response of 'neutral'. Evidently,

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96 H B Sales, 'Standard Form Contracts' (1953) 16(3) *Modern Law Review* 318; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] QB 284, 297, 302; *Fair Work Ombudsman v Quest South Perth Holdings Pty Ltd* (2015) 228 FCR 346, 377–8 [140].

97 As long ago as 1971, it was estimated that SFCs accounted for 99 per cent of all contracts: W David Slawson, 'Standard Form Contracts and Democratic Control of Lawmaking Power' (1971) 84(3) *Harvard Law Review* 529. This suggestion has been reiterated many times since. See, eg, John J A Burke, 'Contract as Commodity: A Nonfiction Approach' (2000) 24(2) *Seton Hall Legislative Journal* 285, 290; Jason Scott Johnston, 'The Return of Bargain: An Economic Theory of How Standard-Form Contracts Enable Cooperative Negotiation Between Businesses and Consumers (2006) 104(5) *Michigan Law Review* 857, 864. More modern estimates concur with Slawson's claim insofar as it applies to *written* contracts: Andrew Robertson, 'The Limits of Voluntariness in Contract' (2005) 29(1) *Melbourne University Law Review* 179, 187. This latter view is almost certainly more accurate, given that countless everyday transactions, such as over-the-counter purchases from a shop which indubitably comprise a large percentage of 'contracts', involve no form contracting whatsoever.

98 Robin Burnett and Vivienne Bath, *Law of International Business in Australasia* (Federation Press, 2009) 87.

the SMEs sampled are unclear what the law requires of them when it comes to changing their contracts. This is not too shocking a revelation; businesspeople can hardly be expected to understand the profound complexities of the law underpinning their agreements. As will be discussed shortly, however, this has potential ramifications for purported contract variations that are formally disputed.

Despite how commonly contracts are renegotiated, the process is clearly lost on many Australian SMEs. When asked to indicate the elements of a valid contract variation to the best of their understanding (ie 'what do you legally have to do to make an enforceable variation to your contract?'), two-thirds of the 103 respondents were either *unsure* of what the requisite elements were (30.1 per cent, n=31) or considered a *written agreement to vary*, whether signed or unsigned, as being the only critical element (30.1 per cent, n=31). The next greatest number of respondents (10.7 per cent, n=11) correctly identified agreement (offer and acceptance) as an essential element of contract variation. Of course, the simplest and most accurate answer provided earlier is that the same elements required for valid contract formation also apply to variations. Agreements to vary existing contracts are in themselves contracts, and so a legally valid modification to any business contract must comply with the basic common law rules. Unsurprisingly, none of the respondents correctly noted this, although some came close.

Again, it is quite common for contracts to be renegotiated post-formation. Both internal variables — such as a party's behaviour or poor time and finance management — and external variables — such as market movements increasing costs and natural disasters affecting supplies — may affect the capacity of the parties to fulfil the contract as originally drafted.[99] Sometimes both parties will be affected by the change in circumstance but more often such variables 'tend to operate unevenly between the parties, and result in a loss to one party, rather than a loss to both'.[100] Most variations, therefore, are required to assist only *one* of the parties. Accordingly, the next relevant query on the topic of renegotiation was whether Australian SMEs had ever paid a party (in goods or services) more than originally agreed in a contract.

A total of 155 respondents answered this question, with the bulk (58.7 per cent, n=91) indicating they had never done so. This compares to around a quarter (27.1 per cent, n=42) who claimed that they had. 14.2 per cent (n=22) were not sure if they had previously made such an agreement. These results indicate that the incidence of unilateral or 'one-sided' variations, which ostensibly benefit only one party — the party requesting the additional consideration — is relatively low but not insignificant. Such arrangements enliven some of the common law rules discussed earlier relating to consideration and renegotiation, particularly the requirements that there be a bilateral exchange of consideration to enforce the

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99 Giancaspro, 'The Rules for Contractual Renegotiation' (n 12) 2.

100 Carter, 'The Renegotiation of Contracts' (n 12) 186.

variation[101] and that the consideration be legally sufficient.[102] These rules serve to validate or invalidate an attempted variation to an existing contract, and so, based on the result just discussed, as many as one in four renegotiations are potentially at risk of falling foul of the law if the rules are not followed. As Macaulay noted, the adjustment of contractual relationships is usually more informal compared to their establishment.[103] Parties are far more relaxed in their approach to changing a contract than they are in making it, and so it is likely they would pay little, if any, attention to legal formalities when effecting variations.

Those SMEs who gratuitously offered to pay their counterpart more than originally agreed might not realise that such agreements are prima facie unenforceable.[104] Unless the beneficiary offered consideration in return, the arrangement was captured in a deed, or other doctrines such as promissory estoppel applied to enforce the secondary promise, it could not be legally binding.[105] Indeed, in the subsequent question, a third of respondents (34.2 per cent, n=26) stated that when they did proffer more, the beneficiary gave nothing in return, meaning at least 26 variations that took place were invalid. Those respondents that *did* receive something in return provided qualitative examples such as separate additional jobs, extra work beyond scope, business referrals, and additional support.

The most popular reasons for respondents willingly paying more than originally agreed to the other party were 'to encourage satisfactory completion/performance of the contract' (23.9 per cent, n=26) and 'to strengthen and maintain good relations' with the other party (23.9 per cent, n=26).[106] This finding corroborates Macaulay's early findings that businesspeople prefer to rely on trust than formalities as the basis of their contractual relationships, and care even less for contract law in the adjustment of existing contractual relationships and the settlement of disputes.[107] Indeed, though it may seem irrational from an economics perspective to pay more in return for the same, such behaviour can, as Collins observes, actually be entirely rational in that it propagates a cooperative relationship conducive to repeat business.[108]

Alongside a desire to maintain good relations, the costs, risks and inconvenience associated with pursuing litigation for breach of contract may

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101 *Stilk v Myrick* (n 27); *Wigan v Edwards* (1973) 1 ALR 497; *Dunlop Pneumatic Tyre Co Ltd v Selfridge and Co Ltd* [1915] AC 847; *Australian Woollen Mills Pty Ltd v Commonwealth* (1954) 92 CLR 424.

102 *Haigh v Brooks* (1839) 10 Ad & E 309; 113 ER 119; *Thomas v Thomas* (1842) 2 QB 851; *Chappell & Co Ltd v Nestlé Co Ltd* [1960] AC 87.

103 Macaulay (n 6) 60–1.

104 *Stilk v Myrick* (n 27); *Wigan v Edwards* (1973) 1 ALR 497. Recall the earlier finding that a third of the SMEs surveyed were unsure of how to make a legally enforceable modification to their agreements.

105 For a discussion of the various exceptions and their application, see Giancaspro, 'The Rules for Contractual Renegotiation' (n 12) 14–22.

106 Respondents were provided with a list of six options and instructed to select as many that applied. Respondent error saw 69 respondents — 27 more than reportedly answered 'yes' to Question 41 — make 109 selections.

107 Macaulay (n 6) 61.

108 Hugh Collins, *Regulating Contracts* (OUP, 1999) 140.

make paying additional money for the assurance of performance more valuable to the promisor than any rights of action against them.[109] This appeared to be the case in *Williams v Roffey*, where timely completion and avoidance of the penalty clause that would have been triggered through delay were clearly prioritised by the building contractors. This factor was also evident in *Silver v Dome Resources NL* ('*Silver*'),[110] where avoiding the loss of a highly-valued employee performing critical work and the need to hire and train a replacement prompted the employer to pledge an increase in pay above the salary stipulated in the employment contract. Despite the agreement prima facie violating the existing legal duty rule, the New South Wales Supreme Court detected practical benefit in the employee's agreement to continue in his role and thereby rendered the contract enforceable.

It is also conceivable, in situations where the beneficiary of the additional payment is struggling to afford the costs of performance, that a promisor might react to feelings of guilt in offering to pay more than required under the contract.[111] It might even be an act of pure generosity.[112] Even where efficiency and maintenance of the commercial relationship are paramount considerations, attitudes and priorities can easily shift, as happened in *North Ocean Shipping Co Ltd v Hyundai Construction Co Ltd* ('*The Atlantic Baron*').[113] In that case, a shipbuilder agreed to construct a tanker for the plaintiff at a fixed price in US dollars. Following a strong devaluation of the US dollar, and after just one instalment payment was made, the shipbuilder refused to proceed unless the plaintiff agreed to pay 10 per cent above the contract price. To ensure timely completion and maintain amicable relations, the plaintiff agreed to these terms. Nine months after completion, it sued to recover the additional monies paid, alleging the shipbuilder had procured the renegotiation through economic duress.

The court agreed that the renegotiated contract was voidable on this basis but held that the plaintiff's nine-month delay in seeking relief constituted an implied affirmation of the shipbuilder's conduct. This case therefore highlights an inherent danger in hasty renegotiations in which a promisor is driven by considerations of efficiency and goodwill; namely, that considerations of fairness and business etiquette eventually take precedence, prompting disputation.

Returning to the results of the present study, the second most common reason (20.2 per cent, n=22) for respondents willingly paying more than originally agreed was to 'offset actual or potential losses caused by an external factor' beyond the control of the parties, such as inclement weather. The most

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109 Arthur L Corbin, 'Does a Pre-Existing Duty Defeat Consideration? Recent Noteworthy Decisions' (1918) 27(3) *Yale Law Journal* 362, 380–1; Richard Hooley, 'Consideration and the Existing Duty' [1991] *Journal of Business Law* 19, 26–7.

110 (2007) 62 ACSR 539 ('*Silver*').

111 Rembert Meyer-Rochow, 'The Requirement of Consideration' (1997) 71(7) *Australian Law Journal* 532, 536.

112 Corneill A Stephens, 'Abandoning the Existing Legal Duty Rule: Eliminating the Unnecessary' [2008] 8(3) *Houston Business and Tax Law Journal* 355, 387.

113 [1979] QB 705.

popular option offered for 'other' was that the contracted obligation turned out to be more involved or complicated than originally thought. These responses are interesting because they invite consideration of legal doctrines that can potentially apply in such situations. The most obvious candidate is *frustration*. That doctrine applies where some supervening event renders performance of contractual obligations radically different from how it was originally envisaged by the parties. The modern legal test requires that neither party be at fault and that a contractual obligation affecting one or both of the parties becomes incapable of being performed due to significantly altered circumstances.[114] This was the situation in the seminal case of *Codelfa Construction Pty Ltd v State Railway Authority (NSW)*,[115] where the plaintiff was unable to complete its excavation project on time due to local residents obtaining an injunction that significantly restrained the permissible times at which the contracted works could be continued.

It is possible that, in many of the situations reported by respondents in the present study (in which they agreed to pay more than originally required under the contract due to external factors endangering performance) that the frustration doctrine might have been applicable. This would have resulted in the parties being relieved of all future obligations and terminating, rather than salvaging, the contract. A missed opportunity in this study was to ask if respondents (a) were aware of the legal concept of frustration and (b) knew whether their contract accommodated this doctrine through the inclusion of a *force majeure* clause. Such clauses often provide for temporary suspension of the contract until the supervening event has passed. Importantly, where a contract contains a *force majeure* clause addressing the relevant contingency, it will not be frustrated.[116]

As mentioned earlier, and as detailed in the author's prior work,[117] less than a fifth of respondents in the present study indicated that they had been involved in litigation over a contract dispute. This is despite the fact that one in four of the respondents had previously renegotiated their contracts with a counterparty and agreed to pay them more than originally stipulated. The exiguity of this figure is likely a reflection of the lack of funding and resources characteristic of Australian SMEs.[118] It also seemingly bespeaks the unwritten conventions of business, which, as Macaulay and others have found, often favour flexibility, cooperation, and

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114 *Codelfa Construction Pty Ltd v State Railway Authority (NSW)* (1982) 149 CLR 337, 377.

115 Ibid.

116 *Ocean Tramp Tankers Corporation v V/O Sovfracht* ('*The Eugenia*') [1964] 2 QB 226; *Ardee Pty Ltd v Collex Pty Ltd* [2001] NSWSC 836.

117 See Giancaspro, 'Testing' (n 9) 295.

118 See, eg, ASBFEO, *Access to Justice: Where Do Small Businesses Go?* (Report, Australian Small Business and Family Enterprise Ombudsman, 5 December 2018); Sasan Bakhtiari et al, 'Financial Constraints and Small and Medium Enterprises: A Review' (2020) 96(315) *Economic Record* 506; Productivity Commission, 'Small Business Access to Finance: The Evolving Lending Market' (Research Paper, Commonwealth of Australia, September 2021).

non-legal discourse over resort to the black letter. Not only does this foster and maintain good relations, it also avoids the negative publicity associated with suing those you are in business with. Such bad press would be more detrimental to smaller businesses, who may lack the capacity of bigger businesses with larger clienteles to withstand it. No doubt economic considerations also inform the decision to pursue formal legal proceedings; going to court is costly, time-consuming, and inconvenient for all. The moral, supported by the findings of the present study, is that SMEs are less likely to desire litigation even when compelled (with or without pressure) to renegotiate their contracts.

V Lessons for Australian Contract Law

The insights garnered from the present study help to paint a more accurate picture of SME understandings of, and experiences with, contracts and the law. The specific findings reported in this article shed stronger light upon the commercial renegotiation process and how it works in practice. This empirical information collectively helps us understand the inner workings of the SME sector, and can usefully inform beneficial legal reforms that help nurture a more efficient, productive and reliable law of contract.[119] It also helps us to understand how this law is crafted, communicated and applied; something that is sadly absent from most black-letter law books.[120] Empirical legal research such as this therefore aids in filling what eminent American legal scholar Roscoe Pound described as the 'gap' between the 'law in the books' and the 'law in action'; between the rules that purportedly govern the relations of market players and those that in fact govern them.[121] It empowers the SME sector and its participants to become immediately involved in the examination and development of the law,[122] and provides an invaluable and intimate appraisal of the efficacy or otherwise of particular legal mechanisms.[123]

Even with a more detailed empirical understanding of the workings of the market, however, it must be asked how this knowledge can be practically applied. If there are identified flaws in the current legal framework as it applies to Australian SMEs, what beneficial solutions might be offered? Answering this question and shaping such solutions requires deeper consideration of the key findings of the present study. While contractual renegotiation may be common, the present study found unilateral or one-sided variations benefiting only one of

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119 Felicity Bell, 'Empirical Research in Law' (2016) 25(2) *Griffith Law Review* 262, 273.

120 Katherine R Kruse, 'Getting Real about Legal Realism, New Legal Realism, and Clinical Legal Education' (2012) 56(2) *New York Law School Law Review* 659, 660.

121 Roscoe Pound, 'Law in Books and Law in Action' (1910) 44 *American Law Review* 12.

122 Nicola Lacey, 'Normative Reconstruction in Socio-Legal Theory' (1996) 5(2) *Social and Legal Studies* 131. 132. See generally Dermot Feenan (ed), *Exploring the 'Socio' of Socio-Legal Studies* (Palgrave Macmillan, 2013).

123 Craig Allen Nard, 'Empirical Legal Scholarship: Reestablishing a Dialogue between the Academy and Profession' (1999) 30(2) *Wake Forest Law Review* 347, 349.

the parties to be uncommon. Most of the SMEs surveyed reported never having paid a party (in goods or services) more than originally agreed in their contract. They were also ambivalent as to the ease of the renegotiation process and expressed uncertainty as to the legal requirements for making a valid modification to their contracts. Indeed, a third of those SMEs that did proffer more to their counterpart received no consideration in return, inadvertently violating the existing legal duty rule.[124] As discussed above, the reported reasons for doing so reflect a preference for convenience, collegiality, and timely performance ahead of legal rights (assuming those rights are even known to SMEs).

These findings notably speak to a lack of contract literacy and market confidence in the contract law of the state, as well as the 'gap' between the law and practice that Macaulay, Pound and others have spoken of down the years. Economic actors often do not fully comprehend contracts or are limited in their interpretation of the consequences of their content.[125] This again highlights that there is enormous value in refining methods to devise and disseminate comprehensible information to the market. Greater understanding of the legal framework and the basic principles of contract law will likely translate to fewer disputes, which are disruptive, costly, and time-consuming for SMEs.

A contrary view is that crafting the law of contract to suit the market is futile given that studies by Macaulay and others consistently demonstrate that this law is routinely ignored by market players. Those players are seldom aware of, and are rarely influenced by, the law of contract.[126] Gava and Greene further submit, quite rightly, that the law is a poor 'communication system' in that it is 'incapable of publicising its results' and subsequently guiding market behaviour.[127] Private law, as a system of regulation, relies on the courts as its arbiters, and those courts are the fora in which the law of contract is largely fashioned. The issue with this is that market players simply do not have the time or the training to read, digest and comprehend case judgments (not all of which are reported) and other legal literature. This would suggest that trying to better communicate the law to the SME sector would be a lost cause because they would likely just disregard it anyway.

But these problems surely can, and must, be overcome. If market players ignore the law because they can neither properly understand it nor feel genuinely

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124 Weintraub argues that the fact beneficiaries in unilateral contract modification scenarios are generally met with accommodation and compromise rather than threats of litigation offers further evidence that the existing legal duty rule should be abolished: Russell J Weintraub, 'A Survey of Contract Practice and Policy' (1992) 1 *Wisconsin Law Review* 1, 51–2.

125 See John Hagedoorn and Geerte Hesen, 'Contractual Complexity and the Cognitive Load of R & D Alliance Contracts' (2009) 6(4) *Journal of Empirical Legal Studies* 818.

126 Franklin M Schultz, 'The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry' (1952) 19(2) *University of Chicago Law Review* 237, 283.

127 John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63(3) *Cambridge Law Journal* 605, 615. Collins (n 108) also concedes this point: at 81.

connected to it, then devising methods to synthesise complex principle into workable guidance seems not only sensible but essential to enabling the law to fulfil its role. Public regulatory bodies such as the Australian Competition and Consumer Commission ('ACCC') and the Australian Securities and Investments Commission ('ASIC') do an excellent job of communicating the law to market players in an intelligible manner, although their reach is limited to their respective government-mandated legislative frameworks. The ACCC administers competition and consumer laws, whereas the ASIC is primarily concerned with financial and corporate laws. While some of these laws have encroached into the private law of contract and thereby come within the purview of these regulatory bodies,[128] contract law remains in large part within the realm of the common law. Private industry and advocacy bodies supporting participants within the market, although helpful, are not equipped to distil the law for the benefit of those participants. They also lack the scale and resources to do so.

One solution might be to place more of an onus on the state and territory-based consumer and small business support organisations[129] to disseminate contracting advice and information (shaped in part by the courts), and provide more hands-on training, to their respective markets. Unlike the federal commercial and financial regulators, these organisations are not as heavily restrained by statute and so they would presumably have more latitude to do this. Of course, they are not as well-resourced, meaning more funding would likely be essential if they were tasked with improving the contracting knowledge and skills of market participants. This proposal might also generate inconsistency between jurisdictions, given that state and territory organisations may differ in their approaches.

The results of the present study are especially noteworthy in that they reinforce the idea that market players (in particular, those within the SME sector) have poor legal literacy, although it remains unclear how to best address this phenomenon. While the results and the empirical literature both suggest that the bulk of contract disputes are either resolved informally or simply do not escalate to the courts, this does not justify turning a blind eye to the market's apathy for contract law. If decades of research tells us that market players consistently disregard contract law, then it loses its legitimacy and fails in its principal duty of regulating and efficiently facilitating market exchange.[130] It is argued that a

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128 A good example is the unfair contract terms provisions contained in Part 2-3 of the Australian Consumer Law. The Australian Consumer Law is housed in sch 2 to the *Competition and Consumer Act 2010* (Cth). There are equivalent unfair contract terms provisions applicable to contracts for *financial* products and services in pt 2 div 2 subdiv BA of the *Australian Securities and Investments Commission Act 2001* (Cth).

129 These organisations are: Access Canberra (ACT); NSW Fair Trading (NSW); NT Consumer Affairs (NT); Office of Fair Trading Queensland (Qld); SA Office of Consumer and Business Services (SA); Tasmania Consumer, Building and Occupational Services (Tas); Consumer Affairs Victoria (Vic); WA Consumer Protection — Department of Mines, Industry Regulation and Safety (WA).

130 Collins (n 108) at 5–6.

uniform and authoritative approach to improving contract law as a communication system is critical and is therefore best led by the legislature in collaboration with subject matter experts (such as lawyers and scholars) as well as regulatory and industry bodies. Developing a deeper understanding of market culture and the manner in which market players communicate and transact will helpfully inform the modes and content of communications and resources. This requires a bottom-up, rather than a top-down, approach and should involve more robust interaction with, and involvement of, the SME sector. Genuine consultation is vital to ensuring that any reform measures are appropriate and effective.

Finally, the present study has reminded us of a universal truth once eloquently expressed by former British Prime Minister, Benjamin Disraeli: 'Change is inevitable. Change is constant'.[131] Contracts change, as do the times and, consequently, society's attitudes towards the various principles, features and institutions of the law. But change in the world of contract is seldom a good thing. Contracts are premised on continuity and on the parties' expectations being fulfilled as drafted. Modern contracts are more vulnerable to changes in economic, social and other conditions than ever before owing to their growing complexity and the more globalised nature of contemporary commerce.[132] Both the results of the present study and the case law discussed in this article speak to the difficulties that can arise for contracting parties as a consequence of changing circumstances. The existing legal duty rule was shown in the present study to have been violated in a third of reported contract renegotiations. The doctrine of frustration may operate to vitiate contracts where performance becomes impossible or otherwise radically different due to supervening events. Recent geopolitical events (such as Brexit) and global crises (such as the COVID-19 pandemic) have already triggered attempts to nullify long-term commercial contracts impacted by the same.[133]

Understanding how businesses in our largest and most productive sector respond to the need for change and perceive the legal system in which they operate will help us to address inadequacies in the market. SMEs which are cognisant of the law and better equipped to deal with change will not only be more efficient but less likely to become embroiled in disputes. This will benefit both businesses and the consumers with whom they deal. If we can generate and effectively disseminate comprehensible information about contract law issues to the market, modify the legal framework to encourage — not inhibit — trade, and assist businesses with the contract modification process, we are more likely to successfully prevent disagreements brewing. In these challenging economic times, the SME sector is one we simply cannot afford to see fail.

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131 Donald Quinn, *Back to Basics* (AuthorHouse, 2012) 30.

132 Giancaspro, 'The Rules for Contractual Renegotiation' (n 12) 1–2.

133 See, eg, *Canary Wharf (BP4) T1 Ltd v European Medicines Agency* [2019] EWHC 335 (Ch) regarding Brexit; *Salam Air SAOC v Latam Airlines Group SA* [2020] EWHC 2414 (Comm) regarding the COVID-19 pandemic.

THE INCONSISTENCY OF THE 'LAWFUL CORRECTION' OF CHILDREN DEFENCE WITH QUEENSLAND'S NEW *HUMAN RIGHTS ACT 2019* (QLD)

SIENNA MCINNES-SMITH*

Despite persistent criticism from international human rights bodies and experts, Queensland continues to permit the 'lawful correction' of children as a defence to criminal offences committed against them. The recent introduction of a human rights framework in Queensland further highlights the disconnect between the State's correction defence, contemporary understandings of the deleterious effects of physically punishing children, and children's human rights principles. This article examines that disconnect and the consistency of the Queensland defence with the Human Rights Act 2019 *(Qld). To this end, it outlines the current position in the medical and psychological literature that corporal punishment has severe consequences for children. It also explains the scope of the Queensland defence and compares it to other Australian jurisdictions. The article then turns to an analysis of the consistency of the defence with the* Human Rights Act*. It concludes that the defence offends against human rights guarantees in Queensland, as well as the international framework for children's rights, and identifies avenues for reform.*

I INTRODUCTION

In 1997, seven years after Australia ratified the *United Nations Convention on the Rights of the Child* ('*UNCRC*'),[1] the Committee on the Rights of the Child expressed its 'concern about the lack of prohibition in local [Australian] legislation of the use of corporal punishment, however light, [against children] in schools, at home

* Judge's Associate to President Kingham in the Land Court of Queensland, January 2022-January 2023.

1 *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*UNCRC*').

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and in institutions'.[2] By 2019, the Committee had become 'seriously' and 'gravely concerned at the high levels of violence against … children'.[3]

Despite over three decades of Committee criticism of the 'lawful correction' of children, and the introduction of humans rights legislation in three states,[4] the criminal laws of all Australian jurisdictions still contain a defence permitting the corporal punishment of children.[5] While the form, scope and name of the 'lawful correction' defence varies across Australia, in every jurisdiction it operates to protect adults who perpetrate violence against children as an exception to the general rule that applying force to another person is unlawful.[6] Other circumstances in which ordinary people can lawfully use force against another include in self-defence, defence of property, and restraint of a person about to harm themselves or another.[7]

In Queensland, the defence is titled 'domestic discipline' and is included under s 280 of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*'). This provision makes it lawful for parents and those in *loco parentis* to punish children using reasonable force for the purpose of 'correction, discipline, management or control'.[8] The conduct captured by the Queensland defence, and the corresponding defences of 'reasonable chastisement' and 'lawful correction' in other states,[9] is encompassed by the definition of 'corporal punishment' used throughout this paper, being: physical force used and intended to cause pain or discomfort, *however light*, to correct or punish a child's behaviour. This definition

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2 Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: Australia*, 16th sess, UN Doc CRC/C/15/Add.79 (21 October 1997) [15] ('*Concluding Observations: Australia 1997*').

3 Committee on the Rights of the Child, *Concluding Observations: Australia*, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [46] ('*Concluding Observations: Australia 2012*'). See also Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268 (20 October 2005) [33], [35], [42] ('*Concluding Observations: Australia 2005*'); Committee on the Rights of the Child, *Concluding Observations on the Combined Fifth and Sixth Periodic Reports of Australia*, 82nd sess, UN Doc CRC/C/AUS/CO/5-6 (1 November 2019), [28]–[30] ('*Concluding Observations: Australia 2019*').

4 *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Human Rights Act 2004* (ACT); *Human Rights Act 2019* (Qld) ('*HRA*').

5 *Criminal Code Act 1899* (Qld) s 280; *Criminal Code Act Compilation Act 1913* (WA) s 257; *Criminal Code Act 1924* (Tas) s 50; *Criminal Code Act 1983* (NT) s 27(p); *Crimes Act 1900* (NSW) s 61AA(2). In Victoria and the ACT, the defence arises at common law. Although the defence predominantly arises at common law in South Australia, it is also contemplated by the *Criminal Law Consolidation Act 1935* (SA) s 20(2)(b) according to Bampton J in *W, DL v Police* [2014] SASC 102, [36].

6 In Queensland and at the common law, this extends to *all* offences against the person, as there is no element of assault in the formulation of the defence: respectively, Andreas Schloenhardt and Thomas Cottrell, 'Lawful Correction of Children under s 280 of Queensland's Criminal Code: Retain, Reform, or Rubbish?' (2013) 33 *Queensland Lawyer* 75, 79; *R v Hughes* [2015] VSC 312, [98].

7 *Criminal Code Act 1899* (Qld) ss 271, 277.

8 Ibid s 280.

9 These are the two labels most commonly used in other states: cf (n 5). 'Reasonable chastisement' tends to appear in older cases and in common law jurisdictions, whereas 'lawful correction' is often used in legislation.

is derived from that used by the UNCRC Committee.[10] It is designed to distinguish physical punishment from restraint, which may be necessary to protect a child from harming themselves or others.[11] Where a child is restrained rather than punished, the intent is not punitive but protective, for example, holding onto a child to stop them from running across a busy road. The defence is not required to prevent prosecution for the latter action, as other laws allow for the use of non-punitive and necessary force.[12]

This paper will critically analyse the domestic defence in light of Queensland's new *Human Rights Act 2019* ('*HRA*'), which gives children 'the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child'.[13] It argues that the 'lawful correction' doctrine is incompatible with children's rights because it ultimately fails to protect children from violence and therefore to uphold their right to protection. Indeed, 'lawful correction' has now been abolished by 65 states around the world due to this basic incompatibility.[14] Queensland's failure to follow suit is increasingly inconsistent with international children's rights obligations *and* jurisprudence, making an exploration of the doctrine overdue.

To this end, Part II will canvass the medical and sociological literature regarding the impacts of corporal punishment on children. Despite limited debate, it finds that a large body of current research strongly indicates the impacts on children are adverse.[15] Additionally, there is no evidence that

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10 This is very similar to and derived from the UNCRC Committee's definition in Committee on the Rights of the Child, *General Comment No 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts 19; 28, Para 2; and 37, inter alia)*, 42nd sess, UN Doc CRC/C/GC/8 (2 March 2007) [11] ('*General Comment No 8*').

11 Andrew Rowland, Felicity Gerry and Marcia Stanton, 'Physical Punishment of Children: Time to End the Defence of Reasonable Chastisement in the UK, USA and Australia' (2017) 25(1) *International Journal of Children's Rights* 165, 168; Bernadette Saunders, 'Ending the Physical Punishment of Children by Parents in the English-Speaking World: The Impact of Language, Tradition and Law' (2013) 21(2) *International Journal of Children's Rights* 278, 285.

12 See *General Comment No 8* (n 10) [15] for a discussion of the distinction. As an example, see also *Criminal Code Act 1899* (Qld) ss 271, 277.

13 *HRA* (n 4) s 26(2).

14 End Corporal Punishment, 'Progress', *Countdown to Universal Prohibition* (Web Page, 2022) <https://endcorporalpunishment.org/countdown/> ('End Corporal Punishment').

15 See Elizabeth Gershoff and Andrew Grogan-Kaylor, 'Spanking and Child Outcomes: Old Controversies and New Meta-Analyses' (2016) 30(4) *Journal of Family Psychology* 453; Joe Tucci, Janise Mitchell and Chris Goddard, *Crossing the Line: Making the Case for Changing Australian Laws about the Physical Punishment of Children* (Australian Childhood Foundation, 2006); Joan Durrant and Ron Ensom, 'Physical Punishment of Children: Lessons from 20 Years of Research' (2012) 184(12) *Canadian Medical Association Journal* 1373 ('Physical Punishment of Children'), updated in Joan E Durrant and Ron Ensom, 'Twenty-Five Years of Physical Punishment Research: What Have We Learned?' (2017) 28(1) *Journal of Korean Academy of Child Adolescent Psychiatry* 20, 21 ('Twenty-Five Years of Physical Punishment Research').

corporally punishing a child has any benefits in the short or long-term, rather it is more likely to increase bad behaviour and escalate later punishments.[16]

Part III will analyse the Queensland defence in s 280 of the *Criminal Code.* The paper examines the section's elements and interpretation, context in relevant government policy, and operation in the few cases that have recently arisen.[17] It then analyses s 280 in the context of attempted law reform in other Australian jurisdictions.[18] Ultimately, it finds that the doctrine in Australia is controversial, uncertain and requires reform.

Part IV of the paper assesses the validity of retaining the provision in the context of the rights of Queensland children under the *HRA*.[19] It investigates whether the *HRA* is likely to have imported international standards of care for children and their human rights into Queensland.[20] This paper observes that this seems likely, because the *UNCRC* can be used to interpret the *HRA,* due to, *inter alia,* its textual ambiguity.[21] As the defence prevents children from receiving the protection from violence they require, there is a tension between the defence and Australia's obligations under the *UNCRC*. These are likely to be replicated on a state level, rendering the defence incompatible with Queensland's human rights obligations.

Finally, Parts V and VI examine the avenues for reform to make Queensland's defence consistent with its obligations under the *HRA.* It explores how foreign jurisdictions have dealt with the tension between similar defences and their human rights obligations. Two directions for reform are evaluated: amending or abolishing the defence. Jurisprudence from the UNCRC Committee reveals that compliance with international and domestic human rights obligations requires the abolishment of 'lawful correction' defences and the education of parents and children on the meaning of children's rights. It finds that mere amendment is insufficient.

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16 Renata Porzig-Drummond, 'Help, Not Punishment: Moving on from Physical Punishment of Children' (2015) 40(1) *Children Australia* 43, 46; Durrant and Ensom, 'Physical Punishment of Children' (n 15) 1375; Michael Freeman and Bernadette Saunders, 'Can We Conquer Child Abuse If We Don't Outlaw Physical Chastisement of Children?' (2014) 22(4) *International Journal of Children's Rights* 681, 687; Bernadette Saunders and Chris Goddard, 'Some Australian Children's Perceptions of Physical Punishment in Childhood' (2008) 22(6) *Children & Society* 405, 405 ('Some Australian Children's Perceptions').

17 See *ACP v Queensland Police Service* [2019] QCA 9; *R v DBG* (2013) 237 A Crim R 581; [2013] QCA 370; *R v SDJ* [2020] QCA 157.

18 See, eg, Explanatory Notes, Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000 (NSW); Department of Justice and Attorney General (NSW), *Statutory Review: Section 61AA, Crimes Act 1990 (NSW)* (Statutory Review, February 2010); Tasmania Law Reform Institute, *Physical Punishment of Children* (Final Report No 4, October 2003) <https://www.utas.edu.au/___data/assets/pdf_file/0005/283784/PhysPunFinalReport.pdf>.

19 Specifically, in *HRA* (n 4) ss 15(3), 26(2).

20 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

21 *Acts Interpretation Act 1954* (Qld) s 14B(1)(a).

This paper concludes that Queensland's defence of 'lawful correction' is out of step with contemporary standards and fails to protect children from violence or uphold their rights. Repealing the defence would align Queensland's laws with the *HRA* and international human rights law, strengthen children's rights and better protect them from violence.

II Impacts of Corporal Punishment on Children

Throughout this paper it is presumed that corporal punishment has negative physical and psychological impacts on children. That presumption is based on the plethora of international (and some domestic) evidence that attests to the harmful nature of corporal punishment. Although there is some debate, the evidence demonstrating negative impacts of corporal punishment on children significantly outweighs contrary research. Further, there is no evidence demonstrating that corporal punishment benefits children. Rather, evidence suggests that children subjected to physical punishment are more likely to suffer later in life, as they do not internalise their own standards of behaviour, empathy or productive problem-solving skills,[22] leading to aggression and antisocial behaviour.[23]

Commonly cited studies on the impacts of corporal punishment on children include those by Elizabeth Gershoff and Andrew Grogan-Kaylor,[24] Bernadette Saunders and Chris Goddard,[25] and Angelika Poulsen.[26] Gershoff's studies in particular have resulted in statistically significant findings that the impact of mild to moderate corporal punishment puts children at risk of social, behavioural and psychological problems in childhood and sets children up for violence as adolescents and adults.[27]

Gershoff's seminal study was a meta-analysis of 88 studies conducted since 1938 analysing the associations between parents' use of physical punishment and child outcomes, with four of the eleven outcomes assessed being measured in adulthood.[28] The total number of participants in these studies was 36,309.[29] Gershoff found that physical punishment, though possibly leading to a child's

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22 Judy Cashmore and Nicola de Haas, *Legal and Social Aspects of the Physical Punishment of Children* (Discussion Paper, Commonwealth Department of Human Services and Health, 1995) 93.

23 Durrant and Ensom, 'Twenty-Five Years of Physical Punishment Research' (n 15) 21.

24 Gershoff and Grogan-Kaylor (n 15).

25 Bernadette Saunders and Chris Goddard, *Physical Punishment in Childhood: The Rights of the Child* (Wiley-Blackwell, 2010) ('*Physical Punishment in Childhood*').

26 See Tucci, Mitchell and Goddard (n 15).

27 See Elizabeth Gershoff, 'Corporal Punishment by Parents and Associated Child Behaviours and Experiences: A Meta-Analytic and Theoretical Review' (2002) 128(4) *Psychological Bulletin* 539. The findings of this study are also considered in Anne McGillivray, 'Child Physical Assault: Law, Equality and Intervention' (2003–2004) 30(2) *Manitoba Law Journal* 133, 142–4.

28 Gershoff (n 27) 543.

29 Ibid.

immediate compliance, was associated with ten negative short and long-term outcomes, including: decreased moral internalisation; increased child aggression and delinquent and antisocial behaviour; decreased quality of parent-child relationship; worse mental health; increased likelihood of being abused and injured; increased aggression, criminal and antisocial behaviour in adulthood; worse adult mental health; and increased risk of abusing a future child or spouse.[30] Thus, children who are corporally punished by their parents are more likely to replicate those behaviours, hitting peers and siblings, and later in life are more likely to hit their intimate partners.[31] Other literature supports this view, and further purports that these negative effects are the consequence of parents modelling to children that violence is an acceptable way to resolve conflict.[32]

Gershoff conducted a follow-up study with Grogan-Kaylor in 2016, which sought to address concerns that the existing literature used weak methodology and conflated abusive parenting with corporal punishment.[33] Their study defined corporal punishment as 'noninjurious, open-handed hitting with the intention of modifying child behaviour',[34] thereby purporting to distinguish abuse from punishment. The authors identified studies for inclusion on this basis and constructed a comprehensive literature review.[35] Seventy-five studies, including data from 160 927 children,[36] were ultimately used in the meta-analysis.[37] The authors observed that the individual studies were highly consistent in denoting a significant association between corporal punishment and a detrimental child outcome.[38] Their findings also suggested the adverse impacts of spanking reach into adulthood,[39] evidencing a strong correlation between corporal punishment and adverse outcomes for children and even adults, corroborating the results of Gershoff's 2002 study.

In 2010, Saunders and Goddard conducted a qualitative study with Victorian children (n=31), parents, grandparents (n=34) and professionals (n=21).[40] They used in-depth individual interviews and focus groups to investigate the impact of corporal punishment on children.[41] In their study, adults defined 'a good smack'

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30 Ibid 544.

31 Porzig-Drummond (n 16) 45.

32 Tucci, Mitchell and Goddard (n 15) 28; Sallie McLean, 'Lawful Correction: Why the Legal and Cultural Discourse of Corporal Punishment is a Human Rights Issue' (2013) 19(2) *Australian Journal of Human Rights* 115, 133; David Birchall and Jack Burke, 'Just a Slap on the Wrist? Parental Corporal Punishment of Children and the Defence of Reasonable Chastisement in Hong Kong' (2020) 50(1) *Hong Kong Law Journal* 167, 175.

33 Gershoff and Grogan-Kaylor (n 15) 453.

34 Ibid.

35 Ibid 456.

36 Ibid.

37 Ibid.

38 Ibid 463.

39 Ibid.

40 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 61.

41 Ibid 52–3.

as '[i]nflicting pain' and 'bordering on [a] beating'.[42] This was in dramatic contrast with how adults punished as children vividly recalled the trauma associated with physical punishment by their parents within the context of power: 'I was scared … you are so powerless' and 'I certainly felt … lesser than [adults]',[43] and how children perceived physical punishment: 'adults have basically more power' and 'adults can … hurt [children]'.[44] Adults described a variety of implements being used to punish, including belts, spoons, jug cords, slippers, sticks and straps, resulting in red marks, bruises and welts and feelings of embarrassment, anger, fear, resentment, and hatred.[45] These feelings are not constructive and impede development and learning. They reinforce children's powerlessness and vulnerability and have adverse impacts upon children's sense of self.[46] Additionally, corporal punishment lowers children's perceptions of the adults they love and respect.[47]

More recently, Poulsen conducted a rigorous literature review of Australian research on corporal punishment published over the last 20 years. This included empirical academic research, government data, grey literature (from the Australian Institute of Family Studies and the Australian Institute of Health and Welfare) and online surveys.[48] Although she found a lack of Australian data and research on corporal punishment, there is a plethora of data from overseas, with findings that support the above studies. Examining this data, Poulsen concludes that corporal punishment is 'with very few exceptions, associated with adverse outcomes in childhood, adolescence and adulthood'.[49] Poulsen additionally finds that the literature consistently shows strong associations between corporal punishment and the likelihood of child abuse.[50] This is corroborated in the literature, which indicates that children who are smacked by their parents are seven times more likely to be seriously assaulted, and more than twice as likely to suffer an injury requiring medical attention than those who are not corporally punished.[51] Saunders and Goddard suggest this is because children's bad behaviour is likely to increase following corporal punishment, which prompts parents to increase the intensity of the next punishment and results in an

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42 Ibid 67–8.
43 Ibid 69–70.
44 Ibid 137, 230.
45 Ibid 71.
46 Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16).
47 Ibid 412.
48 Angelika Poulsen, 'Corporal Punishment of Children in the Home in Australia: A Review of the Research Reveals the Need for Data and Knowledge' (2019) 44(3) *Children Australia* 110, 110.
49 Ibid.
50 Ibid 114. This is supported by other literature: McGillivray (n 27) 144; McLean (n 32) 126–128; Alistair Nicholson, 'Choose to Hug, Not Hit' (Speech, Parliament House, 30 April 2007); Birchall and Burke (n 32) 176; Rowland, Gerry and Stanton (n 11); Freeman and Saunders (n 16) 693–709; Rhona KM Smith, '"Hands-Off Parenting?": Towards a Reform of the Defence of Reasonable Chastisement in the UK' (2004) 16 (3) *Child and Family Law Quarterly* 261, 261, 268.
51 Rowland, Gerry and Stanton (n 11) 178.

escalation of the physical force used when punishing the child.[52] Indeed, most cases of child abuse purportedly begin as instances of child discipline by a parent or someone in *loco parentis*.[53] Almost all literature on the impacts of physical punishment on children therefore evidences a correlation between the exposure to violence and significant adverse psychological effects. These include a greater tendency for behavioural problems and risk of abuse than those who are not hit.[54]

The literature emphasises several trends in parents' justifications for physically punishing their children. Most commonly, parents defend hitting their children by saying that their parents hit them and that it is morally acceptable because many Australians do so.[55] These parents justify their behaviour by arguing that it is an effective and harmless method of discipline. The belief that corporal punishment is harmless stems from some parents' own perceptions of their experiences, in addition to the socialised use of minimised language, such as 'smacking' to describe the use of physical force in correcting children.[56] Using such terminology makes the behaviour *sound* less harmful and more acceptable, allowing parents to justify it. However, Saunders and Goddard found that 'smacking' can be defined by parents as '[a] single strike' or 'intensive' and 'painful' and '[w]ith a wooden spoon'.[57] Adults in the same study also described *assaulting* a child in this way: as 'a slap' or 'a good smack' and 'hitting'.[58] Further, 'smacking' is included in definitions of physical punishment and child abuse in government literature.[59] The frequent use of corporal punishment indicates that it is not harmless, instead leading to more severe hitting and the escalation of punishment.[60] Additionally, corporal punishment is often used when parents lose control or as a last resort, suggesting that it is not used because of its acceptability as 'harmless'.[61]

A second common justification that parents use to defend hitting their children is that it is a parent's right to treat their children how they wish. Children are aware of this position, describing their parents as 'the boss' and 'owners' and

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52 Freeman and Saunders (n 16) 687; Porzig-Drummond (n 16) 46, citing Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16).

53 Tasmania Law Reform Institute (n 18) 33; Freeman and Saunders (n 16) 687. See Ben Phillips and Priscilla Alderson, 'Beyond "Anti-Smacking": Challenging Violence and Coercion in Parent-Child Relations' (2003) 11(2) *International Journal of Children's Rights* 175, 177.

54 Durrant and Ensom, 'Physical Punishment of Children' (n 15) 1373–4; McGillivray (n 27) 142–4; Gershoff and Grogan-Kaylor (n 15).

55 Tasmania Law Reform Institute (n 18) 26.

56 Saunders (n 11) 286, 299; Saunders and Goddard, 'Some Australian Children's Perceptions' (n 16) 408.

57 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 67–8.

58 Ibid 68.

59 Australian Institute of Family Studies, 'Corporal Punishment: Key Issues' (Web Page, 2014) <https://www3.aifs.gov.au/cfca/publications/corporal-punishment-keyissues>; Australian Institute of Family Studies, 'What is Child Abuse and Neglect?' (Web Page, 2012) < https://www3.aifs.gov.au/cfca/publications/what-child-abuse-and-neglect>.

60 Freeman and Saunders (n 16) 687.

61 Tasmania Law Reform Institute (n 18) 26.

therefore accepting that they could 'legitimately hurt them'.[62] This is disturbingly premised on the archaic notion of children as their father's property,[63] which is at odds with internationally agreed conceptions of children as autonomous beings with rights transcending those of the family.[64] It is unsurprising then that scholars have also found strong correlations between violence against women and violence against children — being two classes of person historically considered 'property'.[65]

Thirdly, it has been suggested by some scholars that the reason that parents use corporal punishment as discipline is due to a perceived absence of alternative parenting strategies. This stems from a lack of education and governmental support for parents,[66] and explains inter-generational cycles of violence.[67] Ultimately, corporal punishment imposes a high risk of negative outcomes, making children and adults more violent and less functional in society, contrary to its purported intent.

Despite the large body of evidence showing that corporal punishment is harmful for children and the misguided reasons parents have for using corporal punishment, some scholars suggest that adverse conclusions about the long-term psychological effects of corporal punishment are based on unreliable studies using limited methodology and statistics procedures.[68] However, Gershoff and Grogan-Kaylor specifically undertook their 2016 study to address such allegations and made similar findings to Gershoff's original investigation.[69] Furthermore, there is little evidence suggesting there are no impacts on children and none which demonstrates the benefits of corporal punishment on children or their psychological development.[70] The impacts on children are considered sufficiently established for experts to denounce corporal punishment as harmful, and support alternative disciplinary measures. For example, the Royal Australasian College of Physicians have denounced the physical punishment of children as harmful, ineffective, symptomatic of abuse, and as a violation of

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62 Saunders and Goddard, *Physical Punishment in Childhood* (n 25) 69.

63 Schloenhardt and Cottrell (n 6) 75; McLean (n 32) 135; Phillips and Alderson (n 53) 184.

64 McLean (n 32) 135.

65 United Nations Children's Fund (UNICEF), *The State of the World's Children: Women and Children* (United Nations Report, 2007) 76, citing Paulo Sérgio Pinheiro, *Report of the Independent Expert for the United Nations Study on Violence Against Children*, 61st sess, UN Doc A/61/299 (29 August 2006). For an analysis between the reform of laws around violence against women and those around violence against children, see Phillips and Alderson (n 53).

66 Porzig-Drummond (n 16) 44.

67 McGillivray (n 27) 146.

68 See, eg, Christopher Ferguson, 'Spanking, Corporal Punishment and Negative Long-Term Outcomes: A Meta-Analytic Review of Longitudinal Studies' (2013) 33(1) *Clinical Psychology Review* 196, 197–8.

69 Gershoff and Grogan-Kaylor (n 15) 453, 465.

70 Porzig-Drummond (n 16) 46.

children's human rights.[71] In comparison, analyses of cognitive-behavioural parenting techniques have shown that cognitive-behavioural strategies are not associated with adverse outcomes, but instead promote psychological wellbeing and problem-solving skills.[72] The short and long-term adverse impacts upon children, ignorance of parents' misguided justifications, and availability of a multitude of healthy, positive and non-violent methods of discipline mean there can be no argument for the legitimacy of corporal punishment under any guise, including the 'domestic discipline' defence.

III The Doctrine in Australia

A *Queensland*

1 *History*

The Queensland defence of 'lawful correction' has its genesis in Blackstone's Commentaries, which stated that the legal basis for the defence was a father's 'natural right' of control over 'the person and property of his child' with the enumerated purpose being 'for the benefit of [the child's] education'.[73] Its origin therefore lies in notions of children as their parents' property. The defence first became part of the common law in Queensland through Chubb J's approving citation of the English case *R v Hopley*[74] in *Smith v O'Byrne*; *Ex parte O'Byrne*.[75] At that stage, it also applied to other classes of persons, allowing husbands to lawfully discipline their wives and servants.[76] Subsequently, the defence as it relates to children was codified in the *Criminal Code* by Sir Samuel Griffith and, subject to one amendment in 1997, remains in an identical form. The 1997 amendment involved widening the circumstances in which the defence applies from 'correction' to 'correction, discipline, management or control'.[77] This was prompted by the decision in *Horan v Ferguson* where 'correction' was expansively interpreted to include physical contact beyond that which is disciplinary.[78] The defence currently reads that '[i]t is lawful for a parent or a person in the place of

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71 Royal Australasian College of Physicians, 'Physical Punishment of Children' (Position Statement, July 2013).

72 Porzig-Drummond (n 16) 46.

73 Sir William Blackstone, *Commentaries on the Laws of England* (Thomas Tegg, 17th ed, 1830) 120, cited in Schloenhardt and Cottrell (n 6) 75-76; Robert Ludbrook, 'The Child's Right to Bodily Integrity' (1995) 7(2) *Current Issues in Criminal Justice* 123, 123 and commented on by McHugh J in *Secretary, Department of Health & Community Services v JWB (Marion's Case)* (1992) 175 CLR 218, 314.

74 (1860) 175 ER 1024.

75 (1894) 5 QLJ 126, 254.

76 Blackstone (n 73) 397, cited in Schloenhardt and Cottrell (n 6) 76.

77 *Criminal Law Amendment Act 1997* (Qld) s 43(1).

78 [1995] 2 Qd R 490; Explanatory Notes, Criminal Law Amendment Bill 1996 (Qld) 11; Schloenhardt and Cottrell (n 6) 77.

a parent, or for a schoolteacher or master, to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable in the circumstances'.[79] Although there have been no further amendments to the provision, other legislation now restricts its application by making the 'disciplinary' use of force unlawful against children in juvenile detention[80] and against policy for children in state schools.[81] However, teachers in state schools may rely on the defence in criminal proceedings,[82] and the criminalised behaviour does not need to have occurred within school grounds.[83] It is unclear if juvenile detention staff could do the same.[84]

2 *Operation*

The defence is now located in s 280 of the *Criminal Code*, under Part 5, Chapter 26 'Assaults and Violence to the Person Generally: Justification and Excuse'. Although s 280 is a defence to the use of force, it is not specifically limited to any violent conduct such as assault. Therefore, its application is not limited to charges of assault or offences containing assault as an element,[85] and it may excuse more serious offences, such as wounding,[86] doing grievous bodily harm[87] and even manslaughter.[88] The Queensland government suggests,[89] however, that most cases raising the defence do so in relation to the charges of assault occasioning bodily harm and common assault.[90]

Section 280 will only excuse conduct by parents, a person in *loco parentis* or a schoolteacher or master.[91] These terms are left undefined in the *Criminal Code*, although whether a person is in *loco parentis* is a question of fact in the circumstances.[92] Further, the defence only excuses the use of force against children and pupils in the context of a parent-child or teacher-student relationship. The accused bears the evidentiary onus to raise the defence, meaning they must provide sufficient evidence to raise the issue prima facie.[93]

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79 *Criminal Code Act 1899* (Qld) s 280.

80 *Youth Justice Regulation 2003* (Qld) reg 17(4).

81 Department of Education, Training and Employment, Parliament of Queensland, *Annual Report of the Minister of Education* (Report, 1995) 6.

82 *Horan v Ferguson* [1995] 2 Qd R 490, 504 (Demack J).

83 *Cleary v Booth* [1893] 1 QB 465.

84 *Horan v Ferguson* [1995] 2 Qd R 490, 505 (Demack J): 'when the *Criminal Code* uses the word "unlawful", that does not confine the issue within the limits of the *Criminal Code* itself'.

85 Schloenhardt and Cottrell (n 6) 79.

86 *Criminal Code Act 1899* (Qld) s 323.

87 Ibid ss 1 (definition of 'grievous bodily harm'), 320.

88 Ibid ss 303, 310.

89 Department of Justice and Attorney-General (Qld), *Review of Section 280 of the Criminal Code (Domestic Discipline)* (Parliamentary Review, 25 November 2008) 2.

90 Respectively, *Criminal Code Act 1899* (Qld) ss 335, 339.

91 Ibid s 280.

92 *R v Murphy* (1996) 108 CCC (3d) 416, 421.

93 Schloenhardt and Cottrell (n 6) 79.

The prosecution then holds the persuasive onus to disprove the excuse beyond reasonable doubt.[94]

The defence contains two elements: the purpose of the force used and reasonableness. The purpose of the force used must be the 'correction, discipline, management or control' of a child. These four purposes encompass a broad range of conduct. Whether force was used for an enumerated purpose is subjective, as the phrase 'by way of correction' makes the 'motive for [the] infliction of pain … crucial'.[95] This illustrates the difference between the conduct considered by the defence and conduct involved in restraining a child likely to hurt themselves or others. Force used that is 'ill-disciplined',[96] administered in 'rage',[97] or for 'revenge',[98] or any other reason unconnected with the purposes in the defence will not be excused.[99] Moreover, the defence only applies to the 'use' of force, and it appears unlikely that it would excuse merely threatening to use force.[100]

Whether the force used is 'such force as is reasonable under the circumstances'[101] is an objective inquiry of fact.[102] Reasonableness is therefore determined through an application of current community standards at trial by a jury, or in a summary trial by a magistrate.[103] There are several factors in Australian case law that are considered relevant to determining the reasonableness of the use of force. In *R v Terry*,[104] Sholl J held that punishment must be moderate and reasonable,[105] have a proper relation to the age, physique and mentality of the child, and be carried out with a reasonable means or instrument.[106] A substantial body of jurisprudence has evolved around these factors. For force to be reasonable, and have a proper relation to the age, physique and mentality of the child, the child must be able to understand the idea of discipline.[107] Several cases thus suggest that it cannot be reasonable to corporally

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94 *Mullen v The King* [1938] St R Qd 97, 121 (Douglas J); Nicolee Dixon, Parliament of Queensland, *Parental Smacking: The Issues and the Law* (Research Brief No 28, 2008) 4.

95 Rochelle Urlich, 'Physical Discipline in the Home' (1994) 7(3) *Auckland University Law Review* 851, 852.

96 *R v H; Ex parte Attorney-General* [2001] QCA 174, [6]–[7].

97 *W, DL v Police* [2014] SASC 102, [29], citing *R v Hopley* (1860) 175 ER 1024, 1026 [206] (Lord Cockburn CJ).

98 *R v Drake* (1902) 22 NZLR 478, 487 (Edwards J).

99 *R v Kinloch* (1996) 187 LSJS 124, 130; *R v Ottaviano* [1997] QCA 338, [6].

100 In *R v Hamilton* [1891] 8 WN (NSW) 9. Windeyer J held at page 10 that the fact that the assault was by nature of a threat did not prevent the defence from being considered. However, this has not been tested in Queensland and *Hamilton* is now well over a century old.

101 *Criminal Code Act 1899* (Qld) s 280.

102 *RDP v Westphal* [2010] NTSC 50, [16].

103 Department of Justice and Attorney-General (Qld) (n 89) 1.

104 [1955] VLR 114.

105 Note that this echoes Lord Cockburn CJ's judgment in *R v Hopley* (1860) 175 ER 1024.

106 *R v Terry* [1955] VLR 114, 116–17.

107 Ibid 117; *Smith v O'Byrne*; *Ex parte O'Byrne* (1894) 5 QLJ 126, 253.

punish a child under 12 months old,[108] with others suggesting that some older children are also unable to comprehend punishment.[109]

Additionally, the force used against the child must be applied with a reasonable means or instrument.[110] Although using a cane or similar instrument has historically been acceptable,[111] this may no longer be the case.[112] The reasonableness of the force used is also influenced by any injury to the child and where the blows occurred on the child's body. However, the law around each is so inconsistent as to provide little guidance to parents, police or courts on what is lawful. Some cases have held that bruising and welts on an eight-year-old child alone failed to establish an unreasonable application of force,[113] but similar wounds on a five-year-old were found to be evidence of bodily harm and an unreasonable use of force.[114] Furthermore, courts have found blows to the head to be both reasonable,[115] and definitively unreasonable.[116] Psychological harm may also be relevant,[117] as is prior treatment, the relationship between the child and parent(s),[118] and the time lapse between the child's misbehaviour and the punishment.[119] Given that reasonableness is evaluated against current community standards, and the case law contains varying and contradicting standards, it is questionable whether these uses of force would be found reasonable now.

3 Case Law

The inconsistencies and contradictions evident in the operation of the defence are not clarified by the little Queensland case law that exists on s 280, which is limited to Court of Appeal decisions (all unreported) where the defence was raised unsuccessfully. Because Court of Appeal decisions often deal with atypical circumstances and each found the defence was unsuccessful, there has been no development of legal principles in the defence. Although the defence may be raised more often at the Magistrates Court level, or via a 's 222 appeal' in the District Court, such data is not publicly available. There is thus a dearth of judicial guidance available as to the conduct that falls within 'lawful correction' in Queensland and the standard of the defence is unclear.

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108 *R v Miller* [1951] VLR 326, 350; *R v Griffin* (1869) 11 CCC 402.

109 *Cramer v R* [1998] WASCA 300.

110 *R v Terry* [1955] VLR 114, 116.

111 Ibid 116–17 (Sholl J); *Sparks v Martin*; *Ex parte Martin* (1908) 2 QJPR 12; *Mansell v Griffin* (1908) 1 KB 160; *King v Nichols* (1939) 33 QJP 171; *Craig v Frost* (1936) 30 QJP 140.

112 *R v Kinloch* (1996) 187 LSJS 124.

113 *Byrne v Hebden*; *Ex parte Hebden* [1913] St R Qd 233. See also *R v HBP* [2017] QCA 130, [7].

114 *Cramer v R* [1998] WASCA 300.

115 *White v Weller*; *Ex parte White* [1959] Qd R 192; *R v Haberstock* (1970) 1 CCC (2d) 433.

116 *R v Ottaviano* [1997] QCA 338, [2]; *R v Griffin* [1998] 1 Qd R 659; *W, DL v Police* [2014] SASC 102.

117 Gareth Griffith, Parliamentary Library, 'Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000: Background and Commentary' (Briefing Paper No 9, 2000) 28–9.

118 *R v Drake* (1902) 22 NZLR 478; *McClintock v Noffke* [1936] St R Qd 73.

119 *R v Haberstock* (1970) 1 CCC (2d) 433.

In *R v DBG*,[120] the appellant was convicted of assault occasioning bodily harm after hitting his 14-year-old daughter with a bamboo stick because she was secretly using Facebook and swore at him. He caused her injuries so severe that she could not sleep.[121] The appellant unsuccessfully raised the defence at trial and upon appeal, where the court held that it was open to the jury to find that the prosecution had proved that the conduct was unlawful beyond reasonable doubt.[122]

In *R v HPB*,[123] the appellant was convicted of assaulting and causing bodily harm to her 8-year-old son because her conduct 'went beyond what is authorised by s 280 … as domestic discipline'.[124] She had struck the child twice with a belt on the collar bone and then hit the child behind his legs and on his buttocks before he ran away.[125] The child was left with two five-centimetre-long marks on his collar bones and bruising.[126] The appellant admitted her offending to police but said that she was unaware that she had committed an offence.[127] She was fined $400 by the Magistrate.[128] Because this behaviour was, *inter alia*, a breach of a suspended sentence, the appellant was convicted in the Supreme Court for that breach.[129] In determining the sentence, the sentencing judge found that of the behaviour breaching the suspended sentence, 'the assault occasioning bodily harm was the more serious of the breaching offences'.[130] The focus of the appeal was the sentence imposed, rather than the domestic discipline defence.

In *ACP v Queensland Police Service*,[131] a man was convicted of common assault after dragging his 14-year-old stepson out of bed by the ear, slapping him in the head, neck and face three times, dragging him outside, screaming at him and throwing him to the ground where he kicked the child twice with steel capped boots for being lazy.[132] Whether the defence was available was the central issue at trial and on appeal. The appeal court found the conclusion that the force used was not reasonable was open on the evidence. This is because the Magistrate at first instance found that the prosecution had discharged its onus of disproving the application of s 280 by considering the inappropriateness of the applicant's 'nudg[ing]' the child in the chest with steel capped boots, causing a red mark in injury.[133]

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120 [2013] QCA 370.
121 Ibid [8]–[13].
122 Ibid [31]–[32].
123 [2017] QCA 130.
124 Ibid [7].
125 Ibid.
126 Ibid.
127 Ibid.
128 Ibid.
129 Ibid [8].
130 Ibid [9].
131 [2019] QCA 9.
132 Ibid [4]–[7].
133 Ibid [8].

Finally, and most recently, the s 280 defence was mentioned in *R v SDJ*,[134] where the appellant was convicted of common assault and choking, suffocation or strangulation in a domestic setting.[135] The complainant's evidence was that the appellant had kicked him in the leg, slapped him in the head and face and strangled him for using too much body wash in the shower.[136] At trial, the jury was directed that the law permits a parent to use reasonable force for correction, discipline, management or control of a child and that the prosecution had to satisfy them beyond reasonable doubt that the acts were not for those purposes or that the force used was not reasonable.[137] Given the cogency of evidence against the appellant, the Court of Appeal found that it was not unreasonable for the jury to have been convinced beyond reasonable doubt that the force used was not reasonable and to convict the appellant.[138]

The commonalities among these cases reveal the misconception that parents have regarding their rights in relation to their children in Queensland. Each case involves injury to a child via the use of an instrument or trauma to the head and an unsuccessful attempt to raise the defence of lawful correction. This indicates that in each circumstance, the (step-)parent believed that their actions were lawful and justifiable in the name of discipline, demonstrating the inadequacy of the defence's guidance for parents in Queensland. Additionally, due to a lack of data from the inferior courts where the defence is more likely to arise, there is no opportunity for its meaningful development. Even where the defence has been discussed in the Court of Appeal, because it was unsuccessful in each case, the judiciary had no opportunity to discuss its application in detail. Hence, there is little judicial guidance around the defence's application to form a reliable precedent, leaving future courts, prosecutors, and parents in the dark.

B *Policy and Law Reform Options in Australia*

There has been very little consideration of s 280 by the Queensland government in relation to policy or law reform. The most recent governmental consideration of the defence was a 2008 review by the Department of Justice and Attorney-General ('DJAG').[139] This review coincided with Dean Wells MP's unsuccessful attempt to amend s 280 to restrict its application to a charge of common assault.[140] DJAG's review of the defence was only cursory. It relied on limited data from 2006–07, which had to be manually audited as the relevant entities did not collect

134 [2020] QCA 157.
135 *Criminal Code Act 1899* (Qld) ss 245, 315A, 335.
136 See *R v SDJ* [2020] QCA 157, [3].
137 Ibid [13].
138 Ibid [15].
139 Department of Justice and Attorney-General (Qld) (n 89).
140 Bronwyn Naylor and Bernadette Saunders, 'Whose Rights?: Children, Parents and Discipline' (2009) 34(2) *Alternative Law Journal* 80, 85.

data on where the defence has been raised.[141] Ultimately, the review did not have very clear findings, and the Department concluded that it had failed to reveal evidence that s 280 is significantly relied upon or that it impacts upon the ability to charge or prosecute parents.[142] However, it did reveal a concerning trend of parents punishing their children with a variety of implements and by applying force to children's heads, often through punches and slaps to the face.[143] Furthermore, the review acknowledged that abuse is a continuum with no clear boundaries demarcating where excessive punishment ends, and abuse begins.[144] This justifies concerns by scholars about the lack of distinction and connections between corporal punishment, 'discipline', and child abuse.[145]

Because of the dearth of material in Queensland on 'lawful correction', other states' treatment of corporal punishment is relevant. All other Australian jurisdictions also contain a defence to the corporal punishment of children by their parents and those in *loco parentis.* As in Queensland, the defence has been codified in Western Australia,[146] Tasmania[147] and the Northern Territory.[148] Contrastingly, Victoria, the Australian Capital Territory ('ACT') and South Australia have retained the defence at common law, while New South Wales ('NSW') is in the unique position of having legislated the defence, without excluding its common law operation.[149] The defence has only received significant attention in NSW and Tasmania; therefore, its evolution in those states will be examined.

1 NSW

The NSW position is singular among the Australian states. The defence was amended after a review in 2010, resulting in the Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000, which implemented s 61AA of the *Crimes Act 1900* (NSW). The Attorney General's Second Reading Speech introducing the Bill asserted that the defence seeks 'to ensure that children are protected from unreasonable punishment, without limiting the ability of parents to discipline their children in the appropriate manner'.[150] This objective was underpinned by the NSW government's policy that children should not be

141 Department of Justice and Attorney-General (Qld) (n 89) 1–2.
142 Ibid 4.
143 Ibid.
144 Ibid 2.
145 See above (n 53).
146 *Criminal Code Act Compilation Act 1913* (WA) s 257.
147 *Criminal Code Act 1924* (Tas) s 50.
148 *Criminal Code Act 1983* (NT) s 27(p).
149 *Crimes Act 1900* (NSW) s 61AA(5).
150 New South Wales, *Parliamentary Debates*, Legislative Assembly, 21 June 2001, 15025 (Bob Debus).

immune from 'ordinary parental discipline'.[151] The Explanatory Notes to the Bill further explain that s 61AA was intended to clarify the law on using physical force to punish children by restricting what is 'reasonable' through prohibiting the use of implements or weapons and blows to the head and neck.[152] It also prohibits blows to the body where likely to cause harm lasting for more than a short period, unless that force could reasonably be considered trivial or negligible.[153]

The 2010 review of the amendment recommended maintaining the defence, as it was ostensibly uncontroversial and met the policy objective of balancing children's and parents' rights.[154] This is because the restrictions on the defence were asserted to successfully protect children from 'unreasonable punishment' while providing parents and carers with guidelines on acceptable punishment and discipline.[155] However, two submissions to the review and several experts disagreed with this finding, considering the NSW reform failed in its stated objectives of clarification and balancing rights.[156] This is because it merely displaced interpretational uncertainty from 'reasonableness' onto the underfined terms of 'harm', 'short period' and 'trivial or negligible'.[157] The 'trivial or negligible' test in s 61AA(2) was particularly controversial as it introduced a different, subjective, test to the objective 'reasonableness' test in s61AA(1).[158] Thus, the defence is contradictory and left open to case-by-case interpretation.[159]

Furthermore, the defence still fails to balance parents' and children's rights by reinstating the legitimacy of corporal punishment by parents. This undermines and dilutes the intended message of restraint and weakens the amendment's objective of providing clear guidance.[160] It also conflicts with other well-established bodies of Australian law which consider the safety, wellbeing and best interests of the child to be paramount,[161] and Australia's obligations under the *UNCRC*.[162] Indeed, the National Youth Law Centre submitted that affording less

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151 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19112 (Bob Debus).

152 Explanatory Notes, Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000 (NSW) 1–2. Note that the prohibition of implement usage was never legislatively introduced.

153 *Crimes Act 1900* (NSW) s 61AA(2)(b).

154 Department of Justice and Attorney General (NSW) (n 18) 16.

155 Ibid 4.

156 The objectives are elucidated in Department of Justice and Attorney General (NSW) (n 18) 4, 10, 16. Academics who disagree include: McLean (n 32) 116; Schloenhardt and Cottrell (n 6) 86; Bernadette Saunders, 'Children's Human Rights and Social Work Advocacy: "Lawful Correction"' (2019) 72(4) *Australian Social Work* 490, 495; Nicholson (n 50).

157 Schloenhardt and Cottrell (n 6) 86.

158 Standing Committee on Law and Justice, Parliament of New South Wales, *Report on the Inquiry into the Crimes Amendment (Child Protection: Excessive Punishment) Bill 2000* (Report No 15, 24 October 2000) 49.

159 Ibid.

160 McLean (n 32) 124.

161 See, eg, *Child Protection Act 1999* (Qld) s 5A; *Family Law Act 1975* (Cth); Tasmania Law Reform Institute (n 18) 38.

162 Department of Justice and Attorney General (NSW) (n 18) 14.

legal protection from violence to children than is provided to adults was a form of age discrimination, supporting practices causing adverse health and developmental outcomes for children.[163] The NSW Standing Committee on Law and Justice and two submissions to the review were also concerned that the Bill provided no clear distinction between 'where excessive punishment ends and abuse begins'.[164] This is a concern echoed by scholars, who posit that s 61AA is inattentive to the 'sensitive and complex nature of discipline, punishment and abuse', and fails to comprehend that corporal punishment and abuse are violent 'outlets of aggression' distinguishable only by degree, not kind.[165] This suggests the defence is insufficiently restrictive upon parents' rights. Therefore, even narrowed, the NSW defence has failed to achieve its objectives, casting the failings of the broader Queensland defence into stark relief.

2 *Tasmania*

As the NSW defence suffers from significant inadequacies and cannot be used to guide legal reform in Queensland, it is useful to examine the defence in Tasmania. The Tasmanian defence is very similar to Queensland's, except it applies only to 'correction' and does not cover the use of force by 'a schoolteacher or master'.[166] Because of this similarity, the extensive government policy evaluating it is highly relevant for an analysis of the Queensland defence. Most of the Tasmanian policy stems from an unsuccessful attempt to repeal the defence in 2003. The attempt was the consequence of an Issues Paper in October 2002 and public consultation examining corporal punishment of children, producing a detailed report published by the Tasmania Law Reform Institute.

This report criticised the 'lawful correction' provision's lack of clarity on what constitutes 'reasonable force'.[167] Although the lack of definition in the *Criminal Code Act 1924* (Tas) could mean that the law is flexible and reflects changes in community standards of acceptability, it also means that it is so 'imprecise and uncertain' that it provides no guidance to parents, police or courts on what constitutes an 'acceptable' level of corporal punishment.[168] Courts must

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163 Ibid.

164 Standing Committee on Law and Justice, Parliament of New South Wales (n 158) 49 [7.4]. Note that this view was shared by politician Andrew Stoner who expressed concern that the terms used in the provision would 'muddy the waters' between discipline and abuse because 'one might as well ask: How long is a piece of string?': New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 November 2001, 19111 (Andrew Stoner). Note also that Gershoff's studies support this view, stating that 'corporal punishment and physical abuse are two points along a continuum': Gershoff (n 27) 553.

165 McLean (n 32) 127.

166 This is because s 82A of the *Education Act 1994* (Tas) makes it an offence for a staff member or 'other person instructing or teaching, or assisting or supporting teaching, at a school' to corporally punish a student.

167 Tasmania Law Reform Institute (n 18) 7.

168 Ibid 3, 7.

therefore determine the meaning of 'reasonable' on a case-by-case basis, in which they can be guided by their own experience, knowledge of community standards and previous case law.[169] Because there are relatively few reported cases considering the defence in Tasmania and across Australia, there is little to define 'reasonable force' and the case law that does exist (examined below) holds such 'significant inconsistencies' that it cannot assist in demarcating the parameters of 'reasonable force'.[170]

The report from the Tasmania Law Reform Institute compared the uses of force that were considered 'reasonable' or 'unreasonable' in cases from various jurisdictions. Examples from those cases that a court considered to be reasonable include: slaps to the face leaving some bruising and abrasion,[171] a slap to the face chipping a tooth,[172] beating with a belt causing facial bruising,[173] a slap to the face bursting an ear drum.[174] Examples of force considered unreasonable include: a strike to the head rupturing an eardrum,[175] a strike to the head with a piece of wood,[176] slapping across the face several times leaving red marks,[177] pulling ears,[178] tapping on the head with a chair rung,[179] a slap to the face cutting an ear,[180] and ten blows to the head.[181] Furthermore, the use of an instrument to inflict punishment (such as a cane) has been considered both reasonable and unreasonable.[182] In *Byrne v Hebden; Ex parte Hebden* the Court held that bruising or welts do not necessarily determine the 'unreasonableness' of the force,[183] however, other cases have held that punishments causing welts or bruising are unreasonable.[184] Finally, the principle that children incapable of understanding discipline should not be punished has been applied both to children less than 12 months old and to children two-and-a-half years old.[185] Ultimately, the Institute

169 Ibid 7.
170 Ibid 8.
171 *White v Weller; Ex parte White* [1959] Qd R 192.
172 *R v Haberstock* (1970) 1 CCC (2nd) 433.
173 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide a full citation, only 'UK, 1992'.
174 Ibid 8, citing 'UK, 1985'.
175 *Ryan v Fildes* [1938] 3 All ER 517.
176 *Pemberton v A-G (Tas)* [1978] Tas SR 1.
177 Ibid.
178 Ibid.
179 Ibid.
180 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide full citation, only 'Rome, February 1994'.
181 Ibid, citing 'Adelaide, 1994'.
182 Cf Tasmania Law Reform Institute (n 18) 8, citing *R v Terry* [1955] VLR 114; *R v Taylor* [1983] *The Times* High Court (this is the only citation provided); *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986).
183 [1913] St R Qd 233.
184 Tasmania Law Reform Institute (n 18) 8, citing Cashmore and de Haas (n 22) which did not provide full citation, only 'Ontario, 1992'; 'UK, 1985'; 'Victoria, 1994'.
185 Cf *R v Miller* [1951] VLR 346 with *R v Griffin* (1869) 11 CCC 402; *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986).

found that the failure to define 'reasonable force' has led to contradictory legal precedent,[186] illustrating that there is no consensus or common understanding of what is 'reasonable'.[187] The Institute was also concerned that the lack of legal guidance on what is acceptable could prevent the development of a community consensus on appropriate punishment because of the resulting lack of dialogue in the community.[188]

Contrary to the Queensland DJAG review of the s 280 defence, the Tasmanian Institute found that the contradictory legal precedent made prosecutions more difficult, even in cases of serious child abuse.[189] The Institute found that this perpetuates the lack of clarity in the law, because the case law with the potential to clarify what is 'reasonable' is never created.[190] Additionally, like in Queensland, the Tasmanian provision can be raised in defence of any charge involving an application of force to a child by a parent or person in *loco parentis* and such charges can range from minor assaults to grievous bodily harm or manslaughter.[191] Without clear guidance on what is 'reasonable', punishment beginning as 'reasonable' can easily escalate to 'excessive'. The Institute echoed experts and observed that '[w]hen there is no clear line, it may be easily overstepped' and that most cases of child abuse in Tasmania are the result of corporal punishment becoming excessive.[192] Clearly, the defence is unable to effectively protect children from violence or guide parents.[193]

Consequently, the Institute proposed two avenues of reform: abolition or legislative clarification of what constitutes 'reasonable' force. The Institute favoured abolishing the defence because it would achieve maximum legal clarity, abolition has been successful in many other countries, it would align Tasmanian law with international human rights, outlaw harmful conduct, afford children the same protections as adults, be in their best interests and increase the efficacy of educating the public on children's rights.[194] Therefore, the Tasmania Institute's analysis of the defence provides some guidance to Queensland decision-makers, but rather than demonstrating how the defence could be made workable, it concludes that it is not and cannot be made so.

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186 Tasmania Law Reform Institute (n 18) 8.
187 Ibid 11.
188 Ibid 12.
189 Ibid 5; Porzig-Drummond (n 16) 47.
190 Tasmanian Law Reform Institute (n 18) 13.
191 Ibid 7. Note that although the defence extends to people standing in *loco parentis* to a child, it is significantly limited by policy in this regard in relation to, for example, foster parents (also schools and childcare) who are prohibited from inflicting any form of corporal punishment: at 10.
192 Ibid 12. See (n 53).
193 Tasmanian Law Reform Institute (n 18) 14.
194 Ibid 3.

3 Judicial Critique

The fundamental deficiencies of the domestic discipline defence have been felt by the judiciary in other jurisdictions. Courts have criticised the 'lawful correction' defence in numerous cases. For example, Austin J has twice observed that the use of violence against children has 'fall[en] out of public favour'.[195] In 2019 the Supreme Court of Western Australia observed that, 'the provisions of s 257 … reflect the attitudes of the 19th century'.[196] Additionally, in 2015 the Victorian Supreme Court observed that '[i]t might be thought at least anomalous that what would not be a defence to an allegation of assaulting or killing an adult could be a defence to an allegation of assaulting or killing a child, who … will be more vulnerable'.[197] Despite such disapproval, courts remain bound to apply the defence and have found difficulty doing so consistently. This was clearly demonstrated by the Tasmania Law Reform Institute, when they compared 'disciplinary' conduct found reasonable and unreasonable by courts. This comparison revealed significant inconsistencies in the case law and the Institute concluded that it provides 'minimal assistance' in determining the content of 'reasonableness'.[198] An examination of the limited case law and policy suggests that this trend of confusing legal precedent has continued,[199] emphasising, in every iteration, the doctrine's fundamental incoherence and futility.

IV The *Human Rights Act 2019* (Qld)

When viewed through a children's rights lens, Queensland's defence of 'legal correction' appears to be prima facie inconsistent with two rights doctrines and fundamentally inconsistent with the tenor of children's human rights. Firstly, corporal punishment is manifestly inconsistent with children's 'best interests' and secondly, the defence discriminates against children by unjustifiably depriving them of equal protection against violence under the law. In the Queensland context, these arguments can be grounded in the recently enacted *HRA.* The Explanatory Notes explain that the *HRA* was enacted to 'consolidate and establish statutory protections for certain human rights recognised under international law including those drawn from the [*International Convention on Civil and Political Rights*], as well as the rights to health services and education drawn from the [*International Convention on Economic, Social and Cultural Rights*],

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195 *Sandham & Drego* [2018] FamCA 150, [53]. See also *Cao & Cao* [2018] FamCAFC 252, [42].

196 *A v Doubikin* [2019] WASC 426, [92], citing *Cramer v R* [1998] WASCA 300, 304–5, where White J (Pidgeon and Steytler JJ agreeing on this point) referred to *Higgs v Booth* (Supreme Court of Western Australia, Kennedy J, 29 August 1986) 7–8.

197 *R v Hughes* [2015] VSC 312, [100].

198 Tasmania Law Reform Institute (n 18) 8.

199 Cf *W, DL v Police* [2014] SASC 102; *A v Doubikin* [2019] WASC 426; *Ruse v Thew* (Supreme Court of New South Wales, 23 September 1995).

and property rights drawn from the [*Universal Declaration of Human Rights*]'.[200] It further outlines that the *HRA* joins a suite of legislation containing mechanisms to hold the Queensland government accountable to the public,[201] as it requires compliance with the enumerated rights by public entities.[202] If a law cannot be interpreted consistently with the *HRA*, the court must consider whether the law justifiably infringes upon the enumerated right.[203] If not, the Supreme Court may issue a declaration of incompatibility.[204] Although this is a weak measure, it may stimulate positive normative change.

The 'best interests' principle is found in s 26(2) of the *HRA*, which provides that '[e]very child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.' The Explanatory Notes to the *HRA* specify that the s 26(2) right to protection recognises that children have a 'particular vulnerability' and must therefore be afforded 'special protection'.[205] It provides that this 'protection is to be afforded to the child by the child's family, society and the State'.[206] Therefore, the *HRA* appears to recognise that children are entitled to the same rights as adults in addition to further protections, required by their best interests and vulnerabilities. It also imposes a duty upon the Queensland government to enact 'positive measures for protection of children'.[207] The content of this duty should involve promoting children's survival, development and wellbeing as much as possible.[208] The Explanatory Notes also observe that the best interests principle stems from the *UNCRC*, which stipulates that it shall be a 'primary consideration' in actions regarding children.[209]

The freedom from discrimination right is found in s 15(3) of the *HRA*, which stipulates that 'every person is … entitled to the equal protection of the law without discrimination'. The Explanatory Notes explain that 'discrimination' in the *HRA* includes direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991* (Qld) ('*ADA*').[210] The *ADA* prohibits discrimination on the basis of certain attributes, relevantly including age.[211] Section 10(3) stipulates that the motive for discrimination is irrelevant. Therefore, discrimination against

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200 Explanatory Notes, Human Rights Bill 2018 (Qld) 2.

201 Ibid 5–6. Other legislation in this suite includes the: *Right to Information Act 2009* (Qld); *Information Privacy Act 2009* (Qld); *Judicial Review Act 1991* (Qld); *Ombudsman Act 2001* (Qld); *Anti-Discrimination Act 1991* (Qld); *Crime and Corruption Act 2001* (Qld).

202 *HRA* (n 4) s 4(b). 'Public entities' is defined in s 9 and relevantly includes government entities: s 9(1)(a).

203 Ibid s 13.

204 Ibid s 53(2).

205 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

206 Ibid.

207 Ibid.

208 *Application for Bail by HL (No 2)* [2017] VSC 1, [123].

209 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

210 Ibid 18.

211 *Anti-Discrimination Act 1991* (Qld) s 7(f).

children based on their age cannot be justified by arguing that it is in their best interests to do so. Although the *ADA* outlines some exceptions to this rule, none are relevant to using physical force to punish children.

Because the rights enumerated in the *HRA* are derived from international human rights and interpretation of the *HRA* is nascent, international and foreign jurisprudence may guide the application of rights in Queensland and assist analyses of laws' compatibility with the *HRA*.[212]

A *Best Interests of the Child*

1 HRA

The first right with which the domestic discipline defence is prima facie inconsistent is the right to 'protection that is needed by the child, and is in the child's best interests, because of being a child'.[213] The best interests of the child principle is already firmly embedded in Australian law as the paramount consideration for a court when making decisions with respect to children.[214] However, the term has been criticised in Australia for its uncertainty, an issue not addressed by the *HRA*, which leaves it undefined.[215] Therefore, because what constitutes the best interests of the child remains ambiguous and obscure, it should be considered flexibly and adaptably having regard to the circumstances of the case at hand.[216] Furthermore, extrinsic materials (like the *UNCRC*) may guide its interpretation and application,[217] especially since the *HRA* Explanatory Notes refer to the *UNCRC* in relation to s 26(2). Indeed, Garde J of the Victorian Supreme Court considered the factors set out in the *UNCRC* pertaining to children's best interests in *Certain Children by Their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* to interpret the corresponding provision in the Victorian *Charter of Human Rights and Responsibilities 2006*.[218] Thus, the *UNCRC* is likely to strongly influence the *HRA's* interpretation.

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212 See *HRA* (n 4) s 48.

213 Ibid s 26(2).

214 The principle appears in several sections in the *Family Law Act 1975* (Cth): see, eg, ss 60CA, 60CC, 60D, 65AA, 67L and 67V and in Queensland law in the Child Protection Act 1999 (Qld), where s 5A enumerates the Act's main purpose of protecting children and to ensure that the safety, wellbeing and best interests of a child, both through childhood and the rest of the child's life, are paramount.

215 Robert Harris Mnookin, 'Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy' (1975) 39(3) *Law and Contemporary Problems* 226, 260; M Rayner, 'Protection and Promotion of the Best Interests of the Child' (Conference Paper, Children's Rights: The Next Step Conference, 3 April 1997) 9.

216 Committee on the Rights of the Children, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art. 3, Para. 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) [32].

217 *Acts Interpretation Act 1954* (Qld) s 14B(1)(a).

218 (2016) 51 VR 473, 497 [146].

2 *International Law*

Using the *UNCRC* to interpret the *HRA* introduces international standards into Queensland law, which emphasise the foundational incompatibility of corporal punishment with children's human rights. Additionally, it exposes Australia and Queensland's departure from their obligations under international human rights law and the *HRA.* In 1998 the Australian government's position was that the *UNCRC* 'should not be interpreted [as requiring the prohibition of correction by force] because the Convention outlaws "torture or other cruel, inhuman or degrading treatment or punishment" and not *all* punishment'.[219] This is despite art 19 specifically requiring States to 'take *all* appropriate legislative, administrative, social and educational measures to protect the child from *all forms of physical or mental violence* ... while in the care of parent(s), legal guardian(s) or [carers]'.[220] The UNCRC Committee disagrees with Australia's interpretation, stipulating that '[t]here is no ambiguity: "all forms of physical or mental violence" does not leave room for any level of legalized violence against children.'[221] Although the UNCRC Committee has not made any decisions regarding corporal punishment, its substantial jurisprudence (including General Comments, Reports, and Concluding Observations) clearly requires State Parties to prohibit physical punishment of children.[222] For example, the Committee has specified that what is 'appropriate' excludes a justification of violent discipline because the article must be interpreted consistently with the whole Convention.[223] Therefore, what is in a child's best interests 'cannot be used to justify practices, including corporal punishment and other forms of cruel or degrading punishment, which conflict with the child's human dignity and right to physical integrity'.[224] It is important to note that the UNCRC Committee also deliberately recognises the distinction between using force to punish and using it reasonably to protect a child from themselves or others, in which case the principle of the minimum necessary force for the shortest necessary period of time must always apply.[225]

Despite requiring the best interests of the child to be a primary consideration in all actions concerning children, the *UNCRC,* like the *HRA,* leaves the term

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219 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Parliament of Australia, *Model Criminal Code: Chapter 5: Non-Fatal Offences against the Person* (Report, 1998) 135 (the government based its position on the European Court of Human Rights case *Campbell and Cosans v United Kingdom* 4 Eur Court HR).

220 *UNCRC* (n 1) art 19(1) (emphasis added).

221 *General Comment No 8* (n 10) [18].

222 Ibid. This is probably because there was no complaints procedure under the *UNCRC* until 2014 when the *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure*, 66th sess, UN Doc A/RES/66/138 (14 April 2014, adopted 19 December 2011) came into force, and it has only 48 state parties and 16 signatories to date. Australia is not one of them.

223 *General Comment No 8* (n 10) [28].

224 Ibid [26].

225 Ibid [14]–[15].

undefined.[226] While the Convention provides no explicit guidance on what 'best interests' are, the Committee has observed that the interpretation of a child's best interests must be consistent with the whole Convention.[227] Thus, the content of children's interests is likely to include being treated with dignity and worth,[228] and having their voices heard in matters concerning them.[229] In addition to the UNCRC Committee's explicit prohibition on corporal punishment, this content is contrary to Australia's interpretation of the Convention as allowing legalised violence against children.

The current Australian conception of best interests therefore not only conflicts with the international content of the principle, but also fundamentally fails to recognise children as rights-holders. The Committee specifically notes that the prohibition on corporal punishment applies to parents and those in *loco parentis* and highlights that it does not conflict with their rights and duties.[230] This is because, as Lord Fraser observed in *Gillick v West Norfolk and Wisbech Area Health Authority*, parents' duties and rights in relation to their children are conferred for the benefit of the child, not for the benefit of parents.[231] Lord Fraser's observation was a vital turning point in children's rights because it challenges the concept of rights *over* children. This challenge was taken up by the *UNCRC* in two ways. Firstly, as above, it prohibits violence against children. A prohibition is necessary because legal tolerance of corporal punishment enables and endorses parents' right to use violence against their children, which is inconsistent with children's human rights.[232] Secondly, it challenges traditional perceptions of children as powerless. Rather than portraying children as vulnerable, dependent, and irrational 'becomings', the *UNCRC* endorses a participatory approach to children, which depicts them as active, developing beings with evolving capacities, entitled to respect for their human dignity as autonomous humans and rights-bearers.[233] The *UNCRC* does this by limiting parents' duties to provide 'appropriate direction and guidance' to children 'in a manner consistent with the evolving capacities of the child'.[234] This means that children's rights transcend that of the family, and as children grow older and empowered, parental rights and duties as to guidance

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226 *UNCRC* (n 1) art 3(1). Note the slightly lesser standard of 'primary' in the *UNCRC* than 'paramount' under Australian law.

227 *General Comment No 8* (n 10) [26].

228 *UNCRC* (n 1) art 40(1).

229 Ibid art 12.

230 *General Comment No 8* (n 10) [27], [47].

231 [1985] 3 All ER 402, 410.

232 Phillips and Alderson (n 53) 184. Note McLean's interesting discussion about how children's rights don't fit well within the traditional rights framework: McLean (n 32) 135. See also John Tobin, 'Understanding a Human Rights Based Approach to Matters Involving Children: Conceptual Foundations and Strategic Considerations' in Antonella Invernizzi and Jane Williams (eds), *The Human Rights of Children: From Visions to Implementation* (Ashgate Publishing Ltd, 2011) 61, 90.

233 Phillips and Alderson (n 53) 179; Freeman and Saunders (n 16) 698; *UNCRC* (n 1) arts 5, 12.

234 *UNCRC* (n 1) art 5.

correspondingly decrease.[235] The *UNCRC* thus strengthens children's power, providing effective protection against family violence.[236] Without this, children's abilities to defend their human rights are limited by a system that traditionally and otherwise upholds parents' rights over children's rights and which rewards more powerful and articulate lobby groups.[237] Therefore, the best interests principle in the *HRA* can be given content by examining its interpretation by the UNCRC Committee and by the fundamental conception of children as rights holders.

Although some claim that affording children the protection of such rights represents undue interference in family life, the law already does so in manifold ways.[238] It currently imposes reasonableness limits around the correction of children and requires that parents raise their children according to the minimum standards set by Parliament.[239] Moreover, significant incursions into the private sphere are also evident in laws around family violence.[240] Thus, parents are already bound to raise children within the parameters of the law. Arguments regarding family privacy are outmoded and abhorrent because of their historical use to undermine laws regarding domestic violence and marital rape.[241] By excluding any justification of corporal punishment under 'best interests', the *UNCRC* (and by extrapolation, the *HRA*) empowers children through their rights and strengthens their protection against corporal punishment. International conceptions of children and their rights are therefore fundamentally inconsistent with a defence allowing children's dignity and physical integrity to be violated by the use of force.

B *Equal Protection*

1 HRA

The 'lawful correction' defence is also prima facie and substantively incompatible with the right of every person to the equal protection of the law.[242] Chapter 26 of the *Criminal Code* protects all Queenslanders from assaults and other offences of

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235 That arts 5 and 19 should be read together is advised by the Committee on the Rights of the Child, *General Comment No 13 (2011): The Right of the Child to Freedom from All Forms of Violence*, 61st sess, UN Doc CRC/C/GC/13 (18 April 2011) [66] ('*General Comment No 13*').

236 Phillips and Alderson (n 53) 176.

237 Tasmania Law Reform Institute (n 18) 38; Freeman and Saunders (n 16) 698; Phillips and Alderson (n 53) 175.

238 Naylor and Saunders (n 140) 81.

239 Freeman and Saunders (n 16) 701.

240 Tasmania Law Reform Institute (n 18) 38; Rowland, Gerry and Stanton (n 11) 184; Anne McGillivray, '"He'll Learn It on His Body": Disciplining Childhood in Canadian Law' (1997) 5(2) *International Journal of Children's Rights* 193, 229.

241 Tasmania Law Reform Institute (n 18) 38.

242 *General Comment No 13* (n 235) [61].

violence to the person.[243] However, s 280 withdraws this protection from a single class of person – children – while leaving it intact for all others. Children's inferior protection against offences to the person is based on age, despite their need for more, not less, protection due to their evolving capacity and vulnerability. Children's need for more protection is exacerbated by the dependent relationship in which the defence applies.[244] Therefore, the defence clearly fails to afford children their right to the equal protection of the law, and the protection they need.

2 *International Law*

Children's status in international human rights law is influential to the application of the *HRA* rights to domestic law. The Queensland defence denies children equal protection of physical integrity, contrary to s 15(2) of the *HRA*, supported by arts 2 of the *UNCRC* and 26 of the *International Convention on Civil and Political Rights* ('*ICCPR*'),[245] which reinforce children's equality. Article 2 of the *UNCRC* provides that 'State Parties shall respect and ensure the rights set forth … without discrimination of any kind'.[246] Similarly, art 26 of the *ICCPR* stipulates that '[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law'.[247] The Human Rights Committee has held that all rights in the *ICCPR* apply to children, and has explained that non-discrimination may require greater protections for vulnerable groups such as children, not less.[248] As s 15(2) of the *HRA* is based upon this article, it is likely this interpretation would apply to an application of the right in Queensland, requiring children to have greater protections from violence than adults.[249] According to the *International Convention on Economic, Social and Cultural Rights* ('*ICESCR*')[250] Committee, subjecting children to corporal punishment (as s 280 allows) deprives them of the same dignity and respect as adults.[251] Because

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243 *Criminal Code Act 1899* (Qld) ch 26, ss 245, 246.

244 *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76, [226] ('*Canadian Foundation*').

245 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

246 *UNCRC* (n 1) art 2(1).

247 *ICCPR* (n 245) art 26.

248 Human Rights Committee, *General Comment No 17: Article 24 (Rights of the Child)*, 35th sess (7 April, 1989) [2]; Human Rights Committee, *General Comment No 18: Non-Discrimination*, 37th sess (10 November, 1989) [8].

249 Explanatory Notes, Human Rights Bill 2018 (Qld) 22; This may be interpreted to mean that the Queensland government must not only abolish the defence, but explicitly outlaw corporal punishment as suggested by the UNCRC Committee in *General Comment No 8* (n 10) [34].

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

251 Committee on Economic, Social and Cultural Rights, *General Comment No 13: The Right to Education (Art 13)*, 21st sess, UN Doc E/C.12/1999/10 (8 December 1999) [41].

this discrimination violates the principle of dignity of the individual, it undermines the very foundation of human rights law and must be abolished.[252] Affording this dignity to children is vital to successfully challenging children's traditional status and providing them with the same protections they receive at international law. By reducing the protections children receive from violence relative to adults, the Queensland defence is diametrically opposed to the equal protection doctrine.

Indeed, treaty committees have characterised Australia as having particular problems with equal treatment of children and have been uncompromising in their prohibition on corporal punishment. The UNCRC Committee has restated its concern regarding Australia's high rates of violence against children in every response to Australia's periodic reports under the Convention. Consequently, it has specifically required Australian states abolish the defence that makes corporal punishment lawful.[253] Because of the frequency of this observation and States' failure to comply, the UNCRC Committee published General Comment No. 8, expressly addressing children's right to protection from corporal punishment.[254] The Committee defined corporal punishment broadly and found that it is 'invariably degrading'.[255] The latter finding means that States allowing corporal punishment will also violate art 37(a) of the *UNCRC*,[256] which prohibits subjecting children to torture or other cruel, inhuman or degrading treatment or punishment.[257] Indeed, the Human Rights Committee has interpreted this right broadly, as 'extend[ing] to corporal punishment, including excessive chastisement ordered as punishment for … [a] disciplinary measure'.[258] This interpretation was reinforced by the Special Rapporteur on the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*,[259] who observed that 'any form of corporal punishment [against children] is contrary to the [established principles on the] prohibition of torture and other cruel, inhuman or

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252 Ibid [31]; Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, the Crown Dependencies and the Overseas Dependent Territories*, 28th sess, UN Doc E/C.12/1/Add.79 (5 June 2002) [36].

253 Committee on the Rights of the Child, *Concluding Observations: Australia 1997* (n 2) [15]; Committee on the Rights of the Child, *Concluding Observations: Australia 2005* (n 3) [33], [35], [42]; Committee on the Rights of the Child, *Concluding Observations: Australia 2012* (n 3) [8], [43]–[47]; Committee on the Rights of the Child, *Concluding Observations: Australia 2019* (n 3) [28]–[30].

254 *General Comment No 8* (n 10). These comments have been further expressed more broadly in *General Comment No 13* (n 235); Pinheiro (n 65).

255 *General Comment No 8* (n 10) [11].

256 Ibid [18], [30]; *General Comment No 13* (n 235) [24], [26].

257 *UNCRC* (n 1) art 37(a).

258 Human Rights Committee, *General Comment No 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment)*, 44th sess, UN Doc A/44/40 (10 March 1992) [5] ('*General Comment No 20*').

259 *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

degrading treatment or punishment'.[260] Viewed through the lens of international law and the *HRA*, Queensland's legalisation of corporal punishment thus invariably exposes children to degradation and cruel and inhuman punishment.

C *Reasonable Limits that are Demonstrably Justified*

Unlike the *UNCRC*, the rights protected by the *HRA* are not absolute. The *HRA* Explanatory Notes explains that the human rights in the Act 'may be balanced against the rights of others and public policy issues'.[261] Thus, s 13 of the *HRA* subjects the enumerated rights to 'reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.[262] This general limitations clause is not unusual in human rights instruments and can be found in the two instruments on which this general limitations clause is based, the Canadian *Charter of Rights and Freedoms* ('*Canadian Charter*') and the South African Constitution.[263] A limitation imposed upon a right is reasonable where it is 'demonstrably justified'. This places the onus on the State (or public entity) seeking to limit an enumerated right to demonstrate that the limit is justified.[264] Relevant to this demonstration is the nature of the human right, the purpose of the limitation and whether it is consistent with a free and democratic society based on human dignity, equality and freedom, whether the limitation helps to achieve the purpose, whether there are less restrictive and more reasonable ways to achieve the purpose, and the balance between the importance of limiting the right and of preserving it.[265]

The children's rights enumerated in the *HRA* are founded upon children's 'particular vulnerability' and need to be afforded 'special protection' due to being a child.[266] However, the limitation of their rights through the enactment of the defence is not for the purpose of protecting children from violence. Rather, the defence protects parents inflicting pain as discipline.[267] When s 280 was implemented in 1899, and arguably contemporaneously,[268] the objective of shielding parents, teachers and masters from liability for assault was based in

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260 Manfred Nowak, *Report of Special Rapporteur Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, 60th sess, UN Doc A/60/316 (30 August 2005) [28].

261 Explanatory Notes, Human Rights Bill 2018 (Qld) 16.

262 *HRA* (n 4) s 13(1).

263 Canada Act 1982 (UK) c 11, sch B pt I ('Canadian Charter of Rights and Freedoms'); Constitution of the Republic of South Africa Act 1996 (South Africa); 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 Revue* 419, 426–7.

264 Explanatory Notes, Human Rights Bill 2018 (Qld) 16.

265 *HRA* (n 4) ss 13(2)(a)–(g).

266 Explanatory Notes, Human Rights Bill 2018 (Qld) 22.

267 Tasmania Law Reform Institute (n 18) 29; *Canadian Foundation* (n 244) [235] (Deschamps J).

268 Schloenhardt and Cottrell (n 6) 84.

traditional notions of children as property,[269] capable of learning through physical violence.[270] Some have attempted to reclassify the enumerated legislative objective, justifying the corporal punishment of children by emphasising that children are not adults and cannot be treated as such.[271] This is because they allegedly do not have adult experience, understanding or reasoning and parents are responsible for them and have duties to guide them into adulthood.[272]

Even if the purported purpose of the limitation on children's right to protection from violence did benefit children, the putative benefits should not be used to justify a rights violation.[273] Furthermore, the limitation categorically fails to achieve its purpose because the limitation embodied by the defence subjects children to violence and other harms. The limitation on children's rights, allowing them to be corporally punished, cannot be related to the purported purpose of the limitation, 'to protect children from violence' and help them learn. Further, the UNCRC Committee, Human Rights Committee and Special Rapporteur have explicitly stated that the corporal punishment of children is invariably degrading,[274] making it fundamentally antithetical to a free and democratic society based on human dignity, equality and freedom. There are also other less restrictive, less degrading and reasonably available ways to protect and discipline children that uphold their equalised and special status in human rights law.[275] Therefore, the limitations imposed by s 280 on children's rights cannot be justified under international or domestic law due to punitive violence it permits and its inconsistency with human dignity, equality and freedom. In allowing the defence to continue in its current form, Queensland violates domestic and international human rights.

V Limiting the Defence

Despite almost universal support for the *UNCRC*, much of the Western world appears reluctant to abolish 'lawful' corporal punishment.[276] The doctrine remains good law in Australia, England, Canada and the United States, where the

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269 McLean (n 32) 135.

270 *Canadian Foundation* (n 244) [235] (Deschamps J).

271 See, eg, the Supreme Court in *Canadian Foundation* (n 244).

272 Tasmania Law Reform Institute (n 18) 23.

273 Joan Durrant, 'The Empirical Rationale for Eliminating Physical Punishment' in Joan E Durrant and Anne B Smith (eds), *Global Pathways to Abolishing Physical Punishment: Realizing Children's Rights* (Routledge, 2011) 42, 42.

274 *General Comment No 8* (n 10) [11]; Human Rights Committee, *General Comment No 20* (n 258) [5]; Nowak (n 260) [28].

275 See Part II of this paper.

276 Note that although corporal punishment was not discussed in the *travaux préparatoires* of the *UNCRC* (n 1), the Committee has emphasised that like other Conventions, it is a 'living instrument', and since its drafting, corporal punishment has become more visible: *General Comment No 8* (n 10) [20].

legitimacy of corporal punishment has been challenged on human rights grounds. The Canadian case of *Canadian Foundation for Children, Youth and the Law v Canada* ('*Canadian Foundation*')[277] provides an example of the defence being limited and many problems associated with that approach.

In *Canadian Foundation*, the Canadian Supreme Court considered whether s 43 of the Canadian *Criminal Code*[278] was unconstitutional because of its inconsistency with the *Canadian Charter*. Section 43 is similar to Queensland's 'lawful correction' defence, providing that '[e]very schoolteacher, parent or person standing in the place of a parent is justified in using force by way of correction toward a pupil or child, as the case may be, who is under his care, if the force does not exceed what is reasonable under the circumstances'.[279] The Canadian Foundation claimed that this is inconsistent with arts 7, 12 and 15(1) of the *Canadian Charter* because the defence respectively fails to: give procedural protections to children, does not further their best interests and is overbroad and vague; it constitutes cruel and unusual punishment or treatment; and denies children the legal protection against assault accorded to adults.[280]

The Supreme Court held by a 6:3 majority that s 43 was not unconstitutional and violated none of the enumerated rights under the *Canadian Charter*. Writing the leading judgment, McLachlin CJ (Gonthier, Iacobucci, Major, Bastarache and LeBel JJ agreeing) held that s 43 did not unjustifiably infringe the *Canadian Charter*[281] because 'the substantial social consensus on what is reasonable correction … gives clear content to s. 43' and 'exempting parents and teachers from criminal sanction for reasonable correction does not violate children's equality rights … this section provides a workable, constitutional standard that protects both children and parents'.[282] Her Honour's reference to social consensus highlights that she made this finding by effectively redefining a constitutional issue as a policy consideration, deferring to social consensus to define what is constitutional and in a child's best interest.[283]

Mechanically, McLachlin CJ achieved this by first demarcating a protected space for corporal punishment of children in reading down s 43 to include 15 new qualifications on the substantive defence.[284] These were intended to clarify the

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277 *Canadian Foundation* (n 244).

278 *Criminal Code*, RSC 1985, c C-46.

279 Ibid s 43.

280 *Canadian Foundation* (n 244) [1].

281 Ibid [129]–[130].

282 Ibid [2].

283 Sonja Grover, 'A Commentary on *Canadian Foundation for Children, Youth and the Law v. Canada (AttorneyGeneral)*' (2004) 11(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 14, [3]–[4].

284 See Lucinda Ferguson, 'Commentary on *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*' in Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (eds), *Rewriting Children's Rights Judgments from Academic Vision to New Practice* (Hart Publishing, 2017) 381 for an enlightening critique and re-write of the judgment from a children's rights perspective.

reasonableness requirement[285] and included: a prohibition on the use of implements, blanket exclusions for the use of force on children under two and on teenagers, a prohibition on blows to the head,[286] and the inapplicability of the defence to charges other than common assault.[287] Further, McLachlin CJ held that, in direct contradiction of the section's text, teachers fell outside of its scope because corporal punishment by them is always unreasonable, unacceptable and degrading treatment within the meaning of art 7 of the *ICCPR*.[288] Only after interpreting the provision thus, did McLachlin CJ consider whether it was unconstitutional.

This decision has been subjected to wide-ranging judicial and academic criticism,[289] including by the dissenting judges, Arbour and Deschamps JJ, who targeted the Court's reinterpretation of the section to preserve its constitutionality.[290] As Arbour J observed, 'it is useful to note how much work must go into making the provision constitutionally sound and sufficiently precise'.[291] Her Honour dissented on the basis that the provision could not be read down as the majority asserted and was therefore unconstitutional for its infringement of children's rights.[292] Deschamps J, also dissenting, did so on the grounds that the defence unjustifiably violated children's right to equality before the law.[293] Both dissenting judges believed the provision should be struck down.[294]

Moreover, scholars have criticised the majority and Binnie J's judgments for confusing whom the section protected and benefitted. They posited that the defence's infringement upon children's rights (if found) was justified by its protection of parents, rather than its benefit to children, despite the challenge to the provision's constitutionality being founded upon its harm to children.[295] For example, McLachlin CJ's judgment, in using social consensus to give content to s 43, depends upon the assumption that a consensus adult perspective has automatic legitimacy and is unquestionably in children's best interests. This assumption disturbingly reflects the nineteenth century 'Blackstone-esque' attitudes which gave rise to the provision. Such attitudes were alluded to by

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285 *Canadian Foundation* (n 244) [39].

286 Ibid [37], [40].

287 Ibid [59].

288 Ibid [33]–[42].

289 See, eg, McGillivray (n 27) 151–64; Ferguson (n 284); Sanjeev Anand, 'Reasonable Chastisement: A Critique of the Supreme Court's Decision in the "Spanking Case"' (2004) 41 *Alberta Law Review* 871.

290 Ferguson (n 284) 383–5.

291 *Canadian Foundation* (n 244) [190] (Arbour J).

292 Ibid [211].

293 Ibid [213], [240], [246].

294 Ibid [194] (Arbour J), [242] (Deschamps J).

295 McGillivray (n 27) 136 (writing about the earlier instance decisions). Note that in *Canadian Foundation* (n 244), while Binnie J agreed that s 43 did violate children's right to equal protection of the law, his Honour found that such violation was justified because of the section's protection of children.

Deschamps J, who found that the legislator's intention when enacting the defence was to protect parents using physical force on their children from prosecution, rather than protecting children from the intrusion of the criminal law, supported by the heading under which the defence is placed, being 'Protection of Persons in Authority'.[296] The *Canadian Foundation* majority decision was therefore not only dubious as a matter of law but also antiquated as a matter of principle.

It is unlikely that this case would be decided in the same way in 2022 as the majority's restrictive interpretation substantially relied on now-outdated international law to determine the content of 'reasonableness'. The Chief Justice correctly identified that, at the time, neither the *UNCRC* nor the *ICCPR* 'explicitly require[d] state parties to ban all corporal punishment of children'.[297] Further, while the Human Rights Committee had expressed the view that corporal punishment of children in schools engages the prohibition of degrading treatment or punishment, '[the UNCRC] Committee ha[d] not expressed a similar opinion regarding parental use of mild corporal punishment'.[298] However, the debate around corporal punishment and human rights had been raging in Canada since at least 1987, when the Law Reform Commission of Canada decided, by majority, that the defence should remain: 'A minority felt that … [the defence] blunts the general message of the criminal law on force, and singles out children as not meriting full personal security and equal legal protection. The majority felt that such a provision should be retained to prevent the intrusion of law enforcement into the privacy of the home for every trivial slap or spanking'.[299] Since then, the UNCRC Committee has definitively held that the Convention cannot be used to endorse corporal punishment against children, with other treaty bodies following suit and making similarly strong statements.[300]

The United Kingdom ('UK') also attempted to make its 'reasonable chastisement' defence more palatable to the UNCRC Committee, following the landmark decision in *A v The United Kingdom*.[301] This case arose with the English courts' prosecution of a man who punished his nine-year-old stepson by hitting him with a garden cane. The man was acquitted on the basis of 'reasonable chastisement'.[302] However, the European Court of Human Rights ('ECtHR') found that the stepfather's conduct breached art 3 of the *Convention for the Protection of*

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296 *Canadian Foundation* (n 244) [235].

297 Ibid [33].

298 Ibid.

299 Law Reform Commission of Canada, *Recodifying Criminal Law* (Report No 31, 1987) 40, cited in Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, Parliament of Australia (n 219) 133.

300 See Part IV.B.2 of this paper.

301 (1999) 27 EHRR 611. Note that of the nations included in the UK, Scotland and Wales have both abolished corporal punishment: *Children (Equal Protection from Assault) (Scotland) Act 2019* (Scot); *Children (Abolition of Defence of Reasonable Punishment) (Wales) Act 2020* (Wales).

302 *A v United Kingdom* [1998] 3 FCR 597.

Human Rights and Fundamental Freedoms ('*ECHR*'),[303] which provides that no one shall be subjected to torture, inhuman or degrading treatment or punishment.[304] In allowing 'reasonable chastisement', the ECtHR found England liable for failing to provide children with the adequate protection against serious breaches of personal integrity required by art 3, and also cited inter alia arts 19 and 37 of the *UNCRC*.[305] In efforts to comply with their human rights obligations,[306] the UK government enacted s 58 of the *Children Act 2004*, which limits the availability of the defence to parents or those in *loco parentis* charged with common assault.

This section, which has limited the defence like the *Canadian Foundation* case and NSW's s 61AA, has been subject to much criticism from the treaty committees, scholars and children's advocate groups for failing to comply with the international children's rights obligations. The Concluding Remarks on the UK's second report to the ICESCR Committee observed that the government's proposals to limit, rather than remove, the defence of 'reasonable chastisement' do not comply with the tenor of the Convention since they constitute a serious violation of the dignity of the child.[307] Moreover, the UNCRC Committee considered that amending rather than repealing the provision suggests that some forms of corporal punishment are acceptable, undermining educational measures to promote positive and non-violent discipline.[308] The Committee therefore requires abolition of 'reasonable chastisement' defences, as well as the explicit prohibition of corporal punishment and other cruel or degrading forms of treatment in civil or criminal legislation.[309] This is to make it absolutely clear that it is as unlawful for an adult to hit, smack or spank a child and to establish that the criminal offence of assault applies equally to such violence, regardless of whether it is 'discipline' or 'reasonable correction'.[310]

The Committees' views are shared by several scholars, who characterise the limited defences as ethically legitimating violence against children,[311] and 'bungling',[312] 'dilut[ing]'[313] and 'weak'[314] compromises that fail to address the real

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303 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

304 *A v United Kingdom* (1999) 27 EHRR 611, 624, 627, 629.

305 Ibid 618.

306 Michael Freeman, 'Upholding the Dignity and Best Interests of Children: International Law and the Corporal Punishment of Children' (2010) 73(2) *Law and Contemporary Problems* 211, 218, 235–236; Simon Parsons, 'Human Rights and the Defence of Chastisement' (2007) 71(4) *Journal of Criminal Law* 308, 312.

307 Committee on the Rights of the Child, *Concluding Observations: United Kingdom of Great Britain and Northern Ireland*, 31st sess, UN Doc CRC/C/15/Add.188 (9 October 2002) [37].

308 Ibid.

309 *General Comment No 8* (n 10) [34].

310 Ibid.

311 Birchall and Burke (n 32) 7.

312 Freeman (n 306) 236.

313 McLean (n 32) 116.

314 Nicholson (n 50) 24.

issues. They posit that these defences create a grey area where parents, abusers, children and professionals may believe that there are no grounds for intervention to protect children.[315] Additionally, they argue that mere amendments perpetuate the traditional conceptions of children as property and signal that their bodily integrity and physical security are to be sacrificed to the wills of their parents.[316] Observing children's human rights therefore requires much more than limiting the defence, and merely restricting Queensland's 'lawful correction' defence is unlikely to comply with the State's or Australia's human rights obligations.

VI Moving Forward

At the time of writing, the defence of 'lawful correction' has been repealed in 65 states around the world, first in Sweden and most recently in South Korea and Colombia.[317] From a study of several of these States, Bussman et al found the most effective reforms involve a combination of legal deterrents and education. This supports the recommendations made by the UNCRC Committee for educational campaigns to accompany legal change.[318] The Committee envisions that legal deterrents will be constituted by dual positive and negative obligations, like those used in Sweden, to address violence against children.[319] Swedish parents have both negative and positive obligations in relation to raising children. They are obliged not to use violence against their children, and to provide them with care, security and a good upbringing.[320] This reform was grounded in a view that children are not parental property, but 'independent individuals with a right to full respect for their integrity'.[321] If Queensland is to be similarly successful in repealing its defence, educating children (and parents) of their rights and the former's independent and equal status is vital, as access to knowledge empowers children and increases their safety.[322]

Although parents have been cited as fearing prosecution as a consequence of prohibiting corporal punishment, that is not supported by evidence from states which have done so.[323] This is because the defence of necessity and the principle of *de minimis* are still available. Emphasising these defences may make abolition more palatable by excluding some conduct constituting physical punishment

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315 Birchall and Burke (n 32) 2.

316 *Canadian Foundation* (n 244) [231] (Deschamps J).

317 'End Corporal Punishment' (n 14).

318 *General Comment No* 8 (n 10) [18], [46]; *General Comment No 13* (n 235) [44].

319 See *General Comment No 8* (n 10) [34]. This method was so described by Birchall and Burke (n 32) 7.

320 *Parent Code (Föräldrabalken)* (Sweden) 1949:381 §6.1.

321 Pernilla Leviner, 'The Ban on Corporal Punishment of Children: Changing Laws to Change Attitudes' (2013) 38(3) *Alternative Law Journal* 156, 156, citing the Swedish *travaux preparatoires* reforming the law in the following way: Legislative Bill, prop. 1978/79:67 *Om förbud mot aga.*

322 Phillips and Alderson (n 53) 188.

323 Freeman and Saunders (n 16) 700; Naylor and Saunders (n 140) 83; Leviner (n 321) 158.

required by emergency or too trivial to warrant prosecution.[324] Doing so is inconsistent with the UNCRC Committee's definition of corporal punishment, which applies to any force used, *however light*.[325] However, it is justified by the positive object of abolition, to prevent parents from using corporal punishment through supportive and educational, not punitive, interventions.[326] This is consistent with the tenor of human rights law, which is grounded in normative and legal change.[327] Moreover, the test for prosecutorial discretion would still apply, requiring consideration of whether there is sufficient evidence for a prosecution, and whether it would be in the public interest to do so.[328]

The 'lawful correction' doctrine therefore must be abolished in Queensland, and Australia. It is currently unworkable because it has been interpreted and applied inconsistently across the country to produce contrary legal precedent. It thus offers little guidance to parents, prosecutors and the bench. Additionally, the Queensland doctrine is contrary to international and domestic human rights law through interpretation of the *HRA*. It treats children unequally by depriving them of the status of being human through a denial of their rights to dignity and bodily integrity. Further, corporal punishment is not in children's best interests and fails to protect them from violence because it is invariably degrading and occasions actual harm.[329] This inconsistency is evidenced by international jurisprudence on the *UNCRC* and other relevant treaties, which absolutely condemn the use of corporal punishment against children. Repealing the defence and educating parents and children would allow the Queensland government to clarify the law, educating Queensland citizens on the normative unacceptability of corporal punishment and provide children with protections from violence equal to those of adults. This protection would also demarcate a clear boundary between discipline, which should *never* be physically punitive, and child abuse, which is. Perhaps most fundamentally, however, it would establish children's status as autonomous human beings with enforceable rights, in compliance with Queensland's and Australia's human rights obligations.

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324 Phillips and Alderson (n 53) 191–2.
325 *General Comment No 8* (n 10) [11].
326 Ibid [40].
327 Ibid [18],[40]; Birchall and Burke (n 32).
328 Department of Justice and Attorney-General (Qld), *Director's Guidelines* (Guidelines, July 2016) 4.
329 See Part II of this paper.

What Did Queenslanders Think of Human Rights in 2021? An Attitudinal Survey

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This article presents the results of a survey conducted in Queensland from 18 July to 2 August 2021, which gave insights on attitudes to human rights in Queensland, the adequacy of Queensland's human rights performance, and the level of knowledge and support for the new Human Rights Act 2019 (Qld) ('the Act'). We discuss the results from the survey and their implications for human rights in Queensland and the Act itself. Overall, we found strong support for human rights, limited knowledge but overall optimism about the Act and its likely impact, reasonable but fluctuating confidence in the adequacy of human rights protection in Queensland, and instructive demographic differences in the responses.

I Introduction

This article presents the results of a survey conducted in Queensland from 18 July to 2 August 2021, which gave insights on attitudes to human rights in Queensland, the adequacy of Queensland's human rights performance, and the level of knowledge and support for the new *Human Rights Act* 2019 (Qld) ('the *Act*'). The survey was timed to gauge such attitudes 18 months after the introduction of the *Act*, and to establish a baseline to assess attitudes over time, as the *Act* becomes a more familiar part of the Queensland legal landscape. In this article, we discuss the results from the survey and their implications for human rights in Queensland and the *Act* itself. Overall, we found strong support for human rights, limited knowledge but overall optimism about the *Act* and its likely impact, reasonable but fluctuating confidence in the adequacy of human rights protection in Queensland, and instructive demographic differences in the responses.

We begin our analysis with discussion of the background to the *Act*, including discussion of its impetus and the debate preceding its passage, and a brief overview of its content and the way it works. We then discuss public opinion and human rights generally, the dearth of research in this area, and why analysis of community attitudes towards human rights is important. We then turn to our empirical analysis, first by explaining the survey's methodology, and extraneous

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events at the time of the survey which might have affected responses. We then outline the results, focusing, in turn, on responses regarding the importance and relevance of human rights in general, and on responses regarding the adequacy of human rights protection in Queensland in both general and particular contexts (eg, in regional and remote areas, and in certain institutional contexts). Attention then turns to responses regarding perceptions of the areas where protection of human rights is most needed, and of the groups in the greatest need of better protection. The next set of responses relates to the rights perceived to be the most important, and perceived examples of human rights abuses in Queensland's past. Finally, we gauged levels of knowledge and perceptions of the *Act* itself, as well as public sentiment over preferred methods of enforcing human rights. With all responses, we analyse similarities and differences between responses in certain demographic groups, such as between men and women, and between groups categorised according to level of education and wealth. We conclude by addressing the implications of the survey for human rights policy in Queensland, including the future trajectory of the *Act* and its implementation. Finally, the survey itself is included as an Appendix to the article.

II Background: the Passage of the *Act*

Queensland is the third jurisdiction in Australia to adopt a human rights charter. The *Act* was enacted in 2019 and came into force on 1 January 2020. Queensland followed the Australian Capital Territory ('ACT'), which adopted the *Human Rights Act 2004* (ACT), and Victoria, which adopted the *Charter of Human Rights and Responsibilities 2006* (Vic). A number of proposals for human rights statutes then followed at both State and federal levels, without success.[1] Ultimately, there was a 14-year gap before the third sub-national statute was adopted. It was, perhaps, surprising that the third 'cab off the rank' should be Queensland, which is often perceived to be the most conservative Australian jurisdiction.[2]

The impetus for the *Act* was heavily influenced by Queensland's political history, although it also drew on the experience of reform in the ACT and Victoria in this area.[3] The Queensland legislation was seen by its political proponents in

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1 See, eg, Commonwealth, *National Human Rights Consultation Report 2009* (Report, September 2009); Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania* (Report No 10, October 2007).

2 See further, Paul Smith, 'Queensland's Political Culture' in Allen Patience (ed), *The Bjelke-Petersen Premiership 1968-1983: Issues in Public Policy* (Longman Cheshire, 1985) 17. See, however, Jon Piccini, 'The Greens' Election Wins Are Not So Surprising When You Look at Queensland's Political History', *The Conversation* (online, 31 May 2022) <https://theconversation.com/the-greens-election-wins-are-not-so-surprising-when-you-look-at-queenslands-political-history-184049>, commenting on the great success of the Greens in Queensland in the May 2022 federal election.

3 Explanatory Notes, *Human Rights Bill 2018* (Qld) 2.

the Australian Labor Party ('ALP') in Queensland as a remedial response to the perceived excesses of the previous Campbell Newman government (2011–15), as well as the final vestiges of the Bjelke-Petersen era (1968–87).[4] There was an increasingly settled view within the Queensland ALP that the Bjelke-Petersen era had been a time of violations of human rights on a scale that other Australian jurisdictions had not experienced, and which affected Queensland's reputation as a modern state. As Raymond Evans stated in his history of Queensland, Bjelke-Petersen's time in power:

> was a period when democratic principles were trammelled to privilege the interests of a select and powerful minority; the electorate was further malapportioned and manipulated; ... the state's enforcement arm [was] perilously compromised into direct political accord with executive demands; freedom of expression [was] sacrificed to oppressive censorship; minority rights [were] branded a risible intrusion and civil liberties the dangerous ploy of extremists. Viewed from another perspective, it was also a time when many Queenslanders began gradually to learn, by bitter experience, what democratic principles, such as the separation of powers, majority rule, ... an uncorrupted police or judiciary, and respect for freedom of speech, minority justice and basic civil rights really meant.[5]

When in Opposition, the Queensland ALP considered Newman to be a 'Joh Bjelke-Petersen 2.0' figure, due to extreme legislation and policy measures that were passed during this time, in particular the *Vicious Lawless Association Disestablishment Act 2013* ('VLAD') which targeted motorcycle gangs.[6] As the VLAD Bill was going through Parliament, independent MP Peter Wellington expressed his deep concern about the ability to protect rights in a unicameral parliament. When the ALP formed a minority government in January 2015, it required the support of Mr Wellington, and the new Premier, Annastacia Palaszczuk, gave him a written assurance that her government would seek advice from the Department of Justice and Attorney-General about a possible Bill of Rights for Queensland in exchange for his support.[7]

As Michael Cope, President of the Queensland Council for Civil Liberties, stated in 2015: 'The behaviour of the Newman government demonstrates clearly

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4 See further Christopher Crawford, 'Civil Liberties, Bjelke-Petersen & A Bill of Rights: Lessons for Queensland' (2009) 21(1) *Bond Law Review* 1, 23.

5 Raymond Evans, *A History of Queensland* (Cambridge University Press, 2007) 221.

6 Brian Costar, 'Campbell Newman and the Ghost of Joh Bjelke-Petersen', *Inside Story* (online, 30 January 2015) <insidestory.org.au/campbell-newman-and-the-ghost-of-joh-bjelke-petersen/>.

7 Queensland, *Parliamentary Debates*, 19 April 2016, 991 (Peter Wellington). See further Matthew Killoran, 'Queensland Election 2015: Peter Wellington to Push For Bill of Rights', *Courier Mail* (online, 10 February 2015) <https://www.couriermail.com.au/news/queensland-state-election-2015/queensland-election-2015-peter-wellington-to-push-for-bill-of-rights/news-story/0b4add992f5fc15c4879087a98271f5f>.

the need to reform the protection of basic rights and liberties in this state.'[8] He further stated that it would provide restraint on politicians who 'everywhere and everyday … use the pretext of some new or not so new threat to justify depriving citizens of rights and liberties which have been won at great cost and after centuries of struggle'.[9]

The new Queensland Human Rights Commission ('QHRC')[10] included in its first Annual Report a 'Human Rights History of Queensland', which underlined the specific contribution a historic view of human rights breaches made to the passage of the legislation:

> The timelines have been produced here to: acknowledge the human rights abuses and failings of the past; reinforce the need for the *Human Rights Act*; be a reminder that these are fragile freedoms; and that the lives of people are enhanced when human rights are respected.[11]

The 2016 preliminary inquiry into an *Act*,[12] and the 2018 inquiry on the Bill,[13] received a very large number of submissions from the public — 492 submissions in 2016, and 284 in 2018, mostly in support of human rights legislation. There was also a well-organised community campaign that raised 28,000 signatures on a petition to support the Bill.[14] The passage of the legislation through the committee system did not refer to evidence about community attitudes to human rights beyond those represented by the formal submissions to the two inquiries. Many submissions from welfare organisations to the inquiry referred to the idea that human rights are not equally distributed in Queensland, based on data that shows inequality generally worsens with regional placement, and is particularly evident in issues surrounding poverty, youth suicide, health and access to water.[15] Based on the experience in Victoria and ACT, people with disabilities, those facing

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8 Joshua Robertson, 'Human Rights Act "To Head Off Newman Excess" Supported by Queensland Labor', *The Guardian* (online, 30 August 2015) <https://www.theguardian.com/australia-news/2015/aug/31/human-rights-act-to-head-off-newman-excess-supported-by-queensland-labor>.

9 Ibid.

10 The Queensland Human Rights Commission ('QHRC') is created by Division 1 of the *Human Rights Act 2019* (Qld) (the '*Act*'), with various powers and functions conferred by ss 61 and 62.

11 QHRC, *Putting People First: The First Annual Report on the Operation of Queensland's Human Rights Act 2019–20* (Report, 2020) 23.

12 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into a Possible Human Rights Act for Queensland* (Report No 30, June 2016) <https://documents.parliament.qld.gov.au/tableoffice/tabledpapers/2016/5516t1030.pdf>.

13 Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No 26, February 2019) <https://documents.parliament.qld.gov.au/TableOffice/TabledPapers/2019/5619T7.pdf>.

14 Emma Phillips and Aimee McVeigh, 'The Grassroots Campaign for a Human Rights Act in Queensland: A Case Study of Modern Australian Law Reform' (2020) 45(1) *Alternative Law Journal* 31.

15 Legal Affairs and Community Safety Committee (n 13) 118–20. See further Matthew Tonts and Ann-Claire Larsen, 'Rural Disadvantage in Australia: A Human Rights Perspective' (2002) 87(2) *Geography* 132.

homelessness and Aboriginal and Torres Strait Islander people seemed likely to benefit most from the *Act*.[16]

The parliamentary discourse surrounding the passage of the legislation was colourful and over in a matter of four hours due to the unicameral nature of the Queensland Parliament. Dr Robinson (Oodgeroo – LNP) touted the Bill as 'political correctness gone mad' and regarded its adoption as 'mindlessly following the Labor left of the ACT and Victoria on a race to the socialist bottom'.[17] A common theme among those opposed to the Bill was that it was not needed. For example, Mr Hunt (Nicklin – LNP) described it as 'a bill desperately searching for a reason to exist'.[18] Assertions were made on both sides regarding public opinion, as outlined below.

III About the *Act*

The *Act* protects 23 fundamental human rights and requires each arm of government to act compatibly with those human rights.[19] Rights can be limited under the *Act*, but only where it is reasonable and justifiable.[20] Under the dialogue model, also utilised in the ACT and Victoria, the executive must attach a statement of human rights compatibility to new bills, which ensures that human rights are taken into account by the bureaucracy in drafting legislation.[21] Parliament can scrutinise bills for human rights compliance before they are enacted.[22] Courts and tribunals must, as far as possible, interpret legislation in a way that is compatible with human rights.[23] If this is impossible, the Supreme Court of Queensland may make a Declaration of Incompatibility with regard to the relevant law.[24] Such a Declaration does not affect the validity of the relevant law and does not compel amendment of the relevant law.[25] Rather, the *Act* requires the relevant Minister and a portfolio committee of the Legislative Assembly to respond in writing within certain time periods.[26]

Under s 58, it is unlawful for public entities, such as state government departments, local councils, state schools, the police, and non-government

16 Legal Affairs and Community Safety Committee (n 12) 11–18.
17 Queensland, *Parliamentary Debates*, 27 February 2019, 439, 458 (Mark Robinson).
18 Ibid 448 (Martin Hunt).
19 Legal Aid Queensland, *Human Rights Act 2019* (Web Page, 28 October 2021) <https://www.legalaid.qld.gov.au/Find-legal-information/Personal-rights-and-safety/Human-Rights-Act-2019>.
20 *Human Rights Act 2019* (Qld) s 13.
21 Ibid s 38. Section 38 requires the statement of compatibility to be tabled by the member of Parliament introducing a Bill, who will normally be a government minister, except in the case of a private member's bill.
22 Ibid ss 39–40.
23 Ibid s 48.
24 Ibid s 53.
25 Ibid s 54.
26 Ibid ss 56–7.

organisations and businesses performing a public function, to act or make a decision that is incompatible with the human rights in the *Act*. Legal proceedings may be brought under s 59 against a public entity for failure to comply with its s 58 duties. However, s 59 constrains the right of legal action. In particular, a s 58 action may only arise 'where there is an assertion of unlawfulness separately from a claim under s 58',[27] a so-called 'piggyback' provision in s 59(1).[28]

Any person in Queensland can make a complaint to the QHRC under the *Act*, so long as certain prerequisites are satisfied.[29] The QHRC uses conciliation to resolve admissible complaints.[30] Unlike a court, the QHRC is not empowered to make legally binding decisions. This complaints system, which has no equivalent in the ACT or Victoria, provides a cheap and (hopefully) quick way to potentially bring about the resolution of human rights disputes. The QHRC has other roles, too, including promotion of the *Act*, education of the public about human rights, provision of advice to the Attorney-General, and reviews of laws, governmental practices and processes in relation to their human rights compatibility.[31]

IV Public Opinion and Human Rights

Politicians and media commentators have often made claims about public attitudes to rights, including during the passage of the *Act*. With regard to public opinion, those in favour of the Bill referred to the strong support from stakeholders and the public in consultations over the Bill.[32] Those against the Bill referred to apathy and/or opposition towards the Bill from the public. For example, Mr O'Connor (Bonney – LNP) stated:

> I have had only two people from my area contact me about this issue — only two. It is clearly not a priority for the people I represent. The two that I did receive were both in opposition to the bill.[33]

Mr Bennett (Burnett – LNP) went so far as to call for a referendum prior to the passage of the Act.[34] In contrast, Mr Bailey (Millar – ALP) stated: 'For a long time

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27 Louis Schetzer, 'Queensland's *Human Rights Act:* Perhaps Not Such a Great Leap Forward?' (2020) 45(1) *Alternative Law Journal* 12.

28 Furthermore, damages are not available for breach of s 58 (see s 59(3)).

29 *Human Rights Act 2019* (Qld) div 2. See further, Queensland Human Rights Commission, 'Lodge Your Complaint Online', *Complaints* (Web Page, 15 September 2021) <https://www.qhrc.qld.gov.au/complaints/lodge-your-complaint-online>.

30 *Human Rights Act 2019* (Qld) div 4.

31 Ibid ss 61–2.

32 Queensland, *Parliamentary Debates*, 26 February 2019, 353 (Yvette D'ath). See also Queensland, *Parliamentary Debates*, 27 February 2019, 453 (Kim Richards), 461 (Coralee O'Rourke), 474 (Yvette D'ath).

33 Queensland, *Parliamentary Debates*, 27 February 2019, 440 (Samuel O'Connor). See also at 443 (Powell).

34 Ibid 465 (Stephen Bennett).

there have been calls in our community to enshrine in law the human rights of Queenslanders.'[35]

In reality, there was little evidence in the inquiries leading up to the passage of the *Act* as to the views of the general public of Queensland on the need for the *Act*, or on any other relevant attitudes towards human rights in general or certain issues in particular. We seek to fill a gap in this evidence base. The *Human Rights Act 2019* itself provides, in s 3, that its main objects are:

> (a) to protect and promote human rights; and (b) to help build a culture in the Queensland public sector that respects and promotes human rights; and *(c) to help promote a dialogue about the nature, meaning and scope of human rights.*[36]

That dialogue surely must include the members of the community who are the proposed beneficiaries of the *Act*. Moreover, the objects of the *Act* are specified in s 4 to achieve, among other things:

> (j) providing for the Queensland Human Rights Commission to carry out particular functions under this Act, including, *for example, to promote an understanding and acceptance of human rights and this Act in Queensland.*[37]

Much of the literature on human rights surveys concerns their role in measuring human rights abuses and associated challenges in that respect.[38] As noted in an article from 2009, there is little research on public attitudes to human rights.[39] This remains the case, although such research is growing, as was evident in a 2017 special issue of the *Journal of Human Rights* on the matter.[40]

An understanding of 'mass attitudes about human rights' should, at the least, facilitate 'the implementation of [relevant] legal principles'.[41] It can also inform the work of human rights civil society organisations, since an understanding of community attitudes is important to the ethics of representation when organisations claim to advocate on behalf of rights holders.[42] Furthermore, the sustainability of efforts to protect and improve human rights depends in part on public support and on an understanding of that support.[43]

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35 Ibid 463 (Mark Bailey).

36 Emphasis added.

37 Emphasis added.

38 See, eg, Robert J Goldstein, 'The Limitations of Using Quantitative Data in Studying Human Rights Abuses' (1986) 8(4) *Human Rights Quarterly* 607, 608.

39 Shareen Hertel, Lyle Scruggs and C Patrick Heidkamp, 'Human Rights and Public Opinion: From Attitudes to Action' (2009) 124(3) *Political Science Quarterly* 443, 443.

40 'Public Opinion Polling & Human Rights' (2017) 16(3) *Journal of Human Rights* 257–387.

41 Hertel, Scruggs and Keidkamp (n39) 446.

42 James Ron, 'Introduction to Special Issue on "Public Opinion Polling & Human Rights"' (2017) 16(3) *Journal of Human* Rights 257, 257.

43 Ibid 258. See also Dona-Gene Barton, Courtley Hillebrecht and Sergio C Wals, 'A Neglected Nexus: Human Rights and Public Perceptions' (2017) 16(3) *Journal of Human Rights* 293, 294. See further

Indeed, community support for human rights may operate in a feedback loop, which often provides the parameters for the rate of progress in new areas of rights protection for marginalised groups.

In November 2008, the Rudd Government established a National Human Rights Consultation Committee ('NHRCC'), chaired by Father Frank Brennan, to undertake consultation and report by 30 September 2009 on human rights protection at the national level. The Committee received over 35,000 submissions. While the submissions were overwhelmingly in favour of federal legislative protection of human rights, they only revealed the sentiment among those who made the effort to make submissions, rather than the broader public. The NHRCC also commissioned Colmar Brunton Social Research to run focus groups and a national telephone survey of 1,200 people to allow the Committee to 'gain an appreciation of the level of interest in and knowledge of and attitudes about human rights and their protection among a random sample of Australians who had not attended the community roundtables or made a submission'.[44] Despite its very different methodology and age, as well as the fact that it covered the nation rather than only Queensland, the Colmar Brunton report delivered some results that have interesting synergies with our own, which are reported below.

The existing reviews of the ACT[45] and Victorian human rights legislation[46] give insight into the impact on the parliament, the executive, the public service and the legal sector, but shed little light on the deeper process of socialisation that the operation of a human rights charter may catalyse in the broader community.

However, the 2015 Charter Review in Victoria was partly informed by community forums and a 2011 online RMIT survey about human rights.[47] That survey received over 2,000 responses, about half from Victorians and the rest from other people in Australia. The methodology and questions asked were quite different to our survey. Overall, that survey revealed strong support for human rights with little difference between responses from inside and outside Victoria.[48] However, there was little knowledge of the Victorian Charter within Victoria.[49]

Matthew Carlson and Ola Listhaug, 'Citizens' Perceptions of Human Rights Practices: An Analysis of 55 Countries' (2007) 44(4) *Journal of Peace Research* 465; J Christopher Cohrs et al, 'Determinants of Human Rights Attitudes and Behavior: A Comparison and Integration of Psychological Perspectives' (2007) 28(4) *Political Psychology* 441.

44 Commonwealth (n1) 264. See Appendix B for the report, referred to here as the 'Colmar Brunton Report'.

45 ACT Human Rights and Discrimination Commissioner, 'Look Who's Talking: A Snapshot of Ten Years of Dialogue Under the Human Rights Act 2004' (Report, 2014).

46 Michael Brett Young, 'From Commitment to Culture: 2015 Review of the Charter of Human Rights and Responsibilities Act 2006' (Report, September 2015).

47 Ibid 45.

48 Mike Salvaris et al, Submission No 276 to Scrutiny of Acts and Regulations Committee, *Inquiry into Charter of Human Rights and Responsibilities Act 2006* (September 2011) app 1.

49 Ibid [4.2].

There have been national surveys on Australian attitudes to human rights[50] and particular human rights issues (for example, sex discrimination, sexual harassment, children's rights, people with disabilities).[51] However, there have been no such surveys in Queensland.

Two surveys were conducted in close proximity to our own. The Human Rights Law Centre conducted a survey of 1,038 adults in Australia in June 2021, focusing on whether Australia should have a federal Charter of Rights. That survey revealed strong support for the adoption of such a Charter.[52] The data broken down by State revealed no significant differences between responses from Queensland and those from other States.[53]

A survey of 1,601 people by Amnesty International, known as its 'Human Rights Barometer Report' of 2021 for Australia, was conducted between 24 February and 8 March 2021. It also revealed strong support for a national Charter of Rights, and contains other insights regarding the perceived importance of certain rights and the groups most in need of human rights protection. The methodology and questions were, however, framed quite differently to our survey, so we will not be referring to it below for comparative purposes.[54]

Under the *Human Rights Act 2019*, the Attorney-General must conduct an independent review of the operation of the *Act* after 1 July 2023 (s 95) and again after 1 July 2027 (s 97). In our view, the efficacy of the *Act* should include reference to community expectations of human rights protection in Queensland and how these change over time. Below, we describe the survey as a baseline as it is too early to draw firm conclusions about the link between the passage of the *Act* and any changes in community attitudes.

V Methodology

The questionnaire was formulated over late 2020 and early 2021 with welcome input from staff at the QHRC and academic colleagues. It is contained in an annex to this article. Ethics approval was attained to run the survey for adults. The

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50 Thomas Hinton, 'Different Attitudes Towards Human Rights in Australia as of June 2018', *Statistica* (Web Page, July 2018) <https://www.statista.com/statistics/893813/australia-attitudes-towards-human-rights/>.

51 Australian Human Rights Commission, *Our Work* (Web Page) <https://humanrights.gov.au/our-work>.

52 The results are referred to in Finn McHugh, 'COVID-19 Prompts Dramatic Spike in Support for a National Human Rights Charter', *Canberra Times* (online, 9 September 2021) <https://www.canberratimes.com.au/story/7421653/more-australians-want-rights-defined-by-law-since-covid-19/>.

53 This conclusion is extrapolated from the raw statistical data, shared with us via email from Daney Faddoul of the Human Rights Law Centre on 11 October 2021 (on file with the authors).

54 Amnesty International, *Amnesty International Australia 2021 Human Rights Barometer* (Report, August 2021). For example, our survey offered more options regarding groups most in need of rights protection.

survey was then distributed via email to data company Core Data's proprietary database of Queenslanders aged 18 and above. Core Data explains its survey methodology as follows:

> A total of 1,000 respondents completed the questionnaire, providing reliable and statistically robust insights on Queenslanders aged 18 and above. Particular care was taken to ensure a high degree of representativeness of the sample against the Queensland population of residents aged 18 and above in terms of age, gender and household income.[55]

VI A Note on the Time Period

It is worth noting relevant context during the time period in which the survey was conducted — 18 July to 2 August 2021 — which potentially influenced responses. The most prominent human rights issue in the country concerned management of the COVID-19 virus. Queensland experienced minor COVID-19 outbreaks in the time period, until the 'Indooroopilly schools' cluster began on 29 July, leading to a lockdown of 11 local government areas in South East Queensland from 31 July until 8 August 2021.[56] However, that lockdown only arose at the very end of the survey period, so its impact on the survey results was probably minor.

During the survey period, parts of New South Wales ('NSW') and Victoria were in lockdown due to COVID-19 outbreaks, with steadily increasing case numbers in NSW. Queensland's border shut to Victoria during its July lockdown and shut to all of NSW on 22 July.[57]

Over the preceding years, numerous sickening stories were published of lethal violence against women in Australia, including Queensland, with one story falling within the survey period, concerning the discovery of a woman's body in a box in Brisbane.[58] Furthermore, three people were charged with murder after a violent brawl in Ipswich on 28 July.[59]

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55 Email from Core Data employee to Professor Sarah Joseph, 8 November 2021 (on file with the authors). Responses were also encouraged by Core Data with reminder emails, and an entry into a prize draw (eg, gift cards) for respondents, while cookies and internal data were used to reduce potential duplicate and invalid responses.

56 Rachel Riga, 'Queensland Records Nine Locally Acquired COVID-19 Cases as Delta Cluster Centred on Brisbane Schools Grows', *ABC News* (online, 2 August 2021) <https://www.abc.net.au/news/2021-08-01/qld-covid-lockdown-delta-school-cluster-grows-cases-recorded/100340052>.

57 Rebecca Masters, 'Queensland Closes Border to NSW in Order to Ease Restrictions', *9 News* (online, 22 July 2021) <https://www.9news.com.au/national/coronavirus-queensland-border-closing-to-nsw-but-some-restrictions-lifting/96639bdc-30d2-4383-8508-6570a65d1b7e>.

58 Lia Walsh, 'Woman's Body Found in Box in Brisbane Riverside Apartment Was There "More Than a Week", Police Say', *ABC News* (online, 20 July 2021) <https://www.abc.net.au/news/2021-07-20/qld-police-homicide-body-of-woman-found-in-box-hamilton/100306258>.

59 9News Staff, 'Boy, 16, Among Three Charged with Murder Over Violent Ipswich Street Brawl', *9News* (online, 28 July 2021) <https://www.9news.com.au/national/ipswich-brawl-man-shot-dead-several-others-in-hospital/718f921a-602a-4803-a436-2bd3e7a068f2>.

Although of a much longer duration than the particular reporting period of July, the *Courier Mail* and other Queensland media outlets had provided extensive coverage of the Tiahleigh Palmer case over a six-year period. Tiahleigh, who was 12 years old at the time, was murdered by her foster father Rick Thorburn in 2015 after he discovered his teenage son Trent had had sex with her and feared she was pregnant. Thorburn was sentenced in June 2021 after a long series of investigations and a trial before the final guilty plea,[60] as well as a coronial inquest.[61] This case may have influenced the high responses regarding the importance of human rights for children in the child protection system, discussed below.

VII Results

We will report the results of questions grouped in themes, rather than in strict chronological order. We are reporting on responses to most but not all questions, and are not reporting on all demographic group data. Certain demographic breakdowns were not included as relevant groups were too small, such as groups split according to different religions and countries of origin. Some responses concerned matters that did not inform the present article.[62] Other omissions are acknowledged and explained below.

A *Human Rights — General*

1. The protection of human rights and dignity is important.
2. Human rights are relevant to me.

These two questions related to the importance of human rights generally and personally. Overall, 91.3 per cent of respondents agreed that 'the protection of human rights and dignity is important'. 84.4 per cent agreed that human rights were personally relevant.[63] These numbers are higher than those reported in the Colmar Brunton Report on its national telephone survey in 2009, where '75% of respondents considered human rights to be important or very important'.[64]

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60 Allyson Horn, 'Tiahleigh Palmer Murder: Foster Father Rick Thorburn to be Sentenced for Killing Schoolgirl', *ABC News* (online, 25 May 2018) <https://www.abc.net.au/news/2018-05-25/tiahleigh-palmer-murder-foster-father-rick-thorburn-sentenced/9789984>.

61 Jane Bently, *Inquest Into the Death of Tiahleigh Alyssa-Rose Palmer* (Coroners Findings, 18 June 2021).

62 This was the case, for example, with the responses to questions regarding the media, which will inform other research.

63 Note that many questions had a 1–5 scale. For ease of analysis, we have grouped the responses as 1–2 (negative responses); 3 (neutral), and 4–5 (positive responses).

64 Colmar Brunton Report (n 44) 2. It seems the numbers were higher in the focus groups convened by Colmar Brunton.

The responses to the first two questions did not differ meaningfully between residents of Brisbane (43 per cent of respondents) and residents of the regions (57 per cent of respondents), or between men (44.6 per cent of respondents) and women (54.8 per cent of respondents).[65] A similar trend was evident in comparing those who did not speak English as a first language, who we are referring to as 'culturally and linguistically diverse' ('CALD' ´— 8.4 per cent of respondents), and those who did ('non-CALD' — 91.6 per cent of respondents).

Aboriginal and Torres Strait Islander peoples constituted only 2.7 per cent of respondents, though 1 per cent of people preferred not to say whether they identified as First Nations or not. In the 2021 census, 4.6 per cent of Queensland's population identified as Indigenous.[66] The survey's percentage is lower, perhaps manifesting difficulties of reach into remote indigenous communities. As the importance of the *Act* for Indigenous people was specifically highlighted in parliamentary debate,[67] we are including the answers segmented by Indigenous or non-Indigenous despite the small sample size of the former. Indigenous peoples were marginally more likely to agree than non-Indigenous people that the protection of human rights and dignity was important (96.3 per cent compared to 91.1 per cent), and that human rights were personally relevant (88.9 per cent compared to 84.5 per cent).

Respondents were skewed towards older people with the breakdown as follows: ages 18–24 (7.6 per cent), 25–34 (18.3 per cent), 35–44 (17.5 per cent), 45–54 (20.9 per cent), 55–64 (15.7 per cent), and 65+ (20 per cent). It is more difficult to get younger people to respond to online surveys.[68] All age groups, apart from those aged under 18 who were not surveyed, agreed that the protection of human rights and dignity was important. Those over 55 years old, however, were less likely to believe that human rights were of personal relevance (77.7 per cent for those aged 55–65, dropping to 75.5 per cent for those aged over 65). All younger groups recorded at least 84% acknowledging the personal relevance of human rights.

Responses were disaggregated according to educational level as follows: primary or part of high school (9.3 per cent) (a group we will refer to as 'did not complete high school'),[69] high school (14.6 per cent), diploma or certification qualification (28.5 per cent), undergraduate (25.9 per cent), and postgraduate (21.4 per cent). Three people (0.03 per cent) preferred not to specify. There was little difference in perception of the importance of the protection of human rights

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65 Four respondents recorded a gender of 'other' (0.4 per cent) and two 'prefer[ed] not to say' (0.2 per cent). As these samples are so small, their results are not included.

66 Australian Bureau of Statistics, *Census 2021*, <https://www.abs.gov.au/census/find-census-data/quickstats/2021/3 (Queensland 2021 Census All Persons)>.

67 See Queensland, *Parliamentary Debates*, 27 February 2019, 442 (Jacklyn Trad), 463 (Mark Bailey).

68 This was confirmed in an email exchange between Sarah Joseph and Core Data's CEO on 8 November 2021.

69 We have combined the groupings of primary education, and part of high school, as the numbers with only a primary education were very small (8 people or 0.08 per cent of respondents).

and dignity according to level of education. A higher level of education corresponded with a higher level of perception of the personal importance of human rights, with a marked difference between the second highest level of education, an undergraduate education (with 83.4 per cent finding human rights personally relevant), and the highest level surveyed, those with a postgraduate qualification (with 93.5 per cent finding human rights to be personally relevant).

Regarding wealth, the separate categories were as follows: Mass Market (households earning $75,000 or less per annum; 59 per cent of respondents); Mass Affluent (households earning $75,001 to $150,000 per annum; 27.8 per cent); Core Affluent (households earning $150,001 to $250,000 per annum; 9.4 per cent), and High Net Worth ('HNW', households earning $250,001 and above per annum; 3.8 per cent). There was a significant dip in perceptions of the importance of human rights and dignity amongst HNW respondents, with only 84 per cent agreeing with the statement (compared to the average of 91.5%). Regarding the personal relevance of human rights, the trend reversed, with the Mass Market delivering the lowest affirmative percentage of 81.5 per cent. It seems somewhat confounding that groups would split on these two issues, as one might think that belief in the importance of rights would correspond with belief in their personal relevance. Having said that, the overall 'yes' response to both questions was very high in all groups.

B Human Rights in Queensland

The next set of questions relate specifically to the adequacy of protection of human rights in Queensland.

3. Human rights are well protected in Queensland.

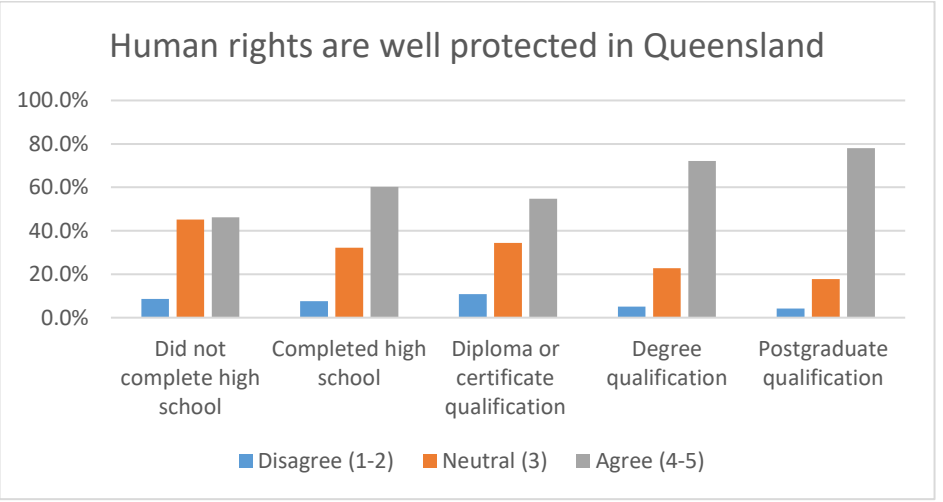
Overall, 64.2 per cent agreed that human rights were well protected in Queensland. Only 7.2 per cent disagreed with that statement, with 28.6 per cent recording a neutral response. There was very little difference in the responses between those in Brisbane and those outside the capital city (62.6 per cent compared to 65.4 per cent agreeing with the statement).

Women were much less likely than men to believe that human rights were well protected in Queensland, with only 58 per cent agreeing, compared to 72 per cent of men. A bigger divide arose between Indigenous and non-Indigenous people (48.1 per cent compared to 64.8 per cent), with 11.1 per cent of Indigenous people disagreeing with the statement. The divide according to language was less: 64.8 per cent of non-CALD respondents agreed that human rights were well protected in the State, compared to 57.1 per cent of CALD respondents.

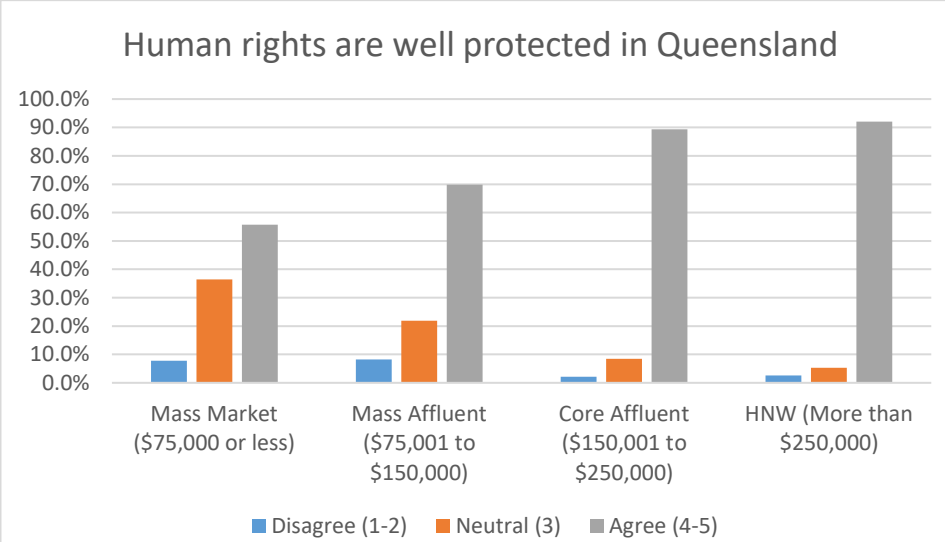
Less than 60 per cent of the older age groups (ages 55–64 and over 65) agreed that Queensland protected human rights well, but the most sceptical

group in that regard was the youngest surveyed group — respondents aged 18–24 — at 56.6 per cent.

Lower levels of education generally correlated with a lower level of satisfaction with the way human rights are protected in Queensland, although it may be noted that slightly fewer of those with a diploma (54.7 per cent) agreed with the Question 3 ('Q3') statement compared to those who had completed high school (60.3 per cent). While 78 per cent of those with a postgraduate degree were satisfied with human rights protection in Queensland, only 46.2 per cent of those who had not completed high school agreed. Within that latter cohort, the majority of those who did not agree were neutral (45.2 per cent) rather than in active disagreement (8.6 per cent).



There was also a large difference, according to wealth sector, regarding perceptions of how well Queensland protects human rights. While HNW (92.1 per cent) and Core Affluent (89.4 per cent) groups overwhelmingly agreed that Queensland protects rights well, only 69.8 per cent of the Mass Affluent group felt that way, dropping to only 55.8 per cent for the Mass Market group. Again, the lack of positive responses largely translated to neutral responses rather than negative responses.



The results for Q3 seem to confirm that members of groups who are perceived as being more vulnerable to human rights abuses are likely to be less satisfied with the adequacy of existing human rights protections in Queensland. Women, Indigenous peoples, CALD, the young and the old, the less educated, and the less wealthy have a worse view of the adequacy of human rights protection in Queensland compared to men, non-Indigenous people, non-CALD, people aged over 25 and middle aged, and those with more education and wealth. It is arguably surprising that there was such little difference in responses between those in Brisbane and those outside Brisbane, given the many parliamentary submissions that highlighted worse human rights outcomes in the regions.[70] The starkest differences in Q3 arose regarding traditional class divides, education and wealth.

8. Does Queensland protect human rights well for people in regional and remote areas of Queensland?

Overall, respondents were less certain as to whether Queensland protected rights well in regional and remote areas, compared to their responses over Queensland's general human rights performance (Q3). Only 42.2 per cent answered 'yes' to Question 8 ('Q8'), while 17.4 per cent answered 'no' and 40.4 per cent were 'unsure'.

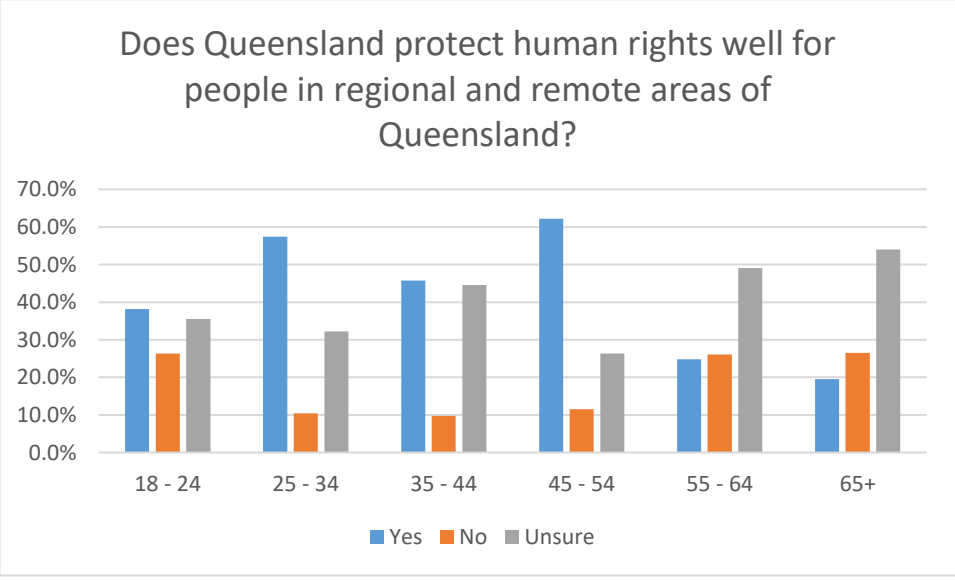
The difference in responses between Brisbane residents and answers from outside the capital city was not large. A tiny percentage more of people outside Brisbane (42.6 per cent compared to 41.6 per cent) thought that Queensland protected human rights well in regional and remote areas. However, 20.4 per cent

[70] Above, text to n 15.

of those outside Brisbane felt rights in regional and remote areas were not well protected, compared to 13.5 per cent in Brisbane. There was, perhaps unsurprisingly, a greater percentage of people unsure in Brisbane (44.9 per cent) compared to those outside the capital (37 per cent).

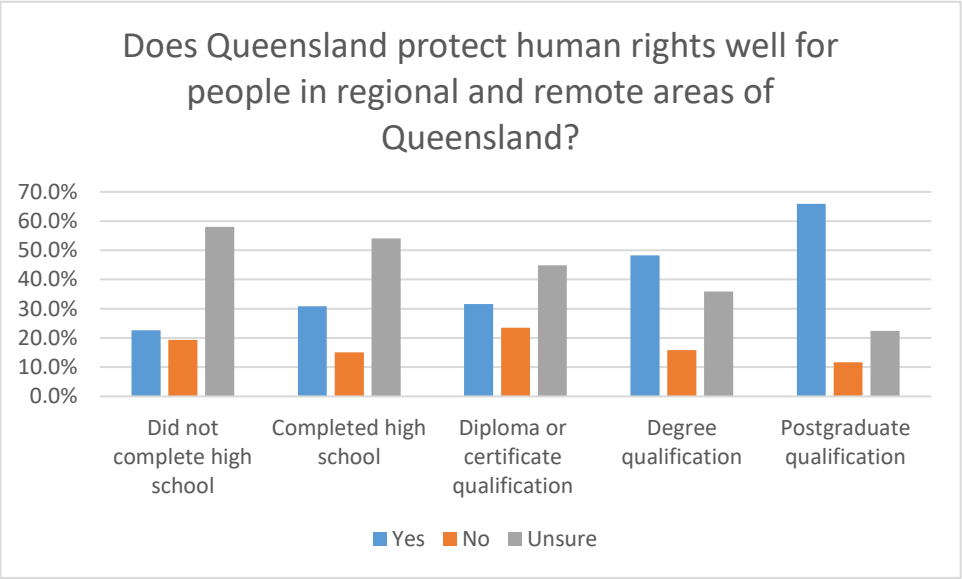
There was a large difference in the answer to Q8 between men and women, with 51.8 per cent of the former and only 34.5 per cent of the latter believing human rights in regional or remote areas were well protected. The female 'no' vote was not much higher (18.1 per cent compared to 16.6 per cent), so women were much more likely to be unsure (47.4 per cent compared to 31.6 per cent). A similar trend was evident between Indigenous and non-Indigenous peoples (respectively, 25.9 per cent to 42.9 per cent 'yes'; 22.2 per cent to 17 per cent 'no'; 51.9 per cent to 40.1 per cent 'unsure'), and between non-CALD and CALD (respectively, 42.8 per cent to 35.7 per cent 'yes'; 17.1 per cent to 20.2 per cent 'no'; 40.1 per cent to 44 per cent 'unsure').

The responses disaggregated by age were as follows. The middle age groups, ranging from ages 25 to 54, were quite positive about Queensland's regional or remote human rights performance, and the youngest and oldest much less so. Those aged over 55 had a more negative view of that performance than positive, even taking into account the large percentages of 'unsure' answers amongst the oldest groups.

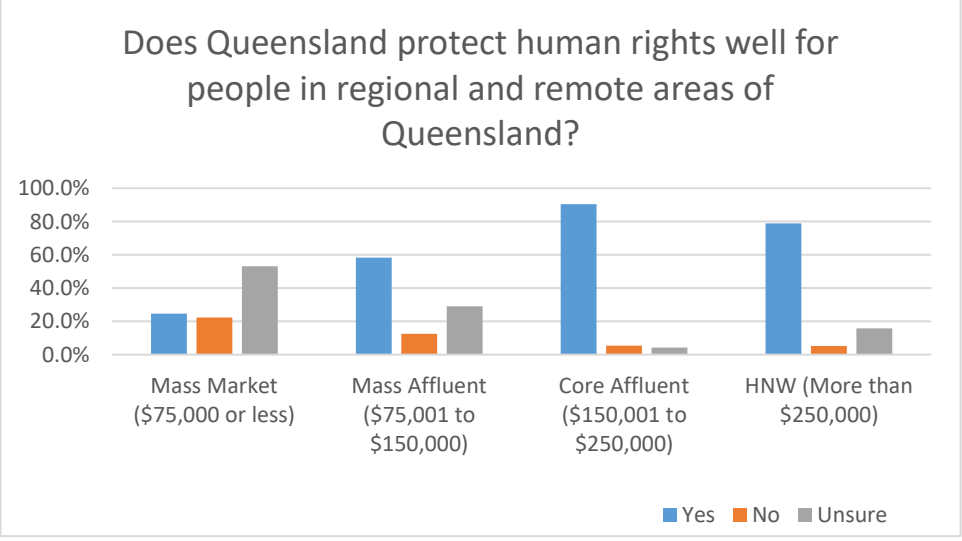


A large divide was also evident regarding levels of education. Those with higher levels of education were more certain and in fact overwhelmingly positive in their responses. Those with lower levels of education were more positive than negative,

but much less so. This split reflects that which arose regarding answers to the more general Q3.



A similar trend was more pronounced according to wealth sector. While, overall, HNW (78.9 per cent), and especially Core Affluent (90.4 per cent), felt Queensland protected rights well in regional and remote areas, Mass Affluent was less positive (58.3 per cent), and Mass Market much less so (24.6 per cent).



Views regarding Queensland's human rights performance in regional and remote areas of the State were similar, demographically, to the answers regarding Queensland's general human rights performance (Q3), although the differences were more pronounced, particularly between groups segregated by age, education and wealth. The fact of regional or capital city residence, on the other hand, did not greatly affect positive responses, although residents of regional Queensland were more negative and certain (as opposed to unsure) in their responses.

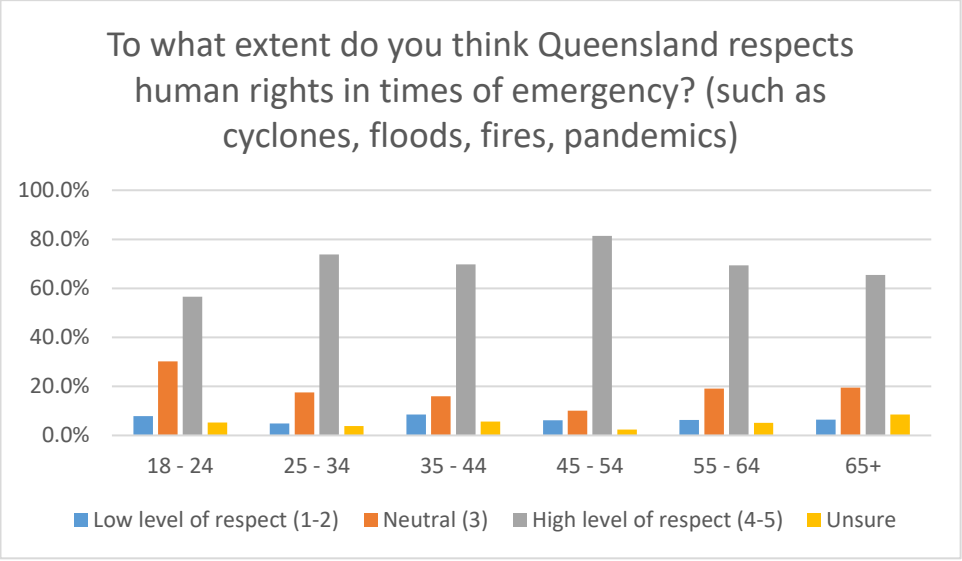
18. To what extent do you think Queensland respects human rights in times of emergency? (cyclones, floods, fires, pandemics)?

Queensland suffers from a large number of natural disasters and crises compared to most other parts of Australia.[71] 71 per cent of respondents felt that Queensland respects rights well in times of emergency. Only 6.6 per cent felt there was a low level of respect; 17.3 were neutral and 5.1 per cent were unsure. The answers from Brisbane and outside Brisbane to Question 18 ('Q18') were very similar. The main difference was a higher 'neutral' response outside Brisbane (19.1 per cent compared to 14.9 per cent) and a lower unsure response (3.9 per cent compared to 6.7 per cent). Similarly, there were few differences between the non-CALD and CALD groups.

Women were less likely to find a high level of respect (67.2 per cent) than men (76.2 per cent) and, instead, were more likely to be neutral (20.1 per cent compared to 13.7 per cent), with only small differences in the most negative 'low level' response (6.9 per cent compared to 6.1 per cent) and in 'unsure' responses (5.8 per cent compared to 4 per cent). Indigenous people were significantly less likely than non-Indigenous people to deliver a positive response (59.3 per cent compared to 71.8 per cent) and had a much higher level of 'unsure' responses (18.5 per cent compared to 4.5 per cent).

The age-disaggregated responses were as follows. Positive responses outnumbered negative responses. The youngest respondents, at 56.6 per cent, were less likely than older groups to find rights to be respected in emergencies. This may reflect their lesser enthusiasm for Queensland's COVID-19 response, discussed below.

[71] Queensland Government, *Resilient Queensland in Action* (Progress Report, February 2020) 3.



Regarding education, the least educated were the most negative, and those with the highest recorded educational level (postgraduate) were the most satisfied with Queensland's human rights performance in emergencies. Regarding wealth, greater positivity tended to correlate with higher levels of wealth, but the most positive group was the Core Affluent group rather than HNW.

As with Q3 and Q8, the more traditionally vulnerable groups (eg, women compared to men, less wealthy respondents compared to more wealthy respondents) were less likely to have a positive view of Queensland's human rights record in respect of emergencies. Again, little difference was perceived between answers from Brisbane and those from outside Brisbane.

4. To what extent do you think your human rights have been protected during the COVID-19 emergency in Queensland?

5. To what extent do you think human rights of the whole community have been protected during the COVID-19 emergency in Queensland?

Queensland's response to COVID-19, by the time of the survey, had been characterised by relatively swift action to lock down to contain outbreaks. These actions were largely successful, so lockdowns, while numerous, were short.[72] Density limits and mask mandates applied reasonably regularly. The most

[72] Lily Nothling, 'Disease Expert Says Quick Response Helped Queensland Avoid High COVID-19 Caseload', *ABC News* (online, 12 August 2021) <https://www.abc.net.au/news/2021-08-12/queensland-coronavirus-delta-dodged-no-more-lockdown/100368922>. The exception was the first lockdown which applied across the country, and across much of the world, from March to May 2020.

constant restrictions were applied to borders to restrict interstate and international travel. The COVID-19 infection and fatality rates in Queensland were very low. Vaccination was proceeding slowly at the time of the survey.[73]

The overall responses to Question 19 ('Q19') and Question 20 ('Q20') were similar. 64.3 per cent of respondents felt that their rights were well protected during the COVID-19 emergency, compared to 61.8 per cent who felt that way regarding the rights of the whole community. Hence, the average respondent felt that their own rights had been more respected than those of others. 13.9 per cent felt that their rights had not been protected, compared to 13.8 per cent for the rights of the community. 16.9 per cent were neutral about their own rights, compared to 19.6 per cent for the rights of the whole community, while 4.9 per cent (Q19) and 4.8 per cent (Q20) were unsure.

The differences between respondents in Brisbane and outside Brisbane were minimal. So too were the differences between the non-CALD and CALD groups.

Women were much more likely than men to find their own rights and those of the community to be 'not protected'. Strangely, the numbers of 'not protected' responses were identical for Q19 and Q20 for both women and men (16.8 per cent for women compared to 10.1 per cent for men). Men were more likely than women to find their own rights protected (71.5 per cent compared to 58.8 per cent) as well as those of the community (70.2 per cent compared to 55.1 per cent).

Indigenous peoples were less likely than non-Indigenous peoples to answer that either their own rights were respected in the COVID-19 emergency (51.9 per cent compared to 64.9 per cent), or those of the general community (48.1 per cent compared to 62.5 per cent). There was a greater level of unsurety in Indigenous responses to both questions (18.5 per cent to Q19 compared to 4.5 per cent non-Indigenous; 19.5 per cent for Q20 compared to 4.4 per cent non-Indigenous). While there was only a small difference in negative answers regarding protection of one's own rights (14.8 per cent Indigenous compared to 13.6 per cent non-Indigenous), there was a larger difference regarding protection of the community's rights (18.5 per cent Indigenous compared to 13.4 per cent non-Indigenous).

The youngest respondents were the least satisfied with the human rights aspects of Queensland's COVID response. Only 53.9 per cent of those aged 18–24 felt that their own rights were respected and only 39.5 per cent of that group felt that the community's rights were respected. The pattern in age responses was not linear, with the most positive groups being those aged 25–34, 45–54, and 65 and over, while those aged in between were notably more negative in their responses to both Q19 and Q20.

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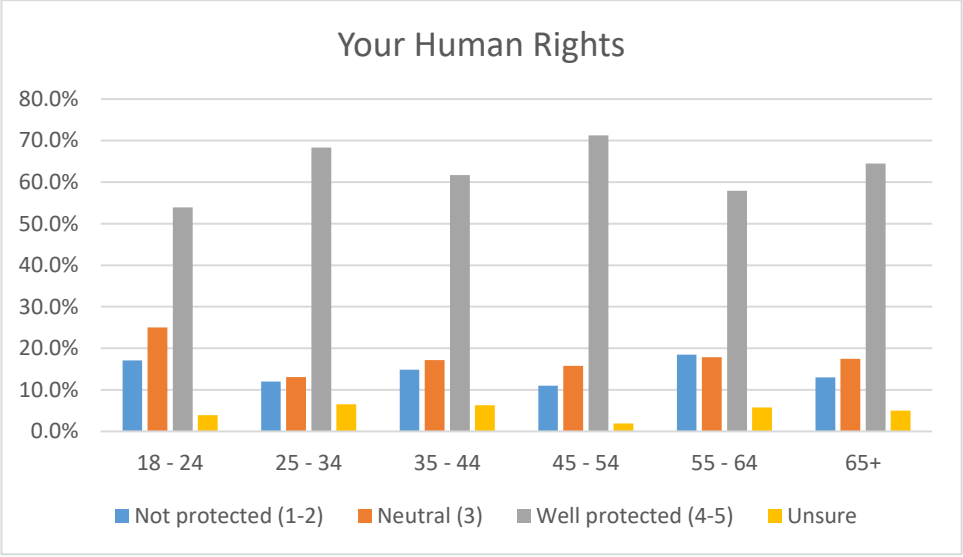
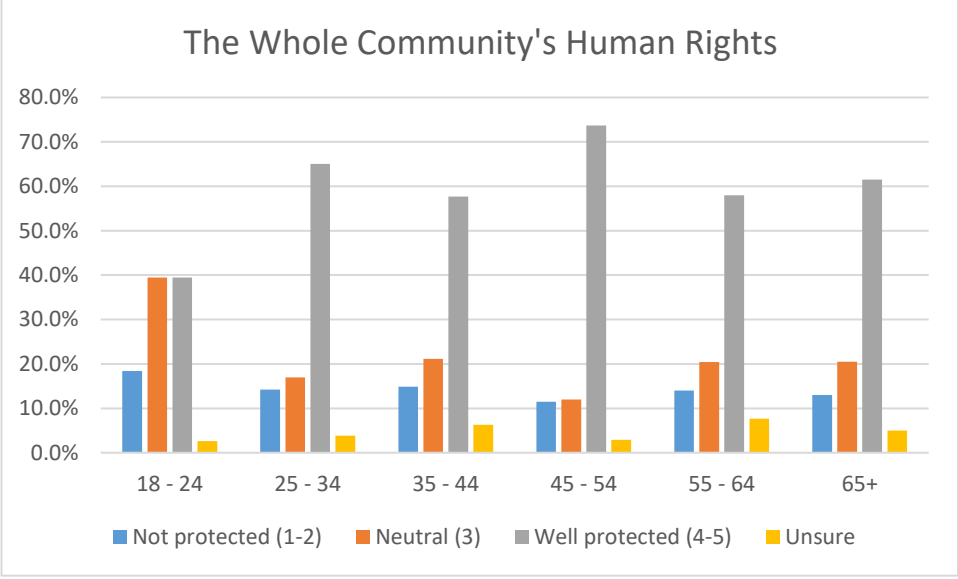
[73] Emilie Gramenz and Dominic Cansdale, 'New Mass Vaccination Hub to Open in Brisbane as Premier Pushes to "Sort" Border', *ABC News* (online, 29 August 2021) <https://www.abc.net.au/news/2021-08-29/covid-qld-latest-cases-update-community-coronavirus/100414634>.





Regarding the education-segregated responses, there was a consistent correlation between higher levels of satisfaction with Queensland's human rights performance in combating COVID-19, and higher levels of educational qualification, though overall all groups felt that rights were protected.

Regarding wealth, there is an almost linear correlation between positive responses and levels of wealth, except that HNW were less satisfied with the

respect evident for their own rights (81.6 per cent) than the next wealthiest group, Core Affluent (89.5 per cent). In contrast, only 57.1 per cent of the least wealthy group felt that their rights were well respected in Queensland's pandemic response. While most groups, including those disaggregated by factors other than wealth, felt that their own rights were respected more than those of the community, that was not the case with the HNW group. Their positive response regarding their own rights (81.6 per cent) is significantly lower than their positive response regarding the community's rights (89.5 per cent).

In States with major COVID-19 outbreaks, namely NSW and especially Victoria at the time of the survey, there was evidence that the less wealthy (who are more likely to be the less educated) were the most likely to contract the virus and suffer poor outcomes.[74] However, such an observation is less relevant in Queensland, where there were fewer cases of COVID-19. Nevertheless, the less wealthy and educated were significantly less satisfied with the human rights compatibility of Queensland's COVID-19 response.

The greater dissatisfaction by young people seems explicable. Young people are the least likely to suffer severe outcomes from COVID-19 infections, yet Queensland's approach very much favoured COVID-19 elimination over the enjoyment of normal societal freedoms. Younger people were more likely to lose their jobs, or work in industries such as hospitality which were impacted by space limits and mask requirements, and are possibly the cohort most interested in interstate and international travel opportunities.[75]

Similarly, evidence shows that women have been and are being impacted disproportionately by the economic and social consequences of the COVID-19 outbreak, increasing women's vulnerabilities regarding family violence, femicide, and socio-economic participation. While Queensland, at the time of the survey, was largely spared from the worst economic effects of the COVID-19 Pandemic, the economic impacts were gendered.[76] This might explain the greater dissatisfaction expressed by women compared to men.

12. To what extent do you feel human rights and dignity are respected in the following settings in Queensland?

Question 12 ('Q12') gauged levels of confidence in the human rights performance of the following public entities in Queensland: health services, schools, TAFE and universities, prisons, police, aged care, the public service, and

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74 Stephanie Dalzell, 'Poorer Australians Four Times More Likely to Die from a COVID-19 Infection', *ABC News* (online, 10 September 2021) <https://www.abc.net.au/news/2021-09-10/poorer-australians-four-times-more-likely-to-die-of-covid-19/100448564>.

75 Australian Institute of Health and Welfare, 'Australia's Youth: COVID-19 and the Impact on Young People', (Web Article, 25 June 2021) <https://www.aihw.gov.au/reports/children-youth/covid-19-and-young-people>.

76 Australian Bureau of Statistics, 'Labour Force, Australia Methodology' (Web Page, 20 May 2021) <https://www.abs.gov.au/methodologies/labour-force-australia-methodology/apr-2021>. See further Leonora Risse and Angela Jackson, 'A Gender Lens on the Workforce Impacts of the COVID-19 Pandemic in Australia' (2021) 24(2) *Australian Journal of Labour Economics* 111.

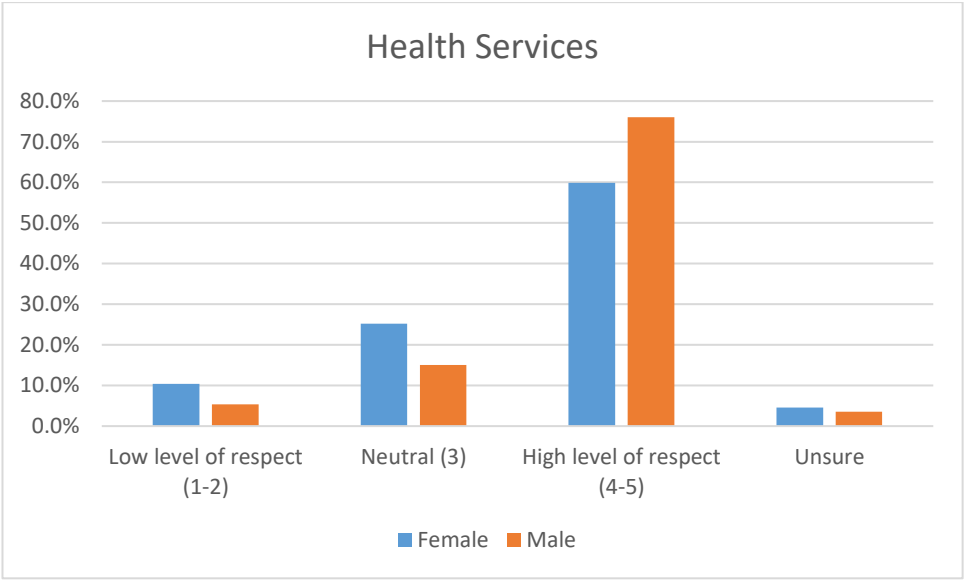
the following private entities in Queensland: employers, businesses, shopping centres and religious institutions. The potential answers were: high levels of respect, low levels of respect, neutral, and unsure. We will only report here on incidences of the first two responses.

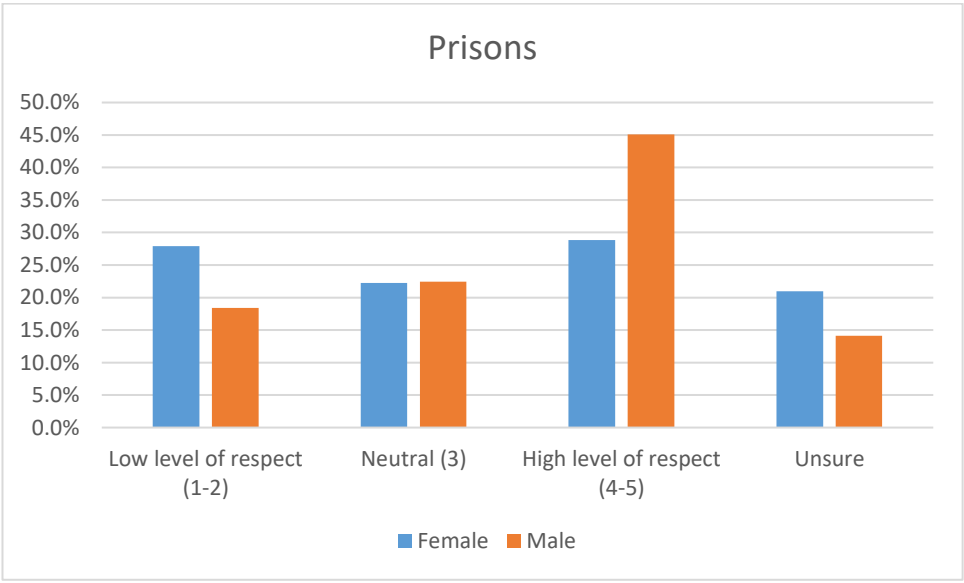
The 'high' performers in the public sector were Queensland health services (67 per cent high, 8.3 per cent low), schools (64.7 per cent high, 8.2 per cent low), tertiary education providers (62.1 per cent high, 5.9 per cent low). The responses regarding the police (56 per cent high, 15.8 per cent low), public service (53.5 per cent high, 13.1 per cent low) and councils (54.2 per cent high, 13.9 per cent) were significantly less positive than the 'top' groups. The most negative responses concerned aged care (40.1 per cent high, 26.8 per cent low) and prisons (36 per cent high, 23.7 per cent low).

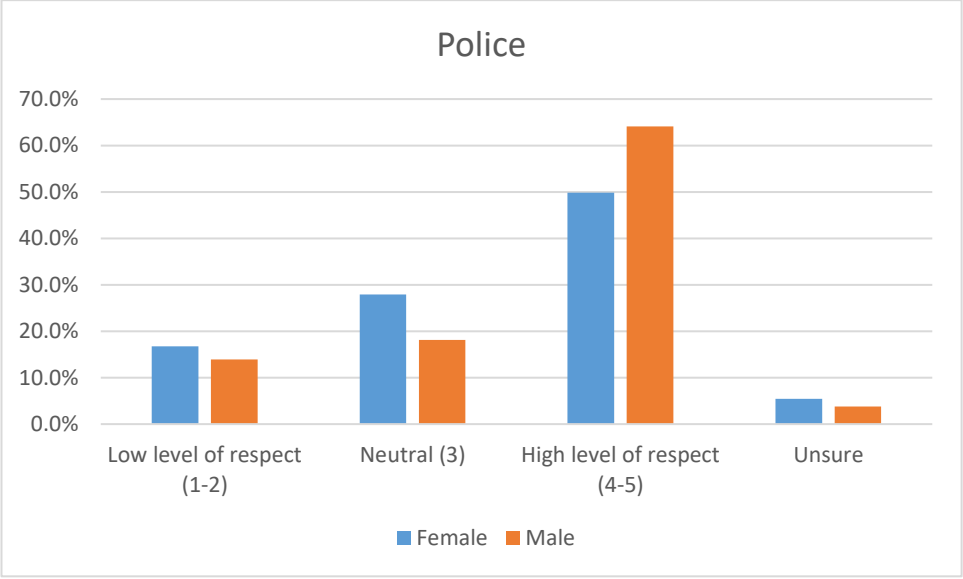
The responses regarding the private sector were fairly similar for employers (51.1 per cent high, 10.7 per cent low), businesses (52 per cent high, 10.2 per cent low), and shopping centres (56.9 per cent high, 10.3 per cent low), and less positive for religious institutions (49.7 per cent high, 18.3 per cent low).

There were few differences in the responses to Q12 between people from Brisbane and those outside Brisbane. Overall, Brisbane respondents were slightly more negative with regard to all of the assessed institutions. Similarly, there were few differences between the non-CALD and CALD groups — the largest difference concerned prisons where non-CALD were more likely to find both high (36.8 per cent compared to 27.4 per cent) and low levels of respect (24.2 per cent compared to 17.9 per cent), with the CALD group recording a large percentage of 'unsure' responses (35.7 per cent compared to 16.4 per cent).

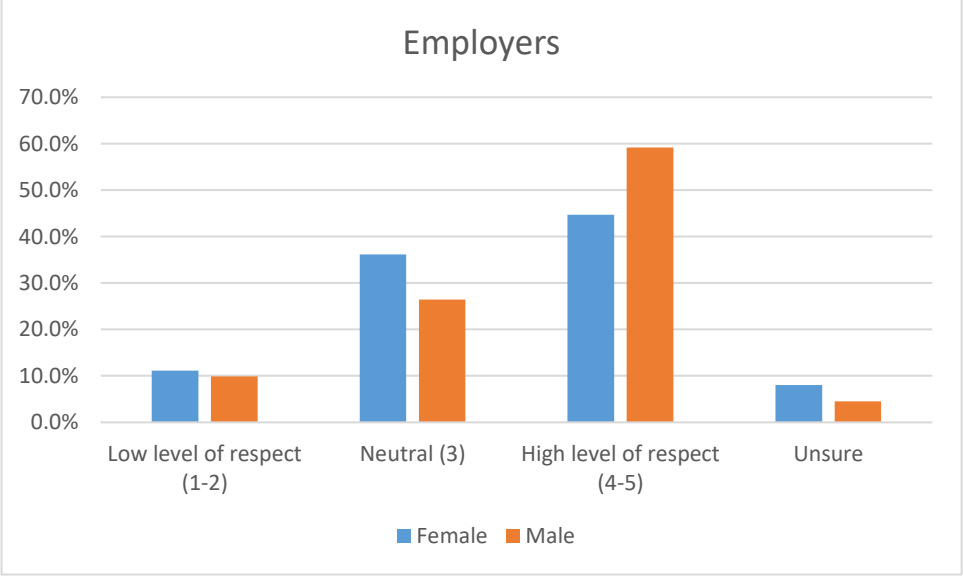
Women were much more negative in their assessments of all institutions than men, as can be seen in the following graphs, which display the largest differences between the sexes.

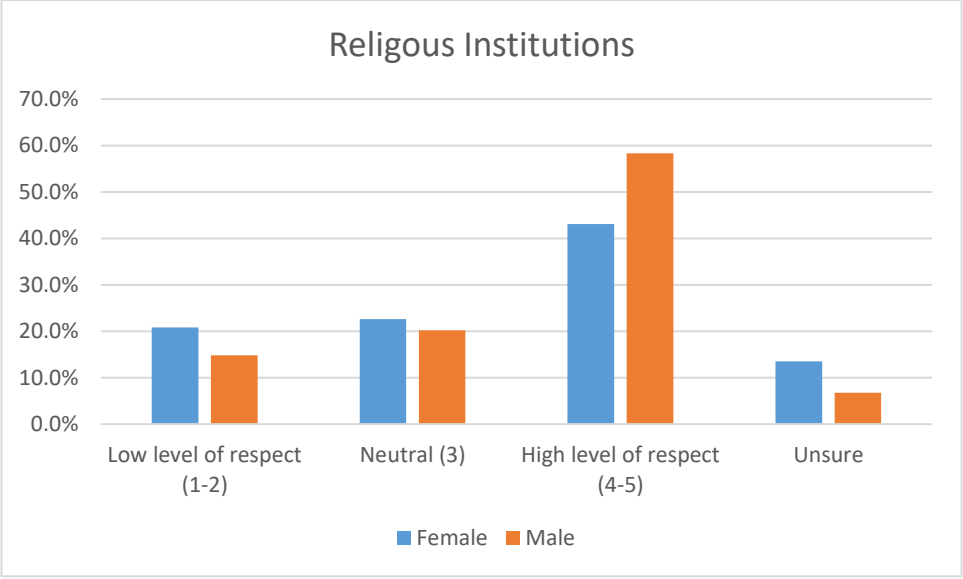

Health Services
80.0%
70.0%
60.0%
50.0%
40.0%
30.0%
20.0%
10.0%
0.0%
Low level of respect (1-2)
Neutral (3)
High level of respect (4-5)
Unsure
Female
Male


Prisons
50.0%
45.0%
40.0%
35.0%
30.0%
25.0%
20.0%
15.0%
10.0%
5.0%
0.0%
Low level of respect (1-2)
Neutral (3)
High level of respect (4-5)
Unsure
Female
Male

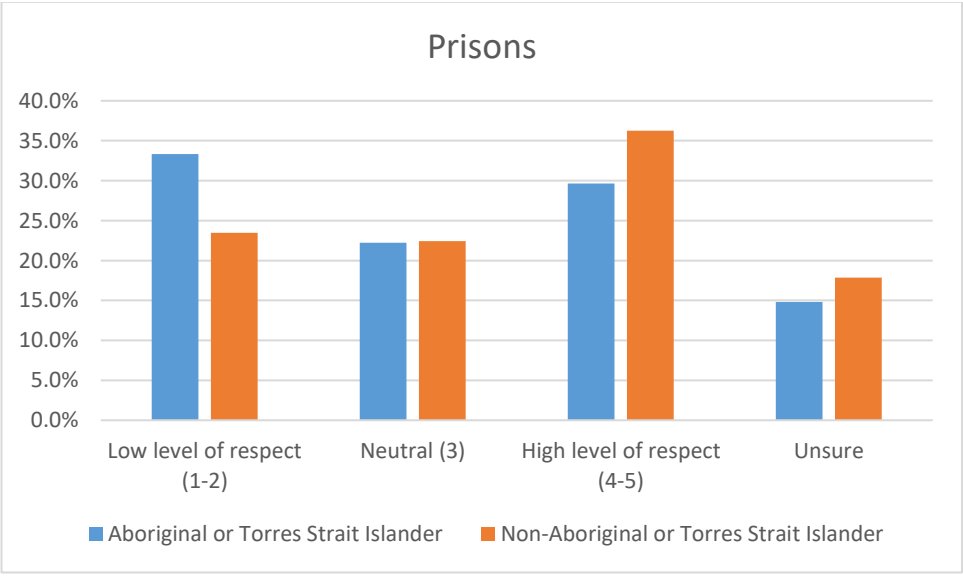


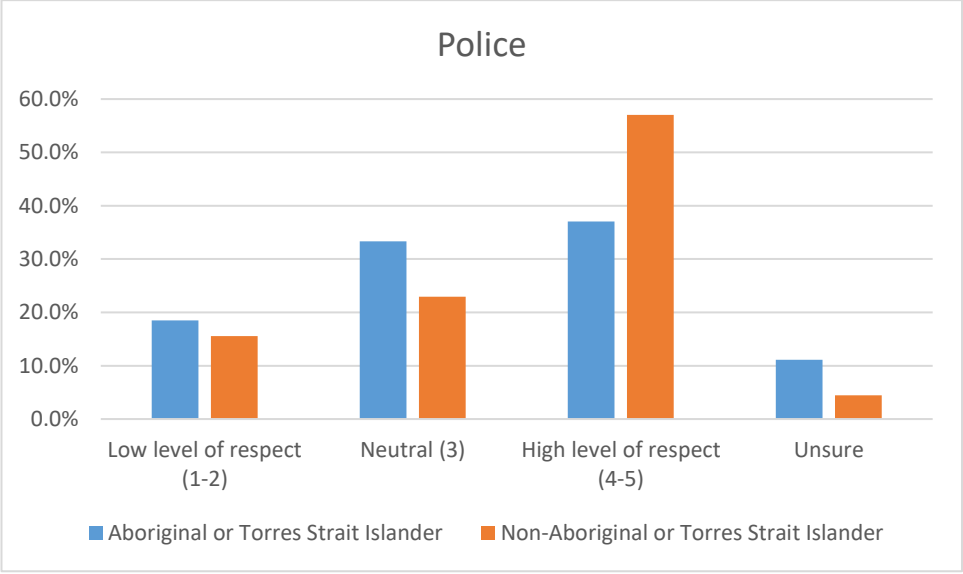
Similar gaps arose concerning the 'high level of respect' response in the private sector, with the biggest differences arising regarding employers and religious institutions:



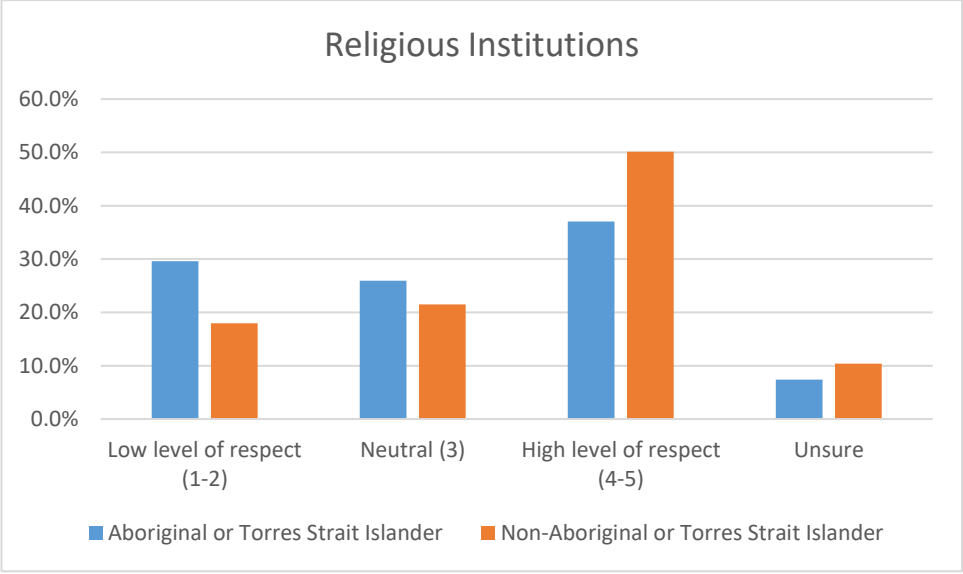


Indigenous people were generally less likely to record positive responses compared to non-Indigenous people, although this was not consistent. Indigenous people recorded more 'high level of respect' responses for the public service and councils, but they also recorded more 'low levels of respect' for councils. The most marked differences concerned prison and the police, as seen in the following graphs:

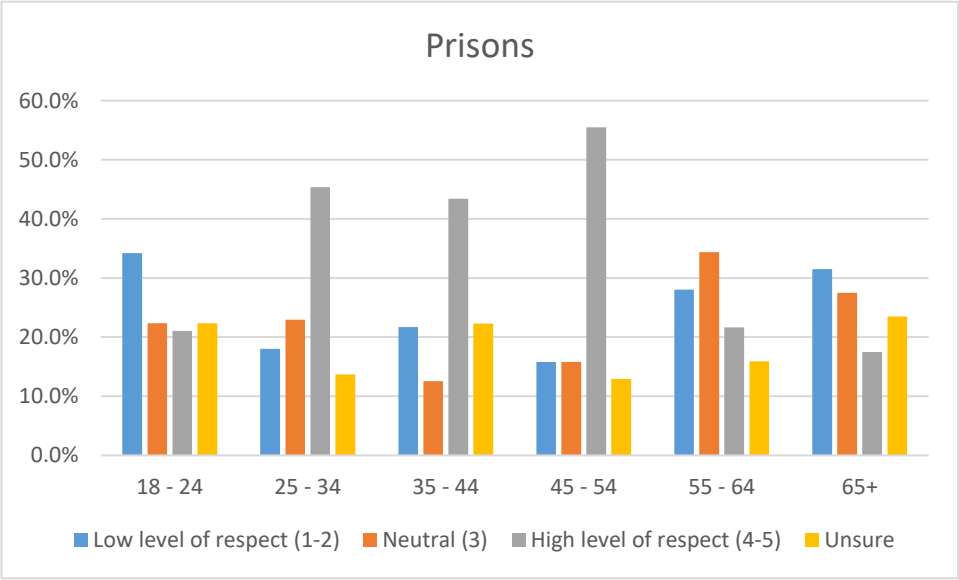


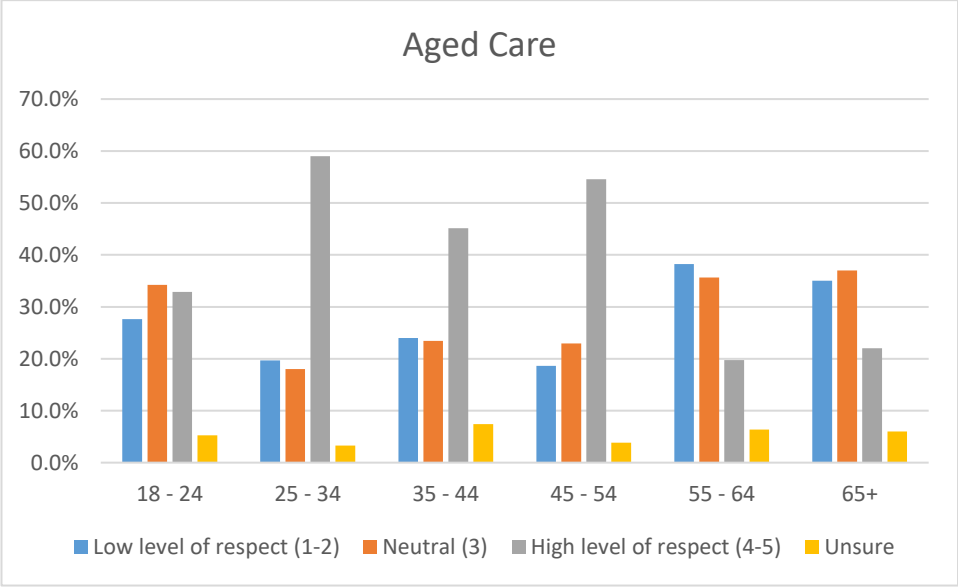


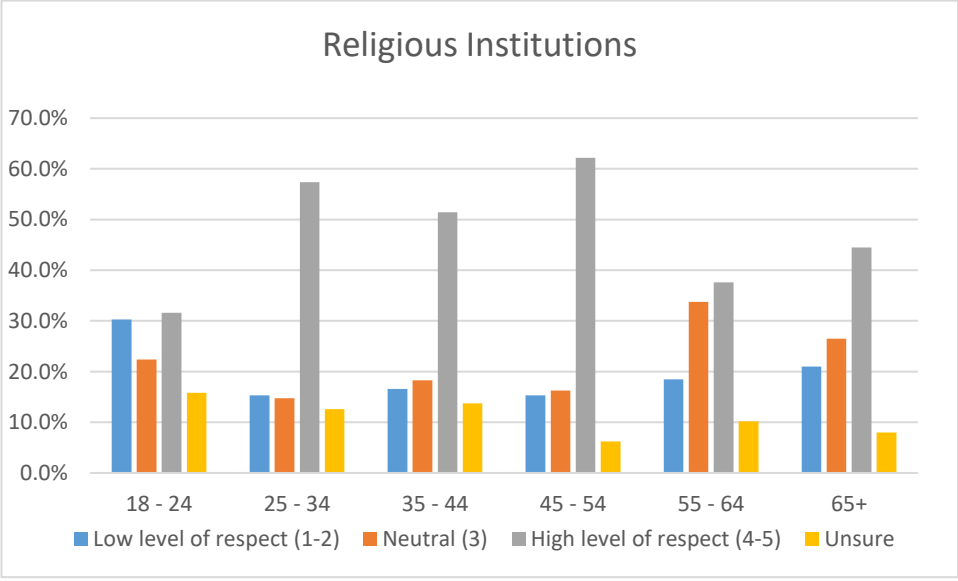
Regarding the private sector, the most marked differences arose regarding shopping centres and religious institutions:



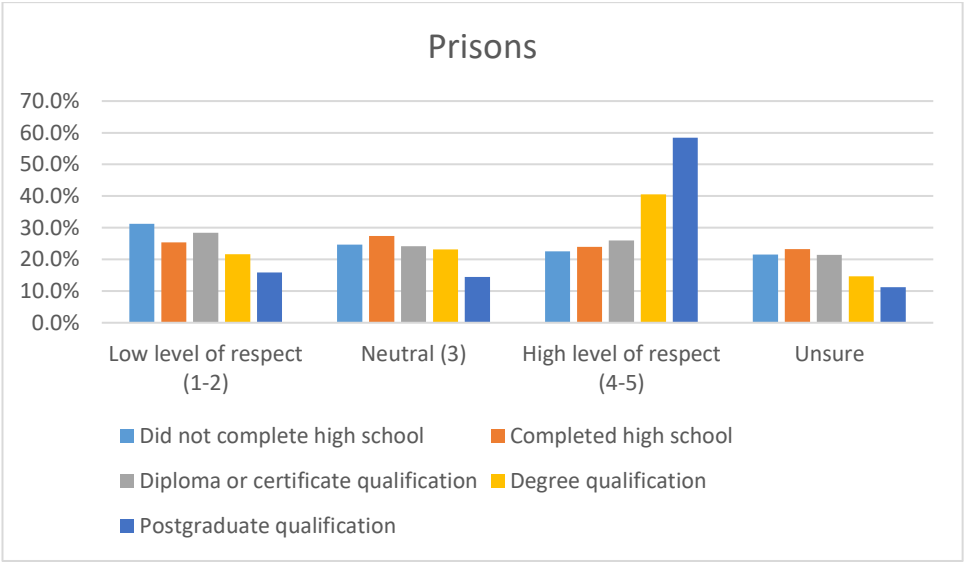
The most positive age groups were, consistently across both public and private institutions, those aged 25–54. The least positive were those aged 18–24 and those aged over 55. The most marked differences are represented in the graphs below, concerning prisons, aged care and, in the private sector, religious institutions.

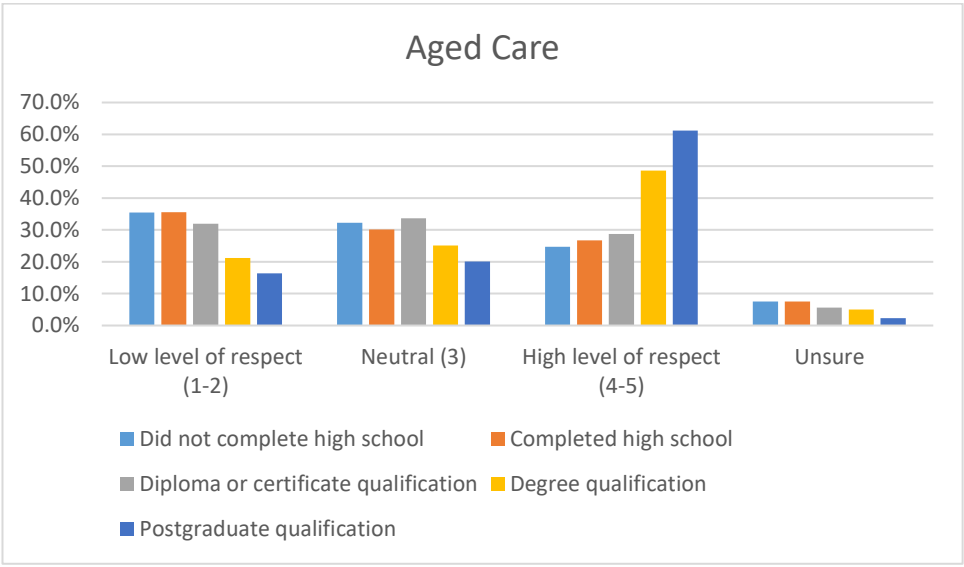




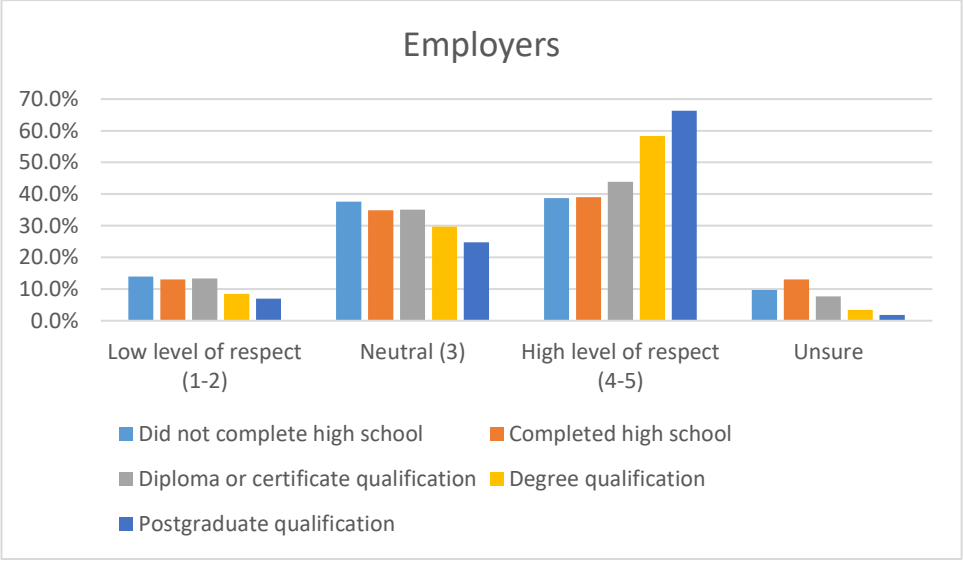


Regarding educational levels, those with the highest educational credentials tended to be more likely to respond 'high' than those with lower educational credentials. Some of the starkest distinctions in response arose regarding prisons and aged care.

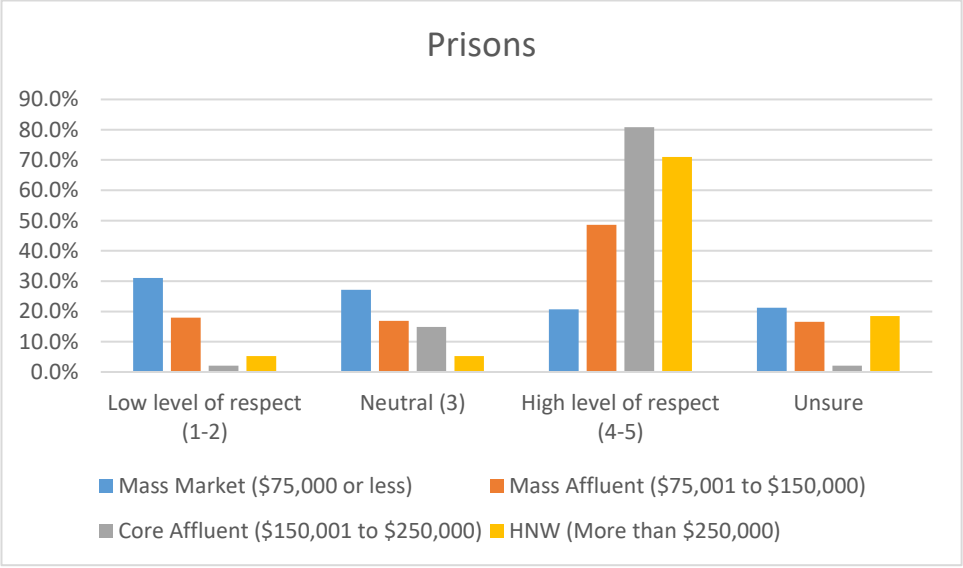


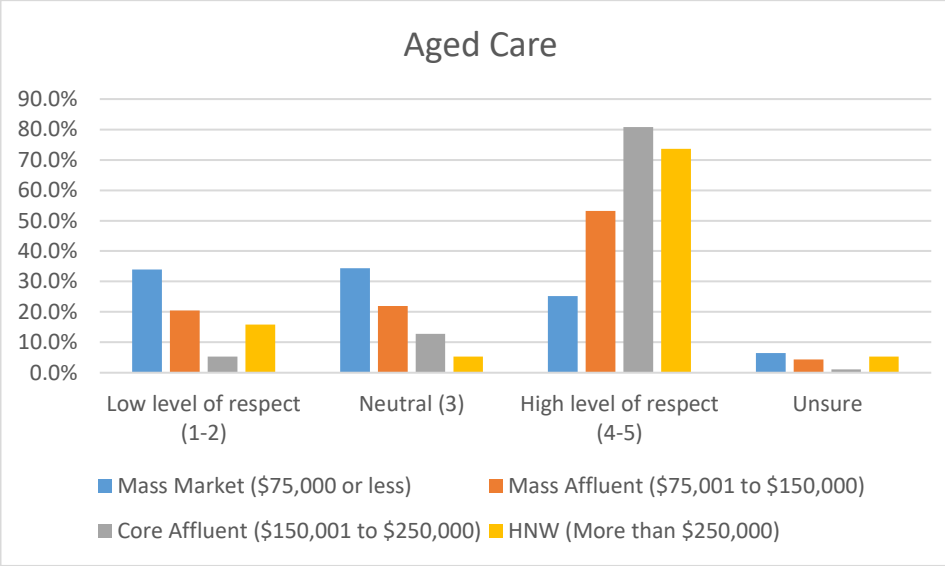


Regarding the private sector, this graph concerning employers was largely reflective of the responses to all private sector institutions disaggregated by education:



The trend in responses according to wealth sector tended to be more positive according to greater levels of wealth. However, the second wealthiest group, Core Affluent, was consistently more positive than the wealthiest group, HNW. The most dramatic differences again concerned prisons and aged care:





Regarding private sector institutions, the Mass Market group did not reach 50 per cent 'high' for any institution, and was in fact below 40 per cent for all of them apart from shopping centres (46.6 per cent high). The Mass Affluent group generally recorded around 60 per cent 'high' for all private sector institutions, while 'high' responses in the wealthier groups were above 75 per cent for all, apart from only 63.2 per cent of HNW believing religious institutions had high levels of respect for human rights.

The answers to Q12 segregated by group reveal that those in the most vulnerable groups generally expressed less satisfaction with the human rights performance of both public and private sector institutions in Queensland, compared to the less vulnerable groups. The low comparative results for aged care, prisons, and religious institutions concern institutions that have been heavily criticised in recent years for their human rights performance. Aged care and religious institutions have been prominently critiqued by both federal and state royal commissions,[77] while prisons have long been a target of human rights criticism and advocacy.[78] One seemingly anomalous result is the greater satisfaction of men with prisons than women, given the greater likelihood of male than female imprisonment.[79] One hypothesis may be that women could be less satisfied with prison environments as visitors and people whose family members

[77] See, eg, Royal Commission into Aged Care Quality and Safety, *Final Report: Care, Dignity and Respect* (Report, 1 March 2021); Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (Report, 15 December 2017).

[78] See, eg, Australian Human Rights Commission, 'Australia Ratifies Major Anti-Torture Treaty OPCAT', *Prisoners* (Web Page) <https://humanrights.gov.au/extended-area-work/prisoners>.

[79] Australian Bureau of Statistics, *Prisoners in Australia 2021* (Catalogue No 4517.0, 9 December 2021).

have gone to prison than men as actual inmates, but further research is required on this issue.

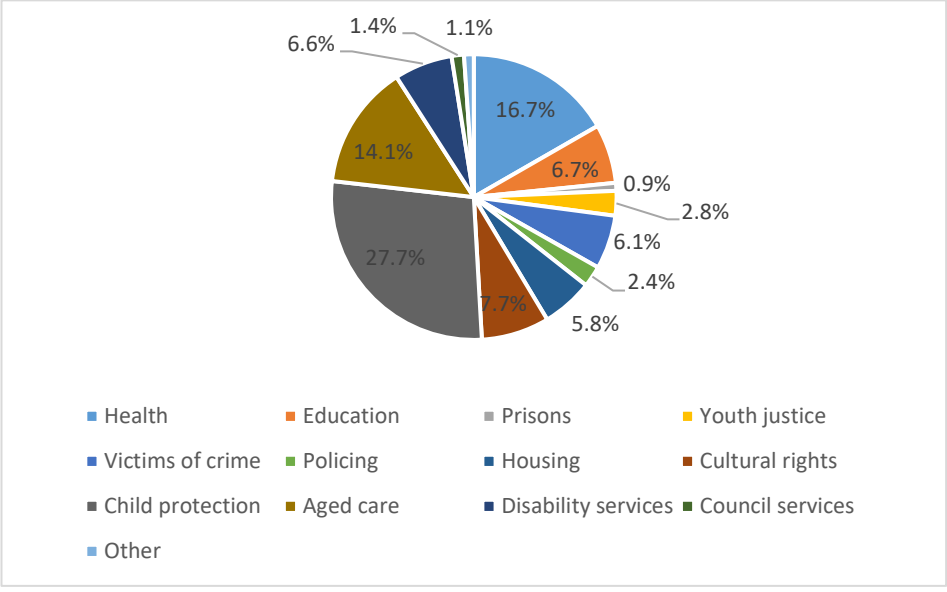
C *Where are Human Rights Most Needed?*

11. What are the three most important areas where protection of human rights is most needed?

21. Please indicate the top 5 groups you think are in need of greater protection.

These two questions related to the areas, and people, which respondents thought should be prioritised in terms of human rights protection. For each answer, we focus here only on the top choice, rather than, respectively, the top three or five choices.

Regarding areas to be prioritised in Question 11 ('Q11'), three answers (combined) commanded over 50 per cent of 'first option' responses: child protection (27.7 per cent), health (16.7 per cent), and aged care (14.1 per cent). It was quite a drop to the fourth placed 'cultural rights' (7.7 per cent), education (6.7 per cent), disability services (6.6 per cent), victims of crime (6.1 per cent) and housing (5.8 per cent). Very few respondents ranked issues relating to criminal justice highly, aside from the rights of victims, with low numbers listing youth justice (2.8 per cent), policing (2.4 per cent), council services 1.4 per cent and prisons (0.9 per cent). 'Other' captured 1/1 per cent of responses.

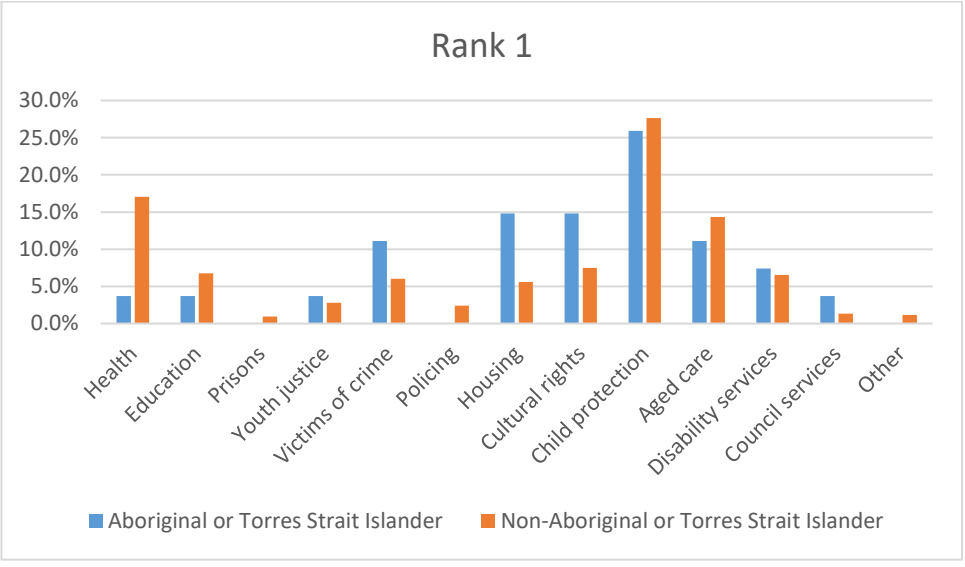


As will be seen with the next question covered (Question 21 ('Q21')), the concern with the welfare of children and the elderly is consistent and dominant. The concern with health as a human rights priority is predictable in a pandemic. In contrast, again, as will be seen with regard to Q21, there is little concern with those in the criminal justice system as perpetrators (or alleged perpetrators), including youth offenders. The low ranking of youth offenders is interesting, given the high correlation between youth offenders and children in the child protection system.[80]

The ranking of priority areas in Q11 did not differ much according to location in or outside Brisbane. Those outside the capital city ranked aged care (15.3 per cent) above health (14.6 per cent), but Brisbane residents ranked them the other way (19.5 per cent health; 12.6 per cent aged care).

Women prioritised child protection (32.8 per cent) at a much higher rate than men (21.7 per cent), though both ranked it as their highest priority area. Men ranked aged care (16.4 per cent) higher than health (14.6 per cent), but women ranked these areas more starkly the other way (18.6 per cent health compared to 12.4 per cent aged care). Men were much more likely to prioritise policing (4.3 per cent) compared to women (0.9 per cent), which might reflect the greater likelihood of their bring engaged by the police.

The priority concerns of Indigenous people were quite different to non-Indigenous people, aside from both groups ranking child protection first, as seen in the following graph:



[80] Susan Baidawi and Rosemary Sheehan, '"Crossover Kids": Offending by Child Protection-Involved Youth' (2019) 582 *Trends and Issues in Crime and Criminal Justice* 1.

Indigenous people ranked housing and cultural rights equal second (14.8 per cent) and ranked victims of crime equal to aged care (11.1 per cent). Indigenous peoples were much less likely to choose health as their first priority (3.7 per cent compared to 17 per cent), although many Indigenous peoples chose health as their second priority (15.4 per cent). The concern of Indigenous people with cultural rights is understandable, as is their greater concern with housing issues and issues related to victims of crime, given statistics regarding the greater vulnerability of Indigenous people to inadequate housing and homelessness, and of exposure to crime.[81]

While both the non-CALD and CALD groups reflected the same top three priority areas as the general population, CALD were much more likely to choose health as their first priority (26.2 per cent compared to 15.8 per cent). Indeed, a combined 58.3 per cent of CALD chose child protection and health as their first priority. While aged care was still the third ranked 'first' priority amongst CALD, it was only 9.5 per cent of CALD compared to 14.5 per cent of non-CALD, which may reflect the fact that CALD families are more likely to care for elderly parents in the home than non-CALD.[82]

The age stratified responses reveal strong support across all age groups for prioritising child protection. As can be seen below, younger people prioritised health more than older people, and older people understandably prioritised aged care much more than younger people. There was strong support amongst the youngest age group for prioritisation of cultural rights (15.8 per cent), perhaps reflecting greater awareness of Indigenous issues.[83] That age group also demonstrated some reasonable prioritisation of youth justice (6.6%), which plummeted to 1.6% for the next youngest age group (25–34).

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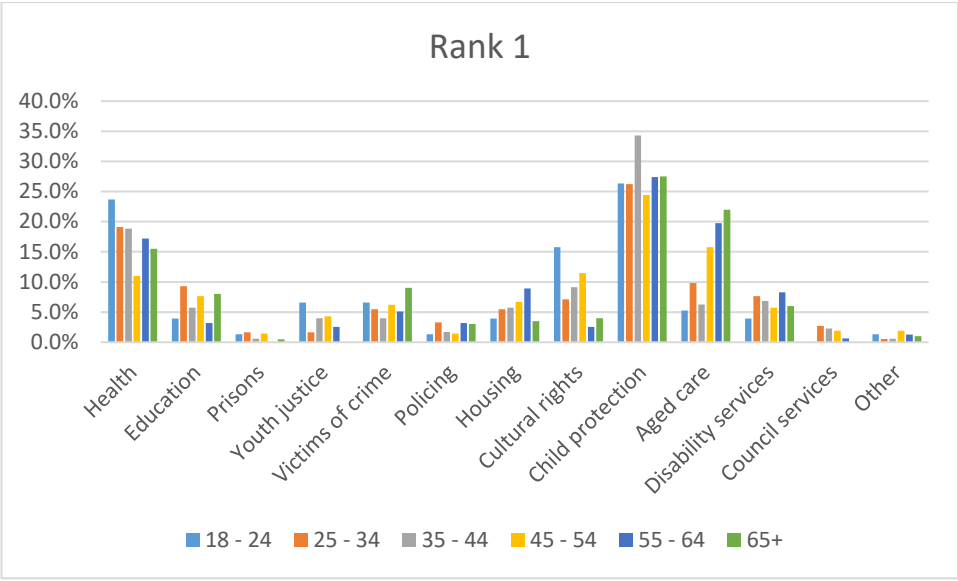
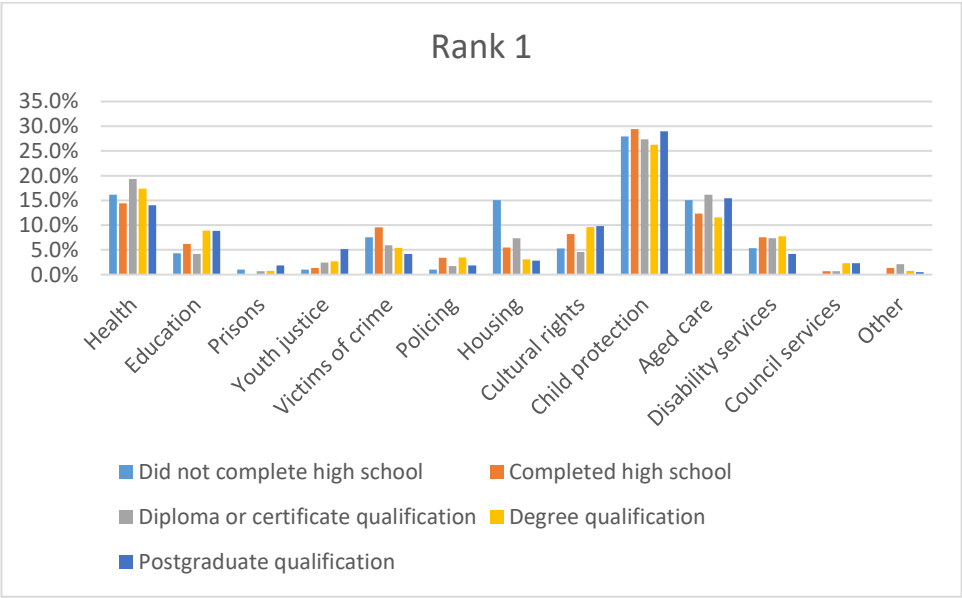
81 See, eg, Australian Institute of Health and Welfare, *Homelessness Among Indigenous Australians* (Report No 133, 16 July 2014); Australian Bureau of Statistics, *Recorded Crime – Victims, Australia, 2017* (Catalogue No 4510.0, 28 June 2018).

82 See, eg, Meihan Lo and Cherry Russell, 'Family Care: An Exploratory Study of Experience and Expectations Among Older Chinese Immigrants in Australia' (2007) 25(1) *Contemporary Nurse* 31; Luma Simms, 'Caring for Our Own: An Immigrant's View of Elder Care', *Institute for Family Studies* (Article, 31 July 2020) <https://ifstudies.org/blog/caring-for-our-own-an-immigrants-view-of-elder-care>.

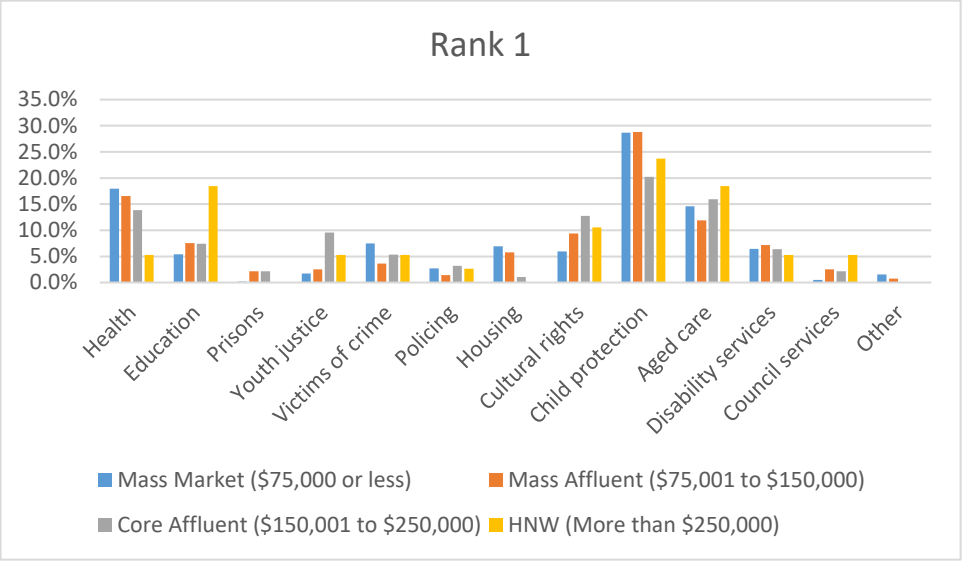
83 Matthew Gray and William Sanders, *Australian Public Opinion on Indigenous Issues: Injustice, Disadvantage and Support for Recognition* (Report No 17, March 2015) 7–8.



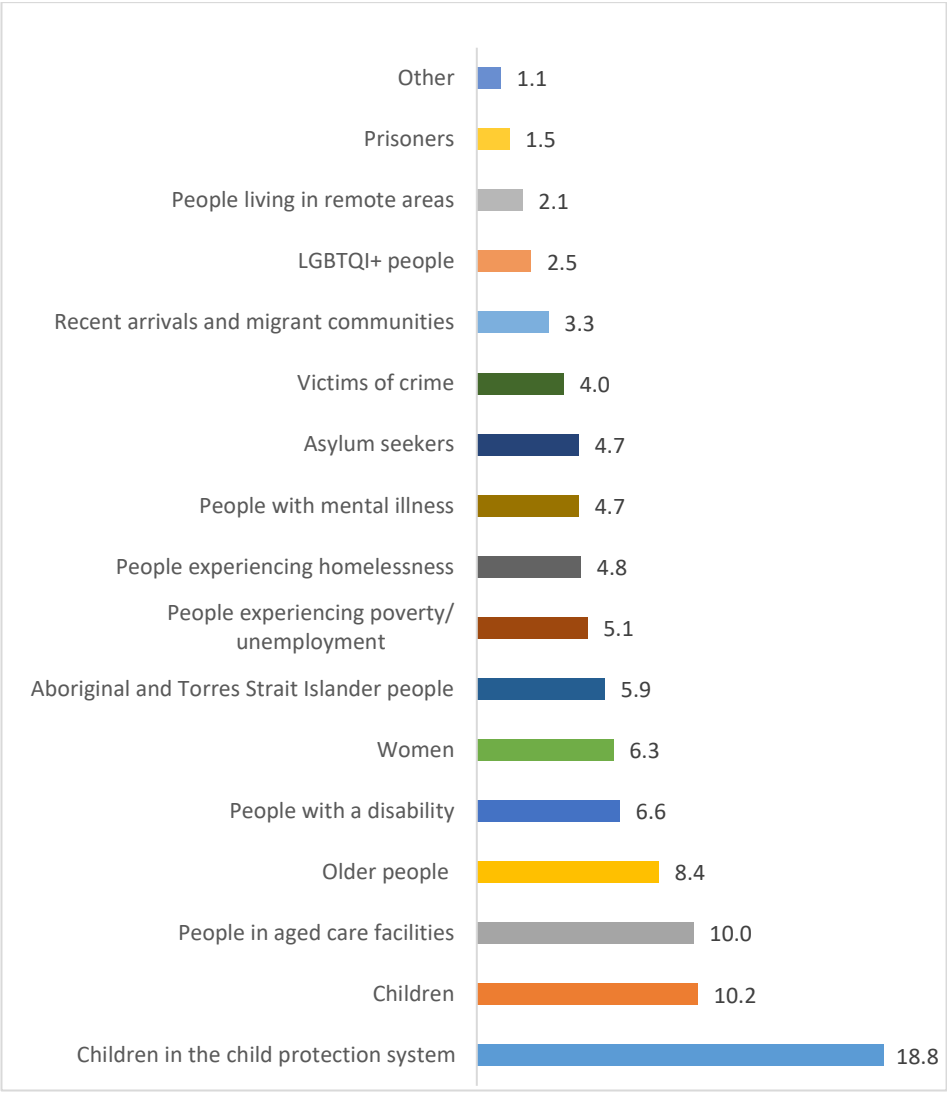
The education-stratified data again reveals strong support for the top three issues. Those who have not completed high school are significantly more likely to prioritise housing compared to others (15.1 per cent) compared to the next highest ranking of 7.4 per cent from those with a diploma or certificate qualification.



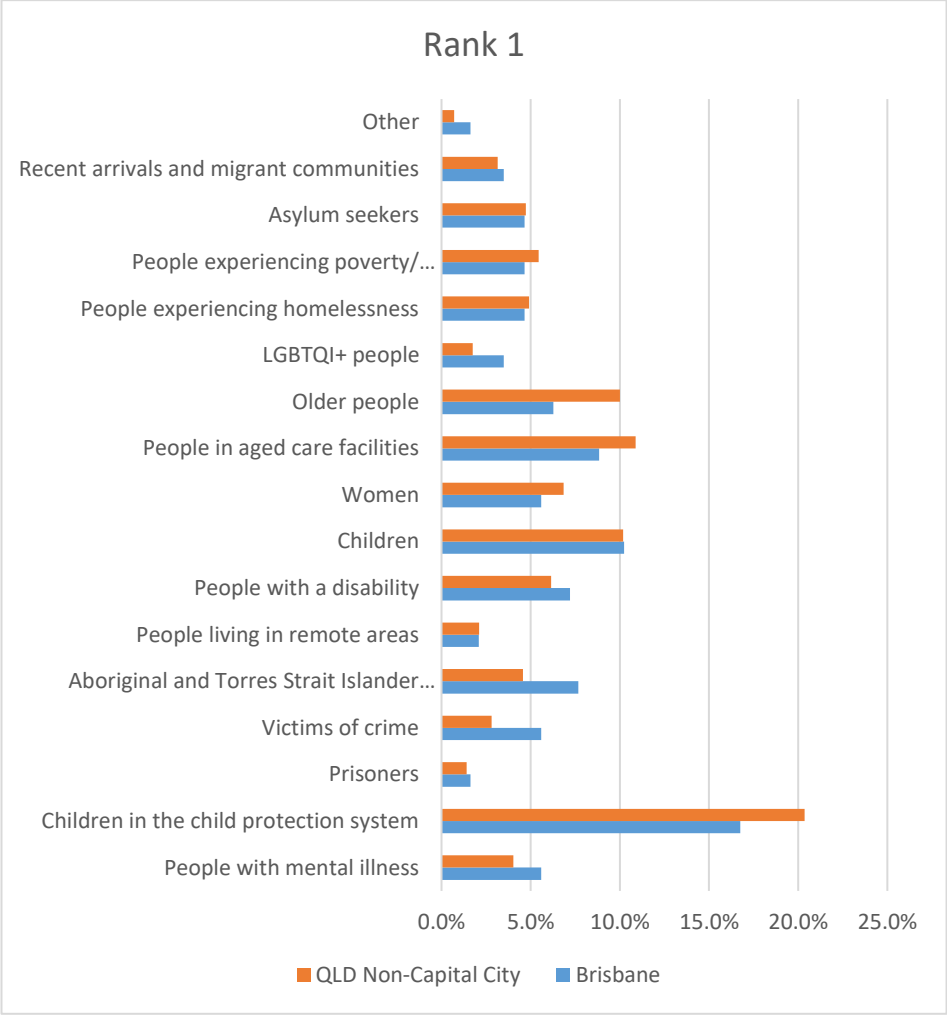
There was strong support for the top three issues amongst all wealth sectors, except that HNW were much less likely to rank health as their first priority (5.3 per cent compared to the next lowest, 13.8 per cent from Core Affluent), and much more likely to rank education, which ranked equal second for HNW alongside aged care at 18.4 per cent. No other wealth group ranked education higher than 7.6 per cent. The idiosyncratic HNW answers may reflect very different life experiences within that group.



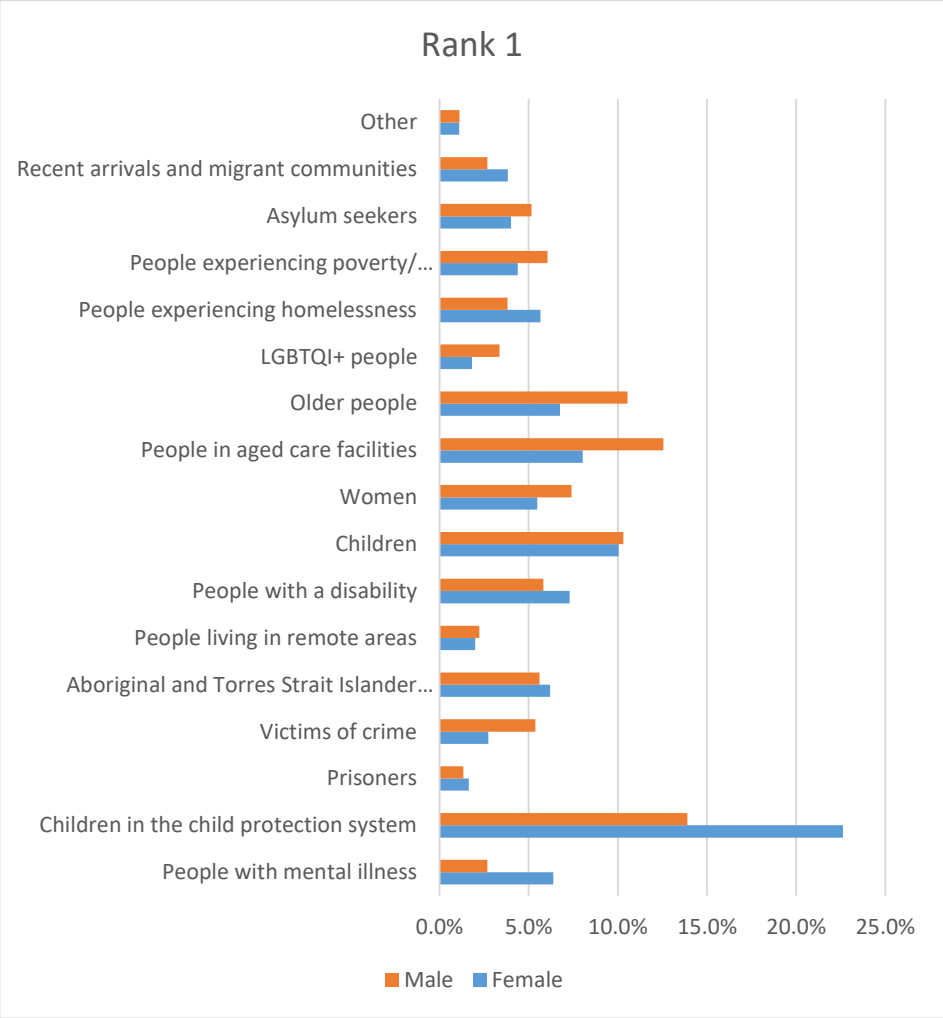
Regarding Q21, children were singled out as the group in greatest need of rights protection. 18.8 per cent ranked 'children in the child protection system' first, and a further 10.2 per cent ranked 'children' first. The next two most commonly ranked 'prioritised persons' were 'people in aged care facilities' (10 per cent) and 'older people' (8.4 per cent). From there, the rankings were as follows: people with a disability (6.6 per cent), women (6.3 per cent), Indigenous peoples (5.9 per cent), people experiencing poverty (5.1 per cent), people experiencing homelessness (4.8 per cent), asylum seekers and people with mental illness (both 4.7 per cent), victims of crime (4 per cent), migrant communities (3.3 per cent), LGBTQI+ people (2.5 per cent), people living in remote areas (2.1 per cent), and last of all, prisoners (1.5 per cent). 'Other' captured 1/1 per cent of responses.



People outside Brisbane were more likely to prioritise children in the child protection system, and both categories of older people, than people in Brisbane, as seen in the following graph. People in Brisbane were much more likely to prioritise Indigenous people (7.7 per cent to 4.6 per cent) and victims of crime (5.6 per cent to 2.8 per cent). There was no difference between the Brisbane and non-Brisbane groups regarding the prioritisation of people living in remote areas (2.1 per cent for both groups).

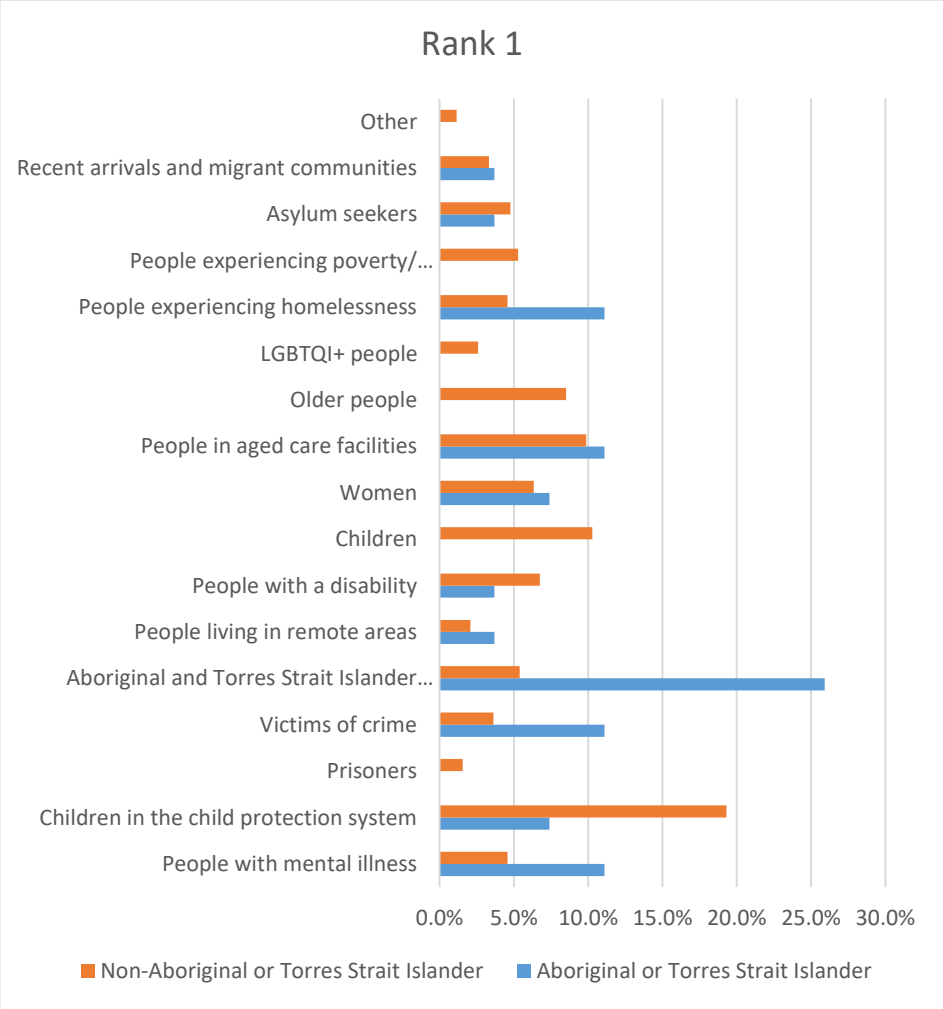


Women were much more likely to prioritise children in the child protection system than men (22.6 per cent compared to 13.9 per cent). Men were, perhaps counter-intuitively, more likely to prioritise women (7.4 per cent to 5.5 per cent) and, despite their shorter life expectancy, both categories of older people.



The top ranked 'prioritised persons' for Indigenous people were very different to non-Indigenous people. Indigenous people had much higher rankings for Indigenous people (25.9 per cent to 5.4 per cent), people with mental illness (11.1 per cent to 4.6 per cent), victims of crime (11.1 per cent to 3.6 per cent), and people experiencing homelessness (11.1 per cent to 4.6 per cent). Neither category of child attracted many responses from Indigenous people, with 7.4 per cent ranking children in the child protection system first, and none ranking children generally first. While people in aged care facilities were equal second in priority for Indigenous people (at 11.1 per cent alongside the three categories mentioned above), older people generally were not ranked as a first priority by any self-identified Indigenous respondent. The different Indigenous responses again

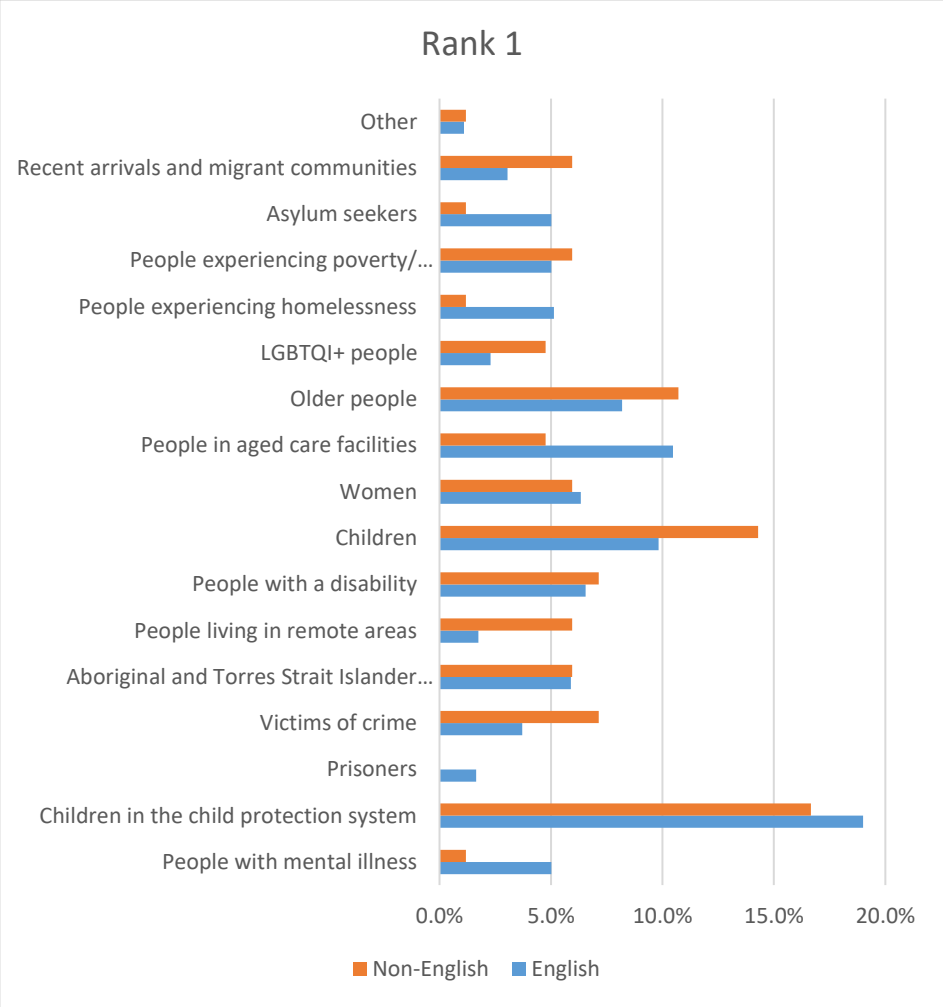
likely reflect greater statistical vulnerability of the Indigenous population to mental illness diagnoses, homelessness and experience of crime.[84]



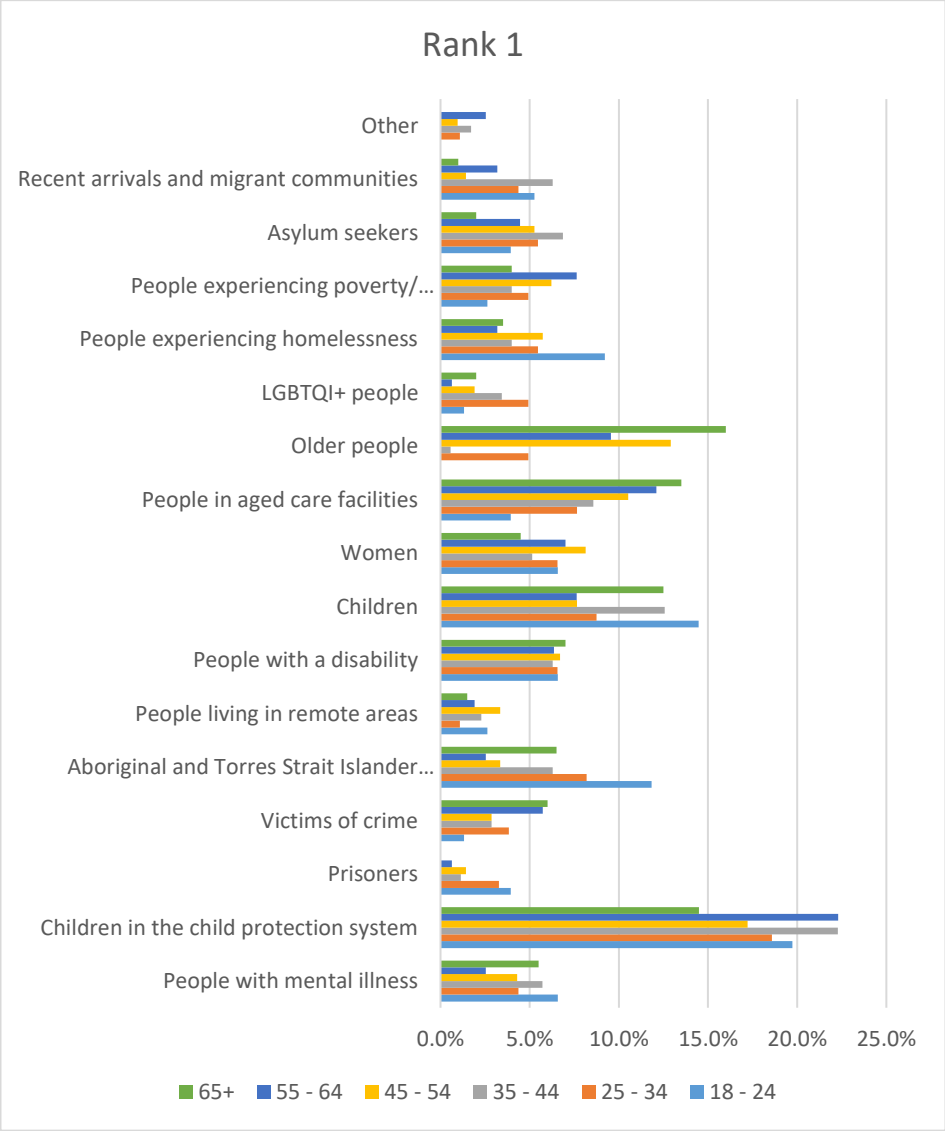
There was much less difference between the non-CALD and CALD groups. While CALD ranked people in aged care homes much lower than non-CALD (4.8 per cent compared to 10.5 per cent), they ranked older people, generally, higher (10.7 per cent to 8.2 per cent). Again, this may reflect the fact that CALD families are more likely to care for parents in their own homes than non-CALD families. The CALD group was more likely to list victims of crime, people in remote areas, LGBTQI+, and migrant communities as the top priority compared to the non-CALD group.

[84] Above n 81.

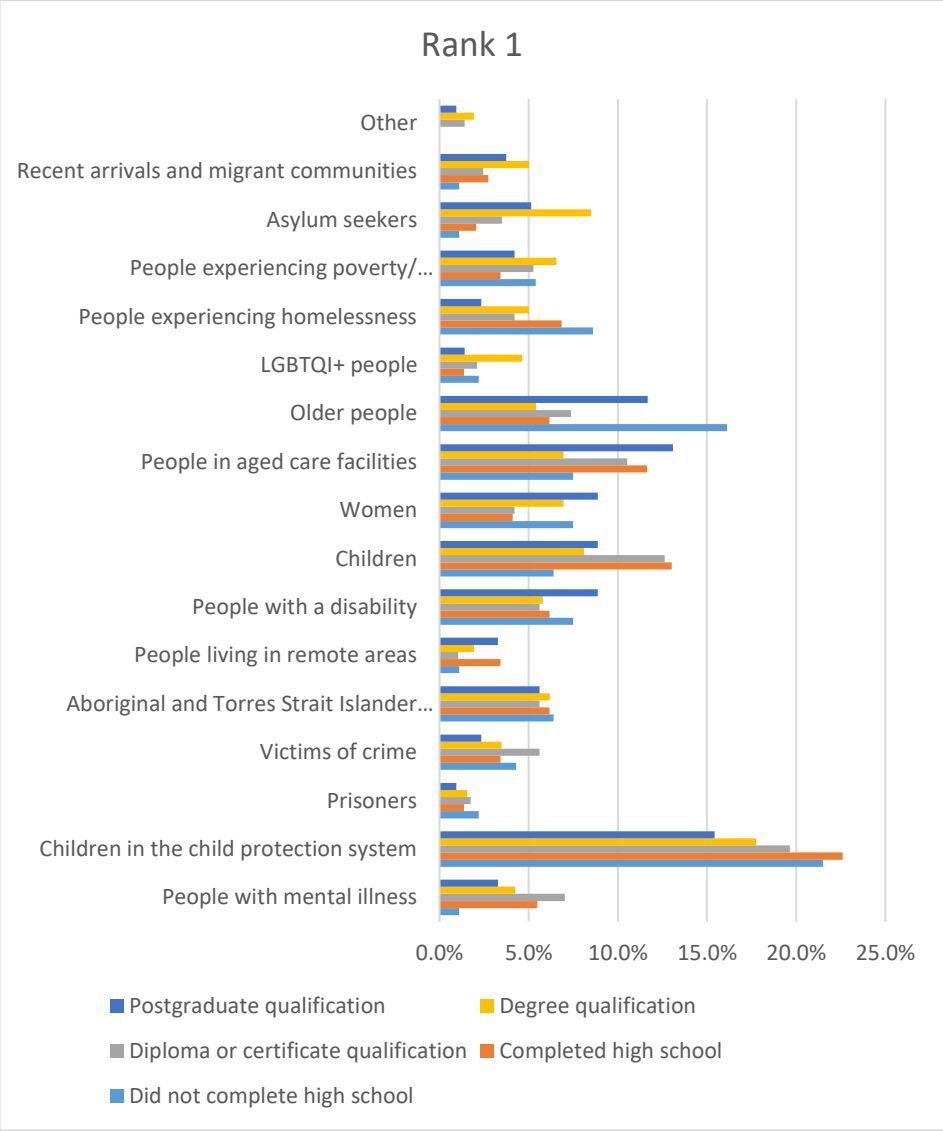
They were much less likely to list people with mental illness, people experiencing homelessness or asylum seekers.



The age stratified data shows all age groups prioritised children, and most age groups prioritised older people next. The youngest group was much more likely to prioritise Indigenous people, people experiencing homelessness and prisoners compared to the older age groups.

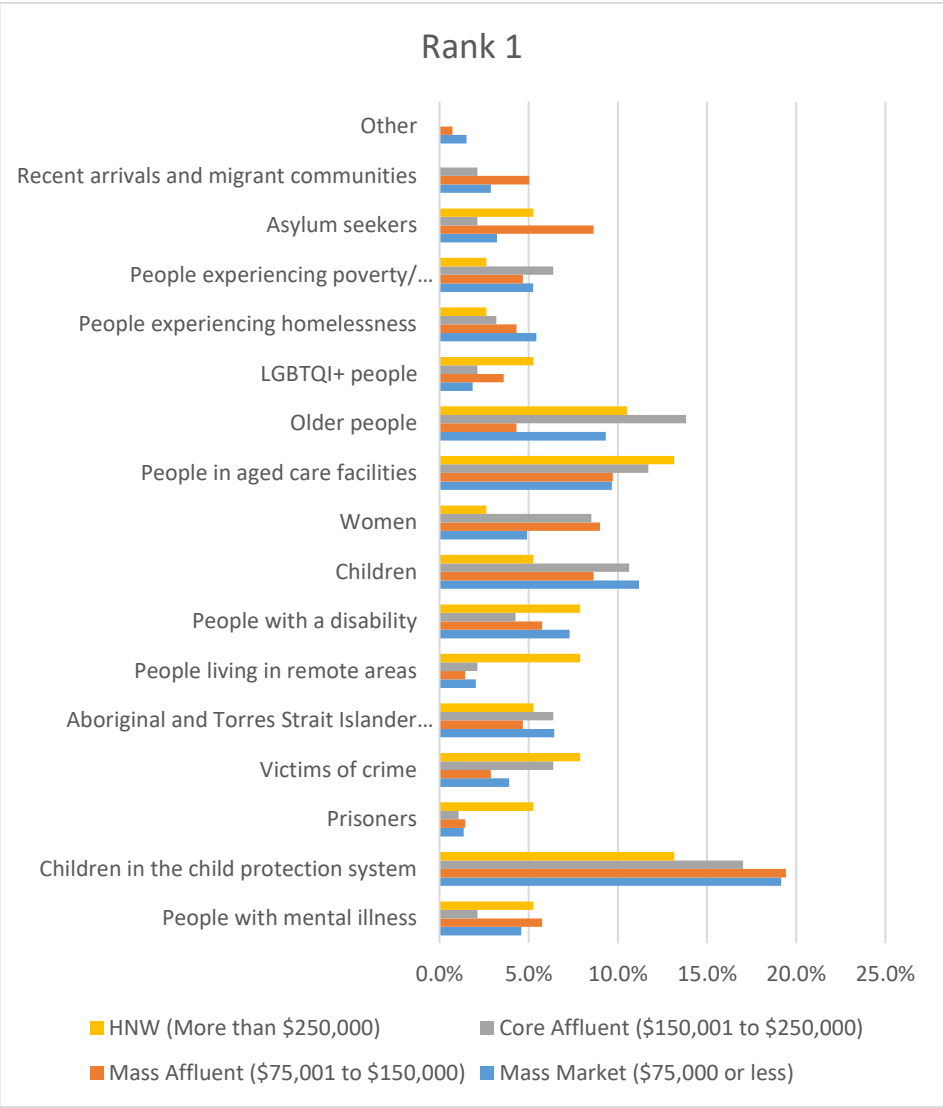


Prioritisation of children is clear across all educational groups, followed by prioritisation of older people in most of those groups.



With the wealth stratified data, there are some notable differences between the HNW group and other groups. HNW were much more likely to rank the following people as a priority than other groups: prisoners (5.3 per cent compared to the next highest being 1.4 per cent among both of the least wealthy groups) and people living in remote areas (7.9 per cent compared to the next highest of 2.1 per cent from the Core Affluent group). The HNW group was much less likely to rank either group of children as the highest priority (13.2 per cent for children in the child protection system, compared to the next lowest of 17 per cent for Core

Affluent; 5.3 per cent for children compared to the next lowest of 8.6 per cent for Mass Affluent). Only 2.6 per cent of the HNW ranked women as the greatest priority, with the other numbers in ascending order being 4.9 per cent (Mass Market), 8.5 per cent (Core Affluent) and 9 per cent (Mass Affluent). The anomalous HNW results may reflect distortions arising from the comparatively small number of HNW respondents. It may also reflect the privileges experienced by children in that group, and different life experiences.



Concern over children and the elderly dominated so much that other vulnerable groups are crowded out, such as women and Indigenous people. We surmise that the great concern for children in care was in part driven by community outrage over the Tiahleigh Palmer case, discussed above. The lack of concern for prisoners was consistent with the answers to Q11. The low responses for women as a first priority were surprising, given the large number of reports across Queensland and Australia in recent years of horrific violence against women, as well as high profile revelations of sexual harassment.

D *Free Text Answers (Most Important Human Rights; Queensland's Human Rights History)*

10. What are the human rights that are most important to you?

23. Can you think of examples in Queensland's past when human rights have not been respected?

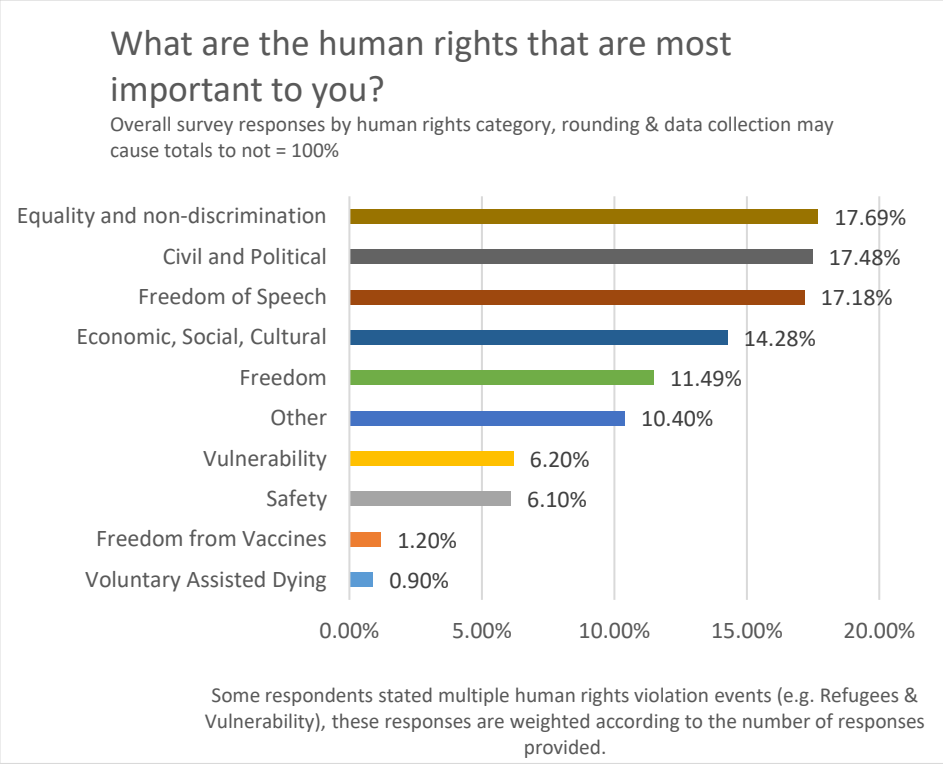
These two questions permitted free text answers. In analysing the responses, we coded each answer within ten categories. The ten categories were determined by their frequency in encompassing the responses given. The tallies for each of the ten categories for both Question 10 ('Q10') and Question 23 ('Q23') were then worked out by our colleagues, data analysts at Griffith University's Relational Insights Data Lab.[85]

As some survey respondents find free text answers off-putting, these questions were not mandatory. Numerous people did not therefore respond, or wrote answers such as 'not sure' or 'don't know'. Such answers are excluded from the analysis. Contrastingly, some people wrote down more than one answer. In such cases, their answers are proportionately counted. For example, if one person wrote down two categorizable answers, each of those answers would count as one half of one response.

Overall, 80 per cent of respondents recorded valid answers to Q10. Regarding Q10, the ten coded responses were: equality and discrimination (including responses regarding freedom from racism, sexism, homophobia); freedom of speech; freedom generally; civil and political rights beyond freedom of speech (including for example right to fair trial, privacy, freedom of movement); economic social and cultural rights (including for example rights to housing and health); vulnerability (the need to care for vulnerable groups such as the elderly, children, and those with disability), safety (freedom from violence and crime);

[85] We must thank, in particular, Tom Verhelst, Rhetta Chappell and Dren Cocaj.

issues related to vaccination; issues related to voluntary assisted dying;[86] and 'other'. The overall results are displayed on this graph.



While equality and discrimination attracted the highest number of responses, the combined total for 'freedom of speech' and 'freedom' generally, is 28.67 per cent, and 29.87 per cent if one adds 'freedom from vaccines'. 'Freedom' per se is not a human right, as opposed to freedom of or from something, but the number of responses highlighting 'freedom' per se could not be ignored. The responses highlight a concern with freedom among nearly a quarter of the respondents overall (if one includes those who did not give a valid answer to Q10) before the advent of vaccine mandates across the country, large 'freedom' protests, and a prominent campaign based on 'freedom' from the United Australia Party funded by Clive Palmer. It seems that concern over 'freedom' is not a fringe issue, although it may be noted that the freedom protests and the United Australia Party

[86] In Question 22, respondents were asked for their opinion on the (then) proposal to legalise voluntary assisted dying in Queensland. The answers revealed overwhelming support: 76.3 per cent were in favour, 8.6 per cent against, 8.6 per cent neutral, and 6.5 per cent unsure. Voluntary assisted dying laws will now commence in Queensland from 2023 under the *Voluntary Assisted Dying Act 2021* (Qld).

are very much associated with the anti-vaccination cause, explicit support for which was low in the survey responses.[87]

While the prioritisation of 'freedom' tends to denote a preference for government non-interference, the responses regarding vulnerability and safety (a combined 12.3 per cent), and, arguably, economic social and cultural rights and equality or discrimination (a combined 31.97 per cent), tend to favour greater government intervention and action. Hence, the Queensland respondents to Q10 seemed evenly split regarding preferences for greater and lesser government intervention.

It is notable that economic, social and cultural rights attracted so much support, if one accepts that the proper addressing of inequality and vulnerability necessarily entails a boosting of the enjoyment of those rights. This underlines the wisdom of the inclusion of certain economic, social and cultural rights within the *Act*,[88] and adds support to proposals to extend the list of those rights in the *Act*. We note that great support for economic, social, and cultural rights was also evident in the Colmar Brunton Report[89] and the 2011 RMIT survey, despite the continuing lack of such rights within the Victorian Charter.[90]

We note here the largest divergences within group responses. The percentages given are percentages of responses to this free text question, thus excluding those who did not answer or who gave an uncategorisable answer. Men were significantly more concerned than women about freedom of speech (19.6 per cent compared to 13.7 per cent) and civil and political rights (20 per cent compared to 12.2 per cent). Indigenous respondents were much more likely to choose economic social and cultural rights (19 per cent compared to 12.6 per cent), and less than one third as likely to choose civil and political rights (4.8 per cent compared to 15.6 per cent) compared to non-Indigenous respondents.[91] In the age stratified data, the oldest groups were those most likely to choose 'freedom', and especially 'freedom of speech'. Concern with equality and discrimination lessened the greater one's level of education, while concern with civil and political rights increased. Finally, concerns regarding 'freedom of speech' and 'freedom' were much higher among the Mass Market group than among the more wealthy groups.

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87 See, eg, Matt Dennien, 'Conservative and Fringe Links Behind Queensland Anti-Mandate Groups', *Brisbane Times* (online, 11 December 2021) <https://www.brisbanetimes.com.au/politics/queensland/conservative-and-fringe-links-behind-qld-anti-mandate-groups-20211208-p59g7k.html>.

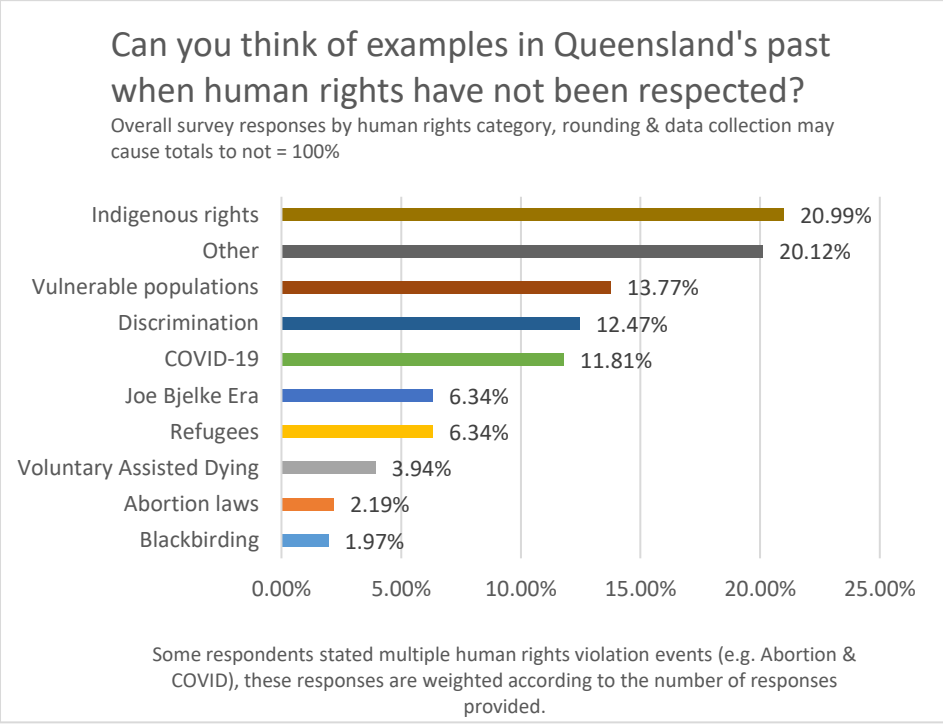
88 The *Act* includes economic, social and cultural rights in Part 2, Division 3 of the Act (a right to education and a right of access to health services). Cultural rights are also protected under ss 27 and 28.

89 Colmar Brunton Report (n44) 29–30.

90 Salvaris et al (n 48) [2.3], app 1 table 2. We do not believe that the 2011 survey allowed for free text answers.

91 Note that group-specific responses may seem disproportionate compared to overall responses because many respondents failed to answer or gave an answer that could not be categorised.

Given the prevalence of Queensland's history as a justification behind the adoption of the *Act*, the responses to Question 23 ('Q23') are insightful. Just over 85 per cent of respondents gave a valid answer to Q23. The ten coded answers were Indigenous issues (including the Stolen Generations and historical massacres), the treatment of vulnerable populations (in, for example, nursing homes, disability homes, homelessness); discrimination (eg, on the basis of race, sex, LGBTQI); COVID-related matters; abuses in the Bjelke-Petersen era (especially regarding the right to protest); treatment of refugees (often with a particular focus on the Biloela family);[92] failure to recognise the right to die; refusal to permit abortions; blackbirding;[93] and 'other events'. The overall results were as follows:



92 A Sri Lankan refugee family was removed from their home in the Queensland town of Biloela and taken into detention in 2018 by the federal government. The situation prompted a prominent local campaign to free the family and return them to the town. The episode is detailed in Katrina Beavan, 'Court Victory for Biloela Tamil Family Over Procedural Fairness, Fears of Post-Election Deportation', *ABC News* (online, 24 January 2022) <https://www.abc.net.au/news/2022-01-24/biloela-tamil-family-court-win-procedural-unfairness-alex-hawke/100777272>. The family were issued with bridging visas and permitted to return to Biloela after the election of the new ALP federal government in May 2022.

93 Blackbirding involved the kidnapping and trafficking of South Pacific Islanders to work in the Queensland colony in the nineteenth century.

The high number of responses regarding Indigenous issues seems intuitive. So, too, were the number of answers citing concerns over the response to COVID-19, given the unprecedented nature of government responses. The low number of answers regarding the Bjelke-Petersen era is perhaps surprising.

Men were twice as likely to choose the Bjelke-Petersen era than women (8 per cent compared to 3.6 per cent). Counter-intuitively, Indigenous respondents were less likely to choose Indigenous issues than non-Indigenous people (12.4 per cent compared to 20 per cent) and were more likely to choose COVID-19 issues (25 per cent compared to 13 per cent). CALD respondents were almost twice as likely to choose Indigenous issues (33.3 per cent) than non-CALD respondents (18.7 per cent), and much less likely to choose the treatment of vulnerable peoples (3.3 per cent compared to 15 per cent), which may again reflect their lesser likelihood of engaging with nursing homes. As one might expect, younger groups did not cite the Bjelke-Petersen era much.

A surprise with these free text questions was, arguably, the absence of any mention of environmentally-related rights as a favoured important right. Regarding Queensland's history, one person listed the Grantham floods as a historical abuse, presumably referring to the response. The survey preceded the floods of 2022, although the bushfires of 2020–2021 were reasonably recent. As it seems that Queenslanders do care about the environment and climate change,[94] they may not appreciate the real linkages between human rights and environmental matters.[95] A younger respondent group may have been more likely to raise such issues. Certainly, environmental challenges have been raised under the *Act*.[96]

E Questions About the Act

4. Did you know that there is a new law protecting human rights in Queensland called the Human Rights Act?
5. Do you think that a Human Rights Act will make a difference in protecting human rights?

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94 Climate Action Beacon, Griffith University, National Climate Action Survey, <https://www.griffith.edu.au/research/climate-action/national-longitudinal-survey>.

95 See, eg, Human Rights Committee, *Billy et al v Australia*, UN Doc CCPR/C/135/D/3624/2019 (22 September 2022), as one example of new international jurisprudence focusing on global warming and human rights.

96 See Environmental Defenders Office, 'Landmark hearing into Clive Palmer's Galilee Coal Project Legal Challenge Begins' (Media Release, April 20 2020) <https://www.edo.org.au/2022/04/20/landmark-hearing-into-clive-palmers-galilee-coal-project-legal-challenge-begins/>.

7. Have you heard of the Queensland Human Rights Commission's free complaint function that a person can access if a government, council or other public entity has breached their rights?

A subset of questions related to the *Act* itself. We have chosen not to report on the responses to Question 6, which asked respondents whether the *Act* is *already* making a different to human rights in Queensland; we believe the answers to Question 5 ('Q5') are more instructive.[97]

Only 43.4 per cent of respondents had heard of the *Act*, while a smaller number, 37.2 per cent, had heard of the free complaints function of the QHRC. A greater number, 55.4 per cent, felt that the *Act* would make a difference in protecting human rights, which must have included a significant number of people who only heard of the *Act* through the survey.[98] 13.6 per cent felt the *Act* would not make a difference, while 31 per cent were 'unsure'.

While it may seem disappointing that less than half of respondents had heard of the *Act*, it is arguable that the rate of knowledge of a very new statute was reasonably high. The Australian population, including that of Queensland, does not have a strong record of specific knowledge of legal rights protections.[99] Indeed, in the RMIT survey of 2011, conducted four years after the Victorian Charter had entered into force, 69 per cent of Victorian respondents knew nothing or very little about the Charter. Only 22 per cent definitively answered 'yes' to the question of whether Victoria had a Charter.[100]

People outside Brisbane were slightly more likely to have heard of the *Act* (43.9 per cent compared to 42.8 per cent) and the complaints service (38.4 per cent compared to 35.6 per cent), and were slightly more sceptical that it would make a difference (while the 'yes' votes were almost identical, 14.7 per cent of those outside Brisbane recorded a 'no' response compared to 12.1 per cent in Brisbane).

Far fewer women (34.3 per cent) than men (54.9 per cent) had heard of the *Act* or the complaints function (26.8 per cent compared to 50.2 per cent). Women were less likely (47.6 per cent) than men (64.8 per cent) to think the *Act* would make a difference and had a much greater 'unsure' response (39.1 per cent compared to 21.3 per cent).

Indigenous people were slightly less likely than non-Indigenous people to have heard of the *Act* (40.7 per cent compare to 43.6 per cent), though they were

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97 This is especially so, given a majority had not heard of the *Act* prior to this survey: see directly below.

98 There was a link in the survey to basic information on the *Act*.

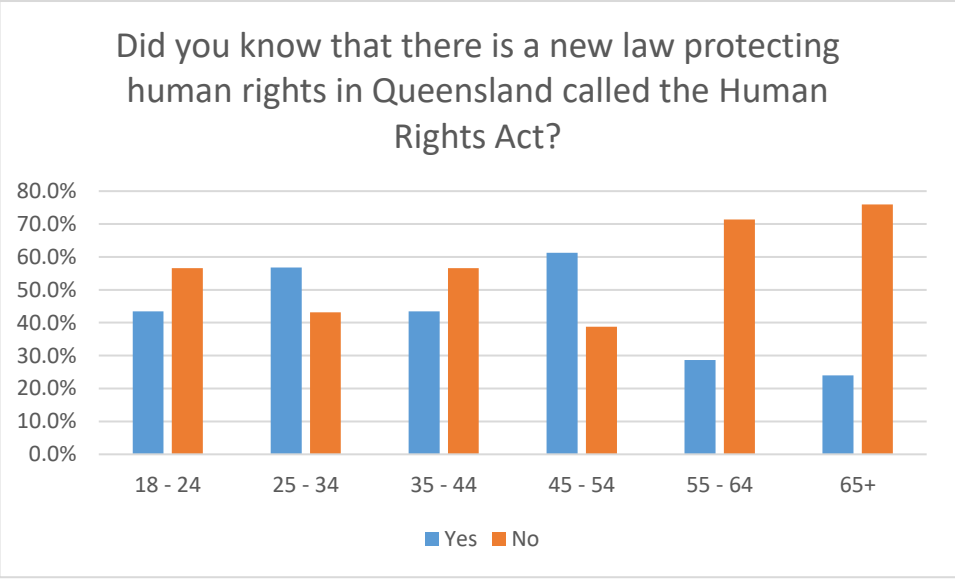
99 For example, only 7 per cent of those surveyed in a 2020 survey could name the *Privacy Act* 1988 (Cth) as the main law that protects privacy in Australia. 58 per cent had heard of the law but did not know its name, while 1 per cent named it incorrectly. 34 per cent could not recall having ever heard of this law, which is over 30 years old: Office of the Australian Information Commissioner, *Australian Community Attitudes to Privacy Survey 2020* (Report, September 2020).

100 Salvaris et al (n 48) [4.2].

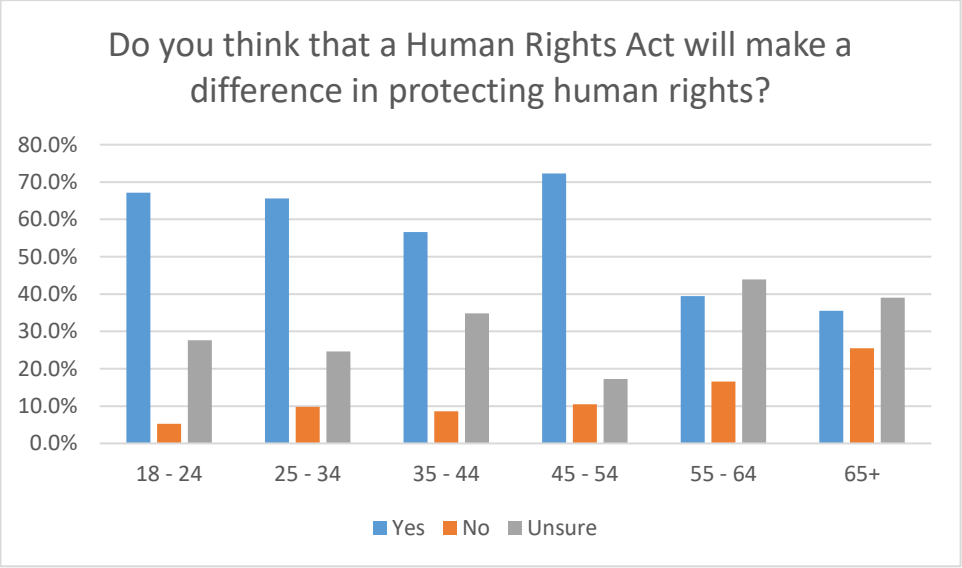
almost equivalent in knowledge of the complaints system (37 per cent compared to 37.4 per cent). Indigenous people were more likely to believe the *Act* would make no difference in protecting rights (22.2 per cent compared to 13.2 per cent).

CALD respondents (29.8 per cent) were much less likely than non-CALD respondents to have heard of the *Act* (44.7 per cent), though it seems that all of the CALD respondents who had heard of the *Act* had heard of the complaints function (29.8 per cent), which was still less than those in the non-CALD group (37.9 per cent). The non-CALD group was slightly more confident than the CALD group that the *Act* would make a difference in protecting human rights (55.7 per cent compared to 52.4 per cent).

The age stratification in answering Question 4 ('Q4') was as follows. As can be seen below, the older groups were much less likely to have heard of the *Act*. A similar pattern was evident in responses regarding knowledge of the complaints system.



The older age groups were also far less likely to believe the *Act* would make a difference to human rights protection. Less than 40% of those in the oldest age groups felt that the *Act* would make a difference; there was also considerable uncertainty in those age groups over its likely impact.



There was a linear relationship between levels of education and knowledge of the *Act* and the complaints system. While only 15.1 per cent of those who had not completed high school and 24 per cent of those who had completed high school had heard of the *Act*, 51.7 per cent of those with an undergraduate degree and 70.1 per cent of those with a postgraduate degree had heard of it. Those with more educational qualifications were much more likely than those with fewer qualifications to believe the *Act* would make a difference in protecting human rights (ie, 74.8 per cent of those with a postgraduate degree; 59.8 per cent of those with an undergraduate degree; 47.4 per cent of those with a diploma or certificate; 44.5 per cent of those who had finished high school; and 39.8 per cent of those who did not complete high school).

Similarly, greater wealth tended to correlate with greater knowledge of the *Act*, with the lowest level of knowledge among the Mass Market respondents (26.3 per cent) and highest level with Core Affluent respondents (89.4 per cent), who were just ahead of the HNW respondents (86.8 per cent). The same trend played out with knowledge of the complaints function (19 per cent for Mass Market, 86.2 per cent of Core Affluent who were comfortably ahead of HNW (78.9 per cent)). 97.4 per cent of HNW respondents felt the *Act* would make a different in human rights protection, sliding down through Core Affluent (90.4 per cent) and Mass Affluent (66.9 per cent) to 41.7 per cent for the Mass Market.

The patterns of greater and lesser knowledge of the *Act*, and the associated complaints system, correspond with traditional patterns of greater and lesser vulnerability to human rights abuse. The lesser knowledge of the *Act* from the CALD group may also signal a need for more communication strategies in non-

English languages. Similarly, confidence in the future effectiveness of the *Act* was greatest among traditionally less vulnerable groups.

F *Enforcement of Human Rights*

13. Who do you think should make the final decision over whether a human right has been breached in Queensland?

14. To what extent do you agree/disagree that a person should be allowed to take the government to court about a breach of human rights?

One of the enduring arguments against human rights legislation is that it is said to undermine the sovereignty of Parliament. This is most obviously true of constitutional bills of rights, which do not exist in Australia. Nevertheless, opponents of human rights legislation in Australia still argue that human rights statutes give unelected judges unwarranted powers over matters of social policy, which is better left to Parliament.[101] A further argument, often raised, is that human rights statutes might generate so much litigation as to lead to a 'lawyers' picnic'.[102] So how do Queenslanders feel about decision-making and human rights?

Regarding Question 14 ('Q14'), a whopping 80.7 per cent believe that a person should be allowed to take the government to court over a breach of human rights. Only 5 per cent disagreed, with 9 per cent being neutral and 5.3 per cent unsure.

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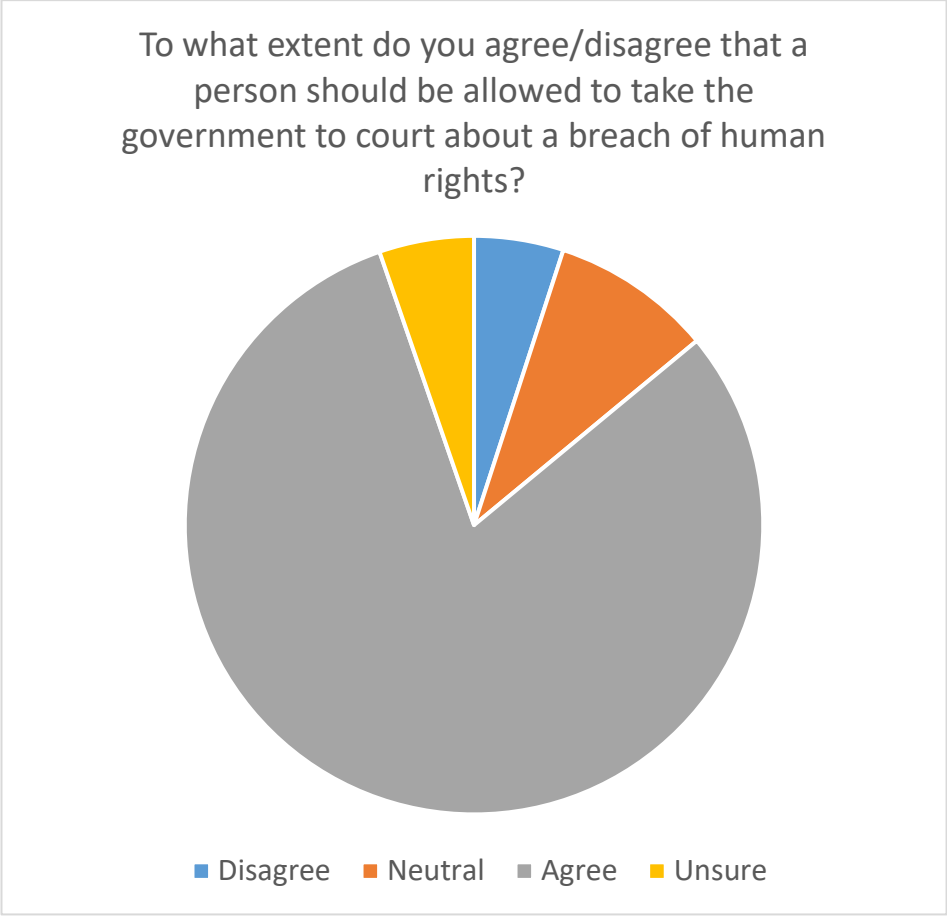
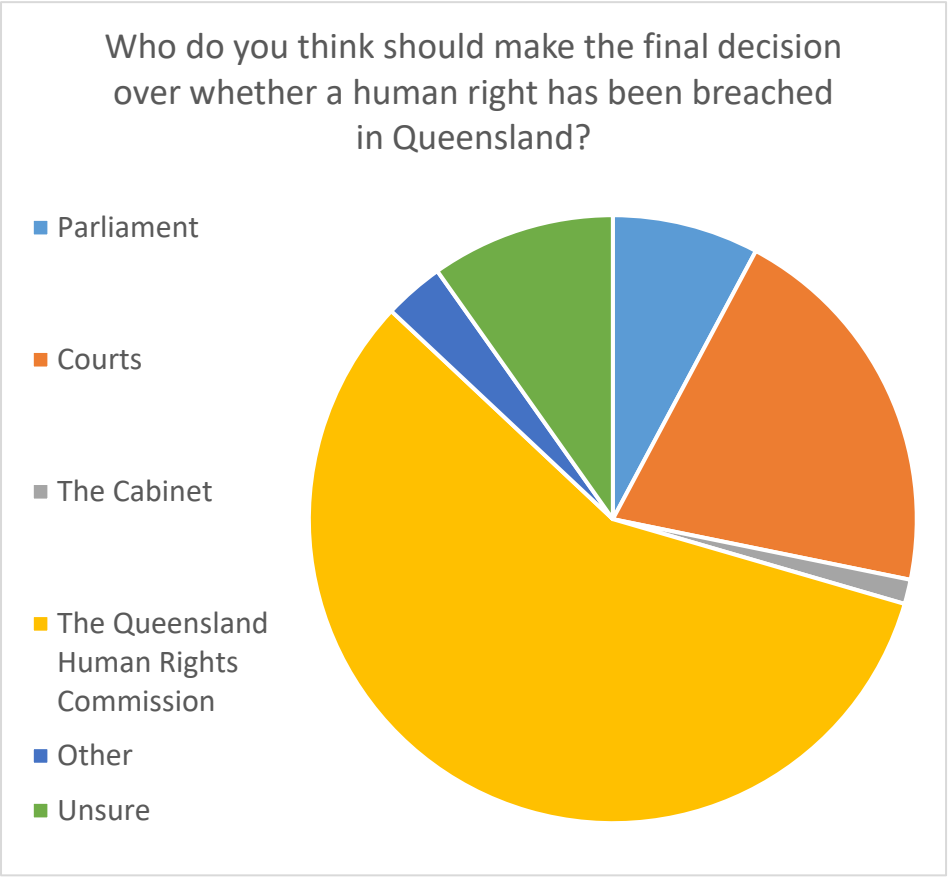
[101] See, eg, Queensland, *Parliamentary Debates*, 27 February 2019, 445-6 (Lachlan Millar), 452 (Anthony Perrett). See, for a discussion of this issue in relation to the Victorian Charter: Julie Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Law-Making' (2007) 33(1) *Monash University Law Review* 9.

[102] 'Countering Claims of a "Lawyers' Picnic' On Human Rights', *Lawyers Weekly* (online, 3 March 2012) <https://www.lawyersweekly.com.au/partner-features/4680-countering-claims-of-a-lawyers-picnic-on-human-rig>.



Regarding Question 13 ('Q13'), only 7.8 per cent felt that Parliament should be the final decision-maker over whether a right is breached or not. Fewer chose the Cabinet (1.3 per cent) while 20.4 per cent chose the courts. 3.2 per cent chose an unspecified 'other' and 9.8 per cent were unsure. The majority (57.5 per cent) chose the QHRC, evincing great trust in an organisation many of them had never heard of, and, perhaps, a lay understanding of principles regarding the separation of powers.



There were no significant differences regarding Q14 between Brisbane respondents and respondents outside Brisbane. Regarding Q13, non-Brisbane residents were less likely to choose Parliament than Brisbane residents (5.6 per cent compared to 10.7 per cent) and more likely to choose the QHRC (60.4 per cent compared to 53.7 per cent).

Women were less likely than men to explicitly agree that people should be able to take the government to court (77.6 per cent compared to 84.5 per cent) but they were more neutral and unsure, rather than opposed to the idea. Women were less likely to choose the courts as a preferred final human rights arbiter (17.2 per cent compared to 24.4 per cent) and were much more unsure of who that arbiter should be (13.3 per cent compared to 5.4 per cent).

While there was generally no great difference between Indigenous and non-Indigenous peoples over whether people should be able to take the government to court over human rights breaches for Q14, there were a greater number of neutral answers among Indigenous peoples (14.8 per cent compared to 8.8 per cent).

Indigenous people were more likely to choose Parliament (11.1 per cent compared to 7.8 per cent), and less likely to choose the courts (14.8 per cent compared to 20.5 per cent) or the QHRC (51.9 per cent compared to 57.8 per cent) as the final preferred decision-maker.

The most significant difference in responses to Q13 and Q14 between the non-CALD and CALD groupings was that 8.1 per cent of the non-CALD group named Parliament as the preferred final arbiter of human rights decisions, while only 4.8 per cent of the CALD group did so.

All age groups believed that people should be able to take the government to court over human rights matters, although there was a range from 70.7 per cent in the 55–64 age group up to 89.5 per cent in the 18–24 group. The oldest group was much more likely to favour courts as the final decision-maker on human rights (26 per cent) while the 25–34 year age group was most likely to favour Parliament (23 per cent), and the only group to give more votes to Parliament than the Courts. It was also the only group to fall below 50 per cent in favouring the QHRC.

All groups disaggregated by education agreed that people should be able to take the government to court, ranging from 71.9 per cent for those who had finished high school to 86.4 per cent for those with a postgraduate degree. A higher level of education led to a greater willingness to trust Parliament as the final arbiter, but the highest number (11.7 per cent for those with a postgraduate degree) was still low. There was no clear trend regarding trust in courts (ranging from 13.7 per cent for those who had completed high school to 25.5 per cent for those with an undergraduate degree) and the QHRC (ranging from 52.5 per cent for those with an undergraduate degree to 65.8 per cent for those who had finished high school) as the final arbiter, though the latter was favoured much more by all educational groups than the former.

All wealth sectors agreed people should be able to take governments to court over human rights breaches. The HNW group was lowest at 76.3 per cent, while the next wealthiest sector, Core Affluent, was the highest at 92.6 per cent. Nobody in the two wealthiest sectors explicitly disagreed with the contention. Trust in Parliament as the final arbiter was extremely low in the HNW group (2.6 per cent) and in the least wealthy Mass Market group (3.7 per cent), with the other two groups at 14.7 per cent (Mass Affluent) and 14.9 per cent (Core Affluent). HNW respondents were most likely to trust the courts (26.3 per cent). While the Mass Market had the lowest trust in the courts, it still had a close-to-average rating in that regard (19 per cent). More than half of all respondents in each of the wealth groups favoured the QHRC, ranging from 52.9 per cent in the Mass Affluent group to 60.5 per cent in the HNW group.

Queenslanders are overwhelmingly in favour of the availability of legal redress for human rights claims against government in courts. Most prefer that a final decision on human rights matters be made by courts rather than Parliaments. Having said that, a majority preferred that the QHRC fulfil that role, which would not accord with our system of separation of powers.

VIII Conclusion

Overall, the survey indicates great support in Queensland for the importance of human rights and their personal relevance. There was confidence that rights in Queensland are well protected, including in times of emergency and the COVID-19 pandemic, although people were less sure of that protection with regard to regional and remote areas. All of the institutions that were assessed, in both the public and private sectors, received more positive than negative human rights assessments, but there were large differences (including large numbers of neutral responses). For example, while 67 per cent or respondents felt there were high levels of respect for human rights in Queensland's health sector, only 40.1 per cent felt that way about aged care facilities, and 36 per cent about prisons.

Regarding human rights priorities, it is clear that the rights of children, the elderly, and rights in healthcare dominated the top choices. At the other end of the scale, few respondents favoured prioritisation for those in contact with the criminal justice system apart from victims of crime, despite relatively low assessments of human rights respect in prisons and by the police (compared to other institutions). Regarding demographic disaggregation, the priorities for Indigenous people and the HNW groups were quite different. This may reflect very different life experiences, and also the small numbers of respondents in those groups, which might have led to some distortion in outcomes.

While concern for children and the elderly is welcome, human rights campaigners should seek to raise awareness of the many other human rights issues, including the rights of prisoners. As noted above, the great concern for the rights of children, especially those in care, is not matched by great concern for the those in contact with the youth justice system. The correlation between the two groups should in our view be made clearer to the general public.

With regard to perceptions as to the level of human rights respect and protection in Queensland and within institutions in Queensland, there were great differences between certain demographic groups. Those groups generally perceived as being the most vulnerable to human rights abuses, such as women, Indigenous peoples, CALD, the young and the elderly, the least educated and the least wealthy, were less satisfied with the actual level of respect and protection for human rights in Queensland, generally and in various contexts, and by various institutions, compared to their comparator less vulnerable demographic group (ie men, non-Indigenous people, and so on). Interestingly, given the prominence in the parliamentary debate of assertions regarding regional support for the *Act*, there was little difference in responses between those in Brisbane and those outside Brisbane to almost every question asked.

While just under one half of respondents knew about the *Act*, a majority thought that it would make a difference in the protection of human rights. The

less vulnerable groups were much more confident and optimistic in the latter respect than the more vulnerable groups.

Importantly, those with more education and wealth are markedly more satisfied with existing levels of human rights protection in Queensland than those with less education and wealth. As the former are far more likely to have power as part of, or as influencers of, the government, their greater satisfaction with the status quo means that there is less likelihood that they will lobby for the improvement that seems to be desired by those likely to have less power. This points to a need for the QHRC and civil society to collect data on the lived experience of human rights of different demographic groups to ensure awareness of relevant divergences for decision-makers.

As with other surveys, it is clear that Queenslanders place a high priority on the enjoyment, and therefore implicitly the protection, of economic, social and cultural rights. This bolsters arguments that more of those rights should be included in the *Act*, especially after its first review in 2023. Many Queenslanders are also concerned about 'freedom', indicating that it is not a mere fringe issue of concern only to anti-vaccination groups and the United Australia Party. This demonstrates that human rights campaigners must be careful not to position themselves as 'anti-freedom' — freedom is an emancipatory ideal that is a core component of human rights, but not the only one: human rights are also informed by concepts such as equality, fraternity and dignity.[103] Finally, it is clear that the links between human rights and environmental issues should be clarified and explained by campaigners if they wish to maximise the impact of the *Act* in combating climate change.

A huge majority felt that people should be able to seek vindication in court for human rights abuses by the government, and most preferred that courts have the final say over rights rather than Parliament. This undermines the common argument against human rights charters based on a perceived need to preserve or maximise parliamentary sovereignty: the public is not as enamoured with parliamentary sovereignty as many parliamentarians. It also indicates that the 'piggyback' requirement for s 58 causes of action in s 59(1) should be removed. Having said that, we also note that the most popular pick for the body with the final say on human rights was the QHRC, which would not accord with Westminster constitutional norms regarding the separation of powers.

There remains considerable work to be done by the Attorney-General of Queensland in educating the public about the new law and the mandate of the QHRC and its ground-breaking free public complaints process. However, there is clearly a demand, even with this limited knowledge, demonstrated by the fact that, since the QHRC began operating in January 2020, it has received hundreds

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[103] Susan Harris Rimmer and Sarah Joseph, 'Why 'freedom' is not the only thing worth fighting for', *The Conversation*, 17 March 2022.

of complaints and is now experiencing delays of up to six months.[104] Hence, proper resourcing of the QHRC is imperative.

Finally, there is a need for ongoing research and public sentiment 'check-ins' to gauge attitudes to human rights in Queensland, to ensure that the administration of the *Act* maintains public support and satisfies public expectations, and to uncover areas of misunderstanding. While the *Act* is premised on the notion of dialogue between the arms of government, there are strong reasons to engage constantly in a 'fourth dialogue … between duty bearers and rights holders',[105] with a particular focus on disadvantaged groups.[106]

These 2021 survey results were disseminated to every Director-General in the Queensland Public Service with a full explanation of the process. We intend to run the survey again before the independent review of the *Act*, which is due after 1 July 2023, potentially with additional questions referring to the review requirements (for example, 'should any additional rights be added to the *Act*', or new remedies). The context of pandemic restrictions may have influenced the 2021 results, which is something that can be tested by repeating the survey in early 2023.

This investment in public sentiment is particularly important for a dialogue model of human rights legislation, especially after the COVID-19 pandemic — a generationally important event that had a major impact on human rights. The voice of the community as the intended beneficiaries of better human rights protection deserves to be heard.

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104 Queensland Human Rights Commission, 'Making a Complaint', *Complaints* (Web Page) <https://www.qhrc.qld.gov.au/complaints/making-a-complaint>.

105 Salvaris et al (n 48) 15.

106 Ibid 16.

APPENDIX: SURVEY QUESTIONS

To what extent do you agree/disagree with these statements.

1. The protection of human rights and dignity is important.

   1 2 3 4 5
   (1-5 scale, where 1 is 'strongly disagree' and 5 is 'strongly agree')

2. Human rights are relevant to me.

   1 2 3 4 5
   (1-5 scale, where 1 is 'strongly disagree' and 5 is 'strongly agree')

3. Human rights are well protected in Queensland.

   1 2 3 4 5
   (1-5 scale, where 1 is 'strongly disagree' and 5 is 'strongly agree')

4. Did you know that there is a new law protecting human rights in Queensland called the Human Rights Act?

   Yes No

5. Do you think that a Human Rights Act will make a difference in protecting human rights?

   Yes No Unsure

6. Do you think that the Human Rights Act is already making a difference in protecting human rights?

   Yes No Unsure

7. Have you heard of the Queensland Human Rights Commission's free complaint function that a person can access if a government, council or other public entity has breached their rights?

   Yes No

8. Does Queensland protect human rights well for people in regional and remote areas of Queensland?

   Yes No Unsure

9. Can you think of three human rights that you think might be protected in Queensland?

   Non-mandatory free text question

10. What are the human rights that are most important to you?

Non-mandatory free text question

11. What are the three most important areas where protection of human rights is most needed? (please rank your top three where 1 is the most important. You may rank fewer than three if you prefer.)

- Health
- Education
- Prisons
- Youth justice
- Victims of crime
- Policing
- Housing
- Cultural rights
- Child protection
- Aged Care
- Disability services
- Council services
- Other _____

12. To what extent do you feel human rights and dignity are respected in Queensland in the following settings?

    a. Health services

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

    b. Schools

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

    c. TAFE and universities

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

d. Prisons

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

e. Police

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

f. **Aged care**

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

g. Public service

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

h. Councils

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

i. Employers

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

j. Businesses

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

k. Shopping Centres

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

l. Religious Institutions

1 2 3 4 5 unsure
(1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

13. Who do you think should make the final decision over whether a human right has been breached in Queensland? Please choose only one of the following

    Parliament
    Courts
    The Cabinet
    The Queensland Human Rights Commission
    Other _____
    Unsure

14. To what extent do you agree/disagree that a person should be allowed to take the government to court about a breach of human rights?

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is strongly disagree and 5 is very strongly agree)

15. How frequently do you follow news and current affairs?

    Never Rarely several times a week Daily

16. What is the main source of your news media?

    Newspaper
    (Please specify which newspapers) _____

    Online newspaper
    (Please specify which websites) _____

    Television
    (Please specify which news programs) _____

    Radio
    (Please specify which radio programs) _____

    Social Media
    (Please specify which platforms) _____

    Other
    (Please specify) _____

17. How do you think the media typically reports on human rights issues?

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is very negatively and 5 is very positively)

18. To what extent do you think Queensland respects human rights in times of emergency? (such as cyclones, floods, fires, pandemics)

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is very low level of respect and 5 is very high level of respect)

19. To what extent do you think *your* human rights have been protected during the COVID-19 emergency in Queensland?

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is not protected and 5 is very protected)

20. To what extent do you think human rights of the whole community have been protected during the COVID-19 emergency in Queensland?

    1 2 3 4 5 unsure
    (1-5 scale, where 1 is not protected and 5 is very protected)

21. What are the five groups that you think are in need of greater protection of human rights? Please rank your top five, where 1 is the greatest. You may rank fewer than 5 if you prefer.

    People with a mental illness
    Children in the child protection system
    Prisoners
    Victims of Crime
    Aboriginal and Torres Strait Islander peoples
    People living in remote areas
    People with a disability
    Children
    Women
    People in aged care facilities
    Older people
    LGBTIQ+ people
    People experiencing Homelessness
    People experiencing poverty/ unemployment
    Asylum seekers
    Recent arrivals, migrant communities and culturally and linguistically diverse communities.
    Other _____

22. What is your opinion of the proposal to permit voluntary assisted dying in Queensland?

    Not supportive of proposal Very supportive of proposal
    1 2 3 4 5 unsure
    (1-5 scale, where 1 is not supportive and 5 is very supportive)

23. Can you think of examples in Queensland's past when human rights have not been respected?

    Non-mandatory free text question

Demographics:

Questions related to: Country of birth; age range; first language; highest level of education completed; current employment status; religion; household income; Aboriginal or Torres Strait Islander status; LGBTIQ+ identity; gender; postcode.

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