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<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matthew Stubbs</td>
<td>The <em>Adelaide Law Review</em> at (Volume) 40: Reflections and Future Directions</td>
<td>1</td>
</tr>
<tr>
<td>Michael Kirby</td>
<td>Celebration of Volume 40: Sixty Years On!</td>
<td>15</td>
</tr>
<tr>
<td>Christian Andreotti and Holly Nicholls</td>
<td>40 is the New 20: The Changing Contours of the <em>Adelaide Law Review</em></td>
<td>29</td>
</tr>
<tr>
<td>Anthony Moore</td>
<td>Reflections on Publishing the <em>Adelaide Law Review</em></td>
<td>45</td>
</tr>
<tr>
<td>Peter Rathjen</td>
<td>135 Years: Reflections on the Past, Present and Future of Adelaide Law School</td>
<td>47</td>
</tr>
<tr>
<td>John M Williams</td>
<td>Constitutional Law and the <em>Adelaide Law Review</em></td>
<td>53</td>
</tr>
<tr>
<td>Melissa de Zwart</td>
<td>South Australia’s Role in the Space Race: Then and Now</td>
<td>63</td>
</tr>
<tr>
<td>Ian Leader-Elliott</td>
<td>Norval Morris and the ‘New Manslaughter’ in the <em>Adelaide Law Review</em></td>
<td>75</td>
</tr>
<tr>
<td>Horst Klaus Lücke</td>
<td>Isaiah Berlin and Adolf Hitler: Reflections and Personal Recollections</td>
<td>89</td>
</tr>
<tr>
<td>John Keeler</td>
<td>Ruminations on Personal Injury Law Since 1960</td>
<td>109</td>
</tr>
<tr>
<td>Isabella Dunning, Irene Nikoloudakis and Caitlyn Georgeson</td>
<td>The Value of the <em>Adelaide Law Review</em> from a Student Editor Perspective</td>
<td>125</td>
</tr>
<tr>
<td>John Gava</td>
<td>Legal Scholarship Today</td>
<td>135</td>
</tr>
<tr>
<td>Paul Babie</td>
<td>Publish and Collaborate: An Invitation</td>
<td>145</td>
</tr>
<tr>
<td>John V Orth</td>
<td>Of Titles and Testaments: Reflections of an American Reader of the <em>Adelaide Law Review</em></td>
<td>155</td>
</tr>
<tr>
<td>Irene Watson</td>
<td>Colonial Logic and the Coorong Massacres</td>
<td>167</td>
</tr>
<tr>
<td>Author</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>--------------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Andrea Mason</td>
<td>Where do a Bird and a Fish Build a House? An Alumna’s View on a Reconciled Nation</td>
<td>173</td>
</tr>
<tr>
<td>Martin Hinton</td>
<td>A Bail Review</td>
<td>187</td>
</tr>
<tr>
<td>James Crawford and Rose Cameron</td>
<td>International Law in Australia Revisited</td>
<td>199</td>
</tr>
<tr>
<td>Judith Gardam</td>
<td>Feminist Interventions into International Law: A Generation On</td>
<td>219</td>
</tr>
<tr>
<td>Vickie Chapman</td>
<td>How Laws are Made</td>
<td>227</td>
</tr>
<tr>
<td>Catherine Branson</td>
<td>Human Rights Protections: Need We Be Afraid of the Unelected Judiciary?</td>
<td>233</td>
</tr>
<tr>
<td>Adam Webster</td>
<td>Reflecting on the Waters: Past and Future Challenges for the Regulation of the Murray-Darling Basin</td>
<td>249</td>
</tr>
<tr>
<td>Margaret White</td>
<td>Youth Justice and the Age of Criminal Responsibility: Some Reflections</td>
<td>257</td>
</tr>
<tr>
<td>Melissa Perry</td>
<td>The Law, Equality and Inclusiveness in a Culturally and Linguistically Diverse Society</td>
<td>273</td>
</tr>
<tr>
<td>Brent Fisse</td>
<td>Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law</td>
<td>285</td>
</tr>
<tr>
<td>Suzanne Corcoran</td>
<td>Ordinary Corporate Vices and the Failure of Law</td>
<td>301</td>
</tr>
<tr>
<td>Judith Bannister</td>
<td>South Australian Administrative Law: 40 Years On</td>
<td>311</td>
</tr>
<tr>
<td>Thomas Gray</td>
<td>Succession Law: Reflections and Directions</td>
<td>331</td>
</tr>
<tr>
<td>Author(s)</td>
<td>Title</td>
<td>Page</td>
</tr>
<tr>
<td>---------------------------</td>
<td>----------------------------------------------------------------------</td>
<td>------</td>
</tr>
<tr>
<td>Katrina Bochner</td>
<td>Alternative Dispute Resolution and Access to Justice in the 21st Century</td>
<td>343</td>
</tr>
<tr>
<td>Marie Shaw and Ben Doyle</td>
<td>The ‘Age Of Statutes’ and its Intersection with Fundamental Principles: An Illustration</td>
<td>353</td>
</tr>
<tr>
<td>Vicki Waye</td>
<td>Regtech: A New Frontier in Legal Scholarship</td>
<td>363</td>
</tr>
</tbody>
</table>
It is an enormous pleasure and privilege to introduce this special issue to mark the publication of volume 40 of the Adelaide Law Review. In the 59 years since its establishment in 1960, the Adelaide Law Review has become the pre-eminent home of legal scholarship in South Australia, and its alumni (consisting of former academic and student editors) have made remarkable contributions to the law not only in Adelaide but around Australia and the world.

Every author contributing to this special issue has been involved with the Adelaide Law Review and Adelaide Law School. It is a testament to the impact of the Review, and the wonderful scholars who have been involved with it, that the authors of this volume include current and former judges of the International Court of Justice, High Court of Australia, Federal Court of Australia and Supreme Courts of South Australia and Queensland. As is well known, relationships between academia and the judiciary are not universally friendly. One of the important lessons of the contributions to this special issue is the ability of the Adelaide Law Review to continue to be of service to practitioners, judges and academics. The Review has been living proof of Lord Wilberforce’s observation that ‘no single strand in the tapestry of the law, however brilliant, can do without the support of others’. Indeed, the interaction between the scholarship published in the Review and the legal profession and judiciary is an essential aspect of the strength of the Review. The Review is also, of course, a quintessentially academic endeavour, and contributors to this special issue also include distinguished academics from leading law schools around Australia, North America and the United Kingdom. The diversity of authors and topics in this volume reflect the extensive scope of contemporary legal scholarship, and the ability of the Adelaide Law Review to address a great range of important legal matters.

The theme for this special issue is ‘The Adelaide Law Review at (Volume) 40: Reflections and Future Directions’. Our intent was to bring together diverse contributions which look back on the previous 39 volumes of the Review and look forward to the
next 40 volumes, the common link being that each contribution is situated in relation to the *Adelaide Law Review*. I hope all readers will find intellectual food for thought in the following pages.

II A BRIEF HISTORY OF THE *ADELAIDE LAW REVIEW* IN THE WORDS OF ITS EDITORS

There is no extant history of the *Adelaide Law Review*, and this piece does not attempt to offer a comprehensive story of the evolution of the *Review*. Nonetheless, on the occasion of the publication of its 40th volume, it is appropriate to reflect on the path of the *Review*. I do so here in the words of some of those who have been involved with the *Review* over its history.

The *Adelaide Law Review* was established in 1960, during the Deanship of Norval Morris, as a joint project of Morris and Alex Castles, and with a student editorship. As the Honourable David Bleby QC, one of the early student editors, recounts

> the principal drivers of the publication were Norval Morris and Alex Castles – mainly the latter who was the consistent Faculty Adviser, at least for the first three years. The Editor and Assistant Editors were graduates of the previous year, having done most of the work on the Review during their final year. Other Committee members were spread over all years from second year onwards. I am unaware of the process of selection of the Editorial Board within the Faculty, but I am fairly sure that all were invited to hold their positions by Alex.

Major contributors were either persons well-known by Alex, staff members, or practitioners who lectured at the time, I think mostly enlisted by Alex. I think there were few editorial decisions made by the students themselves without Faculty advice or assistance. The principal functions of those of us who were “Committee” members was to write case notes or notes on personal injury awards or legislation, and to prepare a draft index of the previous year’s edition.

As Bleby notes, whilst in theory a student-run journal at its establishment, academic guidance was never far away. The *Review* formally ceased to be student-run and became faculty-run instead from volume 4(2) in 1972, although in practice this has

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4 The first tranche of Australian university law journals were established in the period 1948–64: see Michael Blakeney, ‘The University of Western Australia Law Review — The First Seventy Years’ (2018) 43(1) *University of Western Australia Law Review* 1, 1.

5 LLB student 1959–1962, member of the Editorial Committee of the Review 1960–1963 (vols 1(2)–2(1)).
meant only that editorial decisions as to the selection of articles are managed by academic staff of the Adelaide Law School using a double-blind peer review process. Student editors remain the lifeblood of the *Review*, as the article by Isabella Dunning, Irene Nikoloudakis and Caitlyn Georgeson in this volume details.

Emeritus Professor Horst Lücke AO, among the longest serving members of the academic staff of the Adelaide Law School,6 and a contributor to this special issue, recalls the establishment of the *Review* as one of Morris’ important reforms:

> Morris remodelled the Law Course and took three further important initiatives: he had Latin abolished as a prerequisite for legal studies, thus opening the Law School to a greatly enhanced influx of law students, he established the *Adelaide Law Review* and he set up the Committee for Continuing Legal Education.

> The initiator [of the *Review*] was Norval Morris, probably assisted by Alex Castles. … One of the great supporters of the *Review* was Commissioner John Portus who taught Industrial Law from 1961 to 1981. He donated all his fees to the Law School for the benefit of the *Law Review*. … It would be nice if the generosity of John Portus could be recognised.

For a time, the *Adelaide Law Review* issued each year a John Portus Prize for the author(s) of the best article. This tradition had fallen into disuse, but will be reintroduced from 2019, to be awarded by the Student Editors of the *Review* at the end of each year to the author(s) of the best work published that year in the *Review*.

Michael Harris, whose association with the *Review* spans service on the first editorial board as a student followed by extensive involvement as a long-time member of academic staff,7 has reflected on the significance of the establishment of the *Adelaide Law Review* to the development of the research reputation of Adelaide Law School:

> The creation and first publication in 1960 of a scholarly journal under the auspices of the Adelaide Law School was, in my view, the greatest contribution to the school’s emergence as a crucible of world legal excellence. Henceforth the high quality of legal scholarship, always nurtured in our school but not as well-known as it deserved, would be made manifest to the legal world at large. When I reflect on my association with the Adelaide Law School, first as student and later as teacher, two things I am proudest of are that I was a student member of the first editorial board of the *Adelaide Law Review* and thereafter served over many years as a faculty member and editor.

Anthony Moore reflects on his involvement with the *Adelaide Law Review* from 1977–1981 and 1985–1994 elsewhere in this special issue, explaining how the *Review* has changed and grown in sophistication since its early days. He further
highlights the value of the Review as a platform for the presentation of research, and the opportunities it provides for students to develop their legal writing and analytical skills.

Emerita Professor Rosemary Owens AO, who with Emerita Professor Judith Gardam was Editor of the Review from 1995–1999, recalls this period in the life of the Review:

As editors our aim was always to publish the highest quality material, and thereby to enhance the reputation of the [Adelaide Law Review] as one of the premier legal journals in Australia.

Some of the noteworthy aspects to the way we approached our role:

First and foremost, we were resolved to ensure that reviewers we selected were first rate scholars in the relevant fields, and that their advice was always followed. We never hastened to publication, merely to meet a time deadline. If quality material was not available we waited.

Secondly, we decided that, where appropriate, we would seek to present some thematic issues, but always on the proviso that each of the papers met with the approval of the journal’s own two independent referees.

Thirdly, there were some other developments — we welcomed longer ‘review essays’ in the book review section.

One change that we implemented during our period as editors was to return the journal to a larger format. In the early 1990s the physical paper size of the Review had been reduced — it looked small and we did not want that to carry any symbolic overtones. So we instituted the change. The only thing we did not anticipate was that several practitioners/judges contacted us to indicate that the changes in size had created a very untidy look on their bookshelves!

During our time as editors we had assistance from a very fine team of assistant editors and a student editorial committee — and working closely with them became an important part of maintaining the quality of the journals.

The themes that emerge from these vignettes — the value of the partnership between students and staff that is at the heart of the Review, the drive to ensure only the very highest quality of research is published in the Review, and the role of the Review as part of the intellectual life of Adelaide Law School — are perennial. Since I took over the editorship with Dr Adam Webster in 2015, and more recently working with Associate Professor Judith Bannister, these have been our aims. They remain the goals of the new academic editorial team that I now have the pleasure of serving as a member of with Dr Michelle Lim and Dr Stacey Henderson.

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8 Emerita Professor, University of Adelaide Law School; Dame Roma Mitchell Chair of Law (2008–2015); Dean of Law (2007–2011).
III The Adelaide Law Review and Adelaide Law School

Some important contributions to this special issue touch particularly on the Adelaide Law Review itself and on its home at the Adelaide Law School. The Honourable Michael Kirby AC CMG — perhaps the Review’s most prolific contributor9 — offers a celebration of the 40 volumes and 60 years of the Adelaide Law Review. He situates the intellectual development of the Review within a broader survey of the intellectual progress of the law in Australia. As one of the most intellectually transparent of Australia’s judges, Kirby’s observation of the drift away from positivism towards the acceptance of the reality of judicial choice — and the related intellectual move towards realism in the Adelaide Law Review — is of particular interest.

Kirby charts in the Review the continuing analysis of legal doctrine in traditional areas alongside the influences of new developments — including increasing numbers of women in the legal profession and academy, the growing importance of international law, the development of understandings regarding the law and sexuality, ongoing debates about the protection of human rights generally and religious freedom more specifically, and the challenges and opportunities posed by new technologies. Kirby’s article is a fitting introduction to this special issue which illustrates both the intellectual values that have guided and continue to sustain the Adelaide Law Review and its broadening focus as we continue to reassess the scope of what Kirby aptly describes as ‘the abiding concern of many practitioners about the attainment of the elusive goal of justice that gives nobility to the law as a profession’.

Two current Student Editors of the Adelaide Law Review, Christian Andreotti and Holly Nicholls, also offer a reflection on the Review over time. They discern changes including an increasingly critical and normative approach by authors replacing earlier more narrow and descriptive work; a progressively more international and comparative outlook on the law; and the rise to prominence of topics of social importance such as women’s rights, Aboriginal and Torres Strait Islander legal issues, and LGBTIQ rights. In this way, they demonstrate that the Adelaide Law Review has moved with the times in both the intellectual approaches and topics examined by its contributors.


Vice-Chancellor and President of the University of Adelaide, Professor Peter Rathjen AO, provides a compelling look at the past, present and future of Adelaide Law School on the occasion of its 135th anniversary. He recalls the great minds who have passed through the School, the contribution the School has made to social justice and law reform in South Australia, and the School’s enduring commitment to producing law graduates of the highest calibre who are ready to carry its legacy forward.

Professor John Williams, Dame Roma Mitchell Chair of Law at Adelaide Law School,11 undertakes a masterly survey of the treatment of constitutional law in the Review over the years. As with other areas, we see in Williams’ work an evolution of the Review’s focus from a narrower consideration of particular decisions to more extensive and holistic examinations of areas of law informed by a greater theoretical critique. We see here an increasing maturity and broadening perspective in the legal scholarship published in the Review.

Professor Melissa De Zwart, Dean of Adelaide Law School, examines South Australia’s role in the space race from its inception to all the burgeoning possibilities of the present. This journey from military-based space activities at Woomera to South Australia’s emerging role at the forefront of Space 2.0 in Australia illustrates the distinguished space heritage upon which Adelaide Law School is now building as a centre of excellence for space law.

Professor Ian Leader-Elliott — long-time staff member of Adelaide Law School — pays a fitting homage to Norval Morris’ contribution to both the Adelaide Law School and the Adelaide Law Review, which was established as a key initiative of his Deanship. With reference to Morris’ own scholarship in the Review, Leader-Elliott follows the development of excessive self-defence and the ‘New Manslaughter’ from its uncertain beginnings through to its statutory enactment. Leader-Elliott demonstrates how Morris’ work in the Review influenced the evolution of the law, and reflects on the law’s subsequent path.

IV DOYENS OF THE ADELAIDE LAW SCHOOL IN THE REVIEW

Every author in this special issue has a significant connection to Adelaide Law School and the Adelaide Law Review. Two contributions in particular, however, come from scholars with extraordinary associations that span most (or all) of the 59 years of the Review.

Applauding Isaiah Berlin’s commitment to individual liberty, Horst Lücke offers a reflection on the philosopher’s life. Lücke tests Berlin’s hypothesis that Adolf Hitler was influenced by the work of the 19th century German Romantics. His erudite analysis is aided by intimate reflections on his own youth in 1930s and ’40s Germany.

11 Executive Dean, Faculty of the Professions, The University of Adelaide; Associate Provost and Chair, Academic Board, The University of Adelaide; Dean of Law (2011–2016); Director, South Australian Law Reform Institute.
Lücke’s thesis is that Berlin’s values of individual freedom and cosmopolitanism are as important today as in his own times — an antidote to the worst excesses of the present-day world’s political climate.

Associate Professor John Keeler AM engages in a theoretical analysis of the development and evolution of personal injury law over the course of the Review’s history. In Keeler’s work, we are shown how recovery of compensation in personal injury matters can perform an essential social security function, albeit one that is threatened by adverse policy and legislative change.

These two contributions — from giants of the Adelaide Law School — are sure to resonate with the many students whose intellectual growth these two great scholars nurtured over their extraordinary tenures.

V Why, How and For Whom we Publish the Adelaide Law Review

The literature on law reviews is well known, and I will not traverse it here. Contributions in this special issue add interesting perspectives on the questions of why, how and for whom we publish the Adelaide Law Review. Importantly, the Review is not principally a means to disseminate research by Adelaide Law School staff — indeed, in the law reviews of the Group of Eight law schools from 2000–2010, the Adelaide Law Review published the fewest articles written by academics within the school of any of the journals.12 This is not a reflection on the quality of Adelaide Law School’s research; on the contrary, the intellectual diversity represented in the Review is a sign of its strength.

While law reviews have been subject to many vigorous criticisms and equally passionate defences over the years, Isabella Dunning, Irene Nikoloudakis, and Caitlyn Georgeson bring a unique perspective to answer the question ‘Why Law Reviews’13 — that of the Student Editors and Associate Editors whose countless hours of careful proofreading and painstaking fact-checking bring the Review to life. With a combined seven years of experience as editors of the Review, the authors offer insights into the value of the Review to the students who are its lifeblood, and reflect on the future of law reviews in a changing academic and technological environment.

Dr John Gava reflects on the nature of legal scholarship. He remains amongst the most eloquent critics of the ‘publish or perish’ mentality of the modern university. Gava is also deeply sceptical of academic legal scholarship which attempts to appeal to the legal profession as its audience. In this piece, Gava launches a powerful defence of insightful and considered legal scholarship — scholarship that, in his view, is threatened by the ‘production line mentality’ that is forced upon legal academics.

In a nod to the past, Gava emphasises the need for legal scholarship to draw upon, and ground itself, in the authors that have come before.

A somewhat contrary argument is made by Professor Paul Babie, who takes up the challenge of articulating what it would mean to ‘publish and collaborate’ with the legal profession and judiciary in an academically rigorous way. Drawing upon the American experience, Babie argues that the contemporary law journal represents an exciting opportunity for collaboration between the academy and the profession — which can eventually develop into a constant dialogue on current legal issues that enriches the fabric of the law.

Professor John Orth brings a different perspective — viewing the *Adelaide Law Review* through the eyes of a leading American academic. He examines two great South Australian legal innovations — Torrens Title in property law and the dispensing power in succession law. Orth traces the rise and fall of the adoption of these innovations in the United States, demonstrating the intricacies of American exceptionalism, highlighting both the value of legal scholarship in being a source of legal innovation, and the limits of the power of legal scholarship to sustain innovations which must ultimately be accepted and sustained by the social and political landscape into which they are brought.

**VI Aboriginal and Torres Strait Islander Issues**

This special issue contains a rich vein of scholarship addressing legal issues of particular importance to Aboriginal and Torres Strait Islander peoples. I am thrilled that it includes the scholarship of two distinguished Aboriginal graduates of Adelaide Law School — Professor Irene Watson and Andrea Mason OAM.

Irene Watson offers an insightful personal reflection on her engagement with an article on the Coorong massacre published in the *Adelaide Law Review* shortly before she enrolled at Adelaide Law School.14 As a member of the First Nations peoples whose experience of British ‘justice’ was the subject of that article, Watson locates that experience and the resulting discourse within a broader international context, observing that the ‘welfare of a colonial state has historically come at the expense of Aboriginal Peoples’.15 She powerfully observes the continuing impacts of colonialism on Australia’s Aboriginal peoples, and asks us as readers to contemplate how today we can empower and respect Aboriginal truths and ways of being.

Andrea Mason’s contribution reflects on the path to reconciliation that lies ahead for all Australians. As Watson did, Mason also examines questions of legal pluralism, highlighting her experience at Adelaide Law School in forming her view that

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‘Australian ‘modern’ laws are a malpa — the Pitjantjatjara word for friend — to the ancient protocols, manners and rules I had learnt about in my Aboriginal community’.16 Mason — who has recently been appointed a Commissioner of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability — explores the potential for greater respect and engagement with Aboriginal justice systems, noting that the initiative that commenced with the 2017 Uluru Statement from the Heart can advance Australians down the path of reconciliation, by enabling ‘the Indigenous governance operating rhythm and the mainstream government operating rhythm to work in a synergistic relationship…for the greater benefit of all Australians’.17 Mason persuasively argues for the voice in Australian governance that the Uluru Statement from the Heart asks for Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander legal issues are also the topic of the Honourable Justice Martin Hinton’s contribution to this special issue. His Honour recounts the experience of being the judge deciding an application for review by the Supreme Court of a refusal of bail concerning a young Aboriginal man who, facing allegations of assault and breaching an intervention order, sought bail to attend sorry camp. This piece gives a rare insight into the thought processes of a judge, and highlights some of the challenges faced by the colonial legal system in dealing with Aboriginal people.

VII INTERNATIONAL LAW

The increasing international engagement of the Review is an important theme of its evolution. In part, this reflects Adelaide Law School’s great strength in international law — the pantheon of its international lawyers over many decades includes D P O’Connell, Ivan Shearer, James Crawford, Hilary Charlesworth and Judith Gardam. In this special issue, His Excellency James Crawford AC SC, Judge of the International Court of Justice and former student and member of academic staff of Adelaide Law School, with Rose Cameron, reflects on the evolution of Australia’s engagement with, and attitude towards, international law. The article showcases Australia’s increasing presence on the international legal stage, evidenced by its involvement in the international dispute resolution system and by its expanding partnerships with other countries and regions. The authors provide a very positive outlook for the future of international law in Australia, noting the key role that is to be played by educational institutions in continuing to provide strong teaching and research in this vital field.

Emerita Professor Judith Gardam’s contribution to this special issue reflects upon the feminist project in international law, a topic addressed in depth in volume 19 of the Review. Gardam offers a critical analysis of the insights and contributions arising

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17 Ibid 182.
from the feminist intervention in international law, reflecting on both the successes and failures of that project, and identifying the modern challenges confronting the effective implementation of feminist insights into the evolution and use of international law.

VIII WHAT LEGISLATORS AND JUDGES REALLY DO

Two contributions to this volume provide rare insights into the processes of law-making and judging. The Honourable Vickie Chapman MP, Attorney-General and Deputy Premier of South Australia, gives an expert account of the legislative processes of the South Australian Parliament. It remains the case, as Blackstone observed centuries ago, that

> it is perfectly amazing that there should be no other state of life, no other occupation, art or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any … but every man of superior fortune thinks himself born a legislator.18

As the Attorney’s insightful contribution demonstrates, effective and appropriate law-making requires intellectual engagement by elected representatives, making politics a worthy calling for law graduates. As already noted, Martin Hinton’s contribution to this special issue provides rare insights into the nature of judging, complementing the Attorney’s observations about the operation of our parliamentary democracy.

IX GRAND CHALLENGES

A number of the contributions in this special issue address some of the grand challenges that confront Australian lawyers. The Honourable Catherine Branson AC QC, who brings a unique perspective to issues of human rights having served both as a Justice of the Federal Court of Australia and President of the Australian Human Rights Commission, compels readers to re-evaluate their understanding of human rights protections in Australia, by critically analysing the merits of a hypothetical Commonwealth Human Rights Act. Branson demonstrates that the role of the judiciary under a Human Rights Act is consistent with our understanding of the judicial role more generally, and she concludes with a convincing invitation for Australia to abandon its ‘human rights exceptionalism’ and join comparable liberal democracies by enshrinining human rights in legislation.

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Dr Adam Webster reflects on the key challenges facing the regulation of water resources in Australia’s Murray-Darling Basin. This timely piece, closely following South Australia’s Murray-Darling Basin Royal Commission, situates these challenges within their historical context. Webster then considers the pressing legal questions raised by the recent Royal Commission and reflects on the continuing relevance of observations made by Sandford Clark in the 1983 volume of the *Adelaide Law Review*. Webster calls for a significant change in approach if the Basin is ever to be managed sustainably.

The Honourable Margaret White AO examines legislative responses to youth offending across Australia, drawing on insights gained from her service as Commissioner of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory. She examines the correlation between anti-social behaviour and adverse childhood experiences to demonstrate that Australia’s existing ‘justice-based’ model for youth offending is outdated and in need of reform. Raising the age of criminal responsibility from 10 years old, as well as increasing the emphasis on public health and welfare in the youth justice system, are suggested as ways to achieve more favourable outcomes for young offenders and reduce rates of youth offending.

**X Diversity**

In continuing with the *Review*’s consideration of issues facing Australia’s cultural groups and the law (a topic addressed in the three contributions addressing Aboriginal and Torres Strait Islander peoples and the law), the Honourable Justice Melissa Perry’s article considers the relationship between cultural diversity and the law. In particular, her Honour engages with the challenges that Australia’s linguistic diversity poses to effective participation in the justice system, and the work of the Judicial Council on Cultural Diversity. Although anti-discrimination laws have been critical in progressing Australia’s acceptance of its culturally diverse society, her Honour’s article highlights the need to be proactive in learning from diversity and to be self-reflective of biases and prejudices, not only to improve the legal profession, but to continue in the pursuit to eradicate discrimination.

**XI Corporate Crime**

The recent Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has re-ignited debate regarding corporate crime in Australia. Two contributors to this special issue explore the challenges to the law posed by corporate behaviour. Brent Fisse critically re-assesses the fundamental methodologies underlying the Criminal Cartel Provisions. In doing so, Fisse builds on previous works in the *Review* to skilfully argue that the current Australian law fails to understand the *corporateness* of corporate conduct. Emeritus Professor Suzanne Corcoran examines the failure of law to effectively deter misconduct in the banking industry, advancing the thesis that the law as it stands intervenes only to prevent the worst excesses of corporate conduct, but is blind (perhaps wilfully so)
to the commission of ‘ordinary corporate vices’. Corcoran advocates the implementation of a general duty of good faith and fair dealing for all corporations, increased use of statutory presumptions to facilitate proof of the mental elements of relevant corporate offences, and the introduction of a legal requirement for corporations and their officers to consider social as well as economic factors in decision-making. Collectively, Fisse and Corcoran provide us with significant food for thought as to how the law deals with the (mis)conduct of corporations.

XII LOOKING BACK, LOOKING FORWARD

Many of the contributions to this special issue embrace the theme of ‘reflections and future directions’. Associate Professor Judith Bannister examines contemporary administrative law through the lens of a 1977 article on the subject in the *Adelaide Law Review* by Michael Harris. She traces the growth of administrative law in the common law, before addressing the ‘new’ statutory administrative law of the 1970s. Bannister’s study offers a fascinating perspective on the rise of statutory administrative law, and then the re-growth of common law administrative law with (what seems at the moment to be) the inexorable rise of jurisdictional error. The interplay between common law and statute in securing the legality of administrative action is a phenomenon of interest to all lawyers, not merely those with an interest in administrative law.

In his article on succession law, the Honourable Thomas Gray QC surveys key legal developments over the past two centuries and contextualises each one by reference to underlying trends. Starting with the first modern legislation on wills — and the underlying principle of testamentary freedom — Gray tracks how the law has spread across the common law world and changed to meet specific challenges, such as excessive formality requirements, family maintenance needs, the loss of capacity and technological innovations. Against this background, Gray offers his expert outlook on the field while reminding readers that flexibility is essential and that testamentary freedom should remain the cornerstone of succession law.

Her Honour Judge Katrina Bochner explores the role of mediation in the Australian court system. She questions whether the so-called ‘alternative dispute resolution’ really is alternative and examines its efficacy in providing access to justice. While acknowledging its positive role in facilitating the court process, her Honour concludes that relying on mediation alone to resolve disputes ultimately leads to a more impoverished legal system, limiting access to justice and negatively impacting the development of the common law.

Marie Shaw QC and Ben Doyle trace the battles between the legislature and the judiciary in attempting to strike a balance between the protection of the vulnerable and the protection of the rights of the accused in cases of persistent sexual offending.

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against children. This exercise ultimately reveals that despite being in the ‘age of statutes’, we cannot escape the influence of the fundamental common law principles that underlie our legal system.

Professor Vicki Waye looks to the future by examining Regtech and its use of automated solutions to introduce potentially groundbreaking developments in legal research. She explores the law’s ability to adapt to changing times and advancing technology through illuminating examples. Waye illustrates Regtech’s capabilities, but also acknowledges that the ambiguities of language and the need for judgement will always require a human element in the law. Thus, for Waye it is the assimilation of technology such as Regtech in the current legal landscape, and overcoming the practical difficulties brought about by its implementation in current legal scholarship, which will prove the challenge for legal researchers in the coming years.

XIII Thank You!

I have enjoyed the happy coincidence of being Editor in Chief of the Adelaide Law Review as it reaches its 40th volume. There are many people to whom I express both my sincere gratitude, and that of the Adelaide Law Review:

- the remarkable contributors to this special issue;
- the Dean of Adelaide Law School, Professor Melissa de Zwart, for her enthusiastic support of the Review and of this special issue;
- the Honourable Michael Kirby AC CMG for launching this special issue;
- the authors from the academy, profession and judiciary who continue to submit innovative, exciting and insightful work to the Review;
- the expert reviewers who continue to cheerfully volunteer their time and expertise to referee submissions and ensure the Review continues to publish legal scholarship of the highest quality;
- the Student Editors and Associate Editors who maintain the editorial standards of the Review and are its lifeblood;
- the distinguished members of our Advisory Board;
- my colleagues on the Editorial Board, Dr Michelle Lim and Dr Stacey Henderson, and all of our distinguished predecessors who have served as Editors of the Review;
- the marketing team led by Charles Jackson who created the spectacular new cover art for this special issue in homage to the famous cover art featuring judge’s wigs from 1967–70; and
- the readers of the Review, whose belief in the value of legal scholarship of the highest quality is what sustains and justifies the Review.
XIV Conclusion

The publication of volume 40 of the Adelaide Law Review is an important milestone; I hope one day to have the privilege of reading volume 80. That happy occasion will no doubt see a Review addressing some topics unimaginable to the readers of volume 40, and perhaps some others anticipated in this special issue. I have no doubt that the partnership between students and staff that has always been the great strength of the Review will remain central in the future. Equally, though, it seems likely that a more automated production process, and the end of the hard copy version of the Review in favour of an online-only format, are also inevitable at some point. Irrespective of the topics it will cover, the reason the Review can be expected to endure is that whilst we still care about understanding and improving our legal system, and whilst we still see value in promoting intellectual engagement between the academy, profession and judiciary, we will find these timeless values reflected in the Adelaide Law Review.
CELEBRATION OF VOLUME 40: SIXTY YEARS ON!

The world into which the first volume of the *Adelaide Law Review* emerged was significantly different from the world of today.

Notoriously, the *Australian Constitution* and state constitutions have changed very little in the intervening years. In 1960, when the first volume appeared, the Judicial Committee of the Privy Council, sitting at Westminster, was the highest court in the land. Its jurisdiction was seemingly assured, at least to a substantial degree, by s 74 of the *Constitution*. However, in a series of quite rapid legislative steps between 1968 and the final quietus of the *Australia Act 1986 (UK)* and *Australia Act 1986* (Cth), the judicial role of that venerable imperial court over Australia, was finally terminated. As chance would have it, I presided in the last Australian appeal to proceed to the Privy Council. It came from orders of the Court of Appeal of the Supreme Court of New South Wales. The appeal was dismissed.

The end of the Privy Council appeals, not so long after the establishment of this *Review*, was much more than a rearrangement of the institutions of justice. It marked the severance of the umbilical cord that had tied the Australian legal system to the highest judicial institutions and substantive law and traditions of the United

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1 The only formal changes to the *Australian Constitution* since 1960 were made by the Constitutional Alteration (Aboriginals) 1967 (Cth); Constitutional Alteration (Senate Casual Vacancies) 1977 (Cth); Constitutional Alteration (Retirement of Judges) 1977 (Cth); and Constitutional Alteration (Referendums) 1977 (Cth), which came into force respectively on 10 August 1967 and 29 July 1977 in accordance with s 128 of the *Australian Constitution*.

2 *Australian Constitution*, s 74 restricts the power of the Federal Parliament to make laws limiting matters in which leave to appeal to the Privy Council might be asked.

3 See Privy Council (Limitation of Appeals) Act 1968 (Cth); Privy Council (Appeals from the High Court) Act 1975 (Cth); *Australia Act 1986 (UK)* s 11; and *Australia Act 1986* (Cth) s 11. Cf *Kirmani v Captain Cook Cruises Pty Ltd [No 2]; Ex parte A–G (Qld)* (1985) 159 CLR 461.

Kingdom since settlement. For some time after the process of abolition, our judges and lawyers continued to display the English case and textbooks on their shelves. Some still do. Many then faithfully applied the English judicial authorities, even where (as in the case of the House of Lords) the court in question was never part of the Australian hierarchy. Many of the subjects examined in the Review in its first volumes could only be ventured upon with a thorough understanding of the then current doctrines of the English judiciary. Until the writings of Alex Castles a few years later, legal history for all Australian lawyers (a compulsory subject in their law courses), involved the detailed study of English legal history, with barely a mention of the peculiarities of that story in Australia.

Few women studied law in Australia’s six law schools of that time. This reflected a long-standing antagonism to the participation of women in the law. Heralding a challenge to that aspect of patriarchy, Enid Campbell wrote an article on ‘Women and the Exercise of Public Functions’ in the first volume of this Review. However, so far as I could see, none of the other contributors to the Review before volume 5 were women. Mary Fisher wrote a book review of the text on Property Law Cases and Materials in 1975. That book had been compiled by Ronald Sackville. Perhaps it was coincidental that his co-author was Marcia A Neave. She was a member of the Adelaide Law School before she departed for her distinguished legal career in Victoria.

In the first five years of the Review, and indeed thereafter, contributions to the Review were dominated by leading scholars in the Adelaide Law School at that time, including CH Bright, Alex Castles, JF Keeler, David St L Kelly, Horst Lücke, Ivan A Shearer (news of whose death was received with universal sadness as this volume was sent to the printer) and WAN Wells. At first, there were few other regular contributors. Very soon other prominent names began to appear. They included alumni who went on to

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5 Cf Piro v W Foster & Co Ltd (1943) 68 CLR 313, at 320, where Latham CJ declared that it would be ‘a wise general rule of practice’ in cases of conflict between the House of Lords and the High Court of Australia, for Australian courts to follow the decision of the House of Lords upon a matter of general legal principle.


7 AC Castles, An Australian Legal History (Law Book Co, 1982).

8 Eg the standard legal history text was Theodore Plucknett’s A Concise History of the Common Law (Butterworths, 4th ed, 1948).


great distinction at the University of Oxford (John Finnis)\textsuperscript{14} and at the University of Cambridge and later the International Court of Justice (James Crawford).\textsuperscript{15} In his first substantive article, James Crawford described the radical changes that had come over the Australian judicial hierarchy following the creation of the Family Court of Australia in 1975 and the Federal Court of Australia in 1976 and the enhancement of federal tribunals and the passage of ‘new’ Administrative Law.

There were further major alterations in the Australian legal system that began in the first decade of this Review. By then things were changing in the law. The interest and focus of legal writing was shifting quite rapidly, particularly to focus on the new enhancement of federal jurisdiction. It had been modest in the early years of Australia’s federation. But when it happened, it brought new challenges and opportunities for the legal profession that had not been dreamed of before the advent of the Whitlam and Fraser Governments.\textsuperscript{16} Suddenly there were new issues to be addressed in the Review and new constitutional and other legal problems to be considered.\textsuperscript{17}

Further features came to be noticed in the contributions to the Review as the years unfolded. The articles chosen for inclusion began to stray from the path of the strict positivist analysis that had constituted the received doctrine of the Australian judiciary under the leadership of judicial proponents led by Sir Owen Dixon, long-time Justice and Chief Justice of the High Court of Australia. He declared:

It is taken for granted that the decision of the court will be ‘correct’ or ‘incorrect’, ‘right’ or ‘wrong’ as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal. The court would feel that the


\textsuperscript{16} Whitlam Government (1972–75); Fraser Government (1975–83).

function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.\(^{18}\)

Dixon was the most articulate and consistent Australian advocate of the approach of ‘strict logic and high technique … rooted in the centuries’.\(^{19}\)

Even after bold and inventive constitutional decisions, apparently based on ‘deep values’ and notions of public policy, such as the decision that struck down the *Communist Party Dissolution Act 1950* (Cth)\(^{20}\), most lawyers in Australia (and most teachers of law in Australia’s law schools) assumed and taught that discovering the legal answer to a question involved no choice on the part of the judge. It was simply a matter of knowing and applying the correct rules of logic, derived from the essential reasoning of earlier cases or (where relevant) the true and only available interpretation of the constitutional text or statutory language.

By the time this *Review* came upon the scene of Australian law increasing numbers of judges, practitioners and law teachers (some of them taught, as I was, by the great writer on jurisprudence at the Sydney Law School, Julius Stone) increasingly accepted that judges did have choices to make in deciding many cases that came before them. One of those who questioned the Dixonian thesis was Dr John Bray, later to be Chief Justice of South Australia, who predicted how the role of the Australian judge might change:

> A few years ago the English courts rejected with indignation the suggestion that they had been empowered by Parliament to administer what was contemptuously called palm tree justice, the justice which is traditionally administered in Eastern societies by the *cadi* sitting in the city gate. It seems to me, however, that the Australian judge is going to have to assume more and more the role of the *cadi* in the gate whether he likes it or not.\(^{21}\)

This uncomfortable awakening was, in part, a consequence of the termination of appeals beyond Australia; in part, a result of the special leave system that narrowed the fields of operation of the High Court of Australia; in part, the influence of scholars like Stone and the critical writing in journals such as this *Review*; and, to some extent,


\(^{19}\) Ibid 153 (n 1).

\(^{20}\) *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

the consequence of later realism in legal analysis encouraged by the impact of social sciences on the understanding of the actual operation of the law.\textsuperscript{22}

On top of these institutional and attitudinal changes that confronted the legal profession and academy after 1960 many other changes were influencing the contributions offered for publication in this Review. They included the shift in subject matters as new areas of the law opened up; the changes in the interests and focus of research of Australian lawyers and legal academics; the new spirit that was spreading in legal education; the growing impact of international law on our domestic law; and the fresh attention to areas of the law that had been substantially ignored in earlier times.

The new areas that had earlier been ignored included topics of special importance to women in the law and in society;\textsuperscript{23} topics affecting Aboriginals and other Indigenous peoples, long neglected by Australia’s legal system;\textsuperscript{24} new subjects of law that were the result of technological changes;\textsuperscript{25} the growing appreciation of the challenge of

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climate change for Australian society and its laws;\textsuperscript{26} the increasing impact of international law on our municipal legal systems;\textsuperscript{27} the growing interest in institutional law reform to which the Adelaide Law School contributed more than most;\textsuperscript{28} and the increasing awareness of the special features of legal history, in which Adelaide had also long been engaged.\textsuperscript{29}

There have, of course, been many interesting and important articles published in the \textit{Review}, devoted to the core topics of legal doctrine in Australia and elsewhere.

\textsuperscript{26} Michael I Jeffery and Xiangbai He, ‘Going Beyond Mitigation: The Urgent Need To Include Adaption Measures To Combat Climate Change in China’ (2012) 33(1) \textit{Adelaide Law Review} 79.


These include the law of torts;\textsuperscript{30} the law of contract;\textsuperscript{31} the law of trusts, property and Torrens title;\textsuperscript{32} the growing body of administrative law;\textsuperscript{33} the ever-puzzling problems of evidence law and its reform;\textsuperscript{34} and the growing attention to the debates over a charter or bill of rights within the Australian legal system.\textsuperscript{35}

One feature of life in the law that would be noticed immediately by someone who had departed Australia when this \textit{Review} was launched and returned to see this fortieth volume would undoubtedly be the huge increase in the number of women in law school classes; in legal offices; in the academy; at the Bar and on the Bench. This change is reflected in successive volumes of the \textit{Review}.


Thus, in the first volume, 25 of the contributors were men and only one was a woman.\textsuperscript{36} In volume 2 there were 17 contributions by men, but none by women. In volume 3 the ratio was 20 men to one woman. However, by the time we arrive at volume 37, there were contributions from 20 men and 16 women. In volume 38 the ratio was 12 men to 14 women. So the tables have now been turned. Today women are major contributors to teaching, researching, practise and writing about law. It would be a worthwhile study on its own to review the articles written by women and about aspects of law of special interest to women to see whether there, or elsewhere, features stand out that can be described as distinctive and different. One feature is clear. It is no longer necessary in a ‘Preface’ of a volume of this Review to thank female administrative staff, in order to provide mention of the role of women, as Horst Lücke did in April 1983.\textsuperscript{37} True, administrative functions in a law journal are vital. But now they are by no means the only, or main, activities of women in the production of this Review.

The Adelaide Law School has always exhibited a strong interest in, and engagement with, international law. This has remained a strength of the School to which alumni, who have been leaders in international law and its institutions (like Judge Crawford and Professor Shearer), continue to contribute. Similarly, the School, from the early days, has been an Australian centre on federal constitutional law. This is reflected in many articles over the past 40 years.\textsuperscript{38} Similarly, since Alex Castles’s day the School has been a centre for the study of legal history. The decline in the interest in, research and teaching of this subject in Australia is a source of much pain and anxiety to me.\textsuperscript{39}

\textsuperscript{36} In some cases, there is double counting because an author had two or more articles in the same volume.


Likewise, as one of the oldest law schools in the nation, Adelaide has long been a centre for the study of different notions about the contents of legal education. This interest is also reflected in many articles in these pages.\(^40\)

It has been my privilege to have a number of my own contributions published, the first of which was in volume 7 in 1980,\(^41\) dealing with Aboriginal customary law — a subject of great interest as demonstrated by the many ‘hits’ upon the website of the Australian Law Reform Commission (ALRC) relating to its report on the subject.\(^42\) Although legislation recommended in the Commission’s report has not yet been enacted by the Federal Parliament, the opening up of this subject almost certainly helped change the Zeitgeist in Australia about Indigenous people and the law. It was followed by very important decisions of the High Court of Australia, upholding, for the first time, the recognition of native title.\(^43\) Professors Castles, Kelly and Mr (now Justice) Michael Ball, were engaged, as I was, full-time in the work of the ALRC. Although political and professional support for institutional law reform has declined in recent years,\(^44\) the long-term future of institutional law reform seems reasonably safe. Law reform reviews methodically our likely professional challenges. It therefore has an essential role in the future of this Review. Many of the future themes are already evident from those that have featured in the past. However, others are substantially new and different. The Review should continue to raise new awareness and suggest novel topics of law reform.

One theme that was little mentioned in the early days of the Review, but has made its mark repeatedly in recent times, is the role of religion in society and the possible need to protect freedom of the spiritual aspects of human life. Back in the 1960s,


secularism was in the ascendant. Even John Finnis had not fully embraced the engagement with natural law that was to dominate his scholarship at Oxford University and now at Notre Dame Law School in the United States.\textsuperscript{45} Despite the continuing growth of respondents to the Australian national census who declare that they have ‘no religion’\textsuperscript{46} and the growth of the presence of Non-Christian religions in Australia, this has resulted in expressed feelings favouring so-called ‘religious freedoms’ that are electorally significant. They have produced current debates in Australia about law and religion that are likely to continue. Globally, the power of vehement religious beliefs seems likely to expand. This will probably, therefore, continue to attract attention in the \textit{Review}, as it already has in recent years.\textsuperscript{47}

Another theme that was totally missing in the early days of the \textit{Review} concerned the law and sexuality. When the \textit{Review} was established, same-sex conduct was uniformly criminalised throughout Australia, even where involving consenting adults acting in private. The first Australian legislation to change this situation was enacted in South Australia in 1972. This was expanded under the Dunstan Government in 1974.\textsuperscript{48}


\textsuperscript{46} In the Australian Census of 2016, 52.1\% of respondents identified as ‘Christian’; with 22.6\% as Roman Catholic and 13.3\% as Anglican. The category ‘No Religion’ continues to ‘rise fast’. In 2016 it was nearly 30.1\% compared with 19\% in 2011. See Australian Bureau of Statistics, 2016 \textit{Census: Religion} (Media Release, 27 June 2017) <https://www.abs.gov.au/AUSSTATS/abs@.nsf/mediareleasesbyReleaseDate/7E65A144540551DCA25814B000E2B85>.


\textsuperscript{48} The course of reform is described in MD Kirby, ‘Dr George Ian Duncan Remembered’ (2016) 37(1) \textit{Adelaide Law Review} 1.
Sadly, it took the death of Dr George Ian Duncan of the Adelaide Law School to help propel legislative change.49

In recent years there have been a number of articles in the Review on this subject.50 The recent contribution by Liam Elphick51 suggests that more cases and increasing legal analysis will be presented as this topic becomes more visible both in Australia and overseas. The rapid change in community attitudes towards minority sexuality is striking. It is reportedly faster than any other recent attitudinal shift.52 It now makes the writings of John Finnis, suggesting comparisons between homosexual acts and bestiality,53 appear dated, unscientific and unpleasant. This topic seems likely to remain a global issue over the next 60 years. Every month brings surprising developments concerning sexuality and the law in Australia and globally.

Generic human rights protection, both in Australia and internationally, played little part in the early editions of the Review. When I wrote on the growing impact of international law and the common law,54 it seemed as if the international institutions for the protection of human rights were well established and likely to expand in influence.

However, these developments have attracted vehement opponents in Australia55 who continue to reject even the modest model for the protection of ‘universal rights’ adopted in New Zealand and the United Kingdom. The only human right advocated by many politicians in recent discourse in Australia has been ‘religious freedom’. Seemingly this is to be granted without a counterbalance for the other freedoms that are at stake. Internationally, the United States of America walked out of the United Nations Human Rights Council to which it had been elected not long before.

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49 Ibid.
51 Elphick (n 47).
Dialogue concerning human rights violations in North Korea with which I have been engaged have been diverted to issues concerning peace and security alone.

Nevertheless, human rights protections both in Australia and globally, seem likely to remain high on the agenda of this Review. Not least will this be so because of the strong tradition of international law at the Adelaide Law School, as well as the continued contributions of regional courts and international institutions to our understanding of the contents of global human rights and the occasional role of domestic courts in upholding them.

Although the request of Aboriginal Australians for a ‘voice’ in the Federal Parliament, as an antidote to inaction and indifference, has been misrepresented as a suggested proposal for a ‘third chamber’ in our Federal Parliament, there are many topics on Indigenous rights that need to engage the Review in the future. They include the possible needs for other constitutional changes to recognize Australia’s First Peoples in that document; the possible need for generic equality guarantees in the Constitution; the desirability of a treaty or Makarrata to establish a new legal basis for sovereignty in Australia in the place of uncompensated confiscation of property of the past; and the need for particular changes, including to address the shockingly high and persisting Indigenous incarceration rates under our present laws and policies.

Technology, which has been another recurring theme in the Review, will also continue to attract insightful contributions. Amongst these will surely be the analysis of the growing impact of artificial intelligence upon substantive law and the processes of legal decision-making. Hopefully, this technology may help lawyers to address the fundamental flaw in the common law system for the delivery of justice: its prohibitive expense which has grown even greater in the 60 years since the first volume of the Review.

Of clear importance for the future of humanity is the legal response to the development, deployment, delivery and use of nuclear weapons. This has many implications

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57 See generally n 27.
59 Australian Law Reform Commission, Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (ALRC Report No 133, 28 March 2017).
60 See generally n 25.
affecting consequential issues. But it also has broad importance in international law, exemplified in the Advisory Opinion of the International Court of Justice on the legality of nuclear weapons, and the decision of the non-nuclear weapons states in the United Nations General Assembly to negotiate a treaty to prohibit nuclear weapons. Clearly these topics are of existential significance. The fact that they have attracted little attention in Australian law reviews is perhaps further evidence of the inclination of lawyers to address immediate but relatively minor problems whilst ignoring great dangers that seriously threaten continued human existence.

Another topic likely to attract continued attention in the Review is climate change and environmental regulation and the associated challenge of guaranteed water availability both in Australia and internationally. There are many interesting and novel Australian legal developments affecting our global posture on these topics. These will surely attract many contributions to the Review in the future.

Although formal changes to Australia’s Constitution are notoriously difficult to secure, constitutional law has long been a special strength of the Review. What has already been written will suggest certain topics for future articles that deserve continuing attention. These include constitutional recognition of our Indigenous peoples; better protection of universal rights; the relationship of municipal and international law; and the need to address growing public disillusionment about the capacity of our present political system to respond to large challenges as distinct from small, insignificant targets that attract votes in a limited number of marginal electorates. Can or should Australia turn its attention to such big issues, including that of a Republic; interstate rivalry over access to water; and improvements in

64 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.
66 Jeffery and He (n 26).
69 See generally (n 17).
the processing of law reform.\textsuperscript{72} Viewed as an efficiency mechanism for a legal system with many challenges, critical scrutiny of our legal system and its practitioners is needed more urgently today that ever it has been in the past 60 years.

If humanity survives the triple challenges of nuclear weapons, climate change and the complex issues of terror and security, the \textit{Review} will still be published in 60 years time. It will remain an ongoing stimulus to lawyers in Adelaide, and their colleagues, to analyse and provoke, stimulate the legal discipline and to enhance its contribution to the good governance of the Australian people and in the world.

My small list of likely topics for possible attention in the second 60 years of the \textit{Review} will doubtless seem as inadequate and unperceptive as it would have been had I ventured upon that task at the end of my legal studies in 1961. Efforts of lawyers in futurology are usually doomed to fail because the nature of the legal discipline often tends to trap their minds in the past. Commonly, it requires the advances and challenges of other disciplines, and especially of new technology, to force awareness of unwelcome change upon lawyers.

Some aspects of our law that are desirable and even admirable have been generally preserved over the past 60 years. Most notably these have included fidelity to incorruptibility on the part of judges and legal practitioners\textsuperscript{73} and the abiding concern of many practitioners with the attainment of the elusive goal of justice that gives nobility to the law as a profession. Yet none of us 60 years ago foresaw the advent of the internet, search engines and mobile devices.\textsuperscript{74} And I doubt that many of us, even the great Roma Mitchell and John Bray, dreamed about the developments of \textit{Mabo};\textsuperscript{75} of the huge growth in women’s engagement with the law; and of the advent of gay rights that, with other changes, have marked the last 60 years.

For the contribution that the \textit{Adelaide Law Review} has made to the legal discipline in Adelaide, South Australia and our country generally, I express grateful thanks. For the contribution that the \textit{Review} will make in the coming decades, I express eager anticipation.

\textsuperscript{72} AC Castles, ‘Reform the Law, Essays on the Renewal of the Australian Legal System (Book Review)’ (1983) 9(2) \textit{Adelaide Law Review} 309.

\textsuperscript{73} Gabrielle Appleby and Grant Hoole, ‘Integrity of Purpose: A Legal Process Approach to Designing a Federal Anti-Corruption Commission’ (2017) 38(2) \textit{Adelaide Law Review} 397.

\textsuperscript{74} Seb Tonkin, \textit{Google Inc v Australian Competition and Consumer Commission} (2013) 34(1) \textit{Adelaide Law Review} 203.

\textsuperscript{75} \textit{Mabo} (n 43).
Christian Andreotti* and Holly Nicholls**

40 IS THE NEW 20: THE CHANGING CONTOURS OF THE ADELAIDE LAW REVIEW

I Introduction

For millennia, age has been something of a pariah. The prospect of growing older is often accompanied by fear or stoic denial, as we strive to maintain the perceived relevance associated with youth. Ironically, this desire to escape the effect of time is an ancient phenomenon, Herodotus having written of the legendary ‘fountain of youth’ during the 5th century BCE.¹ Since the time of Herodotus, gerascophobia has crystallised into a cultural universal truth, encapsulated by the timeless words of The Beatles, who asked:

When I get older losing my hair, many years from now, will you still be sending me a Valentine? Birthday greetings, bottle of wine … Will you still need me, will you still feed me, when I’m sixty-four?²

Certainly, this fear may be well-founded, and one need only reflect on the plight of those residing in aged care facilities across Australia — a topic which will likely receive increasing coverage in legal scholarship over the coming years.³ But it need not be all doom and gloom. With age comes experience, and with experience comes wisdom, and the ability to reflect on the past whilst illuminating the future.

With this special issue, the *Adelaide Law Review* celebrates the scholarly equivalent of its 40th birthday, which presents an opportune moment for reflection. It should be no surprise that across 59 years and 40 volumes, the subject matter of the *Review* has changed in tandem with the society in which it is published, as

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[l]aw, being society’s relational rules and principles that govern and control all exercises of power, must have a character and form that is adapted to, and suited for, application to law’s human task.\(^4\)

The changing contours of the Review are many and varied, encompassing every facet of the scholarly process and contributing to a seismic shift in topography. What was once doctrinal and descriptive is now critical and prescriptive. What was entirely Anglo-Saxon, heterosexual and male is now representative of the diverse cultures, and sexual identities and orientations that contribute to the richness of our society.\(^5\)

What was geographically insular now has a global perspective.

As Student Editors of the Review, we are uniquely placed to reflect on these changes over 59 years and 40 volumes. Over the course of one year, we are compelled to live and breathe the Review as we tirelessly strive to uphold its esteemed reputation as a leading Australian journal of legal scholarship. With this comes an osmotic familiarity with the history of the Review, its personalities, and the debates that have informed its content.\(^6\) This is not to say that mere familiarity equates to insightful reflection — it is also our independence, energy, and lack of trepidation that enables a well-rounded and informed survey of the Review’s development. One may go so far as to say that the changing contours of the Review are symbolic of the changing demographic, attitudes and interests of its Student Editors.

But we cannot rest on our laurels. Beyond retrospectively celebrating the progress that has been made by the Review, this reflection encourages a consideration of the future and its opportunities for further progress. This is particularly pertinent as the law seeks to address existential global issues including (amongst others) climate change, the regulation of cyberspace, human rights and poverty — issues which will come to define the contours of the Review for the next 40 volumes.

II A Shift in Methodology

Before we can reflect on changes in the subject matter of the Review, the issues addressed and injustices overcome, it is useful to consider the prevailing scholarly method given effect in the Review.\(^7\) In order to understand the changing contours, we must first study the tools by which they are carved and shaped. Though crude and unsophisticated on its face, this study is best undertaken through a comparison between volumes at opposing ends of the Review chronology.


A From ‘What Is’…

Published in four issues from 1967–70, volume three saw the Review successfully navigate its first decade and contained contributions from eminent and quintessentially South Australian scholars including James Crawford, David St Leger Kelly, Alex C Castles and Horst Klaus Lücke.\(^8\) Putting their subject matter aside, the articles in volume three can largely be described as both descriptive and doctrinal in their method — that is, describing the law as it is, in terms of common law, statute or custom. The leading article of issue one is a fitting testament to this method, in which AR Carnegie provides a forensic analysis of the previous century of English jurisprudence on the law of bailment and its relationship with contract.\(^9\) Curiously, there is not one citation of Australian authority throughout the entire article, and no attempt to draw any parallel to the laws of bailment and contract in Australia.

Another curiosity of the Review’s descriptive early years was the subject-specific comment, a precursor to the contemporary case note. Each issue of volume three contained a unique — if not strange by today’s standards — ‘survey of recent [personal injuries] awards in South Australia’, compiled by prominent members of the South Australian legal community including John Mansfield and MC Harris. These surveys ‘include[d] summaries of all cases involving claims for damages for personal injuries which have been reported in the Law Society Judgment Scheme’.\(^10\) Crudely, the cases were categorised according to the injury, or if there were multiple injuries, according to the major injury received.\(^11\) What followed was a forensic description of said injury, lacking in substantive analysis or comment:

### Head Injuries

$40,000 Maried woman aged twenty-three suffered loss of consciousness, multiple lacerations of the face and fractures of the facial skeleton, including a fractured mandible. Her left side was paralysed. She cannot move her left arm at all, for some sensations it is deficient and for others hypersensitive. She suffers

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\(^{11}\) Ibid. See also MC Harris, ‘Personal Injuries: Survey of Recent Awards in South Australia’ (1967) 3(1) *Adelaide Law Review* 84.
very painful, uncontrollable spasms in the arm, and has to wear a splint in bed to stop the fingers curling up.\textsuperscript{12}

To juxtapose these surveys against the case notes published in recent issues of the \textit{Review} is to fully appreciate the development of the scholarly method by which its contours have changed. To the politically astute reader, the case of \textit{Re Canavan}\textsuperscript{13} needs no introduction, and lends itself beautifully to discussion in a case note by a Student Editor of the \textit{Review}.\textsuperscript{14} Whereas the surveys of volume three formulaically recite the cases in question, the discussion of \textit{Re Canavan} provides an eloquent critique of the High Court of Australia’s interpretation and reasoning in respect of s 44(i) of the \textit{Constitution}, whilst arguing that ‘the problems which this case has highlighted might only be resolved by constitutional reform’.\textsuperscript{15}

Although the passage of time has exposed a divergence in the sophistication of the \textit{Review}’s scholarly method, one thing remains the same from 1970–2018 — that is, the critical contribution of Student Editors to the development of the \textit{Review}.

\textbf{B … To ‘What Ought to Be’}

To implicitly tar the entirety of the early \textit{Review} with the brush of bland doctrine is admittedly unfair, and for proof one need look no further than the contribution of the legendary Dr John Jefferson Bray, who curiously remains the only legal scholar to write on Roman law in the \textit{Review}.\textsuperscript{16} Dr Bray himself personifies the progressive pedigree of the \textit{Review}.\textsuperscript{17} In his article, Dr Bray goes beyond a comprehensive recital of Roman legal doctrine in the context of the common law, and instead draws upon Roman jurisprudence to prescribe how the common law ought to be. This early transition from the doctrinally descriptive to the prescriptive and critical is most evident in Dr Bray’s conclusion, which draws upon the Roman quasi-contractual doctrine of \textit{iniuria} to remedy the unsatisfactory common law position set down by the High Court of Australia in \textit{Victoria Park Racing and Recreation Grounds Co Ltd v Taylor}.\textsuperscript{18}

\begin{quote}
It appears in \textit{Victoria Park} … that there could be no remedy in English law: not defamation because nothing defamatory was said or written, not assault because
\end{quote}

\begin{flushleft}
\textsuperscript{12} MC Doyle, ‘Personal Injuries: Survey of Recent Awards in South Australia’ (1968) 3(2) \textit{Adelaide Law Review} 221, 221.
\textsuperscript{13} \textit{Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon} (2017) 349 ALR 534 (‘\textit{Re Canavan}’).
\textsuperscript{15} Ibid 479.
\textsuperscript{16} JJ Bray, ‘Possible Guidance From Roman Law’ (1968) 3(2) \textit{Adelaide Law Review} 145.
\textsuperscript{17} Michael Kirby, ‘John Jefferson Bray: A Vigilant Life, by John Emerson’ (2016) 37(2) \textit{Adelaide Law Review} 537.
\textsuperscript{18} (1937) 58 CLR 479 (‘\textit{Victoria Park}’).
\end{flushleft}
there was no contact between the defendants and the plaintiff, not nuisance because nothing escaped from the property of the defendants on to the property of the plaintiff. Rather the defendants trapped the reflections that had escaped from the property of the plaintiff but the plaintiff had no proprietary right in such reflections. *Clearly this would have been an iniuria* … It is surely preferable that there should be some general principle under which acts of this nature can be comprehensively dealt with instead of leaving them without remedy unless they can be fitted into one of a limited number of pigeonholes constructed between the fourteenth and eighteenth centuries.19

The spirit of critical, progressive legal scholarship set in motion by Dr Bray is well and truly alive today. The *Review* has moved beyond docile restatements of the law and frequently publishes critical scholarship at the apex of legal–social discourse. In the process, the *Review* has liberated itself from the seminal criticism of Fred Rodell by concurrently publishing scholarship written for strictly informative purposes, and that which needs to be read to enliven debate on pressing legal–social issues.20

By sheer luck, the first issue consulted when conducting research on this point was 36(1), published in 2016, which exemplifies the *Review*’s methodological development and commitment to prescriptive and critical legal scholarship. In an article discussing the ‘limited’ law in South Australia, Lucy Line, Claire Wyld and David Plater make an explicit plea for the reform of pre-trial defence disclosure. Transcending the divide between critical analysis and prescriptive method, they go so far as to suggest potential sanctions for noncompliance, including adverse comment or inference on the defence’s noncompliance being made by the judge and/or prosecution to the jury, a factor to take into account in sentencing, wasted costs orders against an accused and/or their lawyer, staying or adjourning the proceedings to allow the defence to comply with disclosure orders and/or for the prosecution to gather further material, exclusion of the undisclosed evidence to be led, professional disciplinary action against the lawyer involved and even a finding of contempt against the accused and/or their lawyer.22

Critical analysis, and its synthesis into law reform, is not limited to the *Review*’s immediate jurisdiction of South Australia, and has evolved to consider global issues and perspectives. One such issue is the vilification of Islamic women, subversively concealed behind calls to ban garments including the burqa, niqab, hijab and chador. In the midst of passionate public debate, Renae Barker authored an articulate and measured critical analysis of the arguments in favour of such a ban, which included:

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19 Bray (n 16) 158 (emphasis added).
22 Ibid 129–30 (citations omitted).
I’m going to tell you what your religion says …

Playing the feminist card …

But others are doing it …

You might have a bomb under there [and] …

You can see my face, I want to see yours.23

Invoking the poignant words of Dr Bray, who once said that ‘diversity is the protector of freedom’,24 Barker comprehensively deconstructs the bigoted basis of these arguments, and epitomises the Review’s movement away from the dull and doctrinal, concluding that

[n]one of the arguments put forward to support a blanket ban on the Islamic face veil stand up to close scrutiny. Even if it is accepted that a ban is necessary to alleviate the oppression of Muslim women and to enhance Australia’s security, a ban will be counterproductive. If these women are oppressed, a ban will only deepen that oppression. Further, rather than enhancing security, a ban is more likely to be detrimental as it becomes a rallying cry for extremists.25

C The Review as Global Citizen

The advent of the 21st century has also witnessed a shift in the jurisdictional scope of the Review. An initial focus on primarily Australian (or South Australian) subject matter26 has given way to coverage of existential issues of international law. Despite its status as a generalist journal, the Review has published articles addressing the legal nuances of climate change that would not be out of place in a specialist journal of international environmental law. In 2012, Michael I Jeffery QC and Xiangbai He published a fascinating article on the urgent need for a meaningful legal framework in China to facilitate a reduction in its greenhouse gas emissions, noting that

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25 Barker (n 23) 217.

[b]ecause climate change in China is primarily identified as a development issue, China has invested a significant amount of time and effort on establishing and refining mitigation measures through resource conservation, emission reduction, renewable energy exploitation and industry structure adjustment, that are directly related with and contribute to future sustainable development.\(^{27}\)

This article built upon the earlier work of Shol Blustein, which characterised the Kyoto Protocol\(^{28}\) as ‘incapable of effectively responding to the problem of anthropogenic climate change’.\(^{29}\) In response to this critical shortcoming, Blustein proposed the reform of the legal principles underpinning national climate policies across the globe. The purpose of the article was therefore framed as ‘draw[ing] attention to the principles that must permeate the new national legal arrangements for them to effectively mitigate climate change’.\(^{30}\)

By publishing cutting-edge scholarship on pressing international issues of an existential bent, the Review continues to discharge its duty as a global academic citizen.

### III A CHANGING WORLD; A CHANGING REVIEW?

The Adelaide Law Review was born into a changing world. In 1965, Sydney hosted the Third Commonwealth and Empire Law Conference. This was hosted by the Law Council of Australia, whose executive was comprised entirely of men, with the exception of ‘Miss’ Roma Mitchell, appointed Vice-President in July of that year.\(^{31}\)

The organisation of the conference included a ‘Ladies Committee’, members of which were tasked with duties of great importance including ‘[f]lowers and [d]ecorations’ and ‘[e]ntertainment of [w]ives’.\(^{32}\) Mitchell, of course, would soon go on to become the first female judge of a superior court in Australia.\(^{33}\) Yet when she was beginning her career as junior counsel, she did not take part in criminal trials for fear ‘that juries might be embarrassed by the presence of a wom[a]n while hearing the type

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\(^{29}\) Shol Blustein, ‘From the Bottom-Up: Redesigning the International Legal Response to Anthropogenic Climate Change’ (2011) 32(2) Adelaide Law Review 305, 305.

\(^{30}\) Ibid 306.


\(^{32}\) Ibid xi.

of evidence commonly heard in the criminal courts’. The trajectory of Mitchell’s career is a testament of the changing role of women within the law. In a similar vein, tracing the development of the Review’s scholarship over the past 40 volumes is an effective way to track the journey of the law in South Australia, and indeed the nation as a whole, with regard to three marginalised demographics: women, Indigenous Australians, and the queer community.

A The Feminist Review

Women and the Review share a somewhat checkered history. In its first volume, the Review contained only one article by a woman — Enid Campbell’s consideration of the growing role of women in positions ‘thought to involve an element of public trust’. She noted that it was only a time ‘not … distant from the present’ in which women were barred from standing for Parliament, or from judicial and other public offices. Indeed, even the question of whether the word ‘person’ legally encapsulated women was an issue not long settled. In the early years, while articles did feature topics such as abortion and family law concerns, the typical author was male, and these issues were viewed through the male lens.

Following South Australia’s partial decriminalisation of abortion in 1969, the Review published an intervention on the topic by John Finnis, which, among many bold claims, questioned whether legal abortions may cause ‘a fall in the birthrate so great that the population [would] begin to decline quite rapidly’. With the benefit of hindsight, one might consider this concern to have been slightly overblown. Thankfully, we appear to have moved on from this era — and as the State looks to remove abortion from the criminal law altogether, this look at the history of the debate may well be a positive reflection of how far we have come.

At the time, the consideration of feminist legal issues may well have been a positive step, but it was reflective of a tendency to consider ‘women’s issues’ without

34 Ibid 2.
36 Ibid.
40 Finnis (n 38) 453.
including the voices of women. This issue was not confined simply to the *Adelaide Law Review*. A 1970 review of the ‘Law Relating to Women and Women’s Rights’ by the Law Reform Committee of South Australia featured four authors — all of them male — and is notable for the way it contains barely any consideration of the historical and ongoing social structures which helped form the discriminatory laws in the first place.\(^{42}\)

A glance at the more recent volumes of the *Review* contains far more diverse lists of authors writing on a diverse range of legal issues. The role of women as contributors to the *Review* is no longer contained to those ‘women’s issues’ of Campbell’s day. This is not to deny the importance of feminist interventions in the law contained within the *Review*. Ann Riseley in 1981 explored the history of the award of *consortium* to husbands where their wives suffered a tortious injury, and the application of this principle in an age in which feminists were demanding recognition of the value of women’s housework.\(^{43}\) The potential use of the partial defence of provocation to murder, by women experiencing domestic violence, was considered in the *Review* in 1989;\(^{44}\) this is one of various aspects of provocation that has continued to be considered, including by the South Australian Law Reform Institute, also based at the University of Adelaide.\(^{45}\)

In 1995, the *Review* published a special issue to commemorate the centenary of women’s suffrage in South Australia.\(^{46}\) Articles in this edition considered gender bias in citizenship relating to the ability of women to commence civil actions\(^ {47}\) and the accessibility of alternative dispute resolution to women.\(^ {48}\) More recently, articles in the *Review* have questioned the law’s treatment of neurodivergent women in equity, specifically in cases of unconscionability\(^ {49}\) and examined the issue of gender inequality within New Zealand university hierarchies.\(^ {50}\) This turn to equality within the *Review* is made possible by the ever increasing number of women in the legal profession, and serves only to benefit the diversity and quality of the *Review*’s


\(^{50}\) Amanda Reilly, ‘Voice and Gender Inequality in New Zealand Universities’ (2013) 34(1) *Adelaide Law Review* 81.
publications. Promoting further diversity in the law, in both legal scholarship and the profession as a whole, should continue to be encouraged.

B Indigenous Australians and the Law

A year after the Review celebrated the grant of suffrage to women in South Australia with its special issue, Stella Tarrant reminded readers that, for some Aboriginal women across Australia, the right to vote was not guaranteed until 1962. Thus, the intersections between these once ignored identities can be seen. The articles by Andrea Mason and Irene Watson in this special issue of the Review provide an important perspective in this regard, in that the law not only impacts women differently, but impacts different women differently. This may seem obvious now, but it is only through these diverse contributions that we begin to see the law beyond the black letter.

Throughout its history, the Review has witnessed a number of significant Australian legal milestones. The historic result of the 1967 referendum shifted the power to make laws with regard to Aboriginal Peoples into the Commonwealth Parliament’s hands. Yet at the time, this was not mentioned in the Review. In 1997, the legal issues arising from this examined by John Williams and John Bradsen in an article published in anticipation of the High Court’s decision in Kartinyeri v Commonwealth. Williams and Bradsen concluded that

\[\text{[t]he status of being an outsider, in the constitutional sense, for Aboriginal Australians was overcome in 1967. It would be a perversion of the hopes and aspirations of the people of Australia if thirty years later we celebrated their contribution to our constitutional history by suggesting that s 51(xxvi) is a means by which yet another round of dispossession may be visited upon Australia’s indigenous people.}\]

The continuing impact of the referendum, and decisions like Kartinyeri, remain pertinent in the push for constitutional change. The Uluru Statement From the Heart puts it explicitly: ‘In 1967 we were counted, in 2017 we seek to be heard.’

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51 Stella Tarrant, ‘The Woman Suffrage Movements in the United States and Australia: Concepts of Suffrage, Citizenship and Race’ (1996) 18(1) Adelaide Law Review 47, 47. Tarrant goes on to note that, in South Australian elections at least, Aboriginal women were not excluded from the right to vote: at 72.


53 (1998) 195 CLR 337 (‘Kartinyeri’).

54 Williams and Bradsen (n 52) 140.

With the passage of time, the issues facing Indigenous Peoples in the law gained greater prominence, both in society as a whole, and in the pages of the Review. In 1977, Stephen Lendrum drew attention to South Australia’s colonial history and the Coorong Massacre. This history is revisited by Irene Watson in this special issue of the Review, demonstrating the ongoing impact of these events on legal thought today.

Perhaps the most significant, and certainly one of the most famous, changes to strike the Australian legal landscape was the decision in Mabo v Queensland (No 2) where the High Court swept aside the historical doctrine of terra nullius. Mabo led to the passage of the Native Title Act 1993 (Cth), which would not have been possible without the success of the 1967 referendum. Shortly after the decision was handed down, the Review published a book review of Mabo: A Judicial Revolution, agreeing with the conclusion that the case ‘raises just as many questions as it answers’. One pertinent finding addressed in the Review is the idea that Mabo demonstrates a shift in Australian law from the domestic towards the international; ‘greater reliance being placed upon African, Indian, Canadian and New Zealand jurisprudence to reach legal conclusions’. Is it coincidence that it took an inward look at the foundations of our Australian nation for legal scholars to look outward and recognise the importance of diversity? The turn to the international within the Review coincides with a greater willingness to use a wider range of authority to modernise the common law.

Native title was but one Indigenous legal issue on the minds of the Review’s authors at this time. The disadvantages faced by Aboriginal and Torres Strait Islander Peoples in their interactions with the criminal law system were, and continue to be, a challenging issue. In 1998 the impact of one seemingly mundane, procedural element of this system — the decision to adjourn a trial — on Aboriginal youth was considered. Three years later, Christopher Charles analysed the sentencing of Aboriginal offenders in the Supreme Court of South Australia, concerned that outdated, offensive stereotypes such as that of the ‘noble savage’ were continuing to play a role in sentencing considerations. So long as the damning truth of Indigenous over-representation within the criminal justice system remains, these issues will continue to be of relevance. This issue is insightfully explored in Justice Martin Hinton’s contribution to this special issue of the Review.

57 (1992) 175 CLR 1 (‘Mabo’).
59 Ibid 298.
The experiences of Indigenous law students have been considered in the *Review* twice, 15 years apart. In 1998, Heather Douglas was concerned that the growing number of Indigenous law students was not translating into an equally high number of graduates, because of disproportionately high failure rates.62 Her article highlighted common reasons Indigenous students identify as to why they chose to study law; for many, the promise of helping their own and other diverse communities stands out.63 In 2014, the topic was revisited by Peter Devonshire.64 From his article, it becomes apparent that the barriers to legal education for Indigenous students remain significant, not just because of socio-economic reasons, but also as a result of the continuing ‘tension between Indigenous knowledge systems and Western intellectual tradition’.65 While the *Review* has been a valuable tool for showing how far we have come, articles like Devonshire’s emphasise the challenges that remain in ensuring equal access to the law.

C Queering the Review

Turning now to another milestone in the law, South Australia was seen to be at the vanguard of progressivism when, in 1975, it decriminalised sexual acts between consenting men. Yet again, this reform did not rate a mention in the pages of the *Review*. It was not until the 1990s, when Tasmania held steadfast in refusing decriminalisation, that the issue came to the forefront. The story of Nicholas Toonen’s complaint to the Human Rights Committee about the Tasmanian law, on the basis that it infringed the right to privacy under the *International Covenant on Civil and Political Rights*,66 is now well-documented.67 In the aftermath of the decision, George Selvanara took to the *Review* to question the consequences of relying on the right to privacy to overturn this law.68 Selvanara argued that basing the case on such an analysis left the door open for the Human Rights Committee to consider homosexuality through a lens of ‘public health and morals’; not allowing it to take a stance in relation to the real crux of the issue: discrimination.69

63 Ibid 317.
65 Ibid 314.
69 Ibid 337.
As with the public discourse, the conversation on queer issues shifted over time to focus on the question of marriage equality. While one may think this is a recent concern, in her 1981 article on housework and *consortium*, Riesely mused that ‘unless women marry themselves to wives in the future’ the issue would remain.70 ‘No tautology intended by this statement’ she added in footnotes.71 Thirty-six years later, this was to become a reality, although it remains to be seen whether the acceptance of lesbians’ right to marry will be enough to fix the persisting problem of women’s housework being undervalued.

The question of ‘gay wedding cakes’ and the response of anti-discrimination law to the homophobic pastry chef was considered by Liam Elphick in 2017.72 With marriage equality becoming a reality only months after the article’s publication, the issue is indeed a pointed one. And, as the author concludes, the question of religious exemptions to discrimination laws is certainly not one that is going away any time soon.73 A favourite of the Review, Michael Kirby, wrote on the topic of marriage equality in 2013 — demonstrating the length of the fight for this cornerstone of legal equality.74 Kirby’s own piece in this special issue makes it clear that marriage equality is not the end of these issues for the queer community. Indeed, the intersections between sexuality, gender identity and anti-discrimination law are likely to remain pertinent within the legal discourse for a while yet.

While issues of sexuality have in recent times been embraced by the Review, the experiences of gender diverse individuals have been comparatively neglected. A search for ‘gender identity’ in the Review’s archives would produce only two articles specifically about the transgender community — Theodore Bennett’s critique of the laws regarding sex identification,75 and a book review of Andrew Sharpe’s *Transgender Jurisprudence: Dysphoric Bodies of Law*.76 Following the passage of marriage equality laws, transgender individuals and particularly children have found themselves facing the brunt of reactionary pushbacks to the queer community as a whole. This has particularly been the case with regard to the ‘Safe Schools’ program which was heavily and dishonestly criticised in the press for promoting ‘gender

70 Riseley (n 43) 448.
71 Ibid 448, n 176.
73 Ibid 193.
fluidity’ to school children. While the legal issues raised in this area may be seen by many as complex, the Review offers an opportunity to explore these questions and give greater prominence to the experiences of gender diverse people within the law, as it has done for the queer community as a whole.

D Into the Future

In each of these case studies, the development of the relationship between the law and a disadvantaged and marginalised group — be it women, Indigenous Australians, or the queer community — can be traced through the pages of the Review. This development in the scholarship of the Review certainly does not seem likely to slow down. With the renewed push for constitutional change through the Uluru Statement From The Heart, the response of the law to social movements will likely continue to be of utmost relevance. One hopes that, in another 40 volumes, current instances of discrimination can be seen only in older editions of the Review, as an historical quirk of a bygone era; viewed with the same amusement that the idea of a ‘[f]lowers and [d]ecorations’ committee for a law conference is today.

IV Conclusion

Like any publication, the Adelaide Law Review took time to find its feet. This is not to criticise the early scholars of the Review — many of whom went on to make significant further contributions to the Review and to Australian legal scholarship as a whole throughout their careers. But with the passage of time over the past 40 volumes, the Review has certainly found a bolder editorial voice.

Just as the contours of the natural environment are altered with the passage of time, so too are the contours of the Review. The means by which these contours are shaped have increased in their diversity over 40 volumes, as the monopoly of the law’s doctrinal analysis has given way to a more critical, prescriptive or interdisciplinary focus, often with a view to law reform. Forces of globalisation are also reflected in the pages of the Review, which has abandoned its early Commonwealth-centric focus to become a truly global academic citizen. It is through these changes, in method and jurisdictional focus, that the Review has ensured its longevity, and will continue to do so for decades to come.

The back issues of the Review are also an enlightening resource when tracking the social developments of both South Australia and the nation as a whole. An analysis of the scholarship in three areas: women and feminist thought; Indigenous legal issues; and the emergence of the queer rights movement, demonstrate how far our society has progressed since volume one. It is fitting that the first issue of the Review was published in 1960, at the beginning of what has come to be seen as an era of much social change and progressivism. The growing prominence of articles questioning

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the law’s relationship with these marginalised groups is an important development in making the Review accessible to the widest audience possible.

As this issue goes to print, further changes are sweeping across society. This is particularly apparent with the advent of the digital age. When first published, one might have thought it more likely that pigs would fly than that the Review could be read on computers or even phones. Having traced the history of the Review, and the way it has already adapted to so much change, we have no doubt that it will not only continue to change, but also to prosper and thrive. As Student Editors at the beginning of our legal careers, we look forward to seeing where the scholarship of the Review goes over its next 40 volumes and beyond.
Anthony Moore*

REFLECTIONS ON PUBLISHING
THE ADELAIDE LAW REVIEW

For many centuries law libraries and persons such as judges, legal practitioners, academics and law students have relied on published material. The earliest of this material includes statutes and accounts of cases dating back to at least the 13th century, as well as commentaries — such as Sir William Holdsworth’s A History of English Law1 — attempting to review legal principles in general or in a specific area such as the law of contract. The existence of this material has helped to establish the doctrine of precedent, whereby current principles of law are based on previous decisions. The printing of books or collections of material is a huge advance in this process. A similar reliance on printed material emerged in university law schools, promoting the analysis of legal principles and their philosophical or moral base. In the United States, eminent law schools published law journals or reviews for this analysis as it related to particular decisions, statutes or current issues. In Australia, the older law schools began to publish their own law reviews in the second half of the 20th century. The practice was readily adopted by newer schools.

This history is important because it provides the background to the structure of law review publishing. Committees, largely comprising outstanding students at the law school involved, were formed to manage publication. Membership of the committee was recognition of a student’s academic achievement at the school. Academic staff performed a supportive role on these committees. The content of the reviews was commonly in three parts: articles, case notes and book reviews. Whilst students carried out administrative roles in relation to all three parts, their creative contributions were more in the writing of case notes. Submission of articles for publication was a matter for the initiative of individual academics or legal practitioners. In general, the reviews did not adopt a specialisation in any area of law or by geographical connection to their home.

My time on the Publishing Committee for the Adelaide Law Review marked a significant change in its organisation. During my first Committee membership period from 1977 to 1981, the Review remained in the traditional framework but, during my second period from 1985 to 1994, it became a means by which to promote the Law School’s research. At this time, I held the position of Associate Dean (Research) at the Law School, and encouraging academic staff to publish was seen as important for assisting research work. I have outlined the role of law reviews in advancing legal analysis, but the concentration on staff performance was something different. The

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Review was supplemented by other publications, particularly An Annual Survey of Australian Law published by the Adelaide Law Review Association for several years, which involved analysis of developments in the law, first in the year 1991 and then annually.2

I have described the process of recording material as important for the concept of precedent in Anglo-Australian law, and the development of printing as advancing that process. The period of the late 20th century was one in which publication of printed material had unique advantages. Printing processes were cheaper and quicker than in previous times but, within a short period, the printed word lost many of its advantages, and this loss applied to law reviews as much as the daily press. In fact, the advantages of publication to assist promotion of research were largely overtaken by advances in technology and the ability to convey information and ideas electronically.

In this comment I have concentrated on the role of publication in assisting the use of precedent, and of law reviews in promoting legal research. But there have been lighter sides to my involvement with the Review. I have mentioned the Publishing Committee and, in the period of 1985 to 1994, the Committee met regularly, at least once per month. Committees are a bane of modern academic life and they have the weakness of irregular meeting times and memberships. The regular meeting of a common group of students and staff produced a common goodwill and opportunities for interaction on a lighter plane. In fact, I still remember being an undergraduate Review Committee member chatting with senior members of the academic staff after a substantial dinner and gaining some insight into academic values and approach to life. I cannot however be as positive about another aspect of the Review. The covers of the Review have been varied, and at times seemed to be designed to indicate the truth of the old saying that ‘the law is an ass’.

At 8:45am on Tuesday 3 April 1883, the University of Adelaide’s first law students made their way to the first floor of the Mitchell Building to begin their Bachelor of Laws degree.¹

The establishment of the Adelaide Law School 135 years ago makes it the second oldest in the country — after the University of Melbourne and seven years before the University of Sydney. It was early South Australian pioneering at its best, in many ways a bold and innovative decision. Before then, aspiring lawyers served a five-year apprenticeship with a legal practitioner, with examinations in a small core of legal subjects.

Although there were plenty of firm adherents to the traditional view that universities were not appropriate places for the study of the common law, the Chief Justice at the time, Sir Samuel Way, and others believed that the broader educational experiences offered at universities were necessary for proper training in practising law. Sir Samuel Way was obviously not completely impartial. In addition to his position as Chief Justice, he was also the University’s Vice-Chancellor from 1876 to 1883, and then Chancellor from 1883 until 1916.

The formation of the Adelaide Law School was something of a miracle in modern university terms.

From the time of the agreement of the Supreme Court of South Australia and the University Council on the structure of the degree in late 1882, teaching was already underway in April 1883. It took just four months to appoint the lecturers, design and approve the curriculum, set the timetables, make purchases for the law library, and enrol the students. Today’s universities have much to aspire to.

Ever since those early days, the Adelaide Law School has been closely entwined with the legal profession in South Australia, and with the State of South Australia.

¹ See also Paul Babie, ‘125 Years of Legal Education in South Australia’ (2010) 31(2) Adelaide Law Review 107. Paul Babie — Professor of Adelaide Law School, Associate Dean of Law (International), Associate Dean of Law (Research), and Director of the Law and Religion Research Project for the University of Adelaide Research Unit for the Study of Society, Ethics and Law — presents a stimulating discussion on the Adelaide Law School’s history in the 125th Anniversary Special Issue of the Review.
Teaching in the early decades was heavily dependent on the local profession. Until 1950 there was only one full-time academic on the roll. The first full-time University-appointed lecturer, Walter Philips, did not arrive in that first year until September, nearly six months after the course had started. And on five occasions in the early decades, the teaching was completely in the hands of the legal profession with no academics in place at all. One of the early great names in the profession led by example. In 1891, Sir George Murray, as he later became, was just establishing his practice in Adelaide. He generously agreed to teach six subjects and examine in eight. Sir George Murray went on to become South Australia’s fourth Chief Justice and the Chancellor of the University, holding both offices from 1916 to 1942.

It is quite remarkable that for 88 of the 100 years between 1883 and 1983, the University’s Chancellor was also the serving Chief Justice: Sir Samuel Way from 1883 to 1916, Sir George Murray from 1916 to 1942, Sir Thomas John Mellis Napier from 1948 to 1961, and the legendary Dr John Jefferson Bray from 1968 to 1983.

The foundations of the Law School were built on early pioneers who believed that lawyers should have more than just practical expertise. In the words of the late Sir Robert Menzies, they believed a law school should exist not only to teach municipal law, but to ‘lay a foundation upon which can be based a true conception of jurisprudence as a social force’. That is the spirit that has been at the heart of the foundation, vision and development of the Adelaide Law School.

Assessing the Law School’s impact over the years reveals a spectacular measure of success.

More than 90% of South Australian judges and Adelaide-based Federal and Family Court judges have been Adelaide Law School graduates. Eighty-four percent of the sitting judges in South Australia are Adelaide graduates, and then there are interstate and overseas judges. Examples from the international judiciary include James Crawford, a current member of the International Court of Justice; and Ivan Shearer, who has represented Australia on the United Nations Human Rights Committee and as a member of the Permanent Court of Arbitration.

Within South Australia, the Law School has produced the last five Chief Justices, including the current Chief Justice. Before those five was Sir George Murray, who trained in the years before the Law School was established. All of South Australia’s Chief Justices who could have been trained at Adelaide Law School were trained there.

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3 Alex Castles, Andrew Ligertwood and Peter Kelly, Law on North Terrace (Faculty of Law, University of Adelaide, 1983) 9.
The five Chief Justices also include John Doyle, Chief Justice from 1995 to 2012. The Doyle family is one of those magnificent South Australian families with many connections to the University of Adelaide. Four out of five of John and Marie Doyle’s children graduated from Adelaide Law School. Marie, herself, completed her Diploma in Social Studies at the University.

Among other Law School alumni are Premiers Henry Barwell, Don Dunstan, John Bannon and Jay Weatherill; Australia’s only female Prime Minister, Julia Gillard; and numerous federal and state ministers.

As with so much in South Australia and this University, the Law School has also led the way for women in the legal profession: it was the first law school in Australia to admit women, right from the founding date of the school. The great Dame Roma Mitchell graduated in 1934 and went on to become Australia’s first female Queen’s Counsel, first female Supreme Court judge, founding chair of the Australian Human Rights Commission, first female Chancellor of the University, and Governor of South Australia. She is one of three University of Adelaide graduates who have led the Human Rights Commission — Catherine Branson and John von Doussa (another Chancellor of the University) being the other two.

Another prominent female graduate is Margaret Nyland, the second woman to be appointed to the Supreme Court of South Australia, after Dame Roma Mitchell. Margaret Nyland’s stellar career includes being the inaugural Chairperson of the Commonwealth Social Security Appeals Tribunal (for South Australia), Chair of the South Australian Sex Discrimination Board, and most recently Commissioner of the South Australian Child Protection Systems Royal Commission. She is also the first female club chairman in the South Australian National Football League’s 140-year history, taking the position at South Adelaide Football Club in 2017. At the University, her family law lecturer was Dame Roma Mitchell — a pertinent example of how great universities transcend generations.

The University of Adelaide has looked for a way of showcasing its history and future through its campus infrastructure. The campus banners have been changed, with new ones that speak of the people of the University of Adelaide. The banners represent both the University’s legacy and future, portraying famous alumni alongside future students. The series of banners is called ‘Making History’.

Last year, Vickie Chapman, another University of Adelaide graduate, became South Australia’s first female Attorney-General and the first female Deputy Premier of the State. Vickie Chapman’s banner now sits outside the Law School, between a banner featuring Julia Gillard and a banner featuring Dame Roma Mitchell. Vickie was invited to a special congratulatory event at the Law School and presented with a copy of the banner, in recognition of the University’s pride in her achievements. The

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University is making history in real time. Vickie Chapman’s banner between Julia Gillard and Dame Roma Mitchell says much about the impact of the Law School on the profession, on the University, on South Australia, on the country, and on women in general.

The Law School does not just produce lawyers. The Law School has had a very significant impact on the development of law within South Australia. Arthur Rogerson came from Oxford in 1963 as Professor of Law. He led a committee which included two young staff members, Michael Trebilcock and Michael Detmold, who recommended reforms to consumer law. The state government took up the report, and the *Consumer Transactions Act 1972* (SA) was a pioneering piece of reform, ahead of anything else at that time in Australia and the United Kingdom.

Arthur Rogerson negotiated with the Attorney-General of the time for a member of the Law School to be included on the new state Law Reform Committee — those being over the years David St Leger Kelly, John Keeler and Andrew Ligertwood. These law academics were instrumental in bringing about many changes to the law including the State’s first organ donations Act.\(^5\) David Kelly and Alex Castles were founding members of the Australian Law Reform Commission when it was established in the early 1970s and had a particular influence on reforms to Commonwealth defamation and insurance law.

Law School members also worked over the years on committees looking at criminal law reform. Today, the Law School houses the South Australian Law Reform Institute (‘SALRI’) under the leadership of John Williams and David Plater. Established in December 2010, the SALRI has made major contributions to law reform in South Australia, mainly in the area of LGBTIQ discrimination through a series of reports,\(^6\) which have been largely accepted by the state government.

\(^5\) *Transplantation and Anatomy Act 1983* (SA).

Just before the Law School’s 135th anniversary dinner, the SALRI released its report on surrogacy.\textsuperscript{7} It is an example of an international trend that is seeing aspects of legislative and policy change being outsourced from bureaucracies to universities. In this way, the University of Adelaide is helping to craft the social future of South Australia.\textsuperscript{8} In conjunction, students also gain invaluable experience. The work of the SALRI is supported and informed by a law reform class of final-year law students.

Amongst the Law School’s graduates are those who have influenced the law beyond our shores. Bill Cornish, who the University presented with an honorary doctorate last year, is a pioneer of intellectual property law. John Finnis, the jurisprudence specialist and legal theorist, is another honorary doctorate recipient.

Today, Adelaide Law School has built on 135 years of illustrious history to become a law school that is ranked in the top 100 law schools globally;\textsuperscript{9} a national leader in areas like insolvency, taxation, labour, and constitutional law.

It has an illustrious past, and it has had a global impact. But the Law School, like the University generally, has an eye firmly on the future. It continues to innovate and push boundaries in legal education and research, expanding its expertise and curriculum into the developing field of space law.

The Adelaide Law School is playing a significant role in the development of international law for military uses of outer space. Professor Melissa de Zwart and Professor Dale Stephens are world leaders in this field and among the founders of the Woomera Manual,\textsuperscript{10} working with collaborators in the United Kingdom and the United States to understand how terrestrial laws will be applied in times of armed conflict in outer space.

There is no simple way to measure the impact the Law School has had. But its proud record can be seen through different lenses and different groups of the University; local, national, global, young, old, history, future.


\textsuperscript{8} One key aspect of SALRI’s success in formulating effective reform has been its emphasis on community-based, consultative law reform initiatives. See generally: Sarah Moulds, ‘Community Engagement in the Age of Modern Law Reform: Perspectives From Adelaide’ (2017) 38(2) \textit{Adelaide Law Review} 441.


There is no doubt there is a real energy about the Law School. Groups of students can be found in the corridors talking excitedly about the classes they have attended. Staff are thoughtful, committed, and enthused by the quality of the students. They are outstanding staff, and they make up a wonderful Law School.

At its anniversary dinner, the Law School came together to celebrate 135 years of history — but in the spirit of the future, which the School will continue to contribute to for generations to come.

The University recognises it has a special role to play in the transformation of society and the future of South Australia. It will continue to produce the graduates that are needed and, through its research programmes, innovate in a way that will give rise to new industries and jobs needed to keep people in the State. Its research and education will bring ideas, wisdom and knowledge from outside the State into the community, for the benefit of all.

The Adelaide Law School will play a significant part in that process and looks forward to working with the State for a brighter future for all of us.
I Introduction

Academic journals chronicle not just the emergence of ideas, but also the historical context of their development. The first tentative exploration of the discipline, the rise and fall of doctrine, and the inevitable reassessment of existing truths are all made manifest in the pages of the journal.

The Adelaide Law Review, first published in 1960, provides something of an intellectual ‘archaeological dig’ for those interested in the history of Australian jurisprudence. What topics and areas commanded the attention of scholars is arguably as enlightening as what was written on them. Extending this theme, the absences and omissions in one generation often provide the urgency or catalyst for the next. Gaps, oversights or presumptions are examined and filled with the passage of the years.

This article will primarily explore the development of Australian constitutional law through the 39 previous volumes of the Review. Conceived in its broadest sense, constitutional law incorporates both the historical understanding of the people and their ambition for the institutions of state. As will be evident from what follows, the Review not only kept a watching brief of the technical developments of the law in this area, but also provided a valuable forum for discussion of Australian legal history and public law in general.

As with most journals, a balance is to be observed between scholarship that made sense of the discipline, and those who pushed forward the boundaries of knowledge.

II The Beginning

The 1960s was a period of transition in Australia. The stayed austerity of the 1950s gave way to the optimism of greater economic prosperity. This state of affairs was tempered by the reality of the Cold War and associated tensions in international affairs. On 1 January 1960, The Canberra Times editorialised:
There is good reason, for instance, to believe that real peace may replace the formulas that have passed for peace since the end of World War II. But, whether the goal is peace, achievement in the betterment of mankind through the conquest of disease, the banishment of hunger, or the equitable distribution of the bounties of the world, none is capable of being realised merely by wishing or hoping, but all depend on striving incessantly and behaving equitably.¹

At the University of Adelaide, the campus awoke to the new decade with a mixture of practiced orthodoxy and glimpses of the questioning of the existing social order that would soon come of age. The pages of the student magazine, *On Dit*, recorded an undergraduate life that revolved around academic, social and sporting activities, as well as the increasing political inquiries of the period. In 1960 the magazine kept a steady coverage of the case of Professor Sydney Orr, the University of Tasmania philosophy academic who was dismissed in 1956 for seducing an undergraduate student.² His cause, and the question of academic freedom, was closely covered during the year.³

Strikingly, the magazine had a lively coverage of the various religious groups, missions and fellowships on campus. Living up to its reputation as a ‘city of churches’, *On Dit* reported in its column ‘Church Unity’ on the Aquinas Society, the Seventh Day Adventist Students’ Society, and the ‘Evangelical Union Fanatics!’⁴ John Finnis, the Honorary Secretary of the Student Representative Council, was prompted to write an article entitled ‘Religion in Politics’ for the April 1960 edition. In it he concluded that

> politics is better without the passion of religious dispute, and I think the Churches have done society and themselves a service by whatever retreat they may have made from the bad old days when politicians were churchmen and churchmen were politicians.⁵

Student politics were also given a platform by *On Dit*. The deplorable events of the Sharpeville massacre in South Africa on 21 March 1960 were the catalyst for a protest meeting in the Union Hall, and the condemnation of the apartheid regime.

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The first motion passed at the meeting was subsequently transmitted to the South African High Commissioner in Australia.6

In April 1960, the Adelaide University Labor Club welcomed freshers with an address by the 34 year old backbencher Don Dunstan. According to the report:

Mr Dunstan in his brilliant style pointed out the manifold deficiencies of the Playford dictatorship whose philosophy is expressed in the motto of the AU Liberal Union — ‘God Bless the Empire’ and ‘Dog is Man’s Best Friend’.7

The year ended with a call to arms as the magazine uncovered a motion to the University Council, resulting in the front-page headline ‘Student Parking Ban in 1961’?8

In its first three years, the *Adelaide Law Review*’s editorial board was an outstanding group of scholars and students. Many of the latter would go on to carve out significant careers within the academy or judiciary. In 1960 the *Review* was edited by WR (Bill) Cornish, with Graham Clifton Prior as his Assistant. Bruce Debelle was the Book Review Editor, and other notable members included David St Leger Kelly, Sandford D Clark and John Finnis. The Faculty Advisors were Norval Morris, Alex Castles and Howard Zelling.

In 1961 and 1962, the editorial board saw the addition of new members including David Bleby, Michael Harris, Michael Detmold and John von Doussa. All would become leading lights in the academy or the judiciary.

III The Review Throughout the Decades

Tracing the fortunes of constitutional law through the decades of the *Review* serves to highlight the relative state of the discipline and its trends. It is valuable not to limit the investigation solely to matters associated with the Constitution, but to cast its vision wider to note the emerging scholarship and history of public law.

A 1960s

Not surprisingly, the first article touching on constitutional law in the 1960 issue of the *Review* related to s 92 of the Constitution. In the decades before *Cole v Whitfield*9 the elusive meaning of this section was a staple of the High Court’s docket. The case

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note, entitled ‘Section 92: What is Essential to Interstate Trade and Commerce’,\(^\text{10}\) outlined the recent High Court cases and the Supreme Court of South Australia’s application of the law in *Fry v Russo*.\(^\text{11}\) The following year, the *Review* would continue its quest to make sense of the section with a case note on the next Supreme Court application in *Schwerdt v Telford*.\(^\text{12}\)

The 1960s witnessed a number of emerging themes within the general scholarship. In 1961, the *Review* published an article by Enid Campbell entitled ‘Women and the Exercise of Public Functions’. Her survey soberly concluded that ‘[t]aken as a whole, the Australian legislation surveyed here reveals little in the way of a consistent and even pattern towards female emancipation’.\(^\text{13}\) Campbell and Harry Whitmore’s *Freedom in Australia*\(^\text{14}\) would be reviewed in the pages of the journal by Dame Roma Mitchell. Deftly resisting the temptation to drift into political controversy, the review praised the utility of the book.\(^\text{15}\)

John Finnis would commence his own body of work with two lengthy pieces on jurisprudence and the separation of powers in Australia.\(^\text{16}\) The latter questioned in careful tones the historical and logical conclusions of the High Court in *R v Kirby; Ex parte Boilermakers’ Society of Australia*.\(^\text{17}\) Another significant contribution to South Australian constitutional law was the 1968 article by Michael Harris and James Crawford on the ramifications of that year’s South Australian election, which resulted in a hung parliament.\(^\text{18}\) The authors outlined the subsequent legal and political manoeuvring, and the central role of the Governor in such situations. It remains an article that is consulted as history in this area tends to repeat itself.

The distinctive and emerging study of Australian legal history debuted in the *Review* in the early 1960s. Alex Castles, who would go on to become the leader of the

\(^{10}\) Case Note, ‘Section 92: What is Essential to Interstate Trade and Commerce’ (1960) 1(1) *Adelaide Law Review* 78.

\(^{11}\) [1958] SASR 212.


\(^{13}\) Enid Campbell, ‘Women and the Exercise of Public Functions’ (1961) 1(2) *Adelaide Law Review* 190, 204.


\(^{17}\) (1956) 94 CLR 254.

discipline, wrote his first major work on the adoption of English law in Australia.\(^{19}\) In 1963, Castles was yet to unfold his significant critique of colonial exceptionalism and the legal status of Aboriginal Australians — that would come in time.\(^{20}\)

Perhaps the work that best captured the difficult role of the law in provincial Adelaide was DP Derham’s review of KS Inglis’ *The Stuart Case*,\(^{21}\) which uncomfortably surmised what many in Adelaide’s legal and political circles would know. That is, that the episode pitted an accused Aboriginal man against the might of the establishment. As Derham concluded:

> It may be that in the very long run it is a good thing that quiet and settled communities like that of Adelaide should be disturbed from time to time in their basic structures, as Adelaide’s was by the Stuart case; but such disturbances leave scars nonetheless.\(^{22}\)

**B 1970s**

The 1970s ushered in an expansive period for the Commonwealth’s legislative power, as the Whitlam Labor Government tested some of the perceived limits of the *Constitution*. However, judging by the volume of publications on constitutional matters, the *Review* was largely unaffected by these developments. The little consideration that was given appeared in the form of case notes or comment pieces. RJ (Dick) Whitington, MR Magarey and Kathleen McEvoy addressed issues as diverse as the act of state doctrine,\(^{23}\) the concept of an ‘excise’ in s 90 of the *Constitution*,\(^{24}\) and what constitutes a ‘place acquired by the Commonwealth for public purposes’ under s 52(i).\(^{25}\)

Similarly, the matter of what constituted ‘Australian territorial waters’ and their limits prompted DP O’Connell, the eminent international lawyer, to consider the High Court’s decision in *Bonser v La Macchia*.\(^{26}\) Drawing on the same case, Michael


\(^{20}\) Alex C Castles, *An Australian Legal History* (Law Book Co, 1982).


Detmold considered the federalist tension between the Commonwealth and the states, and addressed the jurisprudential definition of sovereignty.\textsuperscript{27}

There were a number of prescient articles published during the decade. Campbell’s survey of ‘appropriation’ in the Constitution would be recalled for decades.\textsuperscript{28} A comprehensive paper, it mirrored many of the questions that the High Court would consider four years later in the AAP case.\textsuperscript{29}

Castles, again through the lens of legal history, addressed the development of a contemporary concept of which ‘political questions’ could and should be avoided by the judiciary.\textsuperscript{30}

A brief article by David St Leger Kelly is also noteworthy for its early acknowledgement of the work of the South Australian Law Reform Committee.\textsuperscript{31} The Committee, led by Justice Zelling, played an important role in developing South Australia’s reputation for progressive law reform during the 1960s and 1970s.

**C 1980s**

Constitutional matters did not feature heavily in the Review during the 1980s. However, there were some important articles published during the decade.

The impact of the Whitlam Government on the polity and constitutional arrangements were slowly being considered by authors. In 1980, James Crawford reflected upon the 1977 constitutional amendment relating to casual vacancies in the Senate.\textsuperscript{32} Having provided a background to reform at the Commonwealth level, Crawford investigated the role of state parliaments in filling casual vacancies. Of particular interest was the demise of the Liberal Movement, the appointment of Janine Haines to the Senate casual vacancy in 1977, and the associated obligations of the South Australian Parliament. This would not remain an idiosyncratic or isolated issue. The question of who should take up a vacancy when a party has changed its character became relevant in 2018 when Tim Storer was elected to the Senate in the wake of the s 44 cases.\textsuperscript{33}


\textsuperscript{29} Victoria v Commonwealth (1975) 134 CLR 338 (‘AAP’).


\textsuperscript{33} Re Kakoschke-Moore (2018) 352 ALR 579.
Two contributions directly related to the dismissal of the Whitlam Government in 1975 were Crawford’s review of LJM Cooray’s *Conventions, The Australian Constitution and Future* and SJ Gibbs’ review of Sir Garfield Barwick’s *Sir John Did his Duty*. Crawford accepted Cooray’s view that there was a crisis in the interpretation of the conventions related to the role of the Governor-General. Crawford left open the solution. Gibbs was less restrained and dismissed Barwick’s defence of Sir John Kerr as a ‘disappointment’.

Articles that considered emerging constitutional questions included Jeffrey Goldsworthy’s review of s 109 of the Constitution. The High Court’s decision in *Ansett Transport Industries (Operations) Pty Ltd v Wardley* was the backdrop for Goldsworthy’s impressive outline of developments in the area. Another article was Peter Hanks’ account of s 90, published at a critical moment in the development of the relevant jurisprudence. Hanks noted clearly the tension between an economic union and fiscal federalism. The case law surrounding s 90, and what constitutes an ‘excise’, was in a state of flux. Hanks’ recourse to the history of the section would be significant when the High Court considered the issue in the late 1990s.

One of the most important articles published during the decade relating to the history of the High Court was Clem Lloyd’s account of its internal politics during the Chief Justiceship of Sir John Latham. This exquisitely researched article uncovered the role that the former Chief Justice attempted to play as an advisor to government.

**D 1990s**

In 1987, Sir Anthony Mason became the Chief Justice of Australia. He would hold that commission until his retirement in 1995. The ‘Mason Court’, comprised of an array of outstanding jurists, was a catalyst for innovation and renovation in many areas of Australian law. Constitutional law was no exception.

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36 Gibb (n 35) 426.


The Review in the 1990s reflected this influence with a number of major publications on constitutional law. Reaction to the Court’s emerging jurisprudence in areas of express and implied rights was well covered. For instance, Genevieve Ebbeck considered the Court’s decision in *Street v Queensland Bar Association; Re Robertson*. The increasing importance of the external affairs power was reviewed in detail by Donald Rothwell, in light of significant developments. The race power was also the subject of renewed interest.

The theme of state constitutional law and the role of the Governor was again in focus as Alex Castles critiqued the 1989 Tasmanian election and the hung parliament that followed.

To mark the centenary of the *Constitution Amendment Act 1894 (SA)* and female suffrage in South Australia, the Review published a special issue in 1995. Deborah Cass and Kim Rubenstein contributed a wide-ranging article on the role of women in the Australian constitutional system.

In 1998 the Review published a special issue on constitutional law. Entitled ‘Critical Perspectives on Australian Constitutional Law’, volume 20(1) received contributions from the nation’s leading public law scholars. Amongst the authors were Cheryl Saunders, Michael Coper, Penelope Pether, Natalie Stoljar, Sir Anthony Mason, Hilary Charlesworth, Deborah Cass, Leslie Zines, Bradley Selway, Dennis Rose, Geoffrey Lindell, Anne Twomey, Rosemary Owens, Geoffrey Kennett, and Justice Susan Kenny. Topics included the High Court, interpretative methods, the influence of international law, representative democracy and interveners in constitutional litigation.

As the century drew to an end, the Review changed in format and substance. Longer and more detailed expositions of the law were now commonplace. Constitutional law, back in fashion, was influenced by theoretical and comparative discussions.

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E 2000s

The 2000s would see the continuing rise of constitutional scholarship within the volumes of the *Review*. As with previous decades, there were both in-depth dissections of recent High Court decisions and systematic reviews of the jurisprudence to provide clarity or to distil trends.

On a number of occasions throughout the 2000s, the *Review* gave itself over to special editions celebrating the work of leading constitutional scholars. For instance, in 2004 it paid tribute to Adelaide alumnus Professor Geoffrey Lindell. Leading scholars such as Leslie Zines, George Winterton, Adrienne Stone, Graeme Hill, Simon Evans and John Uhr explored Professor Lindell’s contribution to many of the foundational questions of Australian constitutional law.

Three years later, in 2007, volume 28 was assembled in sadness to commemorate the life, and contribution to the law, of the late Justice Bradley Selway. Many of the contributions were from former Solicitors-General such as John Doyle, Chris Kourakis, Tom Pauling, David Bennett and Pamela Tate. They were joined by Robert French, AJ Brown, Melissa Perry, Ben Wickham, Helen Irving, Brian Galligan and Emma Larking in paying tribute to Justice Selway. The theme of the collection touched on many of Brad’s areas of practice and scholarship.

As with previous decades, Michael Kirby continued his faithful support for the *Review* with contributions on the centenary of the *Jumbunna* case and a reflection on the life of Dr George Ian Duncan, whose senseless murder was the catalyst for the decriminalisation of homosexuality in South Australia.

The *Review* continued to publish scholarly works on the issues of the day. Many articles reflected the vibrant debate that accompanied such issues. Whether Australia should have a bill of rights, criticism of the High Court, and the role and purpose of the implied freedom of political communication were all accommodated within the broad mandate of a scholarly outlet.

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IV Conclusion

The University of Adelaide and its law school were in existence well before Australia was a nation. The Adelaide Law School did not so much catch up with the Constitution, rather the Constitution caught up with it. The Review has a proud history, and its volumes have provided a forum for many of the great scholars and jurists of public law and constitutional history.

Before the establishment of the Federal Law Review (1964) and Public Law Review (1990) generalist journals, such as the Adelaide Law Review, were the main outlets for scholarship on constitutional law. Revisiting the volumes of the Review since its establishment, it is possible to discern how the changing nature of Australian constitutionalism has affected scholarship. In a more decentralised federal system, and in the absence of greater national journals with electronic distribution, state-based journals allowed for avenues of scholarship that had a local appreciation of federal constitutionalism.

One conclusion that is inescapable is that the wisdom in establishing the Review has been well and truly rewarded by the intellectual contribution it has made to Australian constitutional law and history.
SOUTH AUSTRALIA’S ROLE IN
THE SPACE RACE: THEN AND NOW

I Introduction

It would surprise most people to learn of Australia’s almost forgotten role in the space race of the Cold War Era. Whilst many people are familiar with the name Woomera, few have any knowledge that it was from this remote South Australian township that an Australian satellite constructed at the University of Adelaide was launched into space on an American rocket, making Australia the fourth country in the world to launch a satellite from its own territory. What we do know is that little followed from this first bold experiment. Australia certainly went on to become a major provider of ground services, famously celebrated in the beloved Australian movie ‘The Dish’, but few Australians regard Australia as a potential site for space launches even now at the dawn of the new era of commercial space.

Australia played a key role in the development of rocket technology after World War II. Whilst derived from the weapons developed and used by Germany during the war, that same technology constituted the basis of the rockets that would take the USSR and the USA into space from the 1950s onwards. Indeed, that technology remained fundamental to launches into space until the recent disruption to the space industry caused by commercial start-ups such as Blue Origin, SpaceX and RocketLab. Australia, and importantly South Australia, have played a significant role in fundamental space research from the dawn of the space age. However, prior to the announcement of the creation of an Australian Space Agency at the International Astronautical Congress (‘IAC’) in Adelaide in September 2017, there was only a fragmented appreciation of the role that Australia had played in this endeavour and of the significant contribution that Australia can make to Space 2.0 if the right regulatory framework is created.

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This article will explore some of South Australia’s role in the fostering and facilitation of an Australian space industry. It will focus on activities rather than individuals, but it should be noted that several key figures in the Australian space pantheon are from South Australia. These include University of Adelaide physicist John Carver, astronaut Andrew Thomas, space lawyer Michael Davis and space archaeologist Alice Gorman, each of whom in a unique way has contributed to the growth and recognition of the Australian space industry. The article will consider in particular the importance and legacy of Woomera, the advocacy for a Space Agency leading up to the IAC, and activities of the Adelaide Law School, through projects such as the Woomera Manual on the International Law Applicable to Military Space Operations, as examples of the role that has been and continues to be played by South Australians in the fostering of an Australian space industry. This article will uncover a little of the importance of the history and legacy of Woomera and point the way to a revised role for South Australia in the new domain of commercial space.

II The Woomera Rocket Range

The Woomera Rocket Range (now known as the Woomera Protected Area) is the largest land-based rocket range in the world, covering an area of approximately 122,000 square kilometres. At its maximum in the heyday of rocket testing, covering an area of 270,000 square kilometres, Woomera hosted the second highest number of rocket launches in the world, exceeded only by the NASA launch facilities at Cape Canaveral.5

Following the capture of the German V2 rocket technology at the end of World War II, the United Kingdom needed a rocket range to continue testing and developing this potent weapon. Two sites were considered as potentially suitable: Canada and outback South Australia. The South Australian site was chosen because its size (at the time, larger than England itself) and remoteness made it uniquely valuable for the development, testing and evaluation of a variety of weapons, aircraft and rockets, including some of the earliest work done involving autonomous or pilotless aircraft, now known as drones. Located approximately 500 km north of Adelaide, its remote and (to many) hostile desert environment made it a desirable location both on national security grounds and due to its quiet electromagnetic environment and many days of clear skies. The leader of the the United Kingdom Mission in 1946, General JF Evatts, is recorded as declaring the attributes of the site:


Three thousand three hundred hours of sunshine a year, cloudless skies for nine months of the year, close to a rail link, good for airfield building and, of course, its remoteness.6

The Woomera Rocket Range consisted of the township of Woomera, which was closed to the general public until 1982, as well as an airport, observation posts and various defence infrastructure assets and testing areas, as well as later, the Nurrangar and other United States satellite ground stations. The township at Woomera was at one time a vibrant place, with a bowling alley, movie theatre, swimming pool, shops and schools, and a hospital with the highest birth rate in Australia in the 1960s.7 The township was built with horseshoe shaped streets to encourage neighbourliness and the streets were given Aboriginal names.8

The Australian government agreed to participate in the project on the condition that Australia would be an equal partner in the project: ‘Australia would share the development and maintenance costs of the Rocket Range in return for technology transfer, the employment of Australians within the facility and contracts to Australian industry.’9

The Anglo-Australian Joint Project was formally constituted by agreement between Australia and the United Kingdom in 1946, with area being declared a Prohibited Area in 1947 and testing commencing the same year.10 Underpinning the creation of the Joint Project was the intention and desire that Australia would develop its technological expertise and capability.

Supporting the testing work to be undertaken at the Woomera Rocket Range, the Long-Range Weapons Establishment (‘LRWE’) was established at a disused munitions factory in Salisbury, north of Adelaide. In 1949 the Australian Defence Scientific Services (‘ADSS’) was also established to oversee and facilitate this research. Importantly, this led in 1955 to the creation of the Weapons Research Establishment (‘WRE’) which was to play a key role in the development and launch of Australia’s first domestically built and launched satellite.11

Although testing had commenced in 1947, the Joint Project was nearly abandoned in 1948 when the United Kingdom cancelled its long range missile development program, but significant work and investment had already been undertaken in the establishment of the Woomera Rocket Range. Therefore a shift was made at this time to apply the use of both the facilities and the rocket and related technology to various other defence related activities including guided weapons and the development of radar. This constant shift in focus of core projects became a hallmark of the work.

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6 Woomera High School (n 5) 8.
7 Alice Gorman, Dr Space Junk vs The Universe: Archaeology and the Future (NewSouth, 2019) 93.
8 Gorman (n 7) 99, 237.
9 Dougherty (n 5) 11.
10 Coexistence Review (n 4) 11.
11 Dougherty (n 5) 14.
conducted at Woomera, as British Government priorities altered course along with the weapons development of the Cold War.

In 1956 the British Government commenced the Blue Streak project, which involved a launch of the smaller Black Knight rocket from Woomera in 1958 and the first Blue Streak in 1960. The launch of the massive Blue Streak, intended as a ballistic missile capable of delivering a nuclear warhead across Europe from the UK to the Soviet Union, required expansion of the launch facilities at Lake Hart and the installation of enhanced tracking and recording facilities at the Woomera Rocket Range and at the intended test impact point of Talgarno in Western Australia. However, yet again the program was cancelled due to a change of British policy regarding the effectiveness and relevance of the Blue Streak as a weapon. The next phase of the project was to see the repurposing of the rocket as a launch vehicle rather than a weapon.

The project came under the auspices of the European Launcher Organisation (‘ELDO’) a consortium consisting of the United Kingdom, France, Belgium, the Federal Republic of Germany, Italy and the Netherlands. Australia joined the project as a full partner on the basis of providing the launch facilities at Woomera. Australia’s contribution to the ELDO launch project included launch tracking and monitoring and range safety, provided by WRE. A tracking station was constructed at Gove, also under the management of WRE. The program operated from Woomera from 1964 until 1970 but was unsuccessful in placing a satellite in orbit.

After the relocation of the ELDO launch program to French Guiana, the United Kingdom contributed its own tests of the Black Arrow (a development of the Black Knight). The final Black Arrow launch in 1971 placed the Prospero satellite in orbit (the second and last satellite successfully placed in orbit from Woomera). The United Kingdom cancelled the project shortly after this launch.

Woomera was also used as the launch site for an extensive and successful research program using sounding rockets, conducted by the University of Adelaide, and many other Australian and international universities. A sounding rocket carries a variety of scientific testing instruments to a sub-orbital distance. WRE was also involved in many of these projects and, on the basis of this experience, began designing a specific Australian sounding rocket. Professor John Carver, a professor of physics at the University of Adelaide, was involved in the early Skylark projects and then collaborated with WRE on the later High Altitude Density (HAD) rockets.

12 Morton (n 5) 409.
13 Morton (n 5) 451–3.
14 Dougherty (n 5) 32.
16 Dougherty (n 5) 35.
17 Ibid 38.
This collaboration provided the foundations for the design, building and launch of the first Australian satellite.18

Provided with the opportunity to use an unwanted United States Redstone rocket, WRE seized upon the chance to build its own satellite, which acquired the somewhat unexciting but descriptive name of WRESAT. Working together with Professor Carver and his team at the University of Adelaide under a very tight timeframe, WRE designed and constructed a range of instruments intended to measure solar radiation. The satellite was successfully launched on 29 November 1967 and operated for only five days, as the design parameters meant it was dependent upon limited battery power. WRESAT remained in orbit until 10 January 1968, after which it re-entered the atmosphere and disintegrated. This project made Australia the fourth country to launch its own satellites from domestic soil.19

Unfortunately, despite the enthusiasm of the satellite team for a further sequence of launches, capitalising upon their experience with the WRESAT launch, and notwithstanding the offer from the United States of additional Redstone rockets, the Australian government of the day had no appetite for further adventures in space. Several commentators have lamented the failure of the Australian Government to foster or build upon the early successes and know-how of the WRE and Woomera team. There was no attempt to capture, retain or build upon the expertise gained by Australian personnel who worked on the ELDO Project.20 Although others have argued that in many of these projects ‘Australia contributed the real estate and little else.’21 As Gorman notes

[a]fter launching one Australian satellite, we retired hurt. Space became a dirty word to politicians and I’ve even heard people say ‘Forget Woomera. It’s all in the past’.22

Upon the formal conclusion of the Joint Project on 30 June 1980, the Woomera Rocket Range became home to a number of uses including various defence training exercises, some of which extensively damaged the remaining foundations of the launch sites on Lake Hart, continued use for experimentation and testing using sounding rockets, testing and development of autonomous aircraft and the notorious Woomera Immigration Reception and Processing Centre, which operated from 1999

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18 Ibid 38.
19 Or possibly, the third or fifth such nation. There is debate regarding the characterisation of ‘domestic launch’: see Dougherty (n 5) 45.
22 Gorman (n 7) 100.
Remarkably in 2007, the American Institute of Aeronautics and Astronautics designated the Woomera Rocket Range an Historic Aerospace Site.24

Even prior to the establishment of the Woomera Rocket Range the area was subject to a variety of existing uses. This included the local Indigenous people, the Kokatha, the Pitjantjatjara, the Arabana, the Antakirinja, and the Yankunytjatjara, who remained in the area despite earlier government removal and resettlement programs.25 Other users included the pastoralists, whom it had been deemed too expensive to remove,26 mineral prospectors and the railway line. With the changing use of the Woomera Rocket Range, now known as the Woomera Protected Area (‘WPA’), as well as a revised interest in both the mining and tourist potential of the area, a Review of the WPA was announced on 17 May 2010, to investigate the best uses of the WPA in the national interest. That review resulted in significant amendments to the use and access to the area, including the identification of three zones: Red, Amber and Green. The Coexistence Review determined that Defence remained the primary user of the WPA and that Defence should continue to control access to the WPA. There was however increased recognition of the value of other uses, in particular the ‘significant resources potential’ leading to the recommendation that ‘the WPA should be opened up to resources exploration to the maximum extent possible’.27 The increased access to the WPA by non-defence interests was created through a new regime under the implementation of the Woomera Prohibited Area Rule 2014 (Cth).28 Defence remained the sole user of the Red Zone, but could only exclude other permitted users from the Amber and Green Zones in accordance with the Rules for a prescribed number of days. Existing users of the WPA under the Defence Force Regulations 1952 (Cth), remained subject to those access arrangements but new users could apply for a permit to be in the WPA for purposes such as mining, research, tourism and


24 Garnaut, Freestone and Iwanicki (n 22) 556.


26 Morton (n 5) 56–8.


environmental activities. A further review of these new zoning and access arrangements was undertaken in 2018, with the outcomes and recommendations published in the ‘Coexistence in the Woomera Prohibited Area 2018 Review’. The Coexistence Review notes that Australia’s changing geopolitical and strategic environment has created specific new security risks and has prompted a need for a comprehensive program to enhance Australia’s defence capability, especially in the advanced technology domains of space, electronic warfare, cyber, intelligence, reconnaissance and surveillance. Notably

\[\text{t}he\ \text{introduction\ of\ such\ systems\ will\ drive\ increasingly\ complex\ testing,\ training\ and\ evaluation\ programs.\ As\ a\ result,\ Defence\ is\ increasing\ its\ investment\ in\ the\ WPA,\ which\ will\ see\ approximately\ $300\ million\ being\ invested\ from\ 2018\ through\ to\ 2021\ to\ deliver\ instrumentation\ system\ and\ facilities\ upgrades.\ Scoping\ works\ are\ underway\ for\ a\ further\ $500\ million\ of\ investment\ in\ redeveloping\ the\ Woomera\ Village\ and\ airfield\ precinct\ between\ 2022\ and\ 2025.\ Other\ smaller\ projects\ over\ the\ last\ five\ years\ will\ bring\ new\ investment\ in\ the\ WPA\ in\ the\ decade\ 2015-2025\ to\ approximately\ $900\ million.}\]

Particular emphasis on non-kinetic systems and use of the electromagnetic spectrum will increase the unique value and importance of the WPA and as a consequence, the ‘WPA is anticipated to become more valuable as an area for international engagement and cooperation, particularly with the United States and the United Kingdom.’

The Coexistence Review found that the coexistence arrangements are basically sound, but suggests the implementation of greater flexibility. These recommendations, whilst recognising the key importance of Defence testing and the security and electromagnetic quietness of the WPA, also reflect a number of other key considerations, including the significance of the area in terms of Aboriginal cultural heritage, mineral exploration, pastoralists and research and scientific activity. In particular, the Coexistence Review notes the need to address national security needs both in terms of the introduction and use of technology in the area and the ownership, control and influence of businesses operating in the WPA. It is recognised that opening up the area to greater access and use creates new complexities. A further review is planned for 2025.

Hence it can be seen that Woomera will yet again play a key role in defence and scientific advancements for Australia and South Australia. The symbolism of the name ‘Woomera’ a word from the Dharug peoples of New South Wales, meaning spear thrower, continues to inspire us to reach beyond the red plains of the South

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29 Woomera Prohibited Area Rule 2014 (Cth) r 13.
30 Coexistence Review (n 4).
31 Ibid 3.
32 Ibid.
33 Ibid 5–6.
Australian desert (or gibber, a unique geological formation which creates a polished red surface) to greater things above.\textsuperscript{34}

III The International Astronautical Congress 2017

The IAC was held in Adelaide in September 2017, the year of the 50\textsuperscript{th} anniversary of the launch of WRESAT. Significant efforts and lobbying were required to bring this major global conference to Adelaide, reflecting years of work by the bid and organisational team. The Space Industry Association of Australia, under the direction of Adelaide-based lawyer and Chair, Michael Davis, the State Government of South Australia and the Adelaide Convention Centre, played key roles in securing the conference at a time when there was particular interest in both the domestic and international space industry. The IAC even secured a presentation from SpaceX founder Elon Musk, who unveiled his plans for using the ‘BFR’ as a transportation system across the globe as well as into space.\textsuperscript{35}

The Minister for Industry, Innovation and Science, the Hon Arthur Sinodinos MP, had announced a review of Australia’s space industry capability on 13 July 2017.\textsuperscript{36} An Expert Reference Group, chaired by former CSIRO Director Megan Clark, was tasked with undertaking a nationwide consultation to consider how to ‘enable Australia to capitalise on the increasing opportunities within the global space industry sector’.\textsuperscript{37} After a few weeks of meeting with industry and interest groups around Australia, it was clear to the Expert Group that there was an overwhelming desire and need for an Australian Space Agency. Repeatedly the statistic was dragged out that Australia was the only OECD country apart from Iceland that did not have a space agency. The lack of an official ‘front door’ through which businesses and space agencies of other countries could make contact with Australian space operators was considered a major impediment to the future development and success of this burgeoning industry. Although not due to report until March 2018, the Expert Group provided the Minister with an \textit{Interim Report} on 14 September 2017, which encouraged the government to make an early announcement regarding the establishment of a space agency to address the overwhelming need for such an agency demonstrated by the consultation process.\textsuperscript{38} It did not go unnoticed that in the meantime New Zealand had quietly and efficiently introduced its own legislative regime designed to encourage and facilitate

\begin{footnotesize}
\textsuperscript{34} Gorman (n 7) 96.
\textsuperscript{37} Ibid.
\end{footnotesize}
a space industry, established a Space Agency and had a company ready to commence launching from the Mahia Peninsula.

Therefore, it was with great excitement that an announcement was made during the opening ceremony of the IAC that Australia would indeed be establishing its own space agency.  

Australia had just moved one further step into the new space age, and again, that step had occurred on South Australian territory.

IV The Australian Space Agency

The Australian Space Agency (‘ASA’) commenced operation on 1 July 2018 and on 12 December 2018 Prime Minister Scott Morrison announced that it would be located in Adelaide, with a further announcement that it would be located at Lot Fourteen, the entrepreneurship and innovation hub located opposite the University of Adelaide North Terrace campus and the old site of the Royal Adelaide Hospital. This location was deemed to be the most suitable due to the large number of space-related businesses already operating in Adelaide, ‘reinforcing South Australia’s long-standing contribution to the nation’s space journey’.  

Whilst yet to open its doors at Lot Fourteen, much work has already been undertaken by the ‘ASA’ on international relationship building. This is seen as a vital aspect of the growth of the Australian space industry. The ASA has developed the Australian Civil Space Strategy 2019–2028, which identifies the Strategic Vision for the ASA and the Australian space sector. The key pillars of that strategy are: International, to leverage international partnerships and open doors for Australian innovators; National, to grow the Australian space sector; Responsible, to manage regulation, risk and culture, recognising the unique safety and security aspects of the space industry and compliance with international obligations; and Inspire, to develop a vision and partnerships that build the future space workforce.


Following a period of domestic consultation in 2016, the Commonwealth Government announced a review of the *Space Activities Act 1998* (Cth) and the *Space Activities Regulations 2001* (Cth) to ensure that Australia’s space regulation is appropriate to technology advancements and does not unnecessarily inhibit innovation in Australia’s space capabilities.\(^{42}\)

The *Space Activities (Launches and Returns) Act 2018* (Cth) will come into effect on 1 August 2019. At the same time a new set of rules will also come into effect, which are designed to be more responsive and reflective of industry needs. However, it remains to be seen how this revamped regime will operate in practice and how the associated costs will scale up for small operators.\(^{43}\)

The Adelaide Law School, through its Research Unit on Military Law and Ethics, now hosts a number of space-specific activities. In addition to participating in the Manfred Lachs Space Law Moot,\(^ {44}\) organised by the International Institute of Space Law, and contributing to the preparation of the annual Space Security Index,\(^ {45}\) managed by Canadian NGO Project Ploughshares, and undertaken in conjunction with students from George Washington University and McGill University, it is the leader of two key research projects, one commercially focused and one military. The Australian Navigational Guide Explaining Laws for Space (ANGELS) will create online resources based on the identified legal needs of space start-ups and entrepreneurs, providing a step-by-step online guide to the new legal and regulatory requirements which will need to be followed in order to conduct space activities lawfully and commercially under the revised Australian legislative regime.\(^ {46}\) Research for and writing of the resources will be undertaken by Adelaide Law School students who are working closely with space industry members to understand and address their practical needs.

The *Woomera Manual on the International Law Applicable to Military Uses of Outer Space* is a major, multiyear project, led by staff at the Adelaide Law School, together with the University of Exeter, University of New South Wales (Canberra) and the University of Nebraska-Lincoln, to develop a manual which articulates the existing law applying to military uses of outer space in times of rising tension and conflict. The Manual involves members of various governments and defence forces (acting in their personal capacity), academics from diverse countries and backgrounds, as well as the International Committee of the Red Cross, the Union of Concerned Scientists and the Secure World Foundation.\(^47\) In this way, the Adelaide Law School is contributing to cutting edge developments in outer space operations at an international level, in the interests of securing peace, certainty and access to this vital domain.

**VI Conclusion**

With the establishment of an Australian Space Agency and the extensive revision of the domestic laws applying to the use of and access to space for commercial operators, Australia truly is entering a new space age. As has been discussed above, South Australia has historically played an important role as a catalyst of space activities in Australia, albeit with mixed success. Despite the failure to transfer the early successes of the ELDO project across to igniting a domestic Australian space industry, there seems to be something in the gibber that keeps space dreamers and space entrepreneurs coming back to this State.

It is clear that in a time of increasing use of and reliance upon space, new problems will arise as space becomes more congested, particularly with the weekly announcements of larger and larger constellations of satellites, bringing with them a burgeoning spectre of space debris. As is now found in the new Australian legislation,\(^48\) space operators will be asked to develop debris mitigation and remediation strategies prior to launch.\(^49\) Further, the increased number of nations seeking to establish themselves as space powers and to stake claims to space assets will bring with it risks of increased tensions and the possibility for conflicts of a kind we have yet to behold. The Adelaide Law School is proud to continue to be at the forefront of these developments and, working together as researchers and students, to help shine the light upon some of the answers to these big questions.


\(^48\) *Space Activities (Launches and Returns) Act 2018* (Cth).

\(^49\) See, eg, *Space Activities (Launches and Returns) Act 2018* (Cth) s 34(2): ‘Without limiting subsection (1), an application for the grant of an Australian launch permit must include a strategy for debris mitigation’.
The first issue of the *Adelaide Law Review* in 1960 opens without preamble or dedication. In that respect, it resembles the initial issues of other university law reviews of the same era. The Adelaide Law Review Association had been established by Norval Morris\(^1\) (1923–2004) in the preceding year, early in his tenure as Dean of the Faculty of Law.\(^2\) The first issue of the *Review* includes his discussion of ‘A New Qualified Defence to Murder’, a partial defence which resulted in what he was later to call ‘the new manslaughter’.\(^3\) It is a significant essay for it brings within its compass a pantheon of tutelary deities of Australian criminal law in the late 20th century and it addresses issues of continuing concern in criminal responsibility for unlawful homicide. The pantheon to which I refer includes Sir Owen Dixon (1886–1972), Sir John Barry (1903–69), Glanville Williams (1911–97) and Colin Howard (1928–2011), who was recruited by Norval Morris to the Adelaide Law School in 1960. A prelude to Howard’s significant monograph on *Strict Responsibility*,\(^4\) entitled ‘Not Proven’, appears in a subsequent issue of vol 1 of the *Review*.\(^5\)

The ‘new qualified defence’ of Norval Morris’ essay celebrated Victorian and South Australian courts’ extension of the common law of justifiable and excusable homicide to allow a partial defence to murder, reducing that offence to manslaughter, when death resulted from excessive force to resist an assault, prevent a crime or apprehend an offender. The qualified defence came to be known as ‘excessive defence’. In retrospect, this well-intentioned exercise in creative law-making now appears to be an example of what Ngaire Naffine has called ‘the man problem’ in criminal law.\(^6\) The authors of the new qualified defence, all of whom were men,

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\(^{*}\) Emeritus Fellow, University of Adelaide; Adjunct Professor, University of South Australia School of Law.


perceived its ‘only real subjects’ to be men.7 Men who kill in self defence, whether excessive or not, were conflated with the entire population of ‘persons’ who kill in response to a threatened harm, a population which includes a small though significant minority of women. None of those who developed the new partial defence considered the question whether a doctrine formulated for men who kill men in response to threatened harm might fail to reflect the exculpatory circumstances when women kill men in self defence.

Morris presented this realignment of the border between murder and manslaughter as a significant Australian departure from English common law, though he took care to compile a miscellaneous collection of fragments from English and American cases to provide support for the Australian development. JC Smith was later to quibble over Morris’ inconsistency in proclaiming a new Australian development while ‘seeking to show that it is well grounded in English common law’.8

I Excessive Defence of Person or Property

The new qualified defence made its first appearance in the trial for murder in 1957 of Gordon McKay, a young Victorian poultry farmer who shot and killed a thief called Walter Wicks when he was running away with three stolen fowls.9 Though self defence was argued, the primary ground for exculpation was prevention of the escape of a thief. Justice John Barry,10 who presided at the trial in the Supreme Court, advised the jury that he considered McKay’s use of a firearm against a poultry thief to be well in excess of reasonable force.11 His Honour directed them, however, that they might acquit McKay of murder and convict him of manslaughter if they concluded that he might have acted in the belief that he was justified in shooting at the thief to apprehend him. The prosecution had effectively conceded that possibility by arguing that a conviction or manslaughter was available as an alternative. Justice Barry went on to add that a complete acquittal would be, in his view, inappropriate on the facts of the case, but did not withdraw that possibility from the jury.12

McKay was convicted of manslaughter and sought leave to appeal to the Full Court against his conviction for manslaughter on the ground that the case was one of murder or nothing. The prosecution found itself in the strange position of arguing in favour of the qualified defence to support McKay’s conviction for manslaughter. A majority

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9 See, on appeal, R v McKay [1957] VR 560 (‘McKay’).
11 McKay (n 9) 563 (Lowe J).
12 Ibid 564 (Lowe J).
of the Court upheld the verdict, agreeing with Barry J that a manslaughter verdict was open to the jury when death resulted from excessive force to prevent a theft or apprehend the thief. Norval Morris, who was then a senior lecturer at Melbourne Law School and a lifelong friend and associate of Sir John Barry, attended the trial and published an extended analysis of the decision in the *Sydney Law Review*. This was the precursor to his article in the *Adelaide Law Review*, which was prompted by a South Australian case arising from another fatal shooting in 1957, once again in response to a comparatively minor criminal offence.

Malcolm Horace Howe shared a bottle of wine with an acquaintance, Kenneth Frederick Millard, as they sat in Howe’s motor car on the outskirts of the township of Port Pirie in South Australia. Howe was 23 years old, living at home with his parents; Millard a hotel barman in his late thirties. They planned an evening at the drive-in theatre after which they were to join a social gathering at the local football club. At his trial for murder in March 1958, Howe testified that Millard suddenly leaned over, pulled his fly open and grabbed or touched his penis. Howe said he protested and told Millard to get out of the car. Howe followed him in what he said was an ‘instinctive rather than rational’ reaction to the assault. He testified at his trial that they were standing on open ground near the car when Millard ran at him from behind and grabbed him by the shoulders. Howe pulled himself free and returned to the car where he picked up a rifle he used for shooting rabbits, took aim and shot Millard in the back. He meant to kill him. He said he was afraid that Millard would rape him. Howe was a small and slender man; Millard was larger and stronger.

13 Ibid 566 (Lowe J), 567 (Dean J). The Full Court appears to have accepted Barry J’s reservation that the qualified defence would not be open if the defendant intended to kill rather than inflict grievous bodily harm in defence of property or to apprehend a thief. That limitation has been preserved in the South Australian statutory provisions on defence of property: *Criminal Law Consolidation Act 1935* (SA) ss 15A(1)(b), (2)(b). Cf the even more restrictive provisions when excessive force is used in defence of property in the *Crimes Act 1900* (NSW) ss 418(2)(c)–(d), 420(a)–(b).

14 Barry was Chairman and Morris was Secretary of the University of Melbourne Department of Criminology: see Norval Morris, ‘The Department of Criminology University of Melbourne’ (1952) 26(1) *Australian Law Journal* 12, 12–13. Morris, together with Mark Perlman, edited the memorial tribute to Barry: Norval Morris and Mark Perlman (eds), *Law and Crime: Essays in Honor of Sir John Barry* (Gordon and Breach, 1972).


16 In his written statement to police, given in evidence at the trial, Howe said that Millard ‘grabbed my penis’ after pulling his fly open. The Supreme Court’s summary of Howe’s testimony states that Millard pulled his fly open and ‘touched the flesh of his penis’: *R v Howe* [1958] SASR 95, 100–1.

17 Malcolm Howe, 163 cm — 51 kg, BMI 19.2; Kenneth Millard, 175 cm — 64 kg, BMI 20.9.
The prosecution disputed Howe’s testimony that he acted in self defence and argued that it was a simple case of murder and robbery. Millard was known to be carrying a substantial sum of money. After shooting him, Howe emptied his wallet, threw it away and went on to the picture show and the football social.

At Howe’s trial for murder, the jury were instructed that they must convict him of that offence if they were persuaded that he had either failed in his duty to retreat or used excessive force in self defence. The jury were not directed that a man-slaughter conviction might be returned when death resulted from excessive force in self defence. He was convicted of murder and sentenced to death. Execution of the sentence was not an entirely remote possibility. Three men had been hanged for murder in South Australia over the preceding decade19 and another South Australian, Raymond John Bailey, was hanged for murder during the period when Howe’s High Court appeal was pending.20

The Full Court of the Supreme Court of South Australia quashed the murder conviction and ordered a new trial for that offence, holding that the trial judge had been in error both in his direction that retreat was a prerequisite for acquittal and in his rejection of the possibility of a qualified defence that might reduce murder to manslaughter. The ensuing prosecution appeal to the High Court provided an opportunity for a definitive statement of the new common law doctrine of self defence in its complete and qualified forms. A majority endorsed the Supreme Court’s conclusion that a plea of self defence to murder that fails only because an attack was repelled with excessive force should result in a conviction for manslaughter.21 Moreover, failure to retreat was not an independent criterion for guilt when liability for an unlawful homicide was in issue, but one among the set of relevant circumstances to be considered when deciding whether deadly force was excusable resulting in acquittal, or partially excusable, resulting in conviction for manslaughter.22 This was the ‘new qualified defence’ of the Adelaide Law Review essay.

At Howe’s second trial for murder in September 1958, he was convicted of man-slaughter and sentenced to 11 years and six months imprisonment, an unusually severe sentence for the offence in the mid-20th century.23

During the remaining time of his brief tenure as Dean of the Adelaide Law School, Norval Morris and Colin Howard collaborated in the preparation of their Studies in

21 Howe (n 16) 462 (Dixon CJ with McTiernan and Fullagar JJ agreeing), 474 (Menzies J).
22 Ibid 462 (Dixon CJ, with McTiernan and Fullagar JJ agreeing), 469 (Taylor J), 470–1 (Menzies J).
23 Transcript, Malcolm Horace Howe, 3391/8/P, 32/Feb/58, Box 98. Higher Courts Criminal Registry, Supreme and District Court, Adelaide.
Criminal Law (‘Studies’). The preface to the collection of essays declared their objective to acquaint the legal community, and English lawyers in particular, with ‘a number of original and valuable contributions to the criminal law by the courts of Australia’. These were lean and troubled years in English criminal jurisprudence and the Australian invitation was welcomed by JC Smith in his review of the Studies. They were introduced by a substantial essay by Sir John Barry, in which he deplored the House of Lords’ acceptance in Director of Public Prosecutions v Smith of an ‘objective test’ of criminal fault and its fictional imputation as an ‘unfortunate aberration’. The essays that follow this introduction are all presented, as Glanville Williams remarked in his review, as works for which Morris and Howard ‘now take joint and unapportioned responsibility’. Some, though not all, were revised versions of their earlier solo publications. Norval Morris’ ‘New Qualified Defence’ from the Adelaide Law Review became ‘A New Manslaughter’, the fourth of the Studies. Howard’s essay, ‘Not Proven’, now bearing the more descriptive title ‘Strict Responsibility’, was the sixth. The opening essay on ‘The Definition of Murder’, which takes up the ‘subjectivist’ cause announced by Sir John Barry, incorporates passages from an address by JL Travers QC of the South Australian Bar and Norval Morris to the Law Council Convention in 1961, roundly rejecting the House of Lords decision in Smith. The Law Lords were guilty, declared Travers QC and Morris, of blurring the ‘distinction between wickedness and stupidity, which is one of the hallmarks of a mature and humane system of criminal law…’

Completion of the manuscript of the Studies coincided with the declaration by Dixon CJ in Parker v The Queen that the High Court would no longer consider itself bound to follow decisions of the House of Lords. Sir John Barry’s introductory essay concludes with a ‘postscript’ of the High Court judges’ joint declaration and injunction that ‘Smith’s Case should not be used as authority in Australia at all’.

25 Ibid iii.
26 Smith (n 8) 217–18. Smith characterised English case law as ‘undistinguished’ and agreed with Morris and Howard that introducing the English legal profession to ‘the example set by their Australian brethren must be a step in the right direction’.
27 Morris and Howard (n 24) xxi, xxix–xxx, citing DPP v Smith [1961] AC 290 (‘Smith’).
30 Morris and Howard (n 24) 1.
31 Travers and Morris (n 29) 157.
33 Morris and Howard (n 24) xxxiv.
The Studies were soon followed by Howard’s Australian Criminal Law,34 a work distinguished by its prefatory homage to Glanville Williams35 and Howard’s ambition to present a unified jurisprudence of Australian criminal law.36 It is, however, the ‘new manslaughter’ that is the subject of the remaining pages of this essay. Howard’s discussion of the qualified defence in the first edition of his text is curiously perfunctory.37 Ten years after Howe, in 1968, he published a critical review titled ‘Two Problems in Excessive Defence’,38 which reflects his doubts as to its viability.

The qualified defence was fashioned by men for a characteristic pattern of masculine aggression that began with an unlawful attack by the eventual victim of homicide on the person or property of another. Deadly force in response to the attack was not excusable if the defendant failed to take advantage of a reasonable opportunity to disengage, withdraw or retreat from conflict. The initial wrong did not licence an aggressive response or vengeance: an unlawful attack was not an invitation to a fight which could be accepted without consequences. The qualified defence did permit courts to avoid a murder verdict in an age when courts were required to sentence murderers to death, a sentence occasionally executed by governments, though the usual outcome was commutation of the death sentence and imprisonment for an indefinite period of years. Of the early proponents of the new manslaughter, Morris and Sir John Barry were actively engaged in the campaign to eliminate the death penalty.39 The qualified defence averted the unlikely risks of execution or lifelong imprisonment and permitted the trial judge to determine the punishment when sentencing for manslaughter. It should be noted, however, that the period of ‘life imprisonment’ in the usual case where the sentence was commuted, though wildly variable across jurisdictions, was relatively short by comparison with the current severity of sentences for murder.40

34 Colin Howard, Australian Criminal Law (Lawbook, 1965).
35 ‘Since the publication in 1953 of the first edition of his book, Criminal Law: The General Part, every writer on the criminal law has owed an intellectual debt to Dr Glanville Williams. The extent of my own is evident on every page’: ibid v.
36 The ‘Australian’ appellation was subsequently dropped in Colin Howard, Criminal Law (Lawbook, 3rd ed, 1977) and the attempt to provide comprehensive coverage of Australian criminal law abandoned in the last edition: Brent Fisse, Howard’s Criminal Law (Lawbook, 5th ed, 1990).
37 Howard, Australian Criminal Law (n 34) 80–3.
40 Arie Freiberg and David Biles, The Meaning of ‘Life’: A Study of Life Sentences in Australia (Australian Institute of Criminology, 1975) 144. The authors conclude their survey, which covers the years 1918–74: ‘There is a considerable disparity in Australia regarding the length of time served by life sentence prisoners, the maximum … average being 17 years 6 months in New South Wales [1932–74] and the minimum being 9 years 8 months in South Australia [1918–74]. However, lengths of detention in the various jurisdictions have tended to fluctuate over the years.’
The qualified defence had a further consequence, welcomed by Morris. Juries that were unwilling to acquit of murder in dubious cases of self defence now had the opportunity to convict for manslaughter rather than return a simple verdict of not guilty. The resulting increase in the overall ambit of liability for unlawful homicide could be expected to result in relatively short deterrent sentences, rather than outright acquittal, for men who responded with unnecessary aggression to threats of unlawful violence. In his 1968 critique, Howard suggested that perhaps the true object of excessive defence was not to mitigate the severity of the law, but ‘on the contrary to restrict … an admitted right of self-defence.’

II The Problems of Proportionality

Concentration on the potential applications of a partial or qualified plea of self defence in murder obscured what appears, in retrospect, to have been a more significant element in the High Court’s decision in Howe. This was the first time the High Court had been required to state the common law requirements for a complete acquittal on the ground of self defence. The decision that Howe was to be tried again for murder meant that the possibility of an outright acquittal, however unlikely, required consideration. The High Court endorsed the Supreme Court’s decision that failure to retreat was a circumstance to be considered among others in deciding whether the defendant was ‘acting reasonably in standing his ground and fighting back …’ The more interesting issue, however, has to do with the nature of threatened harm that could excuse a resort to force intended to kill or cause grievous bodily harm. The Supreme Court concluded that self defence required proof of a ‘violent and felonious attack’; one that threatened death, ‘grave bodily injury’ or the ‘commission of a forcible and atrocious crime’ — in this instance an assault that would now be recognised as an attempted rape. This was a requirement of equivalence between the threat and an

41 Morris, ‘A New Qualified Defence to Murder’ (n 3) 51–2.
42 Howard, ‘Two Problems in Excessive Defence’ (n 38) 354.
43 R v Howe [1958] SASR 95, 110; Howe (n 16) 462 (Dixon CJ, with McTiernan and Fullagar JJ agreeing), 469 (Taylor J), 470–1 (Menzies J).
44 R v Howe [1958] SASR 95, 121.
45 The judgment of Lowe J was the immediate source for the reference to ‘atrocious crime’: McKay (n 9) 562.
46 R v Howe [1958] SASR 95, 119. The Supreme Court formulation appears to reflect the argument presented by Dr JJ Bray QC, subsequently Chief Justice of the Court, for the appellant, that no distinction was to be drawn between excusable and justifiable homicide so that the possibility of retreat was irrelevant, when the defendant killed in response to a violent and felonious (‘sodomitical’) attack: at 108–10. The Court rejected Dr Bray QC’s argument on retreat, holding that the possibility of retreat was relevant when considering whether there was reasonable necessity for deadly force, but retained his formulation of the nature of the threat that might justify or excuse such a response: at 110.
excusable resort to deadly force.\(^{47}\) The judgment of Dixon CJ in the High Court, which attracted majority support,\(^{48}\) would permit a far more extensive area of exculpation for deadly force in self defence. Causing death with intention to kill or cause grievous bodily harm might be justified or excused,\(^{49}\) his Honour said, in response to an attack of a violent and felonious nature, or at least of an unlawful nature … made or threatened so that the person under attack or threat of attack reasonably feared for his life or the safety of his person from injury, violation or indecent or insulting usage.\(^{50}\)

Chief Justice Dixon is precise in his qualification of the Supreme Court’s requirement of a ‘violent and felonious attack’. Though his formulation of the test had potential application to Howe’s account of the shooting, it was evidently intended to be of more general application in the Court’s restatement of the common law of self defence. It is puzzling, to say the least, that Morris failed to perceive the significance of this extension of the scope of complete and partial self defence in his essays on the ‘new manslaughter’.\(^{51}\) Though the circumstances of Howe were very different, Dixon CJ’s restatement has potential application to excuse deadly force in self defence against domestic terrorism and protracted degradation or humiliation within intimate relationships that may not involve threats to life or an ‘atrocious’ crime.

Australian courts are in general agreement that ‘proportionality’ between the threat and the defensive response is relevant to the determination of common law culpability when self defence is in issue.\(^{52}\) Depending on the circumstances of the case, Dixon CJ’s judgment allows the possibility that a resort to deadly force in self defence against threats to the safety of one’s person from ‘injury, violation or indecent or insulting usage’ may be ‘proportionate’ in some sense other than equivalence.

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\(^{47}\) ‘Justifiable homicide’ in response to a ‘forcible and atrocious crime’ included the case of a ‘woman who kills a man who attempts to ravish her’: see Howe (n 16) 452 (JJ Bray QC) (during argument), citing JF Archbold, Archbold’s Criminal Pleading, Evidence &: Practice (Sweet & Maxwell, 33rd ed, 1954) 934–5 [1638], 943–4 [1652].

\(^{48}\) Justices McTiernan and Fullagar concurred. Justice Menzies adopted a less expansive statement of the circumstances that might give rise to a complete or qualified defence.

\(^{49}\) In this essay, which is solely concerned with self defence, the old distinction between ‘justifiable homicide’ (in the execution of ‘justice’) and ‘excusable homicide’ (in self defence), can be disregarded: see Zecevic v DPP (Vic) (1987) 162 CLR 645, 658 (‘Zecevic’). Though a contrary view has been expressed on the issue, the discussion in the text assumes that there is no significant difference between justification and excuse when self defence is in issue: cf Stanley Yeo, ‘Revisiting Excessive Self-Defence’ (2000) 12(1) Current Issues in Criminal Justice 39, 40–1.

\(^{50}\) Howe (n 16) 460. Justice Menzies, who concurred in the result, also departed from the Supreme Court formulation, referring to ‘self-defence against serious violence though not necessarily felonious violence’: at 471.

\(^{51}\) Morris, ‘A New Qualified Defence to Murder’ (n 3) 43; Morris and Howard (n 24) 118.

\(^{52}\) See, eg, Viro v The Queen (1978) 141 CLR 88 (‘Viro’); Zecevic (n 49).
between threat and response. As the law stood, after the decision in *Howe*, it seemed that absence of proportionality, like failure to retreat, was a circumstantial factor to be considered when determining whether the use of deadly force was reasonably necessary in the circumstances: equivalence between threat and response was not an independent or imperative requirement for exculpation.\(^{53}\)

There was, however, a missing item in the set of factors or considerations that had to be considered when reasonable necessity for deadly force was in question. Disengagement from conflict, retreat and other modes of avoidance of threatened harm may involve the sacrifice of significant personal interests or values. When, for example, property is threatened, one must sometimes simply accept its loss or destruction rather than use force against a predator. McKay should not have shot the chicken thief but let him go, with or without his booty.\(^{54}\) Missing from the usual list of modes of avoidance of threats of unlawful harm is *submission*. Glanville Williams was unusual in his blunt conclusion that the criminal law will sometimes require submission to unlawful threats in circumstances where there is no reasonable way of avoidance: ‘there are some insults and hurts that one must suffer rather than use extreme force …’\(^{55}\) The requirement of submission to unlawful conduct is implicit in case law but rarely articulated. Courts are content with the injunction that a trivial or minor assault does not licence deadly force in response. Exercises of judicial imagination about the circumstances that might require submission, rather than a resort to deadly force, are remarkable for their artificiality. A newspaper editor faced by an enraged reader intent on ‘throwing a bottle of ink over him’ must not shoot him.\(^{56}\) Nor it is excusable for a ‘weak lad whose hair was about to be pulled by a stronger one’ to shoot the bully even if that is the only way he can avoid the assault.\(^{57}\)

Howard, alone among those who discussed the question of proportionality in the years following *Howe* managed to ask the right question:\(^{58}\) in what circumstances does the law require a person to submit to ‘indecent or insulting usage’ when there is no reasonable avenue of escape or avoidance? His question was accompanied, however, by an arch illustration — a girl armed with a hatpin threatened by a man intent on stealing an unwanted kiss — which seems to have been intended to amuse

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53 See *Howe* (n 16) 461, where Dixon CJ formulates the test in term of the defendant’s perception of ‘circumstances [that] could cause him reasonably to believe that [deadly force] was necessary for his protection’. Proportionality is subordinate to reasonable necessity.

54 Even so, the emerging law of home invasion is a reminder that threats to property interests do sometimes excuse a resort to deadly force. See, eg, *Criminal Law Consolidation Act* 1935 (SA) s 15C (Requirement of Reasonable Proportionality Not to Apply in Case of an Innocent Defence against Home Invasion). See also *Criminal Code Act Compilation Act* 1913 (WA) app B sch 1 s 244 (Home Invasion).


56 *Viro* (n 52) 126 (Gibbs J), citing *R v Tikos (No 1)* [1963] VR 285, 291 (Sholl J).

57 *Zecevic* (n 49) 666 (Brennan J), quoting *Royal Commission Appointed to Consider the Law Relating to Indictable Offences* (Report, 1879) 44.

58 Howard, ‘Two Problems in Excessive Defence’ (n 38) 352.
his readers rather than to encourage serious consideration of the mundane realities of dominance and submission where they are most commonly manifest, in the theatre of intimate partner violence.59 Howard did not attempt an answer to his question about circumstances that might require submission to a threatened assault and ventured no opinion on the criminal responsibility of the girl with the lethal hatpin. He did, however, suggest a reading of the law of self defence that has potential application in the very different circumstances of domestic abuse involving threats of injury, violation or indecent or insulting usage. Perhaps, in these circumstances, the victim:

is entitled to take measures, not proportionate to the seriousness of the harm she anticipates if she does not escape, but proportionate to the difficulty of escaping from a situation in which the unlawful interference with her person is to be expected.60

**Epi logue**

In the years that followed, courts expressed increasing concern that the qualified defence was incoherent in principle and difficult, if not impossible, to explain to juries. Almost three decades passed however, before the High Court was asked, in *Viro,*61 to reconsider the scope of self defence and its pendant doctrine of excessive defence in a challenge prompted by the Privy Council decision in *Palmer v The Queen.*62 The Privy Council had concluded that the qualified defence was no part of English common law or, the decision being on appeal from Jamaica, the common law of that jurisdiction.63 The High Court was unanimous in holding that Privy Council decisions did not determine the content of Australian common law.64 The Court divided, however, on the question whether *Howe* should be followed. Justice Mason provided a summary six point formulation of the law of self defence, in its complete and qualified versions,65 that secured the reluctant agreement of a majority of the Court.66 Though the ‘new manslaughter’ was saved for another day, all members of

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60 Howard, ‘Two Problems in Excessive Defence’ (n 38) 353.

61 *Viro* (n 52). The significance of the issues relating to the authority of Privy Council decisions required the consideration of the Full Bench of the High Court: Barwick CJ, Gibbs, Stephen, Mason, Jacobs, Murphy and Aickin JJ.


63 *Palmer v The Queen* [1971] AC 814, 831–2.

64 *Viro* (n 52) 93 (Barwick CJ), 119 (Gibbs J), 130 (Stephen J), 135 (Mason J), 150–1 (Jacobs J), 166–7 (Murphy J), 174 (Aickin J).

65 Ibid 146–7 (Mason J).

66 Ibid 128 (Gibbs J), 134–5 (Stephen J), 158 (Jacobs J), 180 (Aickin J).
the majority expressed to varying degrees their unease or incredulity that a threat of ‘injury, violation or indecent or insulting usage’ might be sufficient to excuse or partially excuse a resort to deadly force.

Eventually in 1987, in Zecevic, the High Court repudiated its earlier recognition of the qualified defence and declared that it was no longer a part of Australian common law. The partial defence of provocation, which shares substantial common territory with excessive defence, was called in aid to fill the lacuna left by its elimination.67 The decision in Zecevic has been taken to affirm the view expressed in Howe that ‘proportionality’ does not require equivalence between the threat and response in self defence at common law.68 However, the dictum that circumstances might sometimes excuse a resort to deadly force to repel ‘injury, violation or indecent and insulting usage’ has disappeared without trace.

In the years that followed the decision in Zecevic, legislatures in the common law states of South Australia,69 New South Wales,70 and Victoria71 enacted statutory equivalents of the qualified defence.72 Western Australia incorporated a version in its Criminal Code.73 Of these statutory interventions, the brief Victorian experiment with a new manslaughter called ‘defensive homicide’ is the most remarkable. Defensive homicide was introduced in 2005 and repealed in 2014.74 A brief account of this ‘failed law reform’75 illustrates the perennial problems that beset attempts to devise a rational integration of the elements of conduct, culpability and punishment in murder and manslaughter.

In 2005, the Victorian Parliament enacted defensive homicide as a version of the qualified defence alongside other ‘family violence’ legislation abolishing the partial defence of provocation.76 The qualified defence was transformed into a

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69 Criminal Law Consolidation Act 1935 (SA) s 15(2).
70 Crimes Act 1900 (NSW) s 421.
71 Crimes Act 1958 (Vic) s 9AD, as inserted by Crimes (Homicide) Act 2005 (Vic).
72 For a contemporary discussion of some of these statutory interventions and critique of Zecevic (n 49): see Yeo (n 49).
73 Criminal Code (WA) s 248(3).
74 See Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).
75 Kate Fitz-Gibbon, ‘The Offence of Defensive Homicide: Lessons Learned from Failed Law Reform’ in Fitz-Gibbon and Freiberg (n 59) 128.
distinct offence, with a maximum penalty of 20 years imprisonment, equivalent to manslaughter. Defensive homicide was a response with variations to a recommendation by the Victorian Law Reform Commission to reinstate, in statutory form, the common law of excessive defence. In a post-mortem on the failed reform, the Hon Marcia Neave AO, the distinguished jurist who chaired the Commission, outlined the debate and conflicting views in 2004–05 about proposals to reinstate the qualified defence. Opponents of the qualified defence had argued that a reform meant to save women from a conviction for murder when they responded with deadly force to family violence might result in a compromise verdict of unlawful homicide, rather than complete acquittal. On the other hand, aggressive men who killed unnecessarily and without reason might be convicted of the lesser offence and escape a deserved conviction for murder. A decade of experience with the ‘new manslaughter’ did nothing to settle the scholarly debate but Parliament intervened and abolished defensive homicide in 2014. It was taken to be a justification for legislative repeal that most cases of defensive homicide involved ‘men who killed other men in violent confrontations, rather than women who kill in the context of family violence’. A peculiarity of the 2005 legislative definition of self defence survived the 2014 repeal of defensive homicide. The statutory definition of the complete defence reinstates the rule requiring equivalent proportionality when murder is charged. Nothing short of a belief that the person is threatened with death or really serious injury (which includes serious sexual assault) can excuse a resort to deadly force.

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79 John Bray Professor of Law and Dean of University of Adelaide Law School 1987–89; Chair, Law Reform Commission of Victoria 2000–06; Justice of the Court of Appeal, Supreme Court of Victoria 2006–14; Royal Commissioner into Family Violence 2015–16.
82 Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).
84 Crimes Act 1958 (Vic) ss 322H, 322K.
The requirement of equivalence is qualified, to some indeterminate extent, by the concession that the belief need not be ‘reasonable’, so long as it is honestly held. The statutory provision is remarkable for its repudiation of Australian common law on proportionality and reasonable necessity and for its divergence from statutory provisions in the other common law states.85 Space does not permit discussion of its peculiarities or potential mitigation of its privative effect by recourse to the cognitive subjectivities of different kinds of reasonable people.

The qualified defence had its origin in Victoria. With its abolition in that jurisdiction, we have come full circle. In his review of Morris and Howard’s Studies, Louis Blom-Cooper saw little merit in the ‘new manslaughter’ in jurisdictions where sentences for murder and manslaughter were ‘equally variable’, depending on the circumstances of the case.86 He argued that offenders who used excessive force and killed in self defence should plead their mitigation during a sentencing hearing.87 In reality, however, judicial sentencing discretion in cases of murder and manslaughter is never ‘equally variable’ in the Australian common law jurisdictions. In South Australia, life imprisonment is mandatory for offenders convicted of murder and in all Australian jurisdictions the courts’ sentencing discretion in unlawful homicides is subject to increasingly directive legislative constraints.88 The effect and unexpressed objective of eliminating the qualified defence in Victoria is to increase sentence severity for unlawful homicide. Whatever the mitigation involved in a sentencing plea of excessive defence, a conviction for murder rather than manslaughter will almost always require a retributive premium of additional years in prison.89

85 Cf Crimes Act 1900 (NSW) s 418; Criminal Law Consolidation Act 1935 (SA) s 15B.
88 Note, however, the retreat from severity in the Sentencing Amendment (Sentencing Standards) Act 2017 (Vic) repealing the ‘baseline sentence’ provisions of the Sentencing Act 1991 (Vic).
ISAIAH BERLIN AND ADOLF HITLER: REFLECTIONS AND PERSONAL RECOLLECTIONS

I Introduction

When the editors of the Adelaide Law Review asked me to contribute to 'Reflections and Future Directions' — the motto of this issue — I was honoured by the invitation. My association with the University of Adelaide and its Law School has lasted for almost 60 years. It has given me a life full of interest and of opportunities. I look back on it with a sense of affection and gratitude.

It is tempting to reflect upon past issues which contain many of my contributions, including one in the very first volume, an article which has not very long ago been expanded and given a comparative dimension. Judicial law-making is a fascinating topic, but in our present age of political uncertainty there are issues which have a better claim to our attention.

Isaiah Berlin, one of the great intellectuals of the 20th century, has spoken of the 200 or so meanings of the protean word 'freedom', and has helped us isolate and understand those which should be embraced and those which deserve rejection. Berlin's reflections have brought back personal memories, some of which take me back many decades. If those who govern the fortunes of the Adelaide Law Review are looking for inspiration, Isaiah Berlin's commitment to individual liberty may be a worthwhile guide.

In a number of his lectures Berlin pondered the origin of fascism in Europe, and suggested that German Romantic philosophers, particularly Johann Gottlieb Fichte,
might have provided some of the inspiration for it. Having grown up in Germany during the 1930s and '40s, the suggestion aroused my curiosity and caused me to undertake this study.

II Berlin’s Life

A Early Years

Isaiah Berlin was born in 1909 in Riga, then a seaport in Livonia, a province of the Russian Empire. His father, Mendel Berlin, was a successful Jewish timber merchant. In 1915 the family moved to Petrograd (now St Petersburg) where they witnessed the Bolshevik revolution. In 1920 they returned to Riga. Latvia had become an independent state with Riga its capital. Life was difficult there. Mendel, a fervent anglophil, had extended his timber business to the United Kingdom and had a substantial bank account in England. He managed to move his family there in 1921, thus escaping not only a life of adversity but also the fate of some of the family’s relatives under German occupation.

Isaiah was 11 years old when he and his parents arrived in England. He completed his schooling at St Paul’s School in Hammersmith and was then admitted as an undergraduate to Corpus Christi College, Oxford. He studied Greats and then politics, philosophy and economics with first-class results.

B Career at Oxford

Berlin graduated and became a tutor in philosophy and a fellow of New College (1932–38). In 1932 he was elected to a prize fellowship at All Souls College, the first unconverted Jew to have achieved this distinction. The significant contribution he made to philosophical discourse, particularly during the 1930s, is reflected in his posthumously published work, Concepts and Categories: Philosophical Essays. As Bernhard Williams observed in the introduction to the book,

Isaiah Berlin is most widely known for his writings in political theory and the history of ideas, but he worked first in general philosophy, and contributed to the discussion of those issues in the theory of knowledge and the theory of meaning which preoccupied the more radical among the young philosophers at Oxford in the late 1930s.

On Berlin’s life, see Michael Ignatieff, Isaiah Berlin: A Life (Chatto & Windus, 1998). In preparing this work, Ignatieff spent many hours interviewing Berlin. The reader is further directed to two new works on Berlin’s life and his philosophy: Henry Hardy, In Search of Isaiah Berlin: A Literary Adventure (IB Tauris, 2019); Joshua L Cherniss and Steven B Smith (eds), The Cambridge Companion to Isaiah Berlin (Cambridge University Press, 2018).


Ibid xxix.
The school of linguistic philosophy, also widely practised by members of the Philosophy Department of the University of Adelaide, was dominating philosophical discourse well into the 1950s and beyond. As Gilbert Ryle stated in 1957, ‘[p]reoccupation with the theory of meaning could be described as the occupational disease of twentieth-century Anglo-Saxon and Austrian philosophy’. Berlin joined Oxford philosophers who practised this kind of philosophy; many of their debates took place in Berlin’s rooms at All Souls. However, he was concurrently involved in work on the life and politics of Karl Marx which resulted in his first book, published in 1939. His first publication had less to do with linguistic philosophy than with the impact of philosophical ideas on the lives of millions. It almost certainly caused him to become disillusioned with the narrowness of the preoccupation of his philosophical colleagues.

Berlin spent World War II as an emissary of the British Information Service in New York and then Washington, assisting first with the effort to persuade the United States to join the war and then reporting on the mood of the population in wartime America. His brilliant dispatches brought him to the attention of leading politicians, including Churchill. After the war he returned to Oxford. The year 1946 marked the start of Berlin’s radio broadcasts, which attracted large audiences.

In 1957 Berlin applied for the post of Chichele Professor of Social and Political Theory. Some of the Oxford grandees were consulted and expressed doubt. Gilbert Ryle observed that Berlin was ‘no ice-breaker’ in philosophy. The appointment was made over such objections and his tenure of nearly a decade proved an outstanding success. As Ignatieff observes,

'[t]he lectures he gave to packed halls of undergraduates between the autumn of 1957 and 1965 established him as one of the most exciting teachers in the Oxford of his day … Listening was like an ‘airborne adventure’, in which Berlin took the audience on a swooping flight over the intellectual landscapes of the past, leaving them at the end of the hour to file out into the High Street ‘slightly dazed’, their feet not quite touching the ground.'

In his foreword to Berlin’s *The Power of Ideas*, published posthumously, Avishai Margalit wonders why the history of ideas had not been recognised as an autonomous field of scholarship, and why it had been left to Berlin to establish its legitimacy. Berlin could not have failed to do so, for not more than one or two decades earlier

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11 Ignatieff (n 5) 225.
the impact on humanity of fanatically held political doctrines and ideas had been disastrously demonstrated.

In 1965 Sir Kenneth Wheare, then Vice-Chancellor, suggested Berlin might wish to become Principal of Iffley College, which had been recently established and was not well-endowed. Sir Kenneth Wheare was Oxford’s first Australian-born Vice-Chancellor. See JR Poynter, ‘Wheare, Sir Kenneth Clinton (1907-1979)’ Australian Dictionary of Biography (Web Page) <http://adb.anu.edu.au/biography/wheare-sir-kenneth-clinton-12005>.

Berlin’s acceptance caused surprise. However, he used his manifold connections to attract large grants, inter alia from the Wolfson and Ford Foundations, and turned Iffley into a graduate college. It was re-named Wolfson College after Sir Isaac Wolfson, who had made a large donation. By 1966 it had secured its own site and Berlin became its President, a position he occupied until 1975. The college caters for a wide range of subjects from the humanities to the social and natural sciences. It is perhaps Berlin’s most important legacy.

Regrettably I did not meet Berlin in 1968, during my year as a visiting fellow at All Souls College, Oxford. He had resigned his Chichele Professorship and his Presidency of Wolfson College kept him fully occupied. Visits to All Souls had become rare events.

C In Memoriam: Sir Isaiah Berlin

Isaiah Berlin was knighted in 1957. From 1963 to 1964 he was President of the Aristotelian Society. In 1971 he was appointed to the Order of Merit. From 1974 to 1978 he was President of the British Academy. In 1979 he was awarded the Jerusalem Prize for the Freedom of the Individual in Society, for his writings on liberty.

Berlin died in Oxford on 5 November 1997, aged 88 years. Marilyn Berger of the New York Times published an insightful obituary, calling Berlin a ‘philosopher and historian of ideas, revered for his intellect and cherished for his wit and his gift for friendship’. She listed five of Berlin’s books, and six others featuring Berlin’s
essays, collected and edited by Henry Hardy,\textsuperscript{18} a fellow of Wolfson College and one of Berlin’s literary trustees.\textsuperscript{19} Many university libraries have acquired this material and have made much of it available online.

Efforts to provide access to all of Berlin’s works, documents and letters continue unabated. In 2000 the Isaiah Berlin Literary Trust established the Isaiah Berlin Virtual Library, which provides ready internet access to much of Berlin’s literary estate.\textsuperscript{20}

\section*{III \ Four Freedoms}

\textbf{A Two freedoms}

On 31 October 1957, after his appointment to the Chichele Professorship, Berlin delivered his inaugural lecture in the Schools Building in Oxford, which Ignatieff calls ‘the most influential lecture he ever delivered’.\textsuperscript{21} It was published by the Clarendon Press as a booklet of 57 pages titled \textit{Two Concepts of Liberty}.\textsuperscript{22} Berlin’s distinction between the two forms of liberty, negative and positive, has been the subject of a large body of comment and has become established as an important conceptual tool in the fields of philosophy and political theory.\textsuperscript{23} He defines ‘negative freedom’ as ‘the freedom which consists in not being prevented from choosing as I do by other men’,\textsuperscript{24} and ‘positive freedom’ as the wish to be one’s ‘own master … of playing a human role, that is, of conceiving goals and policies of [one’s] own and realising

\begin{thebibliography}{9}
\bibitem{20} See ‘The Isaiah Berlin Virtual Library’, Isaiah Berlin Literary Trust, (Web Page) \url{http://berlin.wolf.ox.ac.uk/}. The website also contains information about future arrangements regarding Berlin’s work.
\bibitem{21} Ignatieff (n 5) 225.
\bibitem{23} Concerning the enduring character of Berlin’s distinction, see ‘Positive and Negative Liberty’ Stanford Encyclopedia of Philosophy (Online Encyclopedia, 27 February 2003) \url{http://plato.stanford.edu/entries/liberty-positive-negative/}.
\bibitem{24} Berlin, \textit{Two Concepts of Liberty} (n 4) 16.
\end{thebibliography}
them’. I have published an analysis of these concepts elsewhere, and will not repeat what I said there.

B The other two freedoms

In 1952, Berlin had already drawn a distinction between two freedoms. ‘Two Concepts of Freedom: Romantic and Liberal’ was a lecture he had delivered at Bryn Mawr College in Pennsylvania. ‘Liberal freedom’ became ‘negative liberty’ and ‘romantic freedom’ morphed into ‘positive liberty’. There is little substance in the change of the noun because he treats the two terms as synonymous. However, the changed adjectives indicate a significant shift in Berlin’s thinking. In the introduction to Freedom and its Betrayal, the authors of the modern concept of liberty are identified as John Locke, Thomas Paine, Wilhelm von Humboldt, the Marquis de Condorcet, Benjamin Constant, Madame de Staël and, above all, John Stuart Mill, who defined it as

the right freely to shape one’s life as one wishes, the production of circumstances in which men can develop their natures as variously and richly ... as possible ... [subject to] the need to protect other men in respect of the same rights, or else to protect the common security of them all.

Berlin must have realised that Mill’s definition (and certainly his own entirely liberal concept of freedom) contained aspects of both ‘negative’ and ‘positive’ liberty, so these adjectives became part of the new dichotomy.

The distinction between ‘liberal’ and ‘romantic’ concepts of freedom was not discarded; it played an important role in Berlin’s analysis of Romanticism. One of Berlin’s definitions of ‘romantic freedom’ as developed by German Romantic philosophers is the freedom to remove obstacles to self-expression. However, there are variants of the concept and they deserve closer scrutiny.

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25 Ibid.
28 See Berlin, Two Concepts of Liberty (n 4) 6.
30 Ibid. This is how Berlin paraphrased Mill’s view.
31 Ibid 76.
IV ROMANTICISM

I first experienced Berlin in June and July 1975 when I listened to ABC re-broadcasts of six lectures under the overall title ‘Some Sources of Romanticism’. They had first been delivered in 1965 as the AW Mellon lectures in the Fine Arts at the National Gallery of Art in Washington, DC. Originally unscripted, they were later transcribed and published by Princeton University, titled The Roots of Romanticism. In one of these lectures he suggested that Romanticism was responsible for the growth of fascism in Europe.

A Berlin’s Monism and Romanticism

In these lectures, Berlin developed some rather sweeping ideas. From the time of Plato, philosophers have been searching for the one elusive idea which, if adopted by mankind, would end all strife and would enable people to live in a state of perfect harmony. In the 17th and 18th centuries the scientific method was increasingly and successfully applied to understand the natural world. This gave further impetus to the ancient quest: some philosophers of the Enlightenment believed that the same method could also be used in the cause of the harmonisation of human relations. Berlin called this kind of thinking ‘monism’.

This optimistic belief was shattered by philosophers who asserted that there would always be human values, legitimately entertained but irreconcilable with other equally legitimate values. This made conflict, even war, unavoidable so the hope for eternal peace was an illusion. The harbinger of this approach was Giambattista Vico (1668–1744), an Italian political philosopher. On 7 November 1975 I heard Berlin’s lecture on ‘Vico, Voltaire and the Beginnings of Cultural History’ in the

32 Berlin delivered the following lectures at the Washington National Gallery of Art: ‘In Search of a Definition’ (14 March 1965); ‘The First Attack on the Enlighten-ment’ (21 March 1965); ‘The True Fathers of Romanticism’ (28 March 1965); ‘The Restrained Romantics’ (4 April 1965); ‘Unbridled Romanticism’ (11 April 1964); ‘The Lasting Effects’ (18 April 1965). These lectures were re-broadcast by the ABC on the 15th, 22nd and 29th of June; and on the 6th, 13th and 20th of July in 1975. I thank the ABC for having supplied this detailed information.


34 Ibid 477–8: ‘Fascism too is an inheritor of Romanticism … The hysterical self-assertion and the nihilistic destruction of existing institutions because they confine the unlimited will, which is the only thing which counts for human beings; the superior person who crushes the inferior because his will is stronger, these are a direct inheritance — in an extremely garbled form, no doubt, but still an inheritance — from the Romantic movement; and this inheritance has played an extremely powerful part in our lives’.
Napier Building of the University of Adelaide.\textsuperscript{35} Berlin called Vico ‘one of the boldest innovators in the history of human thought’.\textsuperscript{36} He invented, so Berlin said, the concept of ‘culture’, that was destined to become a crucial element in the thinking of the Romantics. Vico saw man as ‘a self-transforming creature whose each next age is the result of the satisfaction of the needs of the previous ones’ and thus rejected as an ‘absurdity’ the view of natural lawyers and the Catholic Church that ‘there is such a thing as natural law engraved upon the hearts of men’.\textsuperscript{37}

**B Romanticism and the Germans**

After Vico, Romanticism became largely a German affair. The essential anti-Enlightenment ideas were developed by ‘the Magus of the North’, Johann Georg Hamann,\textsuperscript{38} and his more accomplished and better-known pupil, Johann Gottfried Herder.\textsuperscript{39} However, no German philosopher gave the Romantic message a more radical shape than Johann Gottlieb Fichte (1762–1814); Berlin regarded him as one of liberty’s most destructive enemies.\textsuperscript{40}

Berlin had every reason to share the anti-German sentiments which had grown in Britain during the war. Both of his grandfathers perished in the Holocaust. Had his father not succeeded in moving his family to the United Kingdom, Isaiah and his parents would almost certainly have suffered the same fate. Perhaps surprisingly, he was in no way blinded by hatred of the nation which had perpetrated many of these atrocities. Berlin’s assessment of some German Romantic philosophers is deeply empathetic. As Adolf Hitler was beginning his fateful march towards Armageddon, and the campaign to remove from national life all persons identified as racially Jewish was well underway, Berlin formed a close friendship with Adam von Trott zu Solz,\textsuperscript{41} a Prussian aristocrat and German Rhodes scholar. Von Trott was eventually made to pay for his opposition to Nazi ideology and practice by being hanged from a meat hook in Plötzensee prison on 26 August 1944. AL Rowse, an All Souls prize fellow

\begin{footnotes}
\item[36] Berlin, The Power of Ideas (n 35) 63.
\item[37] Ibid. Concerning the political impact of natural law in Germany and Austria, see Horst K Lücke ‘The European natural law codes: the age of reason and the powers of government’ (2012) 31(1) Queensland University Law Journal 7.
\item[38] Isaiah Berlin, The Magus of the North (n 17).
\item[40] See discussion in Berlin, Freedom and its Betrayal (n 29) 62–78. See also Berlin, The Roots of Romanticism (n 33) 303–15.
\item[41] Ignatieff (n 5) 73–6. See also Christopher Sykes, Troubled Loyalty: A Biography of Adam von Trott zu Solz (Collins, 1968).
\end{footnotes}
like Berlin, commemorated von Trott in one of his poems (In Memory: A v T – I saw the Ship of Death):

    Who could have known when I knew you first
Of such a fate in store for you
Laid upon that grave and lovely head?
...
The hangman’s noose about your neck,
Sleep soundly in a traitor’s grave.42

In Freedom and Its Betrayal, Berlin explained the origins of Germany’s Romantic philosophical revolution.43 The Thirty Years’ War left the Germans in a state of extreme poverty. After the Treaty of Westphalia of 1648, they were still exposed to the arbitrary will of the absolute rulers of numerous kingdoms and principalities. As a result, the ordinary German suffered from ‘a sense of being a humbler citizen of the universe than the triumphant French or the free and proud English’.44 Many adopted a stoic outlook on life, retreating, as Berlin said, into their ‘inner citadel’,45 which acquired heightened importance to the Romantic philosophers because it is unassailable:

    This is the source of the re-emergence of the doctrine, which has its roots deep both in Christianity and in Judaism, of the two selves: the spiritual, inner, [non-material], eternal soul; and the empirical, outer, physical, material self, which is prey to every misfortune, which is subject to the iron laws of the material world, from which no man may escape.46

Like many philosophers of the Enlightenment, Immanuel Kant believed in objective, universal rules discovered by the right use of reason and was thus in no way a Romantic philosopher. Nevertheless, he helped advance this ‘doctrine of the inner self’ because of his emphasis on the ‘moral law within me’:

    Zwei Dinge erfüllen das Gemüt mit immer neuer und zunehmender Bewunderung und Ehrfurcht, je öfter und anhaltender sich das Nachdenken damit beschäftigt: Der bestirnte Himmel über mir, und das moralische Gesetz in mir.47

    Two things fill the heart with ever renewed and increasing awe and reverence, the more often and the more steadily we meditate upon them: The starry firmament above and the moral law within myself.

42 AL Rowse, Poems of Deliverance (Faber and Faber, 1946) 47.
43 Berlin, Freedom and its Betrayal (n 29) 62–73.
44 Ibid 65.
45 Berlin, Two Concepts of Liberty (n 4) 19–25. More cynically, he spoke of ‘a very sublime, very grand form of the doctrine of sour grapes’ in Berlin, Freedom and its Betrayal (n 29) 66.
46 Berlin, Freedom and its Betrayal (n 29) 66.
A resigned and passive attitude to the hostile external world would have been one possible stoic reaction, but that was not how the Romantics coped with the misery around them. They called for courageous action to free the Germans from oppression and from hostile forces of nature. There is an answer to the question of how to act and what to do, ‘[t]o discover what I ought to do I have to hearken to the inner voice. The voice issues commands, injunctions; preaches ideals which I must live up to’.\(^{48}\) 

The idea of the ‘inner self’ led to enhanced emphasis on motive, intention and, most importantly, the human will. One must be honest, dedicated and true to oneself, as ‘all that a man can be responsible for is his own personal integrity, that he be honest, that he be truthful, that he at any rate does not cheat’.\(^ {49}\) Beethoven, to whom nothing mattered but this inner vision, was a hero of the Romantic movement and so was Martin Luther. In 1521, defying danger to his life, he announced at the Imperial Diet in Worms, ‘[h]ier stehe ich, ich kann nicht anders’ (here I stand, I can do no other).\(^ {50}\)

How can one not admire such integrity, such dedication? In yet another break from the past, the Romantics have given us a new message of tolerance of which Berlin thoroughly approved; ‘[a]nyone who is sufficiently a man of integrity, anyone who is prepared to sacrifice himself upon any altar, no matter what, has a moral personality which is worthy of respect, no matter how detestable or how false the ideals to which he bows his knee’.\(^ {51}\)

The Romantics undermined the optimistic ideas of monism and certainly those of the Enlightenment. Their influence was felt across Europe, not just in Germany. As Berlin suggested, Romanticism spawned fascism.

### V THE POWER OF IDEAS

#### A Heinrich Heine’s prophecy

Berlin took an intense interest in Heinrich Heine, a German poet and essayist of the early 19th century.\(^ {52}\) He even mentioned Heine’s ideas in the lecture I attended, even though there was nothing to link him with Giambattista Vico.\(^ {53}\) In an essay published in 1835, Heine had warned that the power of ideas conceived in a

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\(^{48}\) Berlin, Freedom and its Betrayal (n 29) 68.

\(^{49}\) Ibid 70.

\(^{50}\) Ibid 72.

\(^{51}\) Berlin, Roots of Romanticism (n 33) 460.

\(^{52}\) Heine was the child of Jewish parents but converted to Lutheranism: Jeffery L Sammons, ‘Heinrich Heine, Author’ Encyclopædia Britannica (Online Encyclopedia, 13 February 2019) <https://www.britannica.com/biography/Heinrich-Heine-German-author>.

\(^{53}\) See above, Part IV(A).
professor’s study could prove capable of destroying a civilisation. Jean Jaques Rousseau’s *Social Contract* had provided the ideas of which Maximilien Robespierre had become the bloody executioner and Immanuel Kant’s *Critique of Pure Reason* had been the sword wielded to decapitate deism in Germany: ‘*der Gedanke geht der Tat voraus, wie der Blitz dem Donner*’ (the thought precedes the deed as lightning the thunder). It is the power of philosophical ideas which occupied Berlin throughout much of his life. He concludes his comments on Heine with a sense of muted optimism:

[Heine] prophesied that the romantic faith of Fichte and Schelling would one day be turned, with terrible effect, by their fanatical German followers, against the liberal culture of the West. The facts have not wholly belied this prediction; but if professors can truly wield this fatal power, may it not be that other professors, and they alone, can disarm them?

This passage seems to confirm the view, often voiced, that Heine foretold the horrors of the 20th century. In his essay on the German philosopher and agitator Johann Gottlieb Fichte, Berlin paraphrased and part-quoted Heine’s prophecy:

Heine feels genuine terror … and had a genuine vision of doom to come: ‘Kantians will appear, who in the world of mere phenomena hold nothing sacred, and ruthlessly with sword and axe will hack through the foundations of our European life, and pull up the past by its last remaining roots. Armed Fichtean will come, whose fanatical wills neither fear nor self-interest can touch’. These men, these pantheists, will fight recklessly for their principles, for these principles are absolute, and their dangers seem to them purely illusory. *Naturphilosophen* will identify themselves with elemental forces, which are always destructive. Then the god Thor will wield his gigantic hammer and smash the Gothic cathedrals.

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55 Ibid 160.


57 Berlin, *Two Concepts of Liberty* (n 4) 2.


59 Berlin, *Freedom and its Betrayal* (n 29) 77. The passage continues: ‘Christianity was the only force which held back the ancient German barbarism with its naked violence; once that talisman is broken a terrible cataclysm will break out.’
‘Fichteans’ in this passage refers to (then only potential) followers of Fichte. From my school days (1939–49), I remember Fichte as the great philosopher and patriot who courageously defied Napoleon and upheld German dignity. Berlin mentions Fichte’s celebrated *Reden an die deutsche Nation* (speeches to the German nation), delivered in the city of Berlin in 1807–8, ‘at a time when the troops of Napoleon were occupying the city, in which he told the Germans to arise and resist’. He was introduced to us by our teachers together with Ernst Moritz Arndt (1769–1860). They were two of the main fathers of German nationalism.

B  Fichte’s concept of freedom; a ‘quantum leap’

Berlin reports Fichte as having stated: ‘My system, from beginning to end, is merely an analysis of the concept of freedom’. According to Fichte, true freedom consists in listening to the inner voice which issues orders to myself which I, being free to do as I will, obey. Freedom is ‘obedience to self-imposed injunctions’.

Berlin quotes Fichte as saying, somewhat cryptically, that ‘I am wholly my own creation ... I do not accept the law of what nature offers me because I must, I believe it because I will’. ‘Will’ occurs in Berlin’s account of Fichte’s philosophy at least 30 times. It is best understood as the unbending determination to do what one feels called upon to do. Whoever succeeds in translating such determination into action gains a sense of identity and knows that he exists. Fichte is reported as having said ‘I do not wish to think, I wish to act.’ The Romantics transferred the emphasis from

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60 Ibid.
61 The school I attended in Wuppertal from 1939 to 1942 was called *Ernst Moritz Arndt Schule*. In 1945 after the lost war it was renamed (somewhat ridiculously) *Schule in der Siegesstraße* (School in Victory Street). It had not occurred to the British military government which ordered the change of name also to change the name of the street.
63 Arndt lectured at the University of Greifswald; his publications were anti-French and anti-Semitic, extolling the purity of the German race. He opposed serfdom, as apparent from one of his famous poems *Vaterlandslied* (again arousing patriotic, if not chauvinistic feelings for Germany). Arndt’s agitation against serfdom led to its abolition in Sweden. See Karen Hagemann ‘Of ‘Manly Valor’ and ‘German Honor’: Nation, War, and Masculinity in the Age of the Prussian Uprising Against Napoleon’ (1997) 30(2) *Central European History* 187, 209:

> Der Gott, der Eisen wachsen ließ,       The God who made iron grow,
> Der wollte keine Knechte             Never wanted slaves
> Drum gab er Säbel, Schwert und Spieß He gave man saber, sword and spear,
> Dem Mann in seine Rechte            To man in his right hand.

Hagemann calls Fichte and Arndt ‘contemporary prophets’ at 191.
64 Berlin, *Freedom and its Betrayal* (n 29) 63.
65 Ibid 70.
66 Ibid 71.
reason (from René Descartes’ *cogito ergo sum*)\(^\text{68}\) to motive, intent and, most importantly, the human will (*volo ergo sum*).\(^\text{69}\)

At some stage there was a ‘quantum leap’ in Fichte’s thinking when, according to Berlin, he moved from the conception of the self to a ‘superself’, the nation to which the self belongs.\(^\text{70}\) Berlin finds nothing wrong with groups or indeed nations seeking freedom at least of the positive kind.\(^\text{71}\) However, he rejects Fichte’s ‘theological’ suggestion that the nation can achieve freedom only at the expense of the individual:

> Starting with the notion of the isolated individual who serves some inner ideal which is out of reach of nature or the tyrant, Fichte gradually adopts the idea that the individual himself is nothing, that man is nothing without society … The individual, he begins to suspect, does not exist, he must vanish. The group — *Gattung*\(^\text{72}\) — alone exists, is alone real … Individual self-determination now becomes collective self-realisation, and the nation [becomes] a community of unified wills in pursuit of moral truth.\(^\text{73}\)

A final step is needed to give meaning and direction to such ‘unified wills’.\(^\text{74}\) What is needed is a leader; we need the ‘divine leadership’ of the *Zwingherr*. The *Duden* defines *Zwingherr* as a ‘meist mit Gewalt, despotisch auftretender Herrscher’ (a ruler who is despotic and usually acts violently).\(^\text{75}\) ‘*Zwingherr zur Deutschheit*’, says Fichte, calling for a ruler who takes us to *Deutschheit*, best translated as ‘Germanness’.

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\(^{69}\) ‘I am determined to succeed, therefore I am.’ Berlin, *The Roots of Romanticism* (n 33) 328–9.

\(^{70}\) Ibid 312.

\(^{71}\) Berlin, *Two Concepts of Liberty* (n 4) 54: ‘Indeed, I have tried to show that it is the notion of freedom in its “positive” sense that is at the heart of the demands for national or social self-direction which animate the most powerful public movements of our time, and that not to recognize this is to misunderstand the most vital facts and ideas of our age.’


\(^{73}\) Berlin, *Freedom and its Betrayal* (n 29) 74–5.

\(^{74}\) Ibid.

\(^{75}\) ‘Zwingherr, der’ *Duden Online-Wörterbuch* (Online Dictionary) <https://www.duden.de/rechtschreibung/Zwingherr>. The *Duden* is the German equivalent to the Oxford English Dictionary.
Berlin’s *Roots of Romanticism*\(^{76}\) has been plausibly criticised for loose generalisations and for some mistakes.\(^{77}\) That may cast some doubt on the complete reliability of his general account of Romanticism (see above Part IV(A)–(B)). However, his account of Fichte’s contribution as related in this section is exempt from such strictures; much of the same account is given by an unrelated and reliable German source.\(^{78}\) If Fichte’s effect on German politics was in fact similar to that which Karl Marx exerted on Russia and many other nations, it would be yet another impressive instance of the power of philosophical ideas on human affairs.

### C Johann Gottlieb Fichte and Adolf Hitler

Fascism in Germany equals Nazism, which cannot be separated from the utterly dominant personality of Adolf Hitler. In philosophy, Fichte was the most radical representative of the Romantic movement. For Germany, at any rate, Berlin’s suggestion that Romanticism spawned fascism raises the issue of whether Fichte’s philosophy exerted a significant influence on Hitler’s thought and action. After the Beer Hall Putsch of 1923 Hitler spent a year in Landsberg Prison. While there he wrote *Mein Kampf*.\(^{79}\) He claimed also to have studied a number of German philosophers in Landsberg. The question is whether that included Fichte, and whether Fichte’s ideas became part of Hitler’s political platform.

1 Two major parallels

(a) *Freiheit*

In Nazi Germany, ‘*Freiheit*’ (freedom) was shouted from the rooftops; it was a key concept of Nazi ideology and political practice. Columns of *Jungvolk*, 13-year old Horst Lücke included, were made to march around the streets of Germany’s towns and cities singing: ‘*nur der Freiheit gehört unser Leben* (we devote our lives to freedom)’.\(^{80}\) The song can still be heard on YouTube and is now treated in Germany

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76 Berlin, *Roots of Romanticism* (n 33).
80 ‘*Nur der Freiheit gehört unser Leben*’ (YouTube, 3 December 2008) <https://www.youtube.com/watch?v=0inc9nMi9Mk>.

*Nur der Freiheit gehört unser Leben*

*Laßt die Fahnen dem Wind*  
*Einer stehet dem andern daneben*  
*Aufgeboten wir sind*  
*Freiheit ist das Feuer*  
*Ist der helle Schein*  
*So lange sie noch lodert*  
*Ist die Welt nicht klein.*

Our lives belong to freedom  
Let our flags flutter in the wind  
We are all standing together  
And we follow the call  
Freedom is the fire  
And the brightest glow  
As long as it still blazes  
The world is not too small.
as folk music.\textsuperscript{81} In 1934 the leadership of the Hitler Youth had commissioned Hans Baumann to write and compose it.\textsuperscript{82} The 1935 Nazi Party rally in Nürnberg was titled \textit{Reichsparteitag der Freiheit} (Party of the Realm Convention of Freedom).

This ‘\textit{Freiheit}’ had nothing to do with John Stuart Mill. The \textit{Enabling Act} of 1933 had effectively extinguished any legal protection of individual rights in Germany.\textsuperscript{83} At the \textit{Reichsparteitag der Freiheit} of 1935, the \textit{Nürnberger Gesetze} (Nuremberg Laws) were announced. They defined about 600,000 Germans as racially Jewish, stripped them of their German citizenship and criminalised marriage or sexual relations of other Germans with them. Hitler despised individual liberty; he saw it as an obstacle to the effective organisation of the state.\textsuperscript{84}

It follows that ‘freedom’ was used by the Nazis in the Fichtean sense, viz as wrested from the individual and attached to the nation. As Fichte had invoked it in opposition to Napoleonic domination of German lands, so Hitler employed it in his campaign against the restrictions of the Treaty of Versailles. The fact that Fichte’s and the Nazi’s concepts of freedom are so closely aligned lends some support to the suggestion that Hitler was influenced by the Romantic philosophers and more specifically by Fichte, their most radical representative.

(b) \textit{Der Wille}

To Fichte, \textit{der Wille} (the will) was just as important as freedom. It was also an essential concept in Nazi ideology. Leni Riefenstahl, Hitler’s favourite filmmaker, was asked to produce a documentary about the 1934 \textit{Reichsparteitag} in Nürnberg. Her brilliantly produced film was screened in German cinemas in 1935 and was titled \textit{Triumph des Willens} (Triumph of the Will).\textsuperscript{85}

Just how dominant the concept was in Hitler’s mental universe is shown by the fact that he uses it about 140 times in \textit{Mein Kampf}, often tied to other concepts. Examples are \textit{Willenskraft} or \textit{Willensstärke} (strength of the will); \textit{Willensfreiheit} (freedom of the will); \textit{Willenseinstellung} (direction of the will); \textit{Lebenswille} (the will to live); \textit{Mehrheitswille} (the will of the majority); \textit{Kampfwille} (the will to fight); \textit{Forterhaltungswille} (the will of a nation to preserve itself); \textit{Aufopferungswille} (the will to sacrifice oneself); \textit{Eroberungswille} (the will to conquer); \textit{Willensbekundung} (declaration of one’s will); \textit{Selbsterhaltungswille} (the will to ensure self-preservation);

\textsuperscript{81} Ibid.
\textsuperscript{82} Baumann joined the Nazi party in 1933 and served on the Russian front during World War Two. After the war he disavowed Nazi ideology and wrote children’s books.
\textsuperscript{83} \textit{Ermächtigungsgesetz, Gesetz zur Behebung der Not von Volk und Reich} (Germany) 24 March 1933.
\textsuperscript{84} HR Trevor-Roper (ed), \textit{Hitler’s Secret Conversations 1941–1944} (The New American Library, 1953) 401. There have been further editions, eg, HR Trevor-Roper (ed) \textit{Hitler’s Table Talk 1941-1944: Secret Conversations} (Enigma Books, 2007). Trevor-Roper’s introduction has not changed, nor have Hitler’s comments on individual rights.
\textsuperscript{85} ‘Triumph des Willens’ (Leni Riefenstahl-Produktion, 1935).
Willensenergie (the energy of the will); Willensschwäche (weakness of the will); and Willenslosigkeit (lack of any will). Here again, it could be argued that Hitler learnt the importance of the determination to succeed, of the will, from the Romantics and from Fichte in particular.

2 Other parallels

Many of the slogans and ideas which were common political currency in Nazi Germany were well aligned with Fichte’s theories. Examples are ‘Gemeinnutz geht vor Eigennutz’ (common good before private good), ‘du bist nichts; dein Volk ist alles’ (you are nothing, your nation is everything). Ryback noted that ‘Johann Gottlieb Fichte was in fact the philosopher closest to Hitler and his National Socialist movement in tone, spirit, and dynamic’.86 Ryback relies on a few further parallels: Fichte called for a Volkskrieg (peoples’ uprising), Hitler for the overthrow of the political elite; both believed in ‘German exceptionalism’ as manifested in customs and language, and which both wanted purged of foreign elements.87 Anti-Semitism was one of Hitler’s deadliest and most ferocious passions; Ryback calls Fichte ‘decidedly anti-Semitic’.88

3 Impact of Fichte on Hitler

Napoleon’s conquest of German lands and the loss of World War I, followed by the harsh Treaty of Versailles, engendered similar emotions in many Germans; a sense of domination by foreign powers, collective frustration and national humiliation. It turned Fichte into a ‘national-revolutionary prophet and propagandist’ against Napoleon,89 and caused Hitler either to be gripped by a burning desire for revenge and national salvation, or to politically exploit such sentiments in others. These similarities did not remain hidden from contemporary observers. Professor Ernst Bergmann of the University of Leipzig, one of Hitler’s ardent admirers, even called Fichte one of the first National Socialists.90 These facts alone would help explain some of the parallels which have been discussed.

87 Ibid 107–8: ‘It was Fichte who provided the philosophical foundations for the toxic blend of Teutonic singularity and vicious nationalism.’
88 See also JG Fichte: ‘A State Within a State’ in P Mendes-Flohr and J Reindharz (eds) The Jew in the Modern World: A Documentary History (Oxford University Press, 2nd ed, 1995) 309. It has been suggested that Fichte’s views on this subject were ambiguous. See Edward L Schaub, ‘JG Fichte and Anti-Semitism’ 49(1) (1940) Philosophical Review 37.
89 Nipperdey (n 78) 303: ‘Fichte wird … zum national-revolutionären Propheten und Propagandisten’.
90 Schaub (n 88) 36: ‘To regard Fichte as the first great forerunner of National Socialism, … even as a National Socialist, therefore appears not unjustifiable.’
Hitler certainly took an interest in German philosophers. He boasted that he took Arthur Schopenhauer’s *Die Welt als Wille und Vorstellung* (the World as Will and Representation)\(^91\) into the trenches during World War I and that he read it there.\(^92\) He borrowed books by Schopenhauer from a library in 1919 when he first joined the *Deutsche Arbeiter Party* (the German Workers’ Party), the forerunner of the Nazi Party.\(^93\) *Mein Kampf* quotes Schopenhauer’s comment that the Jew was ‘*der große Meister im Lügen*’ (the masterful liar);\(^94\) however, he eventually tired of the philosopher’s bookishness. The library of his Chancellery contained a set of Nietzsche’s collected works but his reverence for the philosopher seems to have had its limits; he is said to have told Leni Riefenstahl that Nietzsche was more of an artist than a philosopher. His language, Hitler is supposed to have said, is possibly the most beautiful which German literature has to offer.\(^95\) What of Johann Gottlieb Fichte?

Dietrich Eckart, a poet and writer and one of the first members of the Nazi Party,\(^96\) is reported as having stated that Fichte, Schopenhauer and Nietzsche were the ‘philosophical triumvirate of national Socialism’.\(^97\) Eckart, who died in 1923, was Hitler’s much admired mentor; *Mein Kampf*, written in 1924, concludes with a tribute to him.\(^98\) Sherratt mentions Kant, Fichte, Schiller, Schopenhauer and Nietzsche as philosophers who were ‘usurped’ by Hitler.\(^99\) In at least one of his speeches, Hitler mentioned Fichte’s ‘Speeches to the Nation’.\(^100\) In 1933, after he had become Chancellor, Leni Riefenstahl presented him with an eight-volume set of Fichte’s collected works, a first edition published in 1848.\(^101\) It is safe to conclude that Hitler knew of Fichte throughout his political career.

The weight of the pro-Fichte indicators is somewhat lessened by the fact that his name does not appear in a book written by Houston Stewart Chamberlain, a British-born German philosopher.\(^102\) It was his *Foundations of the 19th Century*, which, with

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\(^{91}\) Ryback (n 86) 104.

\(^{92}\) Ibid.

\(^{93}\) Ibid.

\(^{94}\) Hitler (n 79) 253.

\(^{95}\) Ryback (n 86) 107. Remembering poems like *Venedig* and *Die Sonne Sinkt* makes it difficult to disagree with Hitler’s judgment.


\(^{97}\) Ryback (n 86) 108.

\(^{98}\) Hitler (n 79) 781: ‘As one of the best he devoted his life to the awakening of our people in his life, in his poetry, in his thinking and finally in his action’.


\(^{100}\) Ryback (n 86) 107.

\(^{101}\) Ibid 100. The dedication reads: ‘to my dear Führer with the deepest reverence’ and is dated 20 June 1933.

its strongly anti-Semitic orientation, could almost be described as Hitler’s bible.\(^{103}\) Trevor Roper has called it ‘the avowed and recognisable basis of [Hitler’s] racial doctrines’\(^{104}\)

Hitler’s school education had been second-rate and, as Ryback says, he was well aware of his academic deficiencies.\(^ {105}\) He had neither the time, the patience nor the intellectual equipment to truly study the philosophical works which he encountered. Ryback has found no evidence to support the view that Hitler ever engaged in the serious study of German philosophy.\(^ {106}\) His claim to have done so seems like an attempt to make himself look erudite; the realistic view is that, from his limited reading, he would have picked out whatever suited his racial and chauvinistic prejudices and ignored the rest. As he says in Mein Kampf, ‘[d]ie Kunst des Lesens ist auch hier: Wesentliches behalten, Unwesentliches vergessen’ (the art of reading is: remember what is important, forget what is unimportant).\(^ {107}\)

Trevor-Roper has summed up Hitler’s incredible rise to power:

The son of a petty official in rural Austria, himself of meagre education and no fixed background, by all accounts a shiftless, feeble and unemployable neurotic, living from hand to mouth in the slums of Vienna, he appeared in Germany as a foreigner, and, in the years of its most abject condition, he declared that the German people could, by its own efforts … conquer and dominate the whole of Europe [and] … that he personally could achieve this miracle. Twenty years later he had so nearly succeeded that the rest of the world thought it another miracle that he was at last resisted.\(^ {108}\)

Who was this man? There has been endless speculation about the nature of Hitler’s personality. Trevor-Roper’s account\(^ {109}\) and Joachim Fest’s Hitler\(^ {110}\) are the best that I have seen, but even they have not given us a definitive answer. Even those who were very close to him have told us that they did not really know him. General Alfred Jodl, Chief of the Operations Staff of the Armed Forces High Command, is reported as having stated: ‘I ask myself: Do I then know this person at all, at whose side I led so

\(^{103}\) Houston Stewart Chamberlain, The Foundations of the 19th Century (Bodley Head, 2\(^{nd}\) ed, 1912). The same is true of Alfred Rosenberg, Der Mythus des zwanzigsten Jahrhunderts (Zentralverlag der NSDAP, 1930) a deeply racist rant which is best ignored. Chamberlain’s book was originally published in German in 1899.

\(^{104}\) Trevor-Roper, Hitler’s Secret Conversations 1941–1944 (n 84) xxvii.

\(^{105}\) Ryback (n 86) 53.

\(^{106}\) Ibid 104–7.

\(^{107}\) Hitler (n 79) 12.

\(^{108}\) Trevor-Roper, Hitler’s Secret Conversations 1941–1944 (n 84) vii–viii.

\(^{109}\) Ibid vii–xxxii.

\(^{110}\) Joachim C Fest, Hitler, tr Clara Winston and Richard Winston (Weidenfeld and Nicolson, 1987).
thorny an existence? … Even today I do not know what he thought, knew and wanted to do, but only what I thought and suspected about it.111

Whatever the answer, the view, to adapt Berlin’s words, that Hitler simply wielded Fichte’s fatal power in a way which other professors could have cured, can hardly be part of it.112

VI Conclusion

The theories of Karl Marx appear to have had a major impact on Lenin, the leader of the Bolshevik revolution in Russia.113 A similar conclusion about the impact of Fichte’s philosophy on Adolf Hitler’s doctrines, attitudes, emotions and cast-iron prejudices is not sustainable — there is simply not enough persuasive evidence for it. Hitler was the central figure of the fascist movement in Europe during the 1920s and ’30s, so it is unlikely that Berlin’s broader thesis, viz that Romanticism was responsible for the growth of fascism in Europe, can be sustained.

In my study of Berlin’s views on liberal and romantic freedom and of information about his life, two matters stand out which I find profoundly appealing: the liberal concept of individual freedom and a cosmopolitan outlook on life.

The freedom of the individual to which Berlin was committed can never be unlimited. There are many other important values such as justice, happiness, culture, security and varying degrees of equality which need to be accommodated at the expense of personal freedom.114 However, it must never be completely extinguished:

there ought to exist a certain minimum area of personal freedom which must on no account be violated, for if it is overstepped, the individual will find himself in an area too narrow for even that minimum development of his natural faculties which alone makes it possible to pursue, and even to conceive, the various ends which men hold good or right or sacred.115

112 Berlin, *Freedom and its Betrayal* (n 29) 77.
113 Nadezhda Krupskaya ‘How Lenin Studied Marx’ Marxists Archive (Online Archive) <https://www.marxists.org/archive/krupskaya/works/howleninstudiedmarx.htm>: ‘Lenin had a wonderful knowledge of Marx. In 1893, when he came to St. Petersburg, he astonished all of us who were Marxists at the time with his tremendous knowledge of the works of Marx and Engels.’ From 1898 until Lenin’s death in 1924, Krupskaya was Lenin’s wife.
114 Berlin, *Two Concepts of Liberty* (n 4) 9.
115 Ibid.
Within Berlin’s system of value pluralism, his ‘minimum area of personal freedom’ comes as close as anything to an absolute value.\textsuperscript{116}

In 1929 Berlin was naturalised,\textsuperscript{117} and there was never any doubt about his complete loyalty to his adopted country. In Britain he found a spirit of respect for others and toleration, of freedom of thought and debate, including the freedom to cultivate one’s own foreign traditions. As he has explained, his heritage was threefold: British, Russian and Jewish.\textsuperscript{118} In his infancy the family spoke Russian. He read Russian authors and gave lectures on his favourite, Ivan Turgenev. He shared with Turgenev ‘an ability to enter into beliefs, feelings and attitudes alien and at times acutely antipathetic to his own’.\textsuperscript{119} When he visited Leningrad in 1945, he spent many hours with the famous poet Anna Akhmatova; they exchanged views on Russian writers and formed an intense friendship.\textsuperscript{120} He grew up in a Jewish family, was a lifelong Zionist and observed Jewish festivals, although he was not religious. No heritage was more important to him other than his Jewish one. For all his Britishness, Isaiah Berlin was, I believe, a cosmopolitan citizen.

\textsuperscript{116} Berlin has explained the system of value pluralism as follows: ‘values are not discovered but invented – created by men like works of art, of which it is senseless to ask where they were before they were conceived’. See, eg, Berlin, \textit{Political Ideas in the Romantic Age} (n 27) 12.


\textsuperscript{118} Berlin, \textit{Personal Impressions} (n 18). For a brief summary, see Ignatieff (n 5) 292–4.

\textsuperscript{119} Ignatieff (n 5) 256.

\textsuperscript{120} Ibid 151–68.
J ohn Keeler*

RUMINATIONS ON PERSONAL INJURY LAW SINCE 1960

I INTRODUCTION: FLEMING ON TORTS

The first issue of the *Adelaide Law Review* came out in 1960, the same year that I began my undergraduate law course in England under the guidance of Arthur Rogerson.¹ In the final term of my first year we studied torts, and I made my first acquaintance with *Fleming on Torts*,² recommended by Arthur as the most stimulating of the texts though not confined to English law. One other comment he made that stays in the memory from that term is that for the practicing lawyer, *Donoghue v Stevenson*³ was not the most important torts case of the interwar period: he gave that as being *Wilson and Clyde Coal Co Ltd v English*.⁴ This gave an emphasis to personal injury law which reinforced Fleming’s view of the function of tort law.

In their tributes to John Fleming, Peter Cane and Michael Kirby both point to the influence of realist jurisprudence and of Fleming James on his work.⁵ In the language of Jerome Frank, Fleming’s analysis of the law of negligence and of the law relating to personal injury evidences both rule and fact skepticism.⁶ Commonly used judicial language was often described as ‘mantra’ or ‘shibboleth’, lacking any consistent conceptual base and used as a façade for decisions that were made on other policy grounds. Those decisions tended towards strict rather than negligence liability, whether through raising the standard of reasonable care to a high level or by a more explicit adoption of a strict liability doctrine. This was consistent with the function of the law which Fleming, like James, identified as being to cope with the inevitable losses stemming from an industrial, mass-producing and interdependent

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* Emeritus Fellow, University of Adelaide; Lecturer at Adelaide Law School 1964–67; Senior Lecturer 1967–72; Reader/Associate Professor 1973–2002; Adjunct Associate Professor 2002–17.

¹ In addition to his work in England, Arthur Rogerson went on to become an Emeritus Professor at the University of Adelaide, serving as Bonython Professor of Law from 1964–1978 and as Dean of the Faculty of Law from 1964–1968.


³ [1932] AC 562.

⁴ [1938] AC 57.


society and economy. The tools which enabled the achievement of this object were enterprise liability, with a particular focus on strict product liability and endorsement of workers’ compensation legislation backed by liability insurance with road traffic injuries covered by driver liability insurance. James called this ‘social insurance’, with the early editions of Fleming adding collectivisation of losses and loss distribution to the description. In all this, there are echoes of a slightly different American debate in the conflict of laws: in the event of a conflict between the law of the place of an accident, the law of the domicile of the main parties and perhaps the law of the state in which the vehicles were garaged or insured, which should be taken as the governing law? One answer, preferred by Moffat Hancock, was to choose the ‘better’ law. That paralleled Fleming’s approach to personal injury law. Fleming was not content with simply giving a critical assessment of competing decisions. And even beyond common law developments he suggested that eventually personal injury law might be better dealt with by a comprehensive social programme which could spread losses much more widely than to employers, manufacturers and drivers, replacing the role of tort law.

Sixty years later we can see much of this as either prescient of Australian law or as indicative of Fleming’s influence on it. ‘The imperial expansion of negligence’ has been marked in Australia although it has held the scope of strict liability doctrines such as *Rylands v Fletcher* and liability for intrinsically dangerous things and kept vicarious liability and non-delegable duties within tighter limits than other common

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11 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520, 570 (Brennan J) (‘Burnie Port Authority’).
12 (1868) LR 3 HL 330.
law jurisdictions. The *Trade Practices Act 1974* (Cth) (now the *Australian Consumer Law*) established strict manufacturer’s liability, workers’ compensation law has been considerably extended, and a very considerable degree of strict liability has been brought into several state transport accident schemes. A combination of a wider conception of what is reasonably foreseeable, the principle that even unlikely risks that can easily be eliminated should be dealt with, and the corollary of contributory negligence legislation that looking for a single or dominant cause of damage is wrong, together with a heightened appreciation of the physical and economic consequences of personal injury and disability, led to negligence liability becoming increasingly stringent. This resulted in a backlash where some judges argued extrajudicially that the concept of personal responsibility of people for their own safety had been lost. The civil liability Acts, enacted soon after the turn of the 21st century, were based on the recommendations of a committee whose terms of reference explicitly identified the objective of its remit as ‘limiting liability and quantum of damages arising from personal injury and death’.

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14 *Trade Practices Act 1974* (Cth) pt VA. See also corresponding state legislation.

15 *Competition and Consumer Act 2010* (Cth) sch 2, ss 138–49.


Those 60 years have also seen grand scale theorising about the role, morality and utility of the common law of torts. Cases for a combination of fault liability and full compensation for losses have been argued from very different directions by Law and Economics, and by corrective justice scholars. Law and Economics focuses on issues of deterrence and efficiency: it is concerned that when the costs of avoiding or minimising damage to another person are less than those which will be suffered by that other person, the actor who does not take the available precautions should pay the full amount of all the harm that is inflicted as a penalty for choosing an economically inefficient course of action. Conversely, when the cost of taking the precautions is greater than the damage inflicted, it is more efficient to carry on with the activity and let the injured person bear the cost of the harm. Corrective justice scholars start from a formal premise that the object of private law is to redress wrongs by making a wrongdoer put a wronged person in the position they would have been in had the wrong not been committed. They essentially define a wrong as behavior that does not recognise the moral right to equal respect that the actor owes to the person who has suffered harm. While it has often been claimed that these are descriptive accounts of the objectives of the common law derived from its doctrines, they obviously have a normative aspect which has been used not simply to criticise the correctness of particular decisions or doctrines but to argue for preferable directions in which the law should move.

In stark contrast to these views is the movement to remove the law of personal injury from the sphere of private law altogether and to replace it with a scheme that compensates all accident victims — and ideally all disabled persons — by a state authority on a no fault basis. The proponents of tort law focus very much on the principles that govern liability and devote much less time to the procedures that establish it and their costs. Those who criticise and condemn tort law’s operation in the field of personal injury point to its heavy costs in relation to both finding liability and assessing damages, especially for non-economic losses, and emphasise its haphazard and unequal coverage with respect to persons with similar disabilities and needs. Most of the critics have a major concern for fairness in terms of compensation as well as for the wastefulness of the costs of the tort system, though in his last writings on the subject Patrick Atiyah advocated the abolition of tort law in personal injury cases even without any formal replacement system at all. But the most common position

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20 Ibid.
is that the savings from very simplified administration of claims, and the abolition or severe reduction in compensation for non-economic losses, should be sufficient to fund a much more comprehensive coverage of accident victims to compensate them at a reasonably high earnings related level.

III GRAND THEORY THWARTED

Fleming did not elaborate on what precisely his concept of social insurance entailed, but it is reasonable to infer that it involved de facto or more probably de iure compulsory insurance; voluntary insurance leaves too many gaps in coverage, being one of the main reasons for making third party motor vehicle insurance compulsory in the period between the two World Wars. In any event the Australian experience has been that fault-based liability, a serious attempt to provide restitutio in integrum with respect to economic and non-economic harm, and personal injury insurance for third parties, is a combination that governments and the public see as unaffordable. Periodic liability insurance crises, notably in the 1970s and 1980s, established this with respect to motor vehicle accidents and industrial injuries, and the civil liability Acts were preceded by a crisis with respect to professional liability insurance for doctors and public liability insurance for local authorities. Neither the efficiency arguments of economists nor the moral arguments of corrective justice theorists have been able to withstand this brutal point, though economists have retained some influence in the field of industrial accidents.

Replacing the common law altogether with a national compensation scheme based on the principles of the New Zealand Accident Compensation Act 1972 (NZ), as well as of the Australian Woodhouse Report, ran into a much more fundamental objection. Even in New Zealand, the Accident Compensation scheme was seen as dealing with a very specific issue and as an exception to the principles of the social security system. In Australia, the Poverty Commission — which reported very soon after Woodhouse — derided it as ‘a government effort to keep the rich in the luxury to which they have become accustomed and the poor in the penury which has been their lot’. But the Poverty Commission’s own proposal for a guaranteed minimum scheme pitched at its poverty line levels was similarly not taken up by government, and has been a dead letter for decades. A fundamental principle of Australian social security is that its benefits are aimed at meeting frugal lifestyles to those in need as a matter of last resort and that, as a consequence of asset and income testing of benefits together with progressive taxation rates, it is among the most effective income redistribution systems in the world. Another is the ‘active society’ principle, which

23 National Rehabilitation and Compensation Scheme Committee, Compensation and Rehabilitation in Australia: Report of the National Committee of Inquiry (Report, 1974) (‘Australian Woodhouse Report’).
25 Commission of Inquiry into Poverty in Australia, Poverty in Australia (First Main Report, 1975) 33.
emphasises the reciprocal obligations of the system to help beneficiaries to become self-sufficient and take up the opportunities provided. In practice this translates into ‘mutual obligation’ schemes; and the Poverty Commission’s guaranteed income was as incompatible with this as the Woodhouse Committee’s adoption of non-means tested earnings related benefits.

The Commonwealth treats it as a corollary of the ‘last resort’ principle that, whenever another scheme provides compensation to a beneficiary, any sums that the social security, healthcare or National Disability Insurance Scheme (‘NDIS’) systems have paid to the beneficiary be a first charge on the sums that the other schemes provide or disqualify the beneficiary from further payments until the alternative compensation has been fully taken into account. This has been the subject of fierce and extended criticism, but the Commonwealth has been firm in its resolve to maintain it. The states have no option but to live with it and this places practical and political restrictions on what alternative schemes they construct. One way of coordinating Commonwealth and state benefits, for example, would be to set all state benefits at the same levels and subject to the same conditions as social security, so that the sources of revenue their schemes rely on simply supplement the overall budgets available for support to the disabled. But this would both require additional, expensive and probably duplicative administrative arrangements between the Commonwealth and the states; and produce strenuous opposition from employers, motor vehicle owners and others who fund state schemes, since they would see no additional benefit to claimants from their contributions.

American insurers opposed the introduction of compulsory vehicle insurance, partly on grounds that they would lose control over premium setting. Another way of looking at this issue is to see it as reflecting the relationship between private and public law principles in the construction of Australia’s personal injury compensation schemes. In many ways, of course, public policy considerations dominate, though private law principles still retain a place in them. Most obviously in those areas where there is no statutory scheme in place, private law principles still govern premium setting. The most important of these principles are that insurance should be fully funded (meaning that the income from any period should cover all the liabilities arising during that period), and that premiums should as far as possible be consistent with risk so that higher risk insureds pay more than lower risk ones (otherwise by the process of adverse selection lower risk clients will give up their insurance). When insurance is compulsory in theory full funding is less important, but in practice the states encounter economic disadvantages in assessments of their overall financial

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26 Bettina Cass, *Social Security Review: Income Support for the Unemployed in Australia: Towards a More Active System* (Issue Paper No 4, 1988); Bettina Cass, Francis Gibson and Fiona Tito, *Social Security Review: Towards Enabling Policies: Income Support for People with Disabilities* (Issue Paper No 5, 1988). This does not at all imply that the authors approve of the way in which the concept has subsequently been developed and applied.

situation and credit ratings that have discouraged them from moving away from it altogether. In consequence, they only countenance pay as you go funding for limited periods. Since compulsion removes the possibility of adverse selection the classification of insureds into pools reflecting their levels of risk is also less important, but classification remains standard although without as much rigour. Both motor vehicle and workers’ compensation schemes maintain feature rating at a general level, however, workers’ compensation schemes often aim to restrict the number of classifications. One consequence of this is a demand for an element of experience rating even where there can be no statistically reliable base for it.

It is, however, inevitable that public policy and law considerations should influence and normally dominate the private law base. Whether a transport or workers’ compensation scheme is based on the payment of premiums to an insurer or levies to a public authority, they are fixed or tightly controlled by a public authority and the level and terms of the cover are fixed by statute. Private sector companies may be brought in for particular purposes; such as the collection of premiums and the administration of claims, but the design of the schemes is the responsibility of governments, and their monitoring and supervision (when not the overall management and administration) the responsibility of regulatory authorities.

IV PERSONAL INJURY LAW TODAY: INCOME SUPPORT AND NON-ECONOMIC LOSS

Although there are clearly very significant differences between the Social Security Act 1991 (Cth) provisions for the sick, injured and disabled as a provider of last resort, and those of the state schemes directed at people affected by specific activities, there are some core concerns that they share. The most obvious is a concern to keep the overall costs of benefits within acceptable limits and to try to prevent them from growing too far or too rapidly. This is achieved by a combination of restricting the eligibility rules for receiving a benefit, controlling the level of benefit, and having a major focus on reducing the length of time a claimant receives a benefit. In the case of the Social Security Act 1991 (Cth), the first of these has been addressed in the current structure of benefits for sickness and disability. In many ways the basic benefit for a sick claimant, or one with a partial though substantial disability, is the Newstart Allowance, which is generally available to the unemployed.28 Sickness Allowance is restricted to claimants who have current employment to return to,29 and the more generous Disability Support Pension is available only to those whose

28 Social Security Act 1991 (Cth) pt 2.12. For an account of the introduction of this pattern see, eg, Terry Carney, Social Security: Law and Policy (Federation Press, 2006). See also its predecessors: Terry Carney and Peter Hanks, Social Security Law, Policy and Administration (Oxford University Press 1986); Terry Carney and Peter Hanks, Social Security in Australia (Oxford University Press,1994). Together, these texts comprise probably the most ambitious and thoughtful attempts yet to put an area of Australian law into social and economic contexts.

condition precludes them from working for fifteen hours a week, or from training to obtain such work now and for at least two years into the future, and whose physical or mental condition reaches at least 20 points on a legislated impairment scale.\(^{30}\) There is an important definitional issue here.\(^{31}\) The law differentiates between impairment and incapacity to work. Impairment is an essentially medical issue as to whether a condition restricts the functional ability of the body or mind; while incapacity to work covers social, cultural and educational factors that combine with the condition to make the prospect of gaining employment improbable. So, the eligibility provision excludes any claimant whose impairment does not reach twenty points on the scale however unlikely it is that they will be able to find work and, effectively, transfers them to the Newstart Allowance.

The basic rate of the Newstart Allowance and Sickness Allowance for a single person as of March 2019 is $550.20 per fortnight, an amount substantially below the Henderson poverty line for a single person receiving either of the Allowances\(^{32}\) and which has been increased only through indexation for nearly a quarter of a century, despite recently expressed and apparently bipartisan political support for an increase in its real value. The mutual obligation/active society principle makes their receipt subject to conditions as to seeking employment or training for employment, and there are special services available to help the disabled find work. Failure to keep to the conditions applicable to a claimant may result in either Allowance being withheld for a number of weeks, with potential for the amount withheld to easily exceed the fines for many regulatory and minor offences. One of the main objectives of this is to keep the length of time that the Allowances are received as short as possible, so the emphasis is on improving capacity for employment rather than on impairment.

The state schemes have the same core concern for cost and level of benefits, but because they are non-means tested and still earnings-related schemes covering specific types of accidents, they have added accident prevention and safety to the strategy of minimising the period of time for which damages or benefits are calculated or payable. Setting aside for the moment the issue of no fault liability, there has been some tinkering with the criteria for obtaining benefits, most obviously in the restatements of the principles governing liability in negligence for psychiatric harm and recreational activities,\(^{33}\) as well as reviving demarcation disputes between workers’ compensation and motor vehicle schemes, and shaving the limits of the compulsory third party vehicle insurance. More significant has been the statutory expression of

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30 Ibid pt 2.3, s 94. The current rate is $843.60 for a single person.
31 Ibid s 16B.
32 The Melbourne Institute of Applied Economic and Social Research, Poverty Lines Australia, September Quarter 2018 (Report, 2018) 1. The Henderson poverty line differentiates between persons in and out of the workforce because those in the workforce incur extra costs. It treats recipients of the Allowances as being in the workforce because of the costs of fulfilling their obligation to seek employment. On that basis it sets the poverty line exclusive of housing costs for a single person at $705.04 per fortnight.
33 Butler (n 15) 207, 210.
the reduction of damages or benefits to persons with blood alcohol levels above prescribed levels or under the influence of alcohol or drugs; and the provisions for the schemes to recover money from those drivers who are uninsured, unlicensed or affected by alcohol and drugs and have the assets to meet the obligation.34

The continuing place of fault as a criterion of eligibility for damages or benefits from state schemes is more puzzling. In all states, it has been a part of the agreements establishing the NDIS that no fault schemes be established to provide funding for services to the permanently and severely disabled, so to that extent no fault schemes have been generally introduced. But in about half the states — including South Australia — victims of traffic accidents otherwise still have to prove that they were injured through the fault of another person,35 although there is no persuasive evidence that the negligence requirement has any deterrent effect on drivers and the fact that many drivers who do not register vehicles or even drive with the consent of the owner of the vehicle are covered by the third party scheme demonstrates clearly that this is a social ‘welfare’ or ‘solidarity’ scheme for the benefit of the injured. The most plausible speculations are that the ‘undemanding’ fault criterion excludes recovery by the driver and in single vehicle accidents and this avoids some problems of moral hazard. Reform of the structure of damages, especially with respect to non-economic losses and the quantification of the proportionate reductions in damages formerly left to contributory negligence, has reduced the administrative costs of the system by curtailing litigation. These reforms make it less worthwhile for governments to risk any political opposition that a shift to no fault might generate. But the experience of the Victorian transport accidents scheme, and the more recent shift by New South Wales, indicates that these are hardly compelling reasons.

In those states where liability still depends on negligence as restated and modified by the civil liability Acts, damages are still normally awarded as a lump sum and their costs are constrained by overall caps on damages for both economic and non-economic losses, prescribed discount rates and limitations on awards of interest. Although the caps are generally relatively high, this lends additional force to the criticism that the negligence system falls short of fully compensating the most severely injured, a view which is only partially offset by the new provisions for lifetime care. This is reflective of a deliberate policy position that there should be limits on the amount of economic loss compensable before social security provisions take over, and that levels of non-economic loss which are incapable of objective assessment should be regulated and limited. The regulation of non-economic loss is commonly achieved by setting a maximum amount of compensation for the very worst cases and matching proportions of that sum to degrees of harm, either by reference to a statutory table, or by requiring courts to produce on a points scale. This has the practical effect of reducing the number of cases in which it is worth disputing the level of the award, and thereby contributes to the overall objective of keeping the cost of the system within the limits of affordable premiums.

34 Ibid.
35 See, eg, the law in the ACT, Queensland, South Australia and Western Australia.
The Northern Territory is alone in having a no fault scheme for motor vehicle accidents that offers compensation until recovery, retirement or reaching pension age that excludes access to all common law remedies. It is also distinctive in that compensation for loss of earnings is not based on the prior earnings of the injured person, but on a proportion of the average weekly total earnings for all employees in the territory.\(^\text{36}\) Apart from medical, rehabilitation, and attendant care it provides payments for non-economic losses based on an impairment table. Tasmania has long had a no fault scheme which pays limited earnings-related benefits until recovery, retirement or reaching pension age, but the scheme also allows for periodic compensation to be redeemed in a lump sum, and for unrestricted access to common law claims while ensuring there is no double recovery.\(^\text{37}\)

New South Wales now has a no fault scheme which provides earnings related benefits subject to a generous cap on allowable weekly earnings, with the proportion of earnings reducing after three months and the benefit ceasing after two years unless common law proceedings have been instituted.\(^\text{38}\) There are no statutory benefits for permanent impairments or non-economic loss, though there is a separate scheme that meets the state’s obligations related to the NDIS with respect to care and treatment for those with permanent and serious disabilities.\(^\text{39}\) Access to common law remedies is denied where injuries come within the statutory definition of ‘minor’, but is otherwise available with earnings related damages subject to the same weekly cap as statutory benefits and a prescribed discount rate. Non-earnings related benefits are only available where there is a minimum assessed impairment level and are subject to a cap, but there is no requirement that the award match a measured level of impairment and — though the State Insurance Regulatory Authority may publish information that may be useful to those assessing them — the Civil Liability Act 2002 (NSW) leaves it to the courts to establish a tariff system.\(^\text{40}\) That Act also governs specific aspects of the award of damages.

Victoria has an established no fault scheme for transport accidents which provides for earnings related benefits subject to a much more rigorous cap on prior earnings than New South Wales for up to three years, with an impairment assessment test after 18 months which can lead to an award of non-economic loss (\textit{sub nom} impairment benefit) if the assessment is above 10\%\(^\text{41}\). The maximum level of benefit is defined and awards are related to the level of impairment. Common law claims are only allowed where there has been a ‘serious injury’, which is established where there is a 30\% level of permanent impairment according to the statutory tables or where the Commission accepts a permanent impairment as serious. Damages for loss of earnings are subject to both a cap on the prior earnings that can be taken into account

\(^{36}\) \textit{Motor Accidents (Compensation) Act} 1979 (NT) s 13.

\(^{37}\) \textit{Motor Accidents (Liability and Compensation) Act} 1973 (Tas) ss 27, 28A.

\(^{38}\) \textit{Motor Accidents Injuries Act} 2017 (NSW) div 3.3, ss 3.5–3.12.

\(^{39}\) \textit{Motor Accidents (Lifetime Care and Support) Act} 2006 (NSW).

\(^{40}\) \textit{Civil Liability Act} 2002 (NSW) s 17A.

\(^{41}\) \textit{Transport Accident Act} 1986 (Vic) ss 44, 46, 47.
and an overall cap, and damages for non-economic loss to a cap but otherwise to a tariff system devised by the courts. In both cases damages are not to be awarded unless they reach a specified amount. Victoria imposes the lowest limits on both statutory benefits and damages, and there is a clear policy towards skewing benefits in favour of those with lower earnings before the accident that may well go beyond simply aiming to limit the costs of compensating traffic accidents.

The pattern of no fault benefits in workers’ compensation schemes is essentially to provide a high level of replacement of prior earnings for a few months, and a lower but still very substantial level for a more extended period with an overall time or financial limit unless a set level of permanent impairment is assessed or occasionally a determination is made that there is no work capacity and that is likely to continue indefinitely. Where the qualification for payments to continue beyond the usual limit is met, there is generally an option to pursue an action for damages subject to provisions to prevent double recovery. Compensation for non-economic loss is almost universally based on assessments of permanent impairment and proportioned to a maximum sum, though there is either a minimum level of impairment imposed, or minor impairments are compensated at very low levels. But, as with motor vehicle schemes, overall patterns are subject to an almost infinite range of variations in levels of compensation, particular methods for assessing impairments and degrees of impairment that are compensable. Victoria and New South Wales make a creative effort to take social security provisions into account in allowing compensation to continue beyond usual limits where a claimant is working for more than 15 hours a week (and so ineligible for the Disability Support Pension) but is working at the limit of their capacity, and that limit is likely to last indefinitely. The ACT and Northern Territory are the only Australian jurisdictions to bar access to common law remedies altogether, though the Commonwealth Comcare scheme only allows damages claims for impairment and non-economic loss; very serious attempts to provide more general long-term periodic compensation, remove or dramatically reduce rights to their redemption and abolish access to them in Victoria and South Australia did not survive the losses to which the schemes gave rise.

42 *Workers Compensation Act 1951* (ACT) ss 37–41 (weekly payments), s 51 (non-economic loss); *Workers Compensation Act 1987* (NSW) ss 33–41 (weekly payments), pt 5 (common law), s 66 (non-economic loss); *Return To Work Act 1986* (NT) ss 61A, 64, 65 (weekly payments), s 71 (non-economic loss); *Workers Compensation And Rehabilitation Act 2003* (Qld) ss 150, 151 163 (weekly payments), ch 5 (common law), ss 178–80, 192 (non-economic loss); *Workers Compensation and Rehabilitation Regulation 2014* (Qld) sch 4A (non-economic loss); *Return To Work Act 2014* (SA) ss 39–42, 56 (weekly payments) pt 5 (common law), ss 57–8 (non-economic loss); *Workers Rehabilitation And Compensation Act 1988* (Tas) ss 69, 69B (weekly payments), ss 133, 138A, 138B (common law), s 71 (non-economic loss); *Workplace Injury Rehabilitation and Compensation Act 2013* (Vic) ss 152–6 (weekly payments), s 327 (common law), s 211 (non-economic loss); *Workers Compensation And Injury Management Act 1981* (WA) sch 1, s 18 (weekly payments), ss 93H–93S (common law), ss 31B–31D, 146A, sch 2 (non-economic loss); *Safety, Rehabilitation And Compensation Act 1988* (Cth) ss 44–5.
V Broader Issues

Underlying the recent history of the common law and the statutory schemes are the basic issues that capacity to work is a very complex concept — especially as labour markets are constantly and rapidly changing — and that how to deal with permanent partial incapacity has always been a central and most difficult problem for compensation schemes. They are exacerbated when the costs of compensating economic loss are increased by longer periods of unemployment, as well as by the development of new medical procedures that command a higher price. These are the basic reasons for the various time and monetary caps on compensation and recourse in cases of serious disabilities (whatever their definition in a particular case) to one-off awards of damages or rights of redemption, generally calculated with prescribed discount rates that are not aimed at reflecting economic reality. They are exacerbated too by the shadow of moral pressures that undeserving claimants should be excluded from benefit. It is, for example, all too easy to contemplate that the positive aspects of the ‘active society’ policy have been warped by those pressures so as to allow the combination of inadequate benefits and stringent controls presently granted to and imposed on claimants for the Newstart Allowance.

The states have also placed a very strong emphasis on accident prevention with motor accident commissions being given major responsibility for road safety, safety campaigns, and a major emphasis on the strengthening of workplace regulation. Motor vehicle schemes have a remit to support rehabilitation. Rehabilitation was also a central element of workers’ compensation schemes, but the inexorable narrowing of the broad and general concept of rehabilitation to return to work is reflected not merely in detailed accounts of the obligations of employers and employees with respect to it, but in the titles of the South Australian and Northern Territory Return to Work Acts.43 The operation of the safety and return to work provisions reflects, however, a tension in all the industrial accident schemes. Strict economic theory argues that employers should be liable for the full costs of injuries to workers where it would be cheaper to provide better safety and rehabilitation than to meet them. And the pressure of economic argument has led all the schemes to allow for employers to become self-insurers where the regulators are satisfied that they will be able to meet their legislative liabilities. So large corporations which can afford strong safety protocols, and which can ease injured employees back into the workforce, become self-insurers, leaving smaller employers without comparable levels of resources to the insurance or levy system. So it is those smaller employers with lesser resources who are subjected to a measure of cross-subsidisation of higher risk by lower risk employers as a result of broader grained premium classification, and put pressure on the level of premiums or levies that in turn contributes to fixing levels of benefit which are less than the full costs identified by the economic arguments. In turn the market pressures on the provision of safety and rehabilitation are reduced for the self-insurers as their liabilities are limited, and so have to be augmented by regulations which mainly apply generally and increase the felt demands on the smaller

43 Return to Work Act 2014 (SA); Return to Work Act 1986 (NT).
employers. It is an intriguing example of the complexity in balancing private sector and public sector policies and priorities.

With the expansion of no fault schemes, and the failure of guaranteed minimum income schemes to gain political traction, a great deal of attention has turned onto decision-making processes and the resolution of disputes in personal injury cases. These were scarcely matters of any concern until the 1970s; the Report of the Poverty Commission — Law and Poverty in Australia — did not address them at all, leaving them to the work of Committee on Administrative Discretions, and its own focus on test cases and the provision of legal aid. But after Green v Daniels, much more attention was paid to the decision-making and review process under the Social Security Act 1991 (Cth). The New South Wales Law Reform Committee’s Final Report on a Transport Accident Scheme also served to herald a much greater focus on decision-making, review and appeals in the statutory schemes. Concern to ensure that claims receive full and fair attention always had to compete with the imperative that the schemes would make decisions much more quickly and cheaply than the common law, and a balance has proved very difficult to reach and maintain. Common elements in the no fault schemes, most particularly with respect to workers’ compensation, have been initial review at a more senior level than the initial decision-maker, conciliation and the removal of medical issues — in particular, assessments of impairment, and a reduction in the legal input of medical tribunals. Nevertheless, personal injury law has come to be much more involved in public law procedures over the lifetime of the Adelaide Law Review.

Commonwealth provision for the needs of the disabled other than income has become a matter of major concern, especially since the International Year of the Disabled in 1981. Disability organisations sought a major change in overall policy, opposing the then dominant one of institutionalisation in favour of emphasising abilities rather than disabilities, and aiming to provide disabled people with the facilities to enable them to live in the community. This led to the enactment of the Disability Services Act 1986 (Cth), which in turn led to a great reduction in institutional care and a scheme based on subsidies to the providers of disability services. The Productivity Commission found in 2011 that this had led to a wholly inadequate system with a haphazard and inefficient distribution of services (though this was almost certainly

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46 (1977) 13 ALR 1.

exacerbated by consistent underfunding), and recommended instead a scheme based on providing disabled people with the means to acquire the services they need. This produced in turn the NDIS to establish and manage the recommendation. As part of the Commonwealth-state agreements about funding the scheme, the states have legislated no fault schemes providing funds for lifetime services to the long-term disabled. The NDIS has already encountered not merely funding issues but definitional problems, many of which will be all too familiar to personal injury lawyers. Decision-making and dispute resolution are very likely to be continuing problems simply because schemes that provide services that are tailor-made for each individual are the most complex and difficult to administer.

VI Conclusion

Personal injury and disability services law in Australia is a very intricate and detailed affair, the ‘plethora of systems’ criticised by Atiyah being multiplied by the number of states and territories and the different powers constitutionally allotted to them and to the Commonwealth. At the base of it is the social security system, very specifically intended to relieve cases of acknowledged need in the context of a tax-transfer scheme that redistributes income and wealth. It is also specifically designed as a ‘last resort’ scheme, acknowledging and certainly not discouraging the existence of any alternative resources available to those in need. So while a strictly egalitarian approach to the financial needs of the disabled would argue for the abolition of common law recovery and the statutory schemes, Cane’s point that there is no political pressure for either, and that analysis of the present schemes and reform proposals should be pragmatic, must be the basis of any account of them. The reasons that explain that lack of pressure may begin just as pragmatically from a view that where there is an accessible source of funding (whether from vehicle owners or employers) the losses that Calabresi called ‘secondary’, which extend to the financial dislocations that arise from a sudden loss of income, should be ameliorated. This reflects Cane’s position that all the compensation schemes, including the common

50 Where there are existing no fault schemes in place, this is done by adding to the benefits available. In the states where motor vehicle claims are still fault based, specific legislation has been enacted: see, eg, Lifetime Care And Support (Catastrophic Injuries) Act 2014 (ACT); National Injury Insurance Scheme Act 2016 (Qld); Motor Vehicle Accidents (Lifetime Support Act) 2013 (SA); Motor Vehicle (Catastrophic Accidents) Act 2016 (WA). The Motor Accidents (Lifetime Care and Support) Act 2016 (NSW) predates the no fault Motor Accidents Injuries Act 2017 (NSW).
52 See, eg, Peter Cane, The Political Economy of Personal Injury Law (University of Queensland Press, 2007).
53 Calabresi (n18) ch 13.
law, necessarily involve distributional issues and are therefore subject to political considerations.\textsuperscript{54} Those considerations may vary with different contexts. They are perhaps strongest in the workers’ compensation field, where the employer is in an especially strong position to establish standard procedures and protocols and deterrence theory and trade union pressure alike demand acceptance of responsibility where they break down or are ineffective. Most of the issues that are common to all the schemes raise issues of the distribution of losses or responsibility whether as to fixing their limits, fixing eligibility or disqualification from benefit provisions, and the level and duration of benefits and level and classification of premiums or levies as well as the costs of administration. But the influence of matters outside any normal analysis of personal injury theory cannot be excluded. For example, South Australia privatised the operations of the Motor Accident Commission in 2016, a decision which has much more to do with the State’s overall budgetary situation and other social priorities than with improving personal injury compensation.

To the extent that common themes can be identified among the multiplicity of schemes, the strongest are at present that the most severely disabled should be given priority, both with respect to income levels and the provision of facilities to give them an acceptable quality of life and opportunity to live in the community on comparable terms with other people. This gives rise to difficult issues in identifying who is to receive these benefits, which are very largely approached by assessing levels of impairment of physical and mental function as well as the even more difficult task of assessing the appropriate facilities. There are short waiting periods before benefits commence that may be covered by sick leave provisions or personal resources. Claimants with medium-term losses and impairments and who recover within set time limits are relatively well covered and protected from the rigours of the social security system, though levels of benefit vary from scheme to scheme and Victoria has a policy which seems directed to preference those on relatively lower incomes. As ever, the most difficult cases are those involving persons with long-term or permanent partial levels of impairment and only limited work capacity, who are most likely to find themselves moving to the social security system after a period to adjust to harsher circumstances.

Fleming’s view that the law of torts and social insurance are central to the task of coping with the losses stemming from a mass-producing, industrial and inter-dependent society has been overwhelmed by his prediction that other social welfare programmes might take over the role. The law of torts and social insurance do retain a role, but a lesser one against those of the statutory schemes and the social security system. Australia does not and is unlikely to have the comprehensive social programme he envisaged at any time in the (even unreasonably) foreseeable future. The decades between the first issue of the \textit{Adelaide Law Review} and the first issue of its 40\textsuperscript{th} volume witness the difficulties in designing and implementing even partial schemes. The schemes and the reasons and policies that underlie them from time to time will require description and evaluation for at least as many decades again.

\textsuperscript{54} Cane, \textit{The Political Economy of Personal Injury Law}, (n 50).
THE VALUE OF THE ADELAIDE LAW REVIEW FROM A STUDENT EDITOR PERSPECTIVE

I Introduction

While law reviews might appear from the outside to be a purely academic exercise, a means for university professors to reach their publishing quota, or a way for a law school to display its strong history and reputation, for the law students that sit on their editorial bodies they mean a lot more. As previous Student Editors and subsequent Associate Editors of the Adelaide Law Review (‘ALR’), we can attest to the fact that being on its editorial body was one of the most challenging and rewarding experiences of our time at law school. Being Student Editors helped us to think critically and question the law, develop an eye for detail, hone our writing and research skills, build our self-confidence and develop a sense of camaraderie with our fellow Student Editors. The experience also gave us a unique insight into the utility and value of law reviews more broadly. In this article we share our experience of being Student Editors of the ALR and how the experience has benefited us in our professional lives, in which we have collectively worked as judges’ associates, research assistants, solicitors in commercial law firms and in-house legal advisors in government.

While a number of articles have considered what it means to be a Student Editor of a law review, particularly in the context of law reviews published in the United States,1 an article on the unique experience and role of the ALR Student Editor is lacking. We hope this article will provide guidance to law students contemplating becoming a Student Editor and to those already on the ALR editorial body, or similar editing bodies, who seek the perspective of some of their predecessors.

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In line with the theme of this issue, in Part II of this article we provide a brief overview of the ALR course offered by the Adelaide Law School and reflect on our experiences as Student Editors, discussing the skills we gained and lessons learned, and how the experience has assisted us in the development of our careers. In Part III, we consider future directions for the ALR and the value of law reviews more broadly, both in the legal arena and beyond.

II Reflections on the Role and Benefits of Being an ALR Student Editor

The ALR is edited by Adelaide Law School students as part of a year-long elective course. Places in this course are offered to final year students on the basis of academic excellence in the Adelaide Law School. There are typically 12 Student Editors in addition to two Associate Editors, who are chosen on the basis of their performance as a Student Editor in the previous year.

Throughout their year as Student Editors, students attend weekly face-to-face seminars run by the Editors in Chief. Each Student Editor is responsible for editing one to two articles each semester and is allocated a week during which they must utilise the seminar to discuss their assigned articles with their fellow editors and receive feedback. During these class discussions, Student Editors analyse and critique the scholarly work in terms of its content, style, grammar, structure, word choice and adherence to the Australian Guide to Legal Citation (‘AGLC’). Outside of class hours, it is left to the students’ discretion as to when and how they undertake their editing duties. For the purpose of receiving a grade for the ALR elective, Student Editors are assessed by the Editors in Chief on their editing skills, as demonstrated in their assigned articles and on the contribution they make during class discussions. Student Editors must also write a case note each semester for assessment and potential publication. Thus, distinct from many other Australian law reviews, being a Student Editor of the ALR is not a purely co-curricular activity; it is a subject undertaken by students who are actively assessed on their editing, writing and publication management skills.

Associate Editors have a greater role in assisting the Editors in Chief to manage the publication process of the ALR from start to finish. This includes liaising with authors and typesetters and managing publication timeframes, in addition to mentoring and responding to the editorial queries of the Student Editors. Associate Editors also engage in more advanced editorial work by undertaking the final read of all proofs before they are published.

In our view, the structure of the ALR editorial body and format of the elective course are clear strengths of the ALR. By making editing duties assessable, Student Editors are pushed to achieve an extra degree of thoroughness which heightens the quality of

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the articles published in the journal. Further, the flexibility of the coursework allows students, who are typically pressed for time, to dedicate space in their timetables to engage wholeheartedly in their editing duties. In saying this, we do not hide the fact that many hours must be spent outside of class to ensure that each article is proofread to a high standard. But by pushing us outside our comfort zone, strengthening our work ethic and giving us the space to develop new skills, the ALR course afforded us a significant personal and professional development opportunity that has proved invaluable in our careers since. We now turn to discuss five of the key benefits we gained from being Student Editors and Associate Editors over our collective years on the ALR.

A. Attention to Detail

An enhanced level of attention to detail is one of the most important benefits we gained from being on the ALR editorial body. This is a direct consequence of having spent countless hours checking citations, correcting errors in grammar, punctuation and word choice, and editing and critiquing in terms of substance, style and clarity. As we became more experienced editors, our knowledge of the rules of grammar and language grew. But we also came to appreciate that such rules should not be invariably applied. Style sometimes permits departure, and authors appreciate Student Editors who display a strong attention to detail without impeding their unique writing style. Through this attention to detail we began to develop a sense of which writing style, tone and language suit a particular topic, rather than distracting the reader, and which structure and phrasing flow easily, rather than feeling forced or disjointed. Perhaps most unnerving was the intuition we developed in relation to the AGLC rules. Having spent numerous hours scouring its pages, over time we could simply tell when a citation was non-compliant without having to refer to the AGLC itself (which was strangely satisfying and admittedly useful to our fellow law students, for whom the AGLC logic remained quite indecipherable).

Now that we are working professionally, this attention to detail has proven to be both a blessing and a curse. To this day we cannot read a document without immediately analysing its structure, clarity, use of language and grammar. These are important skills to have in legal and related professions as, evidently, much legal work requires a meticulous attention to detail. Such skills not only lead to better quality and more understandable writing, but are also vital from a risk management and governance perspective.

B. Research Skills

Along with developing a critical eye for detail, the experience of being ALR Student Editors also improved our research skills. In editing each article, students must locate each source cited to verify its accuracy. Much of the research we undertook involved finding Australian case law, legislation, parliamentary debates and a variety of secondary materials such as books, articles, reports and law reform papers. However, some articles required a more advanced level of research, including researching the laws of foreign jurisdictions and finding historical international material. The Editors
in Chief, who are themselves legal academics, provided us with valuable guidance and research tips in order to find these more difficult sources.

Proficiency at legal research is a fundamental skill to develop as a law student. After all, it requires legal analysis, issue spotting, application of law to facts and the ability to think creatively and critically in order to arrive at a solution. This skill is also critical after law school for legal practice and related careers, as it is a skill upon which many other professional skills are built. It is difficult to envisage engaging in effective legal writing, advocacy or advisory work without first having conducted appropriate research into the background and scope of the matters at hand. Moreover, beyond the ability to locate a particular piece of information, effective research requires the ability to evaluate the information in terms of its relevance and reliability.

As Student Editors we also developed skills in non-legal research and analysis, as many of the articles we edited were interdisciplinary in nature (intertwining with fields of study such as commerce, science and philosophy). The ability to evaluate and synthesise legal and non-legal information is a highly sought-after skill in legal and related professions. Judges are increasingly citing non-legal sources in judgments, and legal practitioners and in-house legal advisors are required to do far more than simply research cases and legislation to find practical and commercial solutions for their clients.

C Writing Skills

*ALR* Student Editors also hone their writing skills by writing a case note each semester for assessment and potential publication. The case note centres on a recent decision of a superior Australian court. This assessment task is unique to the *ALR* course in that Student Editors devote an entire semester to writing the case note (forming a key component of their final grade), which provides students with the time to engage in an in-depth analysis of the case. The judgment chosen by each Student Editor may explore a contentious point of law, or have significant implications for a particular class of litigants. Through their case note, students are expected to go beyond a mere summary of the case and its findings, and evaluate the court’s reasoning in order to form an independent opinion on the merits of the case. This can be achieved by adopting a broad socio-legal perspective of the case, or a narrower perspective that focuses on the accuracy of the court’s interpretation of the law. Although a challenging exercise, the possibility of publication provides a strong incentive for Student Editors to develop their writing skills and produce a case note of real value.

Beyond writing case notes, Student Editors develop their writing skills by reading and editing scholarly work and discussing this work with their fellow editors. Students are encouraged to take note of an author’s ‘voice’ and are directed to resist the temptation

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3 As an example of the High Court’s use of non-legal periodicals see *McGinty v Western Australia* (1996) 186 CLR 140. See also Russell Smyth, ‘What Do Trial Judges Cite? Evidence from the New South Wales District Court’ (2018) 41(1) *University of New South Wales Law Journal* 211.
to over-edit an article by whittling down that voice until it is effectively replaced with their own. The balancing act of editing for style and substance while not losing an author’s voice is difficult, however it teaches students the valuable skill of learning how others think and write. In turn, it prompts students to become conscious of their own writing style and consider how others will read and understand their work.

D Self-Confidence

The self-confidence that came from being Student Editors of the ALR has proven invaluable to our development as lawyers and young professionals. We recall in our first semester of editing when one of our Editors in Chief advised us to trust our ability to understand and critique academic legal writing; if a piece of work did not make sense to us, it was likely the writing, not us. This was a revelation. The trust that was placed in us as undergraduate law students to understand, critique and improve the writing of senior academics, lawyers and highly-respected judges was significant. It put value on the skills we had already developed through our years of study, and challenged us to grow further in our writing, editing and communication skills. It also enabled us to read every article with a critical eye, objectivity and confidence, and empowered us to give constructive feedback (both to our peers and, more dauntingly, directly to the authors whose work we were editing). The authors’ willingness to listen to us, take our feedback on board, and acknowledge the contribution we made to their article was extremely rewarding and validated the hard work and many hours we had spent editing each piece.

As Associate Editors, a key lesson was learning to take a step back when needed. With experience comes a tendency to take charge and delve into the editing process, especially with new Student Editors. However, learning how to give constructive feedback and prompting the Student Editors to take on the responsibility of doing the hard work themselves was necessary for their skill development. In our years of work since, this experience on the ALR has given us the confidence to edit and give constructive feedback on a variety of work to senior colleagues, including judges, partners in law firms and senior academics. This has proved highly valued in time poor environments which must operate efficiently while still producing high quality work.

E Collaboration

In terms of collaboration, the ALR weekly editing class provided Student Editors with the opportunity to meet and connect with one another. At a time when most law students are studying double degrees, timetables often vary considerably and it is rare to have classes with the same cohort. This can make it difficult for law students to get to know one another and break out of the solitary nature of studying law. In addition, the rise of online lectures and decline of face-to-face tutorials means that students have even less need to be physically present on campus and communicate with one another.

In light of this, the weekly face-to-face ALR class provided a unique opportunity to connect with other law students, workshop ideas in an informal setting and receive
direct feedback from the tutor. Moreover, the ability to work with the same group of students throughout a whole year, and in a class that is half the size of most university seminars, enabled us to create a genuinely collaborative and enjoyable learning environment. Not only did this environment facilitate timely, candid and constructive discussions about style and editing, it enabled us to develop personal and professional relationships with our peers that continue to this day. In a world where the value of collaborative work environments is increasingly recognised, the ALR course enhanced our ability to work effectively with others.

III Future Directions and the Value of Law Reviews

Our experience on the ALR editorial body over a collective period of six years places us in a unique position to consider future directions for the ALR and the value of law reviews more broadly. The survival of law reviews reflects the continued importance of high quality writing, analysis and commentary on contemporary legal issues. In our increasingly digitised and globalised world — where news reporting is churned out instantly (or fabricated entirely), rushed emails replace carefully considered letters, and political pressure is brought to bear on the legal system — law reviews remain a stalwart of the legal profession, capable of resisting such pressures. Accurate, evidence-based, and critical analysis of contemporary legal and socio-political issues, removed from the courtroom and the political arena, will always be necessary. The key is to ensure that this analysis is timely, accessible, understandable and engaging. We now turn to consider means by which the ALR, and law reviews more broadly, can achieve these objectives and remain a valued publication in contemporary society.

A New Technologies

To fulfil their purpose and remain relevant, law reviews must take advantage of new technologies and methods of communication. In modern society, where hard copy journals are becoming increasingly obsolete, it is essential that law reviews are published in a digital format to remain easily accessible and financially viable. Individual articles should also be made available for download free of charge, and the traditionally slow publication cycle must be sped up to avoid articles becoming irrelevant before they are even published. The use of a ‘publication ahead of print’ policy would assist in achieving this latter objective, enabling finalised articles to be made available online prior to their inclusion in a completed issue, thus avoiding their publication being delayed by other outstanding articles.

A strong online presence is also critical to engage students and young professionals and grow readership. During our time as Student Editors, the use of Twitter as a platform to promote publication of new issues and develop the brand of the ALR grew significantly. This allows authors to share their articles featured in the journal, encourages discourse in relation to the issues raised and generally broadens the reach of the ALR. Nevertheless, far more could be done in the online space (whether through other social media platforms such as Instagram and Facebook, or by providing more visible information on the University website) to promote the value of the university
law review to the student body, who are often unaware that it exists as an academic resource and, in the case of the Adelaide Law School, as a means of legal education.

Beyond the use of social media platforms, editors of law reviews must also keep abreast of the growing number of technological tools used to retrieve, sort, and manage academic articles. For example, a simple yet effective technique would be a requirement for authors to include a number of keywords or phrases to accompany their manuscript, as the inclusion of such information would facilitate online article searches and assist in the indexing of electronic research databases. Editors may also consider moving to an American-style submission process, whereby authors initially submit their article to an academic journal management service which tracks the status of the submission and, if accepted for publication, the subsequent editing process, for the benefit of the author and the journal.

B Making the Law Understandable

In our careers since law school, we have often encountered a broad societal perception of the law as being inherently incomprehensible and intentionally confusing, designed only to be understood after years of study. Academia and university-published journals are often seen in a similar vein. However, this does not have to be the case. To reach beyond their traditional academic or judicial audience, law reviews must also be understandable to legislators, policymakers, legal practitioners and law students, amongst others. Achieving this objective requires a reduction in the use of ‘legalese’ and a divergence from the traditional law review format, dominated by lengthy academic articles. The ALR does, to its credit, include a combination of articles, legal commentary, book reviews and student case notes on contemporary cases. However, a greater mix of short-form articles and student commentary alongside more traditional academic pieces could add value and provide more relatable content for a broader audience.

Equally, when selecting content for law reviews, articles with more practical applications should be preferred to overly technical and theoretical subject matters. For example, articles outlining significant law reform initiatives should feature frequently in law reviews. Indeed, it is not uncommon for an author’s law reform article to form part of a committee’s inquiry into a particular policy or issue, or be referred to in parliamentary debates. Also in demand should be legal articles based on empirical research, such as those that are based on ‘archival’ analysis (eg analysing court records), surveys, interviews, focus groups and other fieldwork. As Felicity Bell explains,

empirical methodologies … hold many attractions for legal scholars and for the practice of law — whether in relation to understanding evidence, basing policy decisions on sound research, or having a deep and critical understanding of law’s impact on the world.4

C Pushing Boundaries

The content of law reviews should also challenge prevailing ideas and methodologies in the law. They should be truly contemporary, raising issues that are current, contentious and relevant to judges, practising lawyers, policymakers and legislators. As highlighted by Michael Kirby, ‘a well-timed article on a current issue before the courts of Australia will frequently be read by judges considering a problem of the law’. This acknowledges the important role of extraneous material and new interpretations in those ‘hard’ cases where the law offers an incomplete, ambiguous, or unsatisfactory solution to the legal ‘problem’ at hand. To this end, the ALR publishes special editions that focus on particular areas of law that are subject to recent challenge or are deserving of further exploration and analysis. Often these issues will be published ahead of the regular publication cycle, in addition to the existing two issues per year, to ensure they are timely and relevant to judges, practitioners, students and others alike.

There is also a need for law review articles that delve into topics at the boundaries of law and society. It is in this ‘grey’ area where prevailing ideas are challenged, policy is formulated and laws are changed. In our globalised and digitised world, the law increasingly has a role to play: for instance, in considering the ethics and legal frameworks relevant to the use of new technologies (eg autonomous vehicles and weapons); privacy and data (for individuals and organisations); cyber terrorism (eg the manipulation of media by foreign actors for political ends); and the militarisation of outer space. The law also continues to have a strong role in the areas of human rights, the environment and social justice movements. And yet, in all these fields, the law has struggled to keep pace with rapid technological advances and an increase in action by individuals and non-state actors (eg the recent ‘Me Too’ and ‘Black Lives Matter’ movements). Additionally, due to the nature of globalisation, the laws of different nations will inevitably differ or even come into conflict in these

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areas. In light of this complex environment, which practitioners, judges, politicians and other professionals are expected to navigate, law reviews should continue to publish articles that explore the intersection of law and society (drawing on expertise from other fields as required) and place issues within an international context.

IV Conclusion

Student Editors of the ALR complete their tenure having gained an invaluable set of skills that will assist them in a range of roles post-law school, whether in the legal field or beyond. Indeed, within the Adelaide Law School there is no comparable opportunity where students can learn to write, edit, research, collaborate and manage their own workload. Beyond the tangible skills gained — the attention to detail, the ability to conduct complex research, and the improvements in written style and analysis — the Student Editor experience also strengthened our independence and self-confidence as young professionals, and enabled us to build valuable relationships with fellow students and law colleagues that continue to this day.

Looking to the value of law reviews more broadly, the continued use of Student Editors, in our opinion, is essential to the survival of law reviews into the future. Student Editors have the capacity to ensure that the articles published in university law reviews remain understandable and engaging for audiences beyond academics and the judiciary, in particular, for students and young practitioners. Student Editors learn to edit articles as they are taught to write throughout law school — in a manner that prioritises clarity of expression, ease of understanding and persuasiveness. Student Editors draw on this prior experience to ensure that each published article is not only grammatically sound and AGLC compliant, but also understandable and useful to prospective readers.

Further, Student Editors, who are typically well-versed in new technologies and methods of communication, are critical to ensuring that law reviews are disseminated through new, primarily electronic, means which are easily accessible to new audiences and financially viable for universities. In the future, Australian Student Editors may have an increased role in assessing submissions and helping to determine the content of university law reviews, to ensure they remain truly relevant and of value to a contemporary audience.

While law reviews must continue to improve and adapt to changing academic and technological environments, the utility of Student Editorship endures — for both the Student Editors themselves and for each journal as a publication.
LEGAL SCHOLARSHIP TODAY

I INTRODUCTION

On the surface, legal scholarship in Australia today is flourishing. Never before have we seen so much diversity nor have we seen so much being published in our law journals. But if we consider the nature of law and legal scholarship, it will become apparent that much of what is published is inappropriate, misguided, or unnecessary.

This paper proceeds as follows. First, I will argue that legal academics should not see their task as one of writing for judges and the legal profession because scholarship and professional writing are different things with different aims and different aspirations. Rather, they should write as scholarly outsiders, not as part of the legal profession. Secondly, I will argue that the pressure to publish that is imposed on legal academics in the contemporary, management-run university has blinded too many legal academics to the essential nature of the law — a nature which demands time, effort, and humility. To achieve some sense of mastery in the complex and often contradictory materials that make up the law, we need to recognise that prolific writing runs the danger of being superficial or repetitive. Law is akin to philosophy in that we are engaged in a conversation with the best of the past about problems and solutions that have been with us forever.

II LAW AND LEGAL SCHOLARSHIP

‘There cannot be too many law reviews … [because] [t]here is a lot more law out there to review these days.’

It should not be controversial to suggest that for many legal academics and members of the legal profession the aim of legal scholarship is to help the profession better understand and deploy the ever-growing volume of law embodied in statute and case law. In essence, this understanding of law treats law as similar to the sciences.

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1 John Paul Jones, ‘In Praise of Student-Edited Law Reviews: A Reply to Professor Dekanal’ (1989) 57(2) University of Missouri-Kansas Law Review 241, 244.

There, much effort is devoted to the discovery, cataloguing and systematisation of vast and increasing amounts of data collected by scientists. Similarly, it is assumed that the vast body of decisions and statutes (which are increasing in number) requires legal scholars to discover, catalogue and systematise the law to make it useful for the legal profession.

Accordingly, on this view there cannot be too many law reviews. But is this way of thinking about law correct and does it do justice to what academic life should be? I think not, because it assumes that legal scholars and the profession do the same thing. They do not.

Pierre Schlag explains why in these terms:

the identity, the role, and the job tasks of the judge do not typically lead to asking questions in any intellectually sustained manner about the character of law — what it is, how it works, what it does, or how it should be.3

In Schlag’s view, this is not an attack on the judiciary but rather a statement of the obvious — that judging is not a scholarly activity in pursuit of knowledge and the truth. Judges decide cases in accordance with the methodology and authoritative sources of the common law. From an intellectual point of view this will appear narrow and limited but this approach is perfectly satisfactory from a legal perspective. We have to accept that judging is not an intellectual pursuit. Once we recognise this we can also see that scholars and judges (and practitioners) do different things.

Meir Dan-Cohen makes the point even more strongly. He argues that the discourse of legal practitioners (including judges and bureaucrats given the task of implementing law) is bureaucratic, one-sided, strategic and authoritarian, while that of scholars is imaginative, truth seeking, open-ended and personal.4 Judges decide cases in ways that are consistent with the authoritative legal materials and are not trying to find the truth or ultimate answers. The incommensurability with the two types of discourse (or practice) makes communication between the two problematic. Dan-Cohen’s argument makes it clear that if scholars write as researchers for the profession and law-makers, they are not acting as scholars.

In other words, we should examine the work and attitudes of the judiciary and the wider legal profession from the perspective of outsiders and not allow their working habits and beliefs to regulate the manner of our investigations. Articles designed to help the profession will not be additions to learning and scholarship, however helpful they might be for lawyers and judges. Richard Posner has put this well:

Lord Goff, ‘The Search for Principle’ (Maccabaean Lecture, British Academy, 5 May 1983) to support the proposition that ‘the modern common law is made in partnership between the university law schools and the courts’.

It is constructive to compare traditional academic law with typical fields in the humanities, such as literature and philosophy, on the one hand, and typical scientific fields, such as biology and physics, on the other. The professor of literature or of philosophy is a student of texts created by some of the greatest minds in history, and some of the greatness rubs off on the student. The professor of biology or physics deploys, upon his or her rather less articulate subject matter, mathematical and experimental methods of great power and beauty. The professor of law is immersed in texts — primarily judicial opinions, statutes, rules and regulations — written by judges, law clerks, politicians, lobbyists, and civil servants. To these essentially, and perhaps increasingly, mediocre texts he applies analytical tools of no great power or beauty — unless they are tools borrowed from another field. The force and reach of doctrinal legal scholarship are inherently limited.5

It is true, of course, that judgments may contain evidence of ideological, philosophical or political controversies or that judges sometimes use and illustrate such bodies of thought in their decisions. One can, for example, discern in many common law contract cases a fidelity to liberal political theory. But what is contained in the judgments by various judges is not the best thought on the relationship of contract to this theory. What can be found is the reflection of such ideas or the development of doctrine which is based upon them, whether this is done consciously or not. Judgments are not written as scholarly investigations into the philosophical bases underpinning a particular area of doctrine. Who could claim that anyone wishing to read a considered treatment of contract law from a liberal perspective would get it from reading High Court contract decisions as opposed to reading Charles Fried?6 Or, if we look at another area of law, it is clear that an intimate knowledge of case law is required to master constitutional doctrine for the purposes of litigation before the High Court. If one wishes, on the other hand, to gain some insight into constitutionalism, the cases will contain, at best, echoes and hints about the values which, again, are consciously or unconsciously held. The best treatments of constitutionalism will be found in works of constitutional history and politics: modern, medieval and ancient. Here the ideas which are hinted at, relied upon or superficially treated in the courts, will be available in their best treatments.

To equate judging with scholarship is to profoundly misunderstand the nature and history of common law judging. Judges are not interested in giving illuminating discussions on anything other than case law and statutes, and judges have neither the training nor the knowledge to go beyond the cases and statutes even if they are so inclined. It is unrealistic to think that judges working in the common law

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tradition want to, or can, create lasting works of scholarship. Their judgments might
give evidence of philosophical, jurisprudential and political beliefs but they cannot
provide scholarly treatments of these beliefs.

For practitioners, cases are very important. The analytical development of case law
is the accepted method for resolving legal disputes in the common law. Posner has
called this ‘debaters’ reasoning’. Now, there is nothing wrong with this method; one
method is as good as another if the results are acceptable in that society. What cannot
be argued in its favour is that it gives a scholarly understanding of the law. Classical
apologists for the common law such as Llewellyn and Eisenberg are best understood
as defending the common law method as a practice which gives tolerably predictable
results and which fits the ethos, experience and expectations of the legal profession.

Now, of course, neither of these thinkers argued that the common law method was a
closed, logical system; indeed, they recognised the openness of the common law as
a strength because it allows for the reasonably predictable and orderly development
of the law. Common law judging is an art, as Llewellyn so brilliantly explained. It is
a means of resolving disputes in a way which seems consistent, as the judges and
legal profession see it, with the traditions of the common law and with changes in
society — just as clearly, the common law does reflect the predominant views in our
society and in the legal profession. While this calls for investigation — the judges’
received wisdom may not be to everyone’s taste — it does not demand from scholars
a comprehensive catalogue and analysis of every judgment handed down.

There clearly is a need for much legal writing to be aimed at practitioners. But this
is not scholarship. Scholars and practitioners do different things and we should be
smart enough and brave enough to accept this. Nothing written here is designed to
denigrate writing designed to be of practical use to judges and the legal profession.
Indeed, I think that such writing is as valuable as what I have defined as legal scholar-
ship. But this importance does not make it something that it is not.

Practice and scholarship are different, with disparate needs and duties. Law reviews
should be seen as an integral vehicle for the work of legal scholars and not as sophis-
ticated practice manuals for the legal profession.

In other words, legal scholars should investigate the law as outsiders, not as insiders.
We should be writing about the law, not writing as participants within legal practice.

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7 Posner (n 5) 1654.
8 See, eg, Karl N Llewellyn, The Common Law Tradition: Deciding Appeals (Little,
Brown and Company, 1960); Melvin Aron Eisenberg, The Nature of the Common Law
(Harvard University Press, 1988).
9 See Llewellyn (n 8).
10 Elsewhere I have discussed in detail what this differentiation between scholarship
and legal practice entails for law schools and the profession. See John Gava, ‘Our
Flawed and Failing Universities’, Quadrant Online (Article, 11 March 2014) <https://
III  BUT, AREN’T WE ALL OUTSIDERS NOW?

One response to the above will be that ‘we are all outsiders now’. No doubt it is true that legal writing today is far more wide-ranging than in the past and that an overt desire to write for judges and the legal profession is less dominant than it used to be. Does this mean that more of today’s legal writing fits into my description of what properly constitutes legal scholarship?

I do not think so and the reason for this belief becomes clear if we concentrate again on the nature of the common law and what judges are doing with it. In particular, we need to focus on both the messiness and complexity of the common law and the almost paradoxical timelessness of much of its doctrine.

One can only be sympathetic to a common law judge faced with the vast and unruly body of legal rules and principles that makes up the common law. Each area of law has an immense body of cases interspersed with statutes. The cases and statutes often fit uneasily together and it is quite common to find distinct lines of authority that are competing or even contradictory. Just to make things even harder, the various areas of law overlap and compete, meaning that much judicial effort is devoted to creating and policing demarcation lines between them. Such is the immensity of the materials, and the contradictions and complexities within them and between them that it is unrealistic to talk of mastery of these materials and their interrelationships. Over time, some command and comfort with this unruly mass of materials can be gained. But it will be gained only after much time and effort.

If a legal scholar is to write about the law from an outsider’s perspective, he or she can only do so after devoting much time and effort to come to some sort of understanding of these materials. Writing about the law is not going to be the equivalent of the many papers that can be written from data provided by the latest space probe around Pluto or the voluminous data emanating from a particle accelerator. Writing about law takes time, effort and skill. Legal scholarship demands time of the researcher, both time to learn about the law and time to write about the law. The prodigious output of legal writing mandated by the management class that now runs our universities in Australia cannot and does not reflect the time, effort and skill required to achieve a deep understanding of the law. If we look at some examples of truly scholarly legal writing this will become clear.

Calabresi and Melamad’s seminal article on the relationship between liability rules, property rules, and inalienable property is a wonderful example of a thoughtful piece of legal scholarship. The authors make sense of what would otherwise appear to be arbitrarily chosen rules and remedies in close but competing areas of law. It is not the sort of article that can be produced from the production line mentality that infests our law schools today. Or, to take another example, consider Lawrence Friedman’s masterly history of American contract law which explained the essentially static

nature of contract doctrine during the 19th and 20th centuries. Friedman noted that contract law changed by initially increasing its coverage of legal activities but then shrank as labour relations, family law, corporate law, financial transactions and consumer protection were wholly or partially hived off from contract, leaving the latter largely concerned with commercial transacting.12 Or, for an example closer to home, we can see how Geoffrey Sawer’s pioneering studies of the High Court and Australian politics help one to understand the role of High Court decisions in our political and constitutional history.13 Edward Purcell’s study of the United States Constitution is another example of truly thoughtful scholarship. The source illustrates the indeterminacy of the federal scheme between the states and the federal government, and of the similar indeterminacy in the separation of powers at the federal level, with all that those indeterminacies imply for notions of federalism and originalism as constitutional markers.14

All of these works are the products of time, thought and much reading. The ridiculous ‘output’ numbers required of all legal academics today would have hindered, not encouraged, the writers to devote so much time and thought to them. Why would they, when the time and effort needed to write them could have been spent more ‘productively’ writing several articles of lesser quality?

Not only is a mastery of the law a time-consuming endeavour because of the complexity of the materials; it is also time-consuming because law is more akin to philosophy than it is to the sciences. Rather than dealing in ever increasing knowledge, law is a dialogue with the past, dealing with essentially the same problems and solutions that lawyers have dealt with since the beginning of time. Truly, for law,

> there is no new thing under the sun.15

While on the surface the proliferation of cases, statutes and regulations suggests change, indeed accelerating change, in the law, the reality is that there is much action but not much movement. One only has to read the work of legal historians such as John Baker and SFC Milsom to recognise that the history of the common law is one of movements of areas of law between jurisdictions and changes in procedure. Those changes and movements, however, have often masked an essential continuity in the law.16 Steve Hedley makes the point very clearly for contract:

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Take a book such as Gordley’s fine *Philosophical History of Modern Contract Doctrine* tracing contract doctrine from its Roman origins, through the Digest, through scribes and glossators, through canon lawyers, civil lawyers and common lawyers, up to the present day. The central concerns of the theory described are much the same throughout … Theorists discuss the same stock examples again and again, the same unchanging scenarios. The world changes, commerce changes, but contract doctrine does not.\(^\text{17}\)

Brian Simpson has shown that much of the ‘creativity’ in 19\(^\text{th}\) century contract law was the result of borrowing of civilian ideas of contract to aid the move of common law contract towards a previously non-existent, systematic, textbook tradition.\(^\text{18}\) In his words,

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\text{[a]t least in the Western European legal tradition of private law successful creative work consists in a combination between intelligent plagiarism and systematization of what is lifted from others. This is so partly because of the ramifications of the concept of authority; what the writer says appears more persuasive if it is the same as what others have said. Partly the explanation lies in the close connection between private law and certain moral ideas which have remained relatively static over long periods, thus generating similar principles and problems …}\(^\text{19}\)
\]

Alan Watson has argued that legal historians and sociologists have misread the history of law and its operation in society.\(^\text{20}\) They have underestimated the cultural strength of law and they have failed to recognise the importance of legal borrowing in the development of law. Partly, this can be explained by the continuing lure of authority: Roman law, for example, was considered advanced in comparison to many indigenous legal systems. Partly, this copying was due to a natural economy of effort: why bother creating answers to complicated legal problems if others have done it before you?

For Watson, the development of legal rules is primarily influenced by legal culture. Lawyers have a vested interest, both financial and institutional, in the existing rules.

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Ibid 254. For more detail see Gordley (n 5) 222–74.

They are, after all, the ones who can guide the rest of society through the maze that is the law. Greater simplicity is not necessarily in the interests of lawyers and neither does it guarantee their continued employment. In addition, lawyers have a craft perspective on the law. Logical consistency and the allure of technical mastery and virtuosity in the deployment and development of rules are strong forces operating on lawyers. Legalism is a recognisable force throughout history.21

Once understood in this way the similarities with, say for example, philosophy become evident. Just as philosophers argue about the same things that they were arguing about two and a half millennia ago, lawyers argue about the same sorts of problems that have faced our ancestors since we moved out of caves and started building towns. Scholarship in philosophy requires a solid grounding in the best of what has gone before and humility when adding to a rich literature put together by the best minds of our species. While, as I have argued above, legal practice is not a scholarly activity, scholarship in law does resemble philosophy in that great legal minds have also over the millennia struggled with recurring legal problems again and again. If we are going to write about the law in a scholarly fashion, we require a solid grounding in what has been attempted before and some humility in adding to the rich literature about the law.

Asking people to write two, three, or even more articles a year almost guarantees that their scholarship will neither evidence a solid grounding in the best of what has gone before nor humility in the face of great thinkers of the past.

But what of technological change? Do not the amazing technical achievements of the past 150 years require totally different thinking and writing about the law? I am not sure. Yes, people are now run over by cars instead of horse-drawn carriages and contracts today have many more zeroes than formerly. But are these really fundamental changes that necessitate vast amounts of scholarly writing? I do not think so. Technologies such as assisted reproduction or satellite communication on their face seem to engender fundamentally different legal problems to the ones that we are used to. But it is my impression that traditional legal reasoning within the traditional materials have incorporated them into the legal system without too much difficulty.

We must avoid the temptation to fetishise technologies. Just as there is no law of the hammer or plough (two great transformative technologies of the past) there is probably no need for a law of computers or mobile phones or any of the other great technologies of the future. It is true that, for example, advances in genetic engineering might generate problems that we have never seen before, with no easy analogues in our present practice or law. I suspect, however, that, just as in the past, philosophers and scientists and lawyers and, indeed, the general public, will argue about such new technologies and the law will gradually come to terms with them. It would surprise me if the legal system does not incorporate them, more or less successfully, as it has with technologies in the past.

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IV Conclusion

The vast amount of legal writing that is published in journals and elsewhere is written because it must be written.

To get a job, to keep a job, to get promoted one must write at rates that would test Aristotle. Our law schools are full of fine, hard-working and intelligent academics but they are not full of Aristotles.

As legal academics we do not need to write for the profession. As legal academics we need to accept that scholarly writing about the law is difficult because the law is vast and confusing. Not only do we have to master the work of our predecessors, we also need the humility to accept that it is extraordinarily difficult to say anything new and worthwhile about the law.

The production line mentality that has been foisted on legal academics is costly in financial and psychological terms. We are wasting money on unnecessary writing and we make the lives of good people in our law schools more difficult than they need be because of the artificial and counter-productive rates of publication imposed upon them.
On 7 December 2015, the Commonwealth Government announced the $1.1 billion National Innovation and Science Agenda (‘NISA’).1 Aimed at embracing innovation, technology and science as critical components to powering the economy so as to provide jobs and higher living standards for all Australians, the NISA ‘[set] a focus on science, research and innovation as long-term drivers of economic prosperity, jobs and growth’.2 Following this announcement, then Prime Minister Malcolm Turnbull suggested that the NISA would mean that ‘publish or perish will be replaced by collaborate or crumble’.3 Christopher Pyne, then Minister for Industry, Innovation and Science, added that the government would ‘abolish publications as the chief reason why you attract research grants’ and flagged an intention to ‘change that into research impact’.4 In a press conference on 18 December 2015, Malcolm Turnbull extemporised at length about the benefits of this new approach:

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We seek to be better and a lot of this is to do with culture. I mean the point I made about the level of collaboration between industry and universities is an important one. Now, we, there are various explanations for that. I think the incentives are wrong. Academics have been, in terms of getting research grants and so forth, their, the primary motivator has been to publish and make sure your publications are cited in lots of other publications, hence the term ‘publish or perish’. So we want to, we’re adding another criterion for success in achieving grants which is to demonstrate the degree of collaboration that you’re undertaking with business, with industry, so you can add ‘publish or perish’ or perhaps ‘collaborate or crumble’ as well. So you’ve got two incentives there. Japan clearly is an example of enormous industry-led innovation and that’s really the high point but even if you look at academic business cultures that are very similar to Australia’s and the United States or the [United Kingdom], the level of collaboration is much higher. …

You know if you change the paradigm, if you change the debate, if you change the discourse, things will happen. … So this is, we’re not just talking about pulling some important levers and it’s a big package the National Innovation and Science Agenda across many fields but it’s not just those particular levers, we’re talking about cultural change, a change to, a change to a more innovative approach where you are prepared constantly to challenge the way you’ve been working and be prepared to do things in a different way because that, in this century, is absolutely the key to success. Sorry if I’ve spoken for too long. I’m very passionate about this.5

Indeed. In the case of the legal academy, the idea, if I understand the erstwhile Prime Minister correctly, is that our incentives are wrong — that what we have been doing for too long is writing to each other and not to the industry which, I assume, must mean practising lawyers and judges. What we need to do more of, then, is produce work that will allow us to influence and therefore impact legal change, and that means collaborating.

Collaboration is never defined by the NISA or by Turnbull. In this short article, though, I suggest that in one key aspect of our work in the academy — the law review — it is not the legal academy that is to blame for the failure to collaborate, but the profession and the judiciary. The law review, as both concept and reality, is intended, at least so far as the academy is concerned, to play a role in legal development through both comment on and critique of the way law is, and normative argument as to how it ought to develop. And yet, as a vehicle of legal change, it sometimes appears to be ignored by the practising profession and judiciary. As I suggest in this article, that may not be altogether true. Nonetheless, I also think there is substantial accuracy to this claim.

I present my reflection in three parts. In the first, because Turnbull raised the United States as a supposed comparator in terms of university-industry collaboration, I look very briefly at the place of the law review in American legal culture, and specifically, at the way in which the law review represents a tool of which explicit use is made by practitioners and judges. The second part presents a case study, which demonstrates that while the Australian profession and judiciary may seem to make use of the law review in their work, upon closer inspection that use is minimal, if not non-existent. In order to commemorate volume 40 of the *Adelaide Law Review*, my case study focuses on two articles which discuss Torrens title pursuant to the *Real Property Act 1886* (SA), published by two of my colleagues — Anthony P Moore, in volume 11, and David Wright, in volume 16. Although admittedly small, my sample size of two demonstrates how in some cases, when the most obvious invitation and opportunity for ‘collaboration’ is issued by the academy, practitioners and judges seem to overlook it. Far from it being the case that the Australian legal academy has failed to collaborate with industry — the profession and the judiciary — it is industry that seems to fail to turn to the academy for an obvious source of input in the development of the law. Yet, the story may not be entirely gloomy. The courts do, it is true, make some use of the legal academy’s work in law reviews. But it could be so much more, so much richer, a collaboration. And so I conclude in the final part of my article with an invitation to lawyers and judges to explore what the academy has to offer in the form of the law review, and to make explicit use of it. Only in accepting this invitation will a true collaboration result.

II Collaborate: The American Law Review

It is perhaps not well known that the American law review is a largely student-run endeavour. There is very little, if any, involvement on the part of academic staff or faculty members; rather, students solicit, consider, select, edit, and publish the whole of the content of almost every American law review. This model began with the first publication of the *Harvard Law Review* in 1887 and continues today with the hundreds of flagship (those carrying the university’s name, eg, the *Harvard Law Review*) and specialist (eg, the *Harvard Civil Rights-Civil Liberties Law Review*) legal periodicals. There are no doubt differences of opinion concerning the validity

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of the American model. Former Chief Justice of California, Roger J Traynor, widely considered one of the handful of great American jurists not to have sat on the Supreme Court of the United States\(^9\) (along with Judges Learned Hand and Henry Friendly of the United States Court of Appeals for the Second Circuit, and Judge Richard Arnold of the United States Court of Appeals for the Eighth Circuit),\(^10\) said this in support of the student-edited model:

There is in no other profession and in no other country anything equal to the student-edited American law review, nurtured without commercial objective in university law schools alive to the imperfections of the law, and alert to make space for the worthy commentary of an unknown student as well as for the worthy solicited or unsolicited manuscript of renowned authority. …

Time is with the law reviews. An age that churns up problems more rapidly than we can solve them needs such fiercely independent problem-solvers with long-range solutions.\(^11\)

Richard A Posner, retired Judge of the United States Court of Appeals for the Seventh Circuit (and also one of that handful of great jurists not to have served on the Supreme Court of the United States),\(^12\) however, famously said ‘[w]elcome to a world where inexperienced editors make articles about the wrong topics worse’.\(^13\)

Clearly, there will be those who support the free market approach to the dissemination of novel ideas fostered by the American student-edited law review, and those who will denigrate its failure to make use of peer review in that dissemination. I take no position on the validity or usefulness of the student-edited model and its value in the development and advancement of legal scholarship. My concern here is the role


that the American law review plays in the development of law, as effected by the legal profession and judiciary. Let me make two points about this.

First, consider this — the very fact that Traynor and Posner would say anything about American law reviews, good or bad, demonstrates the important place held by these periodicals in the American legal system, and certainly among judges themselves.\footnote{Harnsberger (n 8) 703–4.} This is of course nothing more than an impression, but one worth keeping in mind when one thinks about the Australian counterpart to the American law review. With the exception of Michael Kirby,\footnote{Michael Kirby, ‘Welcome to Law Reviews’ (2002) 26(1) Melbourne University Law Review 1.} it is rare to hear senior jurists, or anyone in the profession or the judiciary for that matter, say anything — good or bad — about Australian law reviews. It seems they are simply ignored.

Second, while both the legal academy and the practising profession and judiciary express concern about attempting to chart a middle course between, on the one hand, providing cutting-edge interdisciplinary scholarship and, on the other hand, more traditional doctrinal development, it is clear that law reviews do play both roles.\footnote{See Hibbitts (n 8) 646–8.} There is no need for evidence of the former — the law reviews are full of novel scholarship and one need only open any recent issue of any review to see this. But even a cursory look at the evidence of the latter reveals that as a means of collaboration between the American legal academy and the practising profession and judiciary, the American law review appears to be a success. I want to look at two pieces of evidence for this: First, the way that the law reviews themselves see their role; and second, a very cursory examination of the way the courts see that role. Richard Harnsberger summarises the former:

[Most schools] recognize that their primary mission is the training of students to become lawyers. That is what the majority of the students expect when they arrive to study. Law reviews play an important role in the pursuit of that goal …

[All branches of the profession extensively delve into law reviews. When confronted with a problem, my lifelong habit is to first browse the law review literature.

In addition to educational and research functions, the reviews help fulfil other objectives. They reflect contemporary scholarship and are repositories of knowledge that we pass from one generation to the next. Most importantly, law reviews represent the public interest by providing a forum for calm, well-reasoned, and thorough analysis of what courts and legislatures are doing and how well they are doing it.\footnote{Harnsberger (n 8) 706.}
Evidence that the law reviews do facilitate doctrinal development is found in the continued use of such scholarship by the Supreme Court of the United States. 18 A brief review, in an admittedly completely unscientific way, of the 76 cases in which the Supreme Court of the United States delivered opinions in 2017 (its most recent full term) confirms this. In 76 decided cases, the Justices delivered 164 opinions (per curiam, majority, concurring, and dissenting), which cited law review articles 182 times.19 This means that on average, the Justices cited law review articles 1.11 times per opinion. I will return to this point at the end of part III.

III Crumble: The Australian Law Review

John Gava, my colleague and Co-Editor in Chief of volumes 29–36 of the Adelaide Law Review, took a particular view of Australian law reviews, one with which I do not disagree:

The proliferation of law reviews reflects the victory of quantity over thought, good teaching and the possibility of creating a vigorous community of scholars. This is a high price to pay to help judges. I am sure that Justice Kirby would hesitate to say that the cost is worth it. But unfortunately, that is the price to be paid. It simply is not worth it.20

To be sure, the pressure to publish, and now to collaborate, too, means that we in the academy have little time to do the wide reading necessary to be good teachers, let alone good researchers. Still, I do see that there is a place for legal scholarship within the practice of law and the work of judges. My question, though, is this: even when that scholarship exists, do Australian judges make use of it? When I started this article, my initial sense was that they may not. Let me give you just one example of why I took that view. And having considered it, ask yourself whether it might not plausibly represent the attitude of the Australian profession and judiciary towards Australian law reviews.

Section 69 of the Real Property Act 1886 (SA) provides that

[t]he title of every registered proprietor of land shall, subject to such encumbrances, liens, estates, or interests as may be notified on the certificate of title of


such land, be absolute and *indefeasible*, subject only to the following qualifications …  

Subsection (b) then sets out the following exception to indefeasibility:

> [I]n the case of a certificate or other instrument of title obtained by forgery or by means of an insufficient power of attorney or from a person under some legal disability, in which case the certificate or other instrument of title shall be void: Provided that the title a registered proprietor who has taken *bona fide* for valuable consideration shall not be affected by reason that a certificate other instrument of title was obtained by any person through whom he claims title from a person under disability, or by any of the means aforesaid; …  

Notice that there are three exceptions to indefeasibility — for forgery, for insufficient power of attorney, and for legal disability. And notice further that there is an *exception* to those exceptions, or a proviso, for a registered proprietor who has taken *bona fide* for valuable consideration. But look again — does the proviso create *deferred* indefeasibility for all three exceptions, whereby immunity is granted only to a *bona fide* purchaser for value who has claimed title from a person who had previously obtained title by forgery, insufficient power of attorney or legal disability? Or does it create *immediate* indefeasibility for forgery and insufficient power of attorney, protecting a *bona fide* purchaser for value who obtains title by registration tainted with either of these two exceptions? It is not entirely clear on the words of s 69(b), and it all seems to turn on the final comma of the proviso — if the comma separates the two clauses, then the proviso creates *immediate* indefeasibility only in the case of forgery or insufficient power of attorney. If the comma does not separate the two clauses, then it would appear as though the proviso creates *deferred* indefeasibility for all three exceptions. This involves a complicated bit of statutory interpretation. And though there is case law on the meaning of that one little comma, even the judges involved in those cases were not clear about its interpretation.  

My objective here is certainly not an attempt to settle the interpretation of s 69(b). But interpreting that provision *was* relevant to the 2018 decision of Parker J of the Supreme Court of South Australia in *Permanent Mortgages Pty Ltd v Pastro*. There is no need to recount in detail the facts of *Pastro*; suffice to say that in the completion of loan documentation for the creation of a mortgage, a question arose as to whether

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22 *Real Property Act 1886* (SA) s 69(b) (emphasis in original).


24 [2018] SASC 5 (‘*Pastro’*).
forgery had occurred. And that, of course, would directly involve a question of whether the registered mortgagee was protected or not by the proviso in s 69(b). Justice Parker, however, wrote as follows:

Section 69(b) creates an exception to the indefeasibility principle by providing that a certificate or other instrument of title that has been obtained by forgery is void. However, there is an important proviso included in s 69(b) which preserves the indefeasibility of title where the registered proprietor has taken \textit{bona fide} for valuable consideration.\footnote{Ibid [72] (emphasis in original).}

Having considered the evidence, Parker J concluded that forgery had not occurred. If it had, then the issue of whether the proviso applied to the party who became registered by way of forgery would seemingly have become live. But Parker J appears to have overlooked that entirely, concluding that the proviso in s 69(b) protects the \textit{immediate} indefeasibility of anyone who becomes registered as a result of forgery, provided they do so \textit{bona fide} and for valuable consideration, without referring to any of the prior authority of the Supreme Court of South Australia or, indeed, the binding authority of its Full Court. This is problematic. Had Parker J simply followed the advice of Harnsberger, that ‘[w]hen confronted with a problem, my lifelong habit is to first browse the law review literature’,\footnote{Harnsberger (n 8) 706.} he might have been rewarded for the effort by finding two articles, both published in the \textit{Adelaide Law Review} — Moore’s ‘Interpretation of the Real Property Act’\footnote{Moore (n 6).} and Wright’s ‘Forgery and the \textit{Real Property Act 1886 (SA)}’.\footnote{Wright (n 7).} In \textit{Rogers}, von Doussa J made explicit use of the former to resolve the ambiguity in s 69(b) and conclude that the proviso created \textit{deferred} indefeasibility for all three exceptions.\footnote{\textit{Rogers} (n 23) 222–3.} Both articles would have allowed Parker J to advert not only to the difficulty created by the comma in the s 69(b) proviso, but also to the relevant case law. Neither article was hard to find. A simple Google search readily produced both.

Most members of the Australian legal academy could likely recount stories of their own pieces published in Australian law reviews being overlooked by the judiciary in decisions directly on point. Still, it may not be as bad as my initial impression suggests. In fact, the available evidence seems to support the proposition that the Australian judiciary does actually make \textit{some} use of the law review literature.\footnote{See, eg, Russell Smyth, ‘Academic Writing and the Courts: A Quantitative Study of the Influence of Legal and Non-Legal Periodicals in the High Court’ (1998) 17(2) \textit{University of Tasmania Law Review} 164.}

In order to provide a very rudimentary comparison to the evidence gleaned from my perusal of opinions of the Supreme Court of the United States during the 2017 term, I did the same with the High Court of Australia for its 2017 term. The High Court
delivered decisions in 56 cases, with a total of 114 separate judgments (majority, concurring, and dissenting) citing 106 law review articles — an average rate of 0.93 law review citations per judgment, as compared to 1.11 per opinion in the Supreme Court of the United States. The High Court does appear, then, to turn to the law reviews for assistance with some frequency. It might seem reasonable to assume that other courts do the same, although further research would be necessary to determine trends. But rather than accept the current state of affairs as good enough — why not leave well enough alone? — the point I want to make here is that if we are to take Mr Turnbull seriously (and I readily admit that because he is no longer Prime Minister, we might justifiably conclude that we need not), then we ought to take the current state of affairs as nothing more than a strong foundation on which to build a true collaboration between the academy and the practising profession. And so I turn to my invitation.

IV INVITATION: PUBLISH AND COLLABORATE

Benjamin N Cardozo, Chief Judge of the New York Court of Appeals and subsequently Associate Justice of the Supreme Court of the United States, wrote this in 1931 (approximately 30 years before the first volume of the Adelaide Law Review was published):

Judges and advocates may not relish the admission, but the sobering truth is that leadership in the march of legal thought has been passing in our day from the benches of the courts to the chairs of the universities. …

This change of leadership has stimulated a willingness to cite the law-review essays in briefs and in opinions in order to buttress a conclusion. More and more, the law reviews are becoming the organs of university life in the field of law and jurisprudence. The advance in the prestige of the universities has been accompanied, as might be expected, with a corresponding advance in the prestige of their organs. …

No longer is [a judge’s] material confined to precedents in sheep-skin … ‘[H]e may use any material’ … He may look to law or to literature, to economics or to philosophy, to saints or to sinners, to workers or to drones. If his seigniory extends to fiefs not marked as legal, the impulse becomes the stronger to exert it in regions where the denizens are near of kin. Under the drive of this impulse, the law teacher and the law reviews are coming to their own.


Drawing upon Cardozo’s sagacity, I conclude with a two-fold reflection/invitation — a true collaboration between the legal academy, and the legal profession and judiciary in Australia would involve the latter making better and more frequent use of the former’s work. And in doing so, the academy would have greater engagement with the work of the courts, which would over time develop, in a perfect world, into a dialogue between the academy, and the profession and judiciary. Of course, the courts are not in the business of replying to the legal academy in their judgments: theirs is not to theorise and ponder, but to decide concrete disputes between real people. All the same, when the court speaks in the form of a decision, that can be taken as part of a conversation, in the way that Cardozo understood it, between the academy and the judiciary.

Thus, to my colleagues in the legal academy, continue to do what you have always done, and what the *Adelaide Law Review* has always made possible — publish cutting-edge legal scholarship. To the practising profession and to the judiciary — read what we in the academy have to say and make use of it, not merely for background knowledge, or without referring to or citing it, but for foreground guidance. Use it explicitly, in the framing of arguments and the crafting of judgments.

Whatever else one might think of it, and there is much that could be said, Malcolm Turnbull’s call to ‘collaborate or crumble’ must really be one that requires proactive engagement from each of the academy, profession, and judiciary. For those of us in the legal academy, our contribution to that collaboration comes primarily through the law review. In response to our contribution, for those in the profession and in the judiciary, heed the words of Harnsberger — when confronted with a legal problem, make it your first habit to browse the law review literature. As I said in relation to s 69(b) of the *Real Property Act 1886* (SA), the law review literature is not hard to find, and it just might prove useful in doing the real work of the courts — deciding cases. In this way, we in the academy can publish and collaborate without running the risk of perishing or crumbling as we do.

33 See Harnsberger (n 8) 706.
OF TITLES AND TESTAMENTS:
REFLECTIONS OF AN AMERICAN READER
OF THE ADELAIDE LAW REVIEW

I INTRODUCTION

From the point of view of an American lawyer, two Australian innovations in the law of property stand out: titles by registration and the dispensing power in the law of wills. Both originated in South Australia, and both are the subject of articles in the Adelaide Law Review. Both spread rapidly to other Australian states and throughout the Commonwealth. But in the United States, despite some early success, neither achieved widespread adoption. Readers of the Adelaide Law Review, who doubtless view titles by registration and the dispensing power as obvious improvements on earlier property law, may be surprised by American exceptionalism. But in both cases the new entrants encountered entrenched practices which, while seemingly less eligible, nonetheless successfully resisted displacement.

II TITLE BY REGISTRATION

Title by registration originated in 1858 with the South Australian Real Property Act.1 Forever associated with the name of Robert Torrens, who sponsored the Act in the Parliament of South Australia,2 the system provides a rational and efficient
means of determining title, replacing the chaotic traditional practice of examining the muniments of title at every transfer. The Torrens system was quickly replicated throughout Australia and other British colonies, and today is ubiquitous in the common law world.⁴

Eventually, the Torrens system reached the United States. A darling of American law reformers in the late nineteenth and early twentieth centuries, Torrens titles were first authorised by legislation in Illinois in 1895.⁵ Although the system originally encountered challenges based on the American constitutional commitment to separation of powers and due process,⁶ these were successfully overcome by modifications to the Torrens legislation.⁷ By 1917, titles by registration had been made available in 18 more states.⁸ The attraction of Torrens titles was particularly strong in places where titles under the existing system of recording were hopelessly confused, as in Chicago, IL after the Great Fire of 1871. In addition, registration provided clarification of boundaries and protection from claims based upon adverse possession.⁹ So familiar was the system to the general public that the progressive novelist Sinclair Lewis could casually refer to it in his 1922 bestseller *Babbitt* — George Babbitt, a Midwestern real estate agent, attending a state meeting of realtors, reported ‘with startled awe … that he had been appointed a member of The Committee on Torrens

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⁵ *Land Transfer Act*, § 94, 1895 Ill Laws 107, 129.

⁶ *People v Chase*, 46 NE 454 (Ill, 1896) (holding the statute an unconstitutional attempt to confer judicial power on the registrar of titles).

⁷ *People v Simon*, 52 NE 910 (Ill, 1898) (upholding 1897 Ill Laws 141); *Eliason v Wilborn*, 281 US 457 (1930) (upholding 1897 Ill Laws 141). See also *Tyler v Judges of Court of Registration*, 55 NE 812 (Mass, 1900) (rejecting due process challenge to the *Massachusetts Torrens Act*).

⁸ California (1897), Massachusetts (1898), Oregon (1901), Minnesota (1901), Colorado (1903), Washington (1907), New York (1908), North Carolina (1913), Ohio (1913), Mississippi (1914), Nebraska (1915), South Carolina (1916), Virginia (1916), Georgia (1917), North Dakota (1917), South Dakota (1917), Tennessee (1917), and Utah (1917). In 1903 the Territory of Hawaii adopted the Torrens system, which it retained after achievement of statehood in 1959. See, eg, Frederick C McCall, ‘The Torrens System — After Thirty–Five Years’ (1932) 10(4) *North Carolina Law Review* 329, 329–30.

⁹ ‘No title to registered land, or easement or other right therein, in derogation of the registered owner, shall be acquired by prescription or adverse possession’: Mass Gen Laws ch 185 § 53 (1932). See Lynden Griggs, ‘Possessory Titles in a System of Title by Registration’ (1999) 21(2) *Adelaide Law Review* 157; arguing that titles based upon possession are inconsistent with a system of titles based on registration. But see Paul Babie, ‘The Crown and Possessory Title of Torrens Land in South Australia’ (2016) 6(1) *Property Law Review* 46.
Titles.'10 But by then, American enthusiasm for the system had already begun to fade. No more states added their names to the list of adopters.

In 1931 Professor Frederick C McCall surveyed the American experience of the Torrens system over its first 35 years.11 Based upon information he ‘received in 1931 from practicing attorneys, judges, law professors, and registration officials in the various states’,12 Professor McCall concluded that with few exceptions — notably Massachusetts and Minnesota — the system was not being widely used. In several jurisdictions, he said, ‘the law appears to have been still-born.’13 Although the National Conference of Commissioners on Uniform State Laws — the ancestor of the modern Uniform Law Commission — had adopted a Uniform Land Registration Act in 1916,14 it came too late and was withdrawn as ‘obsolete’ in 1934.15 Not only did the surge of American adoptions cease, but over the decades since Professor McCall wrote his article, almost half of the original adopting states have abandoned the system.16 By 1952 the multi-volume American Law of Property noted that ‘[t]he subject of registration of title is of too limited application to justify an extended review of the cases’.17 Illinois, which had been the pioneer, prohibited new registrations as of 1 January 1992.18 Even in the few states where it remains vital, the system

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11 McCall (n 8) 329.
13 Ibid 343.
14 Uniform Land Registration Act (National Conference of Commissioners 1916), 9 ULA 217.
15 See National Conference of Commissioners on Uniform State Laws, Handbook of the National Conference of Commissioners on Uniform State Laws and Proceedings of the 44th Annual Conference (1934) 253–4. The Committee found that the Uniform Act had been adopted by only three states: Virginia, Utah, and Georgia (with modifications), and that Utah, which had adopted the Act in 1917, repealed it in 1933.
16 See John L McCormack, ‘Torrens and Recording: Land Title Assurance in the Computer Age’ (1992) 18(1) William Mitchell Law Review 61, 72–3 (‘[Torrens] legislation has lapsed or has been repealed in nine [states]’). Six states — California, Mississippi, Nebraska, South Carolina, Tennessee, Utah — were identified as having repealed their Torrens Acts prior to 1972: Senate Committee on Banking, Housing and Urban Affairs, United States Congress, Mortgage Settlement Costs — Report of United States Department of Housing and Urban Development and Veteran’s Affairs (Report, March 1972) 22 n 40. In addition, both North and South Dakota repealed their Acts in 1941: Act of 7 March 1941, c 250, 1941 ND Laws; SD Session Laws, c 217 (1941). In other states, such as North Carolina, the Torrens Act remains unrepealed but is little used. See John Orth, ‘Torrens Title in North Carolina’ (2017) 39(2) Campbell Law Review 271.
is not universal and is used in only limited geographical areas. Most American law schools do not teach it, and most American property lawyers know nothing about it.

III Dispersing Power

In 1975 South Australia adopted the *Wills Act Amendment Act (No 2) 1975 (SA)* (‘*Wills Act*’), which instituted many innovations in traditional wills law. Among these innovations was the dispersing power authorising judges to ignore flaws in the execution of a will if the instrument was found to have been executed with testamentary intent. The *Wills Act* inspired imitations in other Australian states and Canadian provinces. In America, too, the innovation drew the attention of law reformers. In 1987, inspired by the South Australian example, Professor John Langbein published an influential article in which he advocated ignoring minor errors in will execution. In 1990 the Uniform Law Commission included the dispersing power — under the

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19 In Massachusetts, Torrens is used in Boston and on Cape Cod; in Minnesota, in the Twin Cities of Minneapolis and St. Paul. In Hawaii, as registrations dwindled, the legislature commissioned a study in 1987 to determine whether there remained any reason ‘for maintaining two separate systems for holding and recording land titles,’ but in the end left the dual systems in place: see Jean Kadooka Mardfin, ‘Two Land Recording Systems’ (Report No 7, Hawaii Legislative Reference Bureau, December 1987).


21 As with titles by registration, I have also previously written on the dispersing power, and again I have to some extent repeated myself. See John Orth, ‘Wills Act Formalities: How Much Compliance is Enough?’ (2008) 43(1) *Real Property, Trust & Estate Law Journal* 73.


name ‘harmless error’\textsuperscript{25} — in the revised Uniform Probate Code,\textsuperscript{26} but to date only six states have adopted it in full.\textsuperscript{27} Characteristic of the fate of ‘uniform laws’ in America, several other states adopted it with non-uniform variations.\textsuperscript{28}

In 1995 the American Law Institute added the harmless error rule to the Restatement (Third) of Property,\textsuperscript{29} presenting the power to dispense with harmless errors in will execution as an intrinsic power of American courts. Casebooks widely adopted in law schools have prominently featured the harmless error rule,\textsuperscript{30} so recent law graduates are well-informed about it, in contrast to Torrens title. But probate courts have been slow to exercise this power in the absence of legislative approval.\textsuperscript{31} In its first 20 years in America, the harmless error rule has not had quite as many adoptions as had Torrens title in the same period. Although it may well advance further in coming years, at present even its most influential supporter admits that its spread has stalled.\textsuperscript{32}

Ever since the law has allowed owners direct succession to property upon death, various formal requirements have been imposed. In ancient Rome, the Twelve Tables allowed patricians to dispose of their estates, but only by public declaration in the presence of the patrician assembly. Plebeians could use a form of sale in the presence

\textsuperscript{25} Harmless error, the doctrine that an unimportant mistake by a trial judge or a minor irregularity at trial will not result in a reversal on appeal, is familiar to American lawyers in the context of civil and criminal procedure.

\textsuperscript{26} ‘Although a document or writing added upon a document was not executed in compliance with Section 2-502 [on formal requirements for will execution], the document or writing is treated as if it had been executed in compliance with that section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (1) the decedent’s will, (2) a partial or complete revocation of the will, (3) an addition to or alteration of the will, or (4) a partial or complete revival of his [or her] formerly revoked will or of a formerly revoked portion of the will.’: Uniform Probate Code § 2-503 (1998).


\textsuperscript{29} American Law Institute, Restatement (Third) of Property: Wills and Other Donative Transfers (1999) § 3.3, 217.

\textsuperscript{30} See, eg, Sitkoff and Dukeminier (n 28) 171–97.

\textsuperscript{31} Ibid 171 (‘Most courts … have continued to require strict compliance’ with the Wills Act). See also Anthony R LaRatta and Melissa B Osorio, ‘What’s in a Name?’ (2014) 28(3) Probate & Property 47. ‘The majority of states have rejected the UPC § 2-503 harmless error doctrine in favor of strict compliance.’: at 49.

\textsuperscript{32} Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 6. Langbein noted: ‘A quarter century after the Commission promulgated the measure, it has been adopted in only 11 of the 50 states’.
of witnesses, which eventually became revocable. In time, civil law came to require an instrument be signed and sealed by seven witnesses.\footnote{Thomas E Atkinson, \textit{Handbook of the Law of Wills} (West Academic Publishing, 2nd ed, 1953) § 2, 9.} Some echo of the latter requirement may have reached even Hobbiton, if JRR Tolkien is to be believed. The will of Bilbo Baggins was reported to be ‘very clear and correct (according to the legal customs of hobbits, which demand among other things seven signatures of witnesses in red ink)’.\footnote{JRR Tolkien, \textit{The Fellowship of the Ring} (HarperCollins, 2nd ed, 2008) 51.}

In England, land was first made devisable by the \textit{Statute of Wills 1540} which permitted a ‘last will and testament in writing,’\footnote{\textit{Statute of Wills 1540}, 32 Hen 8, c 1, s 2. The power to devise was limited to two-thirds of land held by knight-service but extended to all land held by socage tenure. When the \textit{Statute of Tenures 1660}, 12 Car 2, c 14, s 4, converted tenure by knight-service into free and common socage, the power to devise land became general.} but required no signature or other formality. Over the next century, courts struggled to determine whether particular writings expressed a decedent’s testamentary intent. Oral evidence was heavily relied upon to establish the necessary facts. Judges upheld wills that were found to have been reduced to writing on the instruction of testators even if never read or signed by them, while rejecting others that commemorated oral statements of testators’ intention but were not written down by instruction (or subsequently adopted).\footnote{See, eg, \textit{Brown v Sackville} (1552) 1 Dyer 72; 73 ER 152; \textit{Nash v Edmunds} (1587) Cro Eliz 100; 78 ER 358: Reporter’s notes provide information on several other cases.} The distinction proved difficult to manage, and Sir William Blackstone probably spoke for many in the late 18th century when he observed:

> Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the hand writing of another person were allowed to be good wills within the statute.\footnote{William Blackstone, \textit{Commentaries on the Laws of England} (first published 1765–9, 1922 ed) vol 1, 376.}

In reaction, the \textit{Statute of Frauds 1677} increased the necessary formalities by requiring that a will be signed by the testator or some other person in the testator’s presence, and that it be subscribed by ‘three or four credible witnesses’.\footnote{\textit{Statute of Frauds 1677}, 29 Car 2, c 3, s 5.} Even this proved unsatisfactory and the \textit{Wills Act 1837} tightened the requirements.\footnote{\textit{Wills Act 1837}, 7 Wm 4 & 1 Vict, c 26.} Wills had to be in writing and subscribed, that is, signed ‘at the foot or end thereof,’ by the testator or by some other person ‘in his presence and by his direction’.\footnote{Ibid s 9.} Furthermore, the testator’s signature had to be made or acknowledged in the presence of two or more witnesses ‘present at the same time,’ who attested and subscribed the
will ‘in the presence of the testator’. The Wills Act 1837 Act influenced most wills legislation in the United States.

While the various wills acts brought useful clarity to testamentary formalities and reduced the likelihood of loose construction by the courts, they inevitably created new difficulties. Whenever formal requirements are imposed for the effectiveness of a legal act, problems arise when a person seeking to do what is allowed fails to satisfy those requirements, whether through ignorance or mischance. In such cases, a judge faces the unenviable choice of defeating the testator’s intention or introducing the confusion that the statute was intended to eliminate. In 1844, within seven years of the adoption of the Wills Act 1837, Dr Stephen Lushington was acutely aware of the dilemma when trying a wills case:

> It may possibly be said, that the intentions of the Testator will be defeated by this decision; and if so, we may lament it: but we sit here, not to try what the Testator may have intended, but to ascertain, on legal principles, what testamentary instruments he has made; and we must not be induced by any considerations of intention or hardship, to relax the provisions of a Statute (perhaps the most important of modern times) for the disposition of property.

This dilemma continued to trouble judges 100 years later. Disallowing a will in a notorious case of ‘switched wills’ — where each spouse mistakenly signed the will of the other — the Pennsylvania Supreme Court explained:

> Once a court starts to ignore or alter or rewrite or make exceptions to clear, plain and unmistakable provisions of the Wills Act … the Wills Act will become a meaningless, although well intentioned, scrap of paper …

(Could the author of this opinion have been thinking of the German Chancellor’s casual dismissal in August 1914 of the treaty that guaranteed Belgian neutrality as a mere ‘scrap of paper’?)

Even in states where the courts are authorised to use the dispensing power in appropriate cases, the judges may struggle with the same issue that confronted Dr Lushington almost two centuries ago. Confronting a case in which the testator...

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41 Ibid.
42 See Atkinson (n 33) § 62, 292.
44 In re Pavlinko’s Estate, 148 A 2d 528, 531 (Pa, 1959).
made her dispositive intentions clear but died before she could review and execute her will, the Appellate Division of the Superior Court of New Jersey rejected the document:

[W]e distinguish between evidence showing decedent’s general disposition to alter her testamentary plans and evidence establishing, by clear and convincing evidence, that decedent intended the draft will prepared by [her attorney] to constitute her binding and final will.45

In the end, the problem is traceable to the ambiguity lurking in the word ‘will’. Its primary meaning, even in a legal dictionary, is ‘wish’ or ‘desire’. Only secondarily is it ‘[t]he legal expression of an individual’s wishes about the disposition of his or her property after death’.46 The harmless error rule (dispensing power) is an attempt to bring the two into better alignment by allowing intention to trump form in the execution of a will. But relaxation of the formal requirements for a testamentary document closes the gap between intention and form only on the assumption that the document expresses the testator’s intent. As an official comment in the Restatement (Third) of Property makes clear:

The requirement of a writing is so fundamental to the purpose of the execution formalities that it cannot be excused as harmless under the [harmless error rule] of this Restatement. Only a harmless error in executing a document can be excused under this Restatement.47

In effect, the clock has been set back 500 years to the Statute of Wills 1540, which required a writing, but no signature or other formality. Despite clear and convincing evidence of a testator’s intention (a will), unless there is a document executed, however informally, with testamentary intent (a will), a decedent made no legally effective disposition of property after death. An oral will remains invalid.

IV AMERICAN EXCEPTIONALISM

Accepting that titles by registration and the dispensing power are improvements on traditional methods of conveyancing by deed or will, one must inquire why they failed to displace existing American systems. Evolutionary theory prepares us to expect the ‘survival of the fittest’: in the struggle for existence a new entrant, better adapted to a particular environmental niche, will drive out all competitors. But Torrens titles, despite initial success, failed to maintain a significant presence, and the dispensing power, which may yet prevail, has so far had only limited success.

46 See, eg, Black’s Law Dictionary (10th ed, 2014) ‘will’.
47 American Law Institute (n 30) § 3.3 cmt (b) (emphasis added).
A Titles by Registration

In America, titles by registration always existed in competition with traditional methods of assuring title by recorded deeds, usually bolstered by covenants of title and title insurance.\(^{48}\) But Torrens prevailed only in the special conditions where the records were confused or nonexistent. Perhaps because the Torrens system appears so self-evidently superior, its supporters often attribute its relative failure in America to sinister forces: lawyers who derived a steady income from traditional conveyancing and the repeated title searches it required,\(^{49}\) or the title insurance industry which profited from the uncertainties incident to the recording system.\(^{50}\) The specific failure of Torrens in Illinois, the American bellwether, has been attributed to incompetent personnel in the Registry Office.\(^{51}\) Recently, computerisation of land records, which has the promise to strengthen the Torrens system in Australia,\(^{52}\) has also made searches of titles in traditional recording systems in America easier and more reliable.\(^{53}\)

Torrens’ failure need not necessarily be attributed to self-interested actors. Conveyancers might reasonably advise purchasers that traditional methods are less expensive and more expeditious. Professor McCall, who reported on the fate of Torrens in America after 35 years, suggested that its failure may have been due to the reasonable reluctance of landowners to register their titles and take the risk of exposing defects:

> The owner of property, the title to which is in a state of quiescence and is reasonably well-established according to the public records, hesitates to extend a call to the world at large and to his neighbours (the adjoining owners) in particular to come forward and present any objections they may have to his ownership of the land.\(^{54}\)

\(^{48}\) In addition, the operation of the doctrine of adverse possession provides the possibility of acquiring an original title, not one derived from prior grantors.

\(^{49}\) See, eg, *Empire Mfg Co v Spruill*, 86 SE 522, 522–3 (NC, 1915). Clark CJ observed that Torrens Law ‘has not been looked on with favor by some [lawyers] who believe that the act will deprive them of fees for the investigation and making of abstracts of titles’.


\(^{51}\) McCormack (n 16) 72 n 39.

\(^{52}\) See Griggs (n 9) 173–4.


\(^{54}\) McCall (n 8) 345.
In addition, as Professor McCall discovered, some Americans suspected that Torrens was just a scheme ‘whereby rich men could seize the lands of the poor’ — a perception that has not yet disappeared.

B Dispensing Power

The slow acceptance of the dispensing power (harmless error) in America has also been attributed to lawyers’ lack of support. As explained by Professor Langbein,

[t]he professionals, who know what the relevant Wills Act requires and who know how to ensure compliance for their clients, do not have any incentive to encourage the legislature to enact a measure such as the dispensing power …

In addition, concern has been expressed that providing a means to probate formally defective testamentary documents will lead to increased litigation, although this is disputed. Perhaps the greatest obstacle to acceptance of the harmless error rule in America has been widespread distrust of the competence of the American probate bench, a distrust incongruously shared by the rule’s foremost supporter. Furthermore, Americans in general are suspicious of the discretion that permits ‘judicial activism’.

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56 See, eg, Adams Creek Assocs v Davis, 652 SE 2d 677 (NC Ct App, 2007); Adams Creek Assocs v Davis, 662 SE 2d 901, 901–2 (NC, 2008): an appeal was dismissed and a discretionary review was denied; Adams Creek Assocs v Davis, 746 SE 2d 1 (NC Ct App, 2008); Adams Creek Assocs v Davis, 748 SE 2d 322, 322–3 (NC, 2013): a discretionary review was denied; Adams Creek Assocs v Davis, 810 SE 2d 100 (NC App, 2018): the decision of the Court of Appeals was vacated, and case was remanded to the Court of Appeals. According to news accounts, the family who lost title to land due to a Torrens registration are reported to believe that their land was stolen from them ‘via a murky conspiracy — among developers, local lawyers and judges’: see Jay Price, ‘For Two Carteret County Men, Waterfront Land is Worth Nearly Three Years in Jail’ (14 December 2013) News and Observer. For other reports of dishonest practices in title registration, see Phillip Bantz, ‘The Redheaded Stepchild of Land Registration’ (17 February 2012) North Carolina Lawyers Weekly.

57 Langbein, ‘Absorbing South Australia’s Wills Act’ (n 23) 7.

58 Ibid 7–8; Sitkoff and Dukeminier (n 28) 178 (discussing litigation incentives).

V Conclusion

The fate of titles by registration and the dispensing power in America demonstrates that the success of a legal innovation is not dependent solely upon its excellence in the abstract but also upon its suitability in context. Torrens titles and the dispensing power were matched against familiar and well-established practices for conveyancing by deed or will. In addition to the ordinary human resistance to change, they encountered a characteristic American distrust of government. Successful resistance by the prior occupants of this particular legal niche reminds us that in the struggle for existence, the only test of fitness is survival.
Irene Watson*

COLONIAL LOGIC AND THE COORONG MASSACRES

I Introduction

Soon after I enrolled to study law in 1979, I read Stephen Lendrum’s article about the 1840 Coorong massacre in the *Adelaide Law Review*.¹ I belong to the land and peoples of the Coorong, and had been aware of the Coorong massacre from stories told to me by my family and elders. I had an Aboriginal worldview of the colonial frontier. The Coorong massacre occurred after 26 new settlers, who had survived the *Maria* shipwreck, died at the hands of Coorong Tanganekald Milmendjeri people. A punitive expedition was dispatched from Adelaide, and the number of First Nations Peoples’ lives lost to the punitive mission remains unknown. Our Aboriginal oral history maintains that it was many. The punitive mission might have been intended to bring the offenders to ‘justice’, but it was an unlawful process under British law, and unlawful in respect of Aboriginal law. The British did not declare martial law at the time, and two Aboriginal men were executed without trial.

The conflict and contradictions arising from the illegal treatment of the Milmendjeri people remain unresolved, but in alignment with the ongoing colonial project. This brief article interrogates some historical and contemporary relationships between First Nations and the colonial settlers, revealing how those relations situated colonial power and violence in the shaping and constituting of an Australian law that was, and remains, founded on terra nullius.

I studied Australian law while knowing and feeling how onerous it was to shift the power of colonialism. However, I knew that I could nevertheless learn and understand how colonisation legitimised and justified the theft of Aboriginal territories, and enabled an attempted genocide. I learnt how the colonial logic prevailed, while knowing how an Aboriginal way of being survived, holding on to life under the duress of it.

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II Naming, Renaming and Reclaiming

The ancient identity and name of the Milmendjeri, one of the Tanganekald peoples, belong to the Coorong. They are ancient names that have become almost lost to living memory. Post-invasion, the peoples and territories of the Coorong have become known as Ngarrindjeri — this name is now privileged in native title claims over the lands and affairs of traditional First Nations nations such as Ramindjeri, Tanganekald, and Yaralde. Our ancient precolonial names are falling away from more common usage. Why did this occur? I have always wondered if along with the annihilation of the Milmendjeri people, the erasing of the Milmendjeri identity was a means of annihilating our ancient identities and memories of precolonial ways of being.

My Aboriginal identity belongs to Tangalun, a place known to the Tanganekald and Meintangk Peoples as the end place of the Tangane language. It’s at the southern end of the Coorong, and it is where Tanganekald country meets Meintangk people’s lands and territories. It was renamed Kingston by colonial settlers in 1851.

III Aboriginal Territory, Shipwrecks and Massacres

In July 1840, a British ship, the Maria, was wrecked within a few kilometers of Tangalun — now called Kingston SE. The Maria Creek in Kingston was renamed to commemorate the ship. It is also the birthplace of my mother. Twenty-six survivors of the shipwreck began to make their way towards Adelaide along the Coorong beach, on which they were later found dead. It was alleged that they were murdered by members of the Tanganekald-Milmendjiri people. The colonial authorities decided to mount a punitive expedition, and in retribution and without trial, two Aboriginal men were accused of the settlers’ deaths and hanged on the beach. Afterwards, a massacre of many others ensued, to this day unacknowledged.

Now, at the outset of the invasion of South Australia in December 1836, the British had declared that First Nations Peoples were henceforth British subjects, to be accorded all rights and privileges under British law. However, the Maria incident and the way that British law should be applied was hotly debated, raising issue with the application of British law to ‘British subjects’ who were not British, but sovereign First Nations Peoples. Advocate-General William Smillie justified the event as follows:

Necessity warranted the Executive Government, in abandoning ordinary forms, which were inadequate to the emergency, to take upon itself the responsibility

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2 Lendrum (n 1). In this text, the reference to massacres applies to the survivors of the ship wrecked Maria. I invoke the massacre of my ancestors who occupied the Coorong and Lower South East region in the 1840s. The evidence for the massacre of Aboriginal Peoples is found in the population reduction of the region and the advancement from 1840 onwards of colonial settlement of the region.
of putting forth those more ample powers and prerogatives, with which, for the welfare of the state and the peace of society, it is constitutionally vested.\(^3\)

And Justice Cooper of the Supreme Court of South Australia argued that in fact British law could not take effect:

I feel it impossible to try according to the forms of English Law people of a wild and savage tribe whose country, although within the limits of the Province of South Australia, has never been occupied by Settlers, who have never submitted themselves to our dominion, and between whom and the Colonists, there has been no social intercourse.\(^4\)

Nevertheless, within a few years our population was drastically reduced, we had been dispossessed of our lands, and Tangalun became a ‘secure’ colonial territory.

Privileging the welfare of the State at the time of the Coorong massacres is not dissimilar to the contemporary quandaries that international law finds itself in when considering how to ‘recognise’ self-determination and land ownership of Indigenous Peoples. It is the territorial integrity of a colonial state that will always be privileged.\(^5\)

But there is a blind spot when it comes to the territorial integrity of Indigenous Peoples. Conflict is pronounced in international law when the power of a state intent upon upholding its territorial integrity confronts Indigenous Peoples’ sovereignty and ownership. The welfare of a colonial state has historically come at the expense of Aboriginal Peoples, while the ‘peace of society’ was, and remains, secured through the containment, eradication and now assimilation of Aboriginal Peoples.

### IV In the Place of an Unacknowledged Invasion — Who Am I?

For the people of the place Tangalun, named by the ancestors and now renamed by the invader, there is an ongoing struggle to resist and hold onto who we have always been. Our territories remain threatened by the colonial hunger for resources. We struggle to protect the natural world and our underground aquifers from conventional

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\(^3\) Letters from Governor George Gawler to Justice Charles Cooper of the Supreme Court, 12 August 1840, cited in Lendrum (n 1) 31.

\(^4\) Ibid 26.

\(^5\) The territorial integrity of the states is a principle of international law which ensures the stability and security of state borders. The principle is affirmed in Art 46(1) of the *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) (‘UNDRIP’) which states: ‘Nothing in this Declaration may be … construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States’. This provision ensures the colonial state remains, and is safeguarded in international law, while the dismemberment of Indigenous Peoples’ territories continues to be enabled without international intervention or remedy. See, eg, Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law*? (Routledge, 1st ed, 2015).
gas and fracking development, and threats to develop a low-grade coal mine to provide a cheap source of fertiliser will further risk the quality of our water supplies. We hold no paper title. All we can attempt is to buy our own land back, or look to a future that offers a ‘native’ title to the land — a vulnerable title that can be extinguished at the whim of government policy changes.6

Across colonial history, the Tanganekald and Meintangk peoples have been governed as the included-excluded, as British subjects, yet illegally executed under an un-declared ‘state of emergency’. Justice Cooper, with the view in 1840 that his court had no jurisdiction over ‘frontier’ Aborigines stated:

My objection to try the natives of the Big Murray tribe is founded, not on any supposed defect of right on their part, but on my want of jurisdiction. It is founded on the opinion that such only of the native population as have of some degree acquiesced in our dominion can be considered subject of our laws, and that with regard to all others, we must be considered as much strangers as Governor Hindmarsh and the first settlers were to the whole native population when they raised the British standard, on their landing at Glenelg.7

The remarkable aspect of these admissions on behalf of Cooper is their truth — that the colonial logic of genocide and theft involving the ‘settled’, ‘contained’ and ‘acquiescent’ native becoming the included British subject, while Aboriginal relationships to land were ignored, unrecognised and open to a legitimised land theft, was, in reality, a fiction.8 Fiction it may have been, but it prevailed, and Aboriginal

6 Article 27 of UNDRIP recognises the right to restitution of the lands, territories and resources that Indigenous Peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without free and fair compensation. Article 28 recognises the right to redress, which could include restitution when lands, territories and resources have been confiscated, occupied, used or damaged without free, prior and informed consent. Where restitution is not possible there is a right to just, fair and equitable compensation. However, UNDRIP is a soft law that, while persuasive, is merely aspirational. Australian law is weak in its protection of Aboriginal lands.

7 Lendrum (n 1) 26, sourced from the Grand Jury of the Supreme Court 3 November 1840, as reported in ‘Criminal Session’, The Adelaide Chronicle and South Australian Literary Record (Adelaide, 4 November 1840) 175. This is just four years after the ‘official settlement’ of Adelaide.

8 There are other examples of states of emergency being called over Aboriginal Peoples across Australian legal history. A state of emergency was called in 2004 in response to the Palm Island ‘riots’ following the death of Mr Doomadgee in police custody. Another recent example is the Northern Territory Emergency Response 2007. In 1840, Aboriginal people were rounded up and contained — the 2004 Palm Island event was a ‘settling down’ and return to containment, and the 2007 Northern Territory Intervention was aimed at taking back control of the land and communities under the pretext of providing protection for the children. Tony Koch and Andrew Fraser, ‘Police run for their lives as rioters torch buildings in a tropical island rampage’, The Weekend Australian (Australia, 27 November 2004) 1; The Australian Federal Howard
life is still excluded from the normative expectations and experiences of modern state citizens — we remain the included-excluded.

As a law student, I was confounded by the persistent construction of the Aboriginal person as a British subject, and the lack of acknowledgement that there had never been a dialogue between us and the British on the question of our legal and political status. At no stage had Aboriginal Peoples been informed of our coming to being as ‘British subjects’, let alone consented to it.

What makes us human and how is that determined? Who defines our humanness, — ourselves, our communities, other people, the states, or the stock markets? The question of what it is to be human is significant here. It is our connection to land that makes First Nations who we are. Aboriginal law holds the land and our identity as peoples is with the land. Protection of human rights is unnecessary. The concept of human rights is a construct of colonising powers — colonialism necessitates the need for human rights. Pre-invasion Aboriginal Peoples didn’t talk about human rights — human relationships and belonging to country ensured security. Both humans and other living forms were accorded a voice and a rightful space to co-exist.

But since becoming ‘British subjects’, Aboriginal Peoples are instead constructed as lacking — so lacking that the invasion of our lands and lives was, and remains, justified. We are known as peoples in need of salvation and rescue from our accursed native ways of being. ‘Human rights interventions’ came to our ‘aid’ but often resemble the ‘rational’ state’s civilising missions of the past. A human rights discourse came into being when our ways of being and life were invaded, and made vulnerable when we became subjects of an attempted genocide. That mentality, a ‘killing fields’ kind of thinking, led to the punitive expedition along the Coorong in 1840, and that thinking remains. It still views the territories of First Nations as grist for any mill; any environmentally destructive developments down to dumping sites for nuclear waste.

The state continues to dismiss that the inter-generational impact of colonialism is a reality, but it is the key to the contemporary position of Aboriginal Peoples. What might alter these subjugated relationships? While the colonial logic that enabled and continues to legitimise genocide and theft of land prevails, the same can only continue. The future of the continent is dependent upon enabling Aboriginal truths and ways of being to continue and to be freed from the duress of colonialism.

9 There is substantial evidence of Indigenous societies living a safer, more sustainable, and healthier lifestyle pre-invasion. Language itself is an indicator. There are few Indigenous language words that describe suffer, torture, war, and starvation.

9 There is substantial evidence of Indigenous societies living a safer, more sustainable, and healthier lifestyle pre-invasion. Language itself is an indicator. There are few Indigenous language words that describe suffer, torture, war, and starvation.
WHERE DO A BIRD AND A FISH BUILD A HOUSE?
AN ALUMNA’S VIEW ON A RECONCILED NATION

I Introduction

As a former student of the University of Adelaide Law School, this law school’s gift to me was buckets of guidance on how to think critically about the foundations of Australian society, to find a way through complex issues and to stimulate new perspectives and ways of thinking, drawn from these reflections.

All Australians are connected to Aboriginal and Torres Strait Islander Australians through our shared history, but not every individual Australian has personal stories of friendship and understanding of Aboriginal and Torres Strait Islanders hopes and dreams.

This being the case, how do we elevate the discussion on Indigenous reconciliation and recognition in our nation, when many Australians are sometimes two or three degrees separated from friendship or family connections with Aboriginal and Torres Strait Islander Australians.

We may not all have the deep connection of family, but as Australian citizens, we are members of Australia’s democracy and so there are values connecting us to each other. These values are mutual respect, tolerance, fair play, equality between men and women, compassion and equality of opportunity regardless of race, religion, or ethnicity. Importantly, these values are embedded in Australian laws.

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1 This article is based on a speech given to the University of Adelaide Law School on 7 September 2018. I would like to take this opportunity to acknowledge the Kaurna people, the traditional owners of the lands on which the speech was given. I would like to thank them for their love and care for country. I honour their elders as well as their young people, who one day, will take their place as leaders in this proud Aboriginal nation.

However, I put to you that there is a value missing from this list: the value of governance operating rhythms. The first governance operating rhythms did not arrive in Australia in 1788, but evolved thousands of years prior to this date. As of today, Australia is yet to give Indigenous governance operating rhythms a proper place of honour in Australia. These rhythms are anchored to common foundation pillars: land, law, language and family. These four pillars like the legs on a table, held the network of tables of Indigenous societies on an even and balanced footing. These structures are, quite simply, pure Australian structures to enculturate in Indigenous nations peace, order and good governance. During the period of first contact, these pillars were attacked, brutalised, dismissed and even ridiculed. Even though this is the history, Indigenous nations have in their own way and through different means, nurtured, maintained and re-established their nations’ tables. The foundation pillars are critical because they give effect in Indigenous societies to the interconnection of men and women, to families, to identity, to responsibilities, to authority, to vision, to hope, to dreams, to qualifications to speak and to tell. Importantly, they connect Indigenous nations to each other and these nations to modern Australia.

So, how can a fish and a bird make a home together? Or, from another angle, *where do a bird and a fish build a house?* I have thought about this question a lot in recent years. On face value, a solution seems impossible, because of the different environments these animals inhabit.

I first heard this phrase while watching *Corrina, Corrina,* a 1994 film set in an American city in the late 1950s. It is about a businessman of Jewish heritage, Manny, who hires Corrina, an African American, as housekeeper and nanny to care for his daughter after the passing of his wife.

Manny and Corrina, played by Whoopi Goldberg, begin to form a close friendship, which slowly develops into deeper feelings. Manny’s mum observes her son’s interactions with Corrina and begins to worry about the direction the friendship is heading in. One day she pulls her son aside and, in an attempt to express her concerns, she says, ‘how can a fish and a bird make a home together?’ Or, how can a Jewish man make a life with an African American woman, from another class and neighbourhood?

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3 At first contact Australia was described as terra nullius, an empty, uninhabited land; this of course was a wicked lie. At the time of first contact, there were many, many nations living on the continent with their own laws, traditions, trade rules and protocols based on their country, their language and their unique social structures. These were nations that relied on a complex set of principles and protocols such as *ngapatji ngapatji* (giving and receiving of obligations and responsibilities) and *Kutuku mukulyangku* (a protocol regarding kindness). These nations did not exist in isolation, they were interconnected through knowledge super highways called Songlines. Songlines held multiple libraries of knowledge ensuring through word and song that knowledge of lands, heavens, seas and their ecosystems was passed down from generation to generation to ensure everyone knew their place, and every place knew their nation. All of this and more I describe as governance operating rhythms.

4 *Corrina Corrina* (New Line Cinema, 1994).
Something about these words has captured me over the years. It is not so much the phrase itself, as what it represents — how a belief can be a powerful force to resist change, and how a belief that is entrenched so deeply can be deconstructed in someone’s heart and mind and allow new beliefs to be established.

Such a reflection feels like a good way for me to start this speech on Indigenous Peoples’ experiences around reconciliation in Australia, the agency of all Australians in what has occurred and the possibility of change, for the good of all Australians.

II It Is What Governments Do That Is Important

Australia has many beliefs about Aboriginal and Torres Strait Islanders and many of these beliefs were formed over two centuries ago. Australia’s founding fathers were a product of their times and their actions are now our legacy to address. Fred Chaney has commented on the importance of valuing government action over rhetoric: that it is not what governments say, it is what governments do that is important.5

All nations have a historical record and it is important that we learn from the past — from our successes as well as our failures. Nations also carry a moral record and when we reflect on both our historical and moral record, each generation has the opportunity to pause and consider whether, as a society, we could do better — based on our times, our growing knowledge and our understanding of the past. The historical record and the moral record also gives insight on the economic record of a nation and its people. The current economic situation of Aboriginal and Torres Strait Islanders does have a back story, it’s important to acknowledge it and, importantly, to remove race based discriminatory barriers where they still exist.

I learned about the history of race and racism in Australia, not during my high school years, but during my first stint at university in the late 1980s. Processing this information for me was twofold. Firstly, I was trying to understand my personal story as one thread in the historical and moral history of Australia. Secondly, I was trying to understand how public institutions were agents in this history. Today, I continue to be open to understanding these matters.

The concept of race was invented in the 18th century in an attempt to ‘categorise new groups of people being encountered and exploited as part of an ever expanding European colonialism.’6 This practice was no different in Australia and by the 19th century, Australia was busy with attempts to categorise people into races.

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Such categories inevitably gave rise to theories of the racial and cultural superiority of one race over another.\(^7\)

It is my view that such theories are, at their core, about control and power.

According to Cohen,

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\text{race is the object of racist discourse and has no meaning outside of it; it is an ideological construct, not an empirical social category; as such it signifies a set of imaginary properties of inheritance which fix and legitimate real positions of social domination or subordination in terms of genealogies of generic differences.}\(^8\)
\]

Australia’s founding fathers appropriated the contemporary opinions on race to further cause Aboriginal people to become invisible, which can be seen in the absence of legal agency for Aboriginal people in our Constitution. This then provided justification to a range of laws and policies throughout the 20\(^{th}\) century including the Aborigines Acts\(^9\) and the policy of assimilation.

Many Indigenous and non-Indigenous leaders believe this policy, and the underlying ideology is still threaded through various policies in Indigenous Affairs.

In 1975, the Australian Parliament took steps to put this past behind Australia, when the Racial Discrimination Act 1975 (Cth) was enacted. This domestic law was created because, earlier in the year, Australia had ratified the 1966 International Convention of the Elimination of All Forms of Racial Discrimination.\(^10\)

I have been in the ministry of Indigenous reconciliation and recognition all of my adult life. I do not remember the day the light was turned on, but when it was, I became conscious of my identity and difference and that it mattered to me and my family.

\(^7\) David Hollinsworth, Race and Racism in Australia (Thompson Social Science Press, 3\(^{rd}\) ed, 2006) 80–4.

\(^8\) Phil Cohen, ‘The Perversions of Inheritance’ in Phil Cohen and Harwant Baines (eds), Multi-Racist Britain (Macmillan, 1988) 9, 23, quoted in Hollinsworth (n 7) 27.

\(^9\) For example, the Aborigines Act 1911 (SA). This was replaced by the Aborigines Act 1934 (SA), as repealed by the Aboriginal Affairs Act 1962 (SA). On the history of this, and other discriminatory South Australian legislation, see ‘South Australia: Legislation / Key Provisions’, Australian Institute of Aboriginal and Torres Strait Islander Studies (Web Page) <https://aiatsis.gov.au/collections/collections-online/digitised-collections/remove-and-protect/south-australia>.

Moreover, I knew reaching out to generous Australians to confront discrimination and racism was the right thing to do, alongside working with all Australians to structure out these divisions.

I have always felt discussions on reconciliation and recognition were important.

### III Family Histories

Like the United States, we have had our era of slavery. One example being the South Sea Islanders who were transported to Australia between 1863 and 1900, with records showing that over 60,000 Islanders were transported.\(^{11}\) These men worked in Queensland and Western Australia as laborers in sugar cane plantation fields, among other things. While some came voluntarily, many men were tricked or kidnapped — a practice termed ‘blackbirding’.\(^{12}\)

These men were required to serve out fixed-term contracts as indentured laborers. In this regard, South Sea Islanders have said that it is more truthful and accurate to refer to these men as ‘sugar slaves’.\(^{13}\)

As we know, the ground swell towards federation in 1901 had a number of drivers but one of the central policies was the exclusion of all non-whites. After the Commonwealth was formed, many South Sea Islanders who were not exempt — for example those married to an Australian — were deported whence they came.

It does make me pause when I read that South Sea Islanders at the time were seen as racially superior to local ‘Aborigines’, because they were thought to be well-behaved, industrious and religiously minded.\(^{14}\)

When I read such views, I think about the war of resistance in Australia carried out by Aboriginal people against settlers. I think of the tough mindsets of Aboriginal

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14 Moore (n 12) 172.
people and reflect that resistance to oppression comes in many forms, including passive resistance.

Of course, we have a more recent example of the power of belief. We still have members of the Stolen Generation living among us and they continue to speak of the impact of those laws, which separated them from their family.

At the Garma Festival in 2018, I heard the remarkable William Tilmouth speak powerfully of the devastating impact on his life of being removed from his mother in Alice Springs and taken away to the Top End region of the Northern Territory to live in an institution. He spoke of the loss of language, connection to family and, today, a lack of recognition through native title.

What I have taken away from the 1997 *Bringing Them Home* Inquiry is that government policies have had a deep and lasting consequence on Australia. Often the lives of the people affected cannot be fixed or reconciled, even with an apology or redress. While the apology to the Stolen Generation was an important moment in the history of our nation, it was not an instant cure-all.

My own family story, although not directly of slavery, is connected to the same thread of federation and the policies that flowed thereafter.

My parents, Benjamin and Bernice, experienced the government’s management of exclusion through the regime of protection and assimilation: they were mission kids and therefore wards of the state in Western Australia.

Every Aboriginal and Torres Strait Islander child who had a welfare file from 1901 to 1967 experienced exclusion from their community either in part, or forever and it is difficult for me to process the impact of their experiences. For example, my father is buried in the cemetery of the mission he grew up on in what is today the Mount Margaret Community, because of the deep affection he held for this place.

That said, during most of his life, Dad was an exceptional man who carried himself with dignity. He was a proud Aboriginal man, he valued education, was bilingual, and he was an agitator, as well as an articulate rights campaigner in the tradition of Christian civil rights activists. For his service to Aboriginal people in Western Australia, he was awarded an MBE in 1978.


In Professor Fred Hollows’ autobiography, he talks about the resistance his team experienced in Western Australia to treating Aboriginal people. During a meeting of people from the health sector in Kalgoorlie, Fred arrived in the town hoping for support to get his team out to where Aboriginal people were in dire need of help. It was the mid 1970s and Kalgoorlie was a rough old place.

My Dad was also at that meeting, with a group of Aboriginal people from the local community. Dad effectively hijacked the health meeting, challenging bureaucrats who were more focused on minute taking and items on the agenda than on the solution at hand.

Fred wrote the following:

I don’t remember much more about the meeting… Not a peep from the chastened white fellers and the proceedings came to an end. Later Ben Mason told me what it had all been about — a concerted attempt by conservative bureaucrats and threatened health workers to keep us out of the state.

He then gives tribute to Dad, saying that it was largely thanks to Dad’s direct action, that this attempt to derail Fred’s team did not work.

Following my dad’s passing in 1994, I have often thought about where his passion came from. I truly believe it came from hundreds and hundreds of moments of exclusion and his experience of the power others exercised to control solutions, like in the story I have just told. His experience of exclusion, and what it tried to change in him, evolved into a passion to kick such exclusion out of his way and out of the way of other Aboriginal people.

In 2017 the Uluru Statement From The Heart expressed this desire for greater inclusion as Indigenous people wanting their voice to be heard.

The Aborigines Act 1905 (WA) governed the lives of all Aboriginal people in Western Australia for nearly 60 years. Mount Margaret Mission taught my father the operating rhythm of British society. There, among other things, he learned to read, write, and follow the British Christian and social calendar: Easter, church, Sunday school, Christmas, funerals, weddings, cricket season, tennis season, raising sheep

19 Ibid 134–6.
21 Under the Act, the Governor could declare any Crown lands as ‘reserves for aborigines’: s 10. The Minister could then force any ‘aborigine’ to be removed or kept within the boundaries of such reserves; any person who refused such an order was guilty of an offence: s 12.
and goats, fund raising, learning band music, attending school and eventually joining the workforce. Most importantly, my dad learned about the RM Williams store in Percy Street, Prospect and the clothes you needed for all these social and business events.

My parents never talked about ever getting exemption from the Act in Western Australia. I feel my dad may have had exemption given the travel he did in New South Wales during the 1950s, as well as travel he did to New Zealand.

As a child growing up after the 1967 referendum, in the 1970s and ’80s, I had a front row seat to the new dawn of self-determination. Lawmakers were changing discriminatory laws and everyday Australians were challenging social norms to give Aboriginal and Torres Strait Islanders a seat at the decision making table. I personally experienced the effort of non-Aboriginal people and governments to create equal opportunities for me. These offerings focused on closing the inequity gap in housing, employment, health, early childhood, and education. In those days, it was called affirmative action and, like today, school attendance was a hot topic.

In the ’80s, as an incentive to keep Aboriginal kids in school, every Aboriginal secondary student in years 8 to 10 received a fortnightly $3 cheque. In years 11 to 12 the incentive increased to $6 a fortnight. I am not sure if the $3 and $6 cheques were the hooks that got me over the line, but I did finish year 12.

Realistically, it was more about my mum driving me to school every day, and then becoming an Aboriginal education worker at Nailsworth High School. I am convinced she did this so she could keep one eye on me and the other on the school. My sister and I had a friend who ended up working in our local Commonwealth Bank as a teller, which made it a little more embarrassing for us when the time came to cash the cheque that arrived in our letterbox every fortnight.

I would go up to him and the conversation would go something like this,

Hello Andrea, how are you?

Yeah, good thank you. I’d like to cash this cheque.

OK, great. How would you like it, a two and a one?

And as Australians are prone to do, we gave him a nickname: ‘Three Dollars’.

My family history and other personal experiences of racism and prejudice, and these interesting policy offerings motivated me towards working in areas that advanced reconciliation, rights and recognition.

Such exemptions could be granted to any Aboriginal person who was employed, a woman married to a non-Aboriginal man, or who had a permit to be absent from a reserve: Aborigines Act 1905 (WA) s 13.
In 1999 after spending ten years in the South Australian public service, I could not push away the thought that I was a passive bystander, and that I needed to do more to influence law and policy through Parliament. I experienced some life changing moments in the years before 1999 that were influential in showing me that some change was happening for the good, such as Aboriginal employment, housing and education programs offered through government departments in the Commonwealth, States and Territories.

Similarly, there were events that showed racism and assimilation were still entrenched in Australian society: the protests of the bicentennial anniversary in 1988, the Royal Commission into Black Death in Custody 1987–1991, and the push for constitutional reform in 1995.

Applying for a place at Adelaide Law School in 1999 was a serious step for me. I took part in lectures and tutorials, in exams and assignments, in subjects and electives such as International Law, Constitutional Law and Australian Legal Studies and Aboriginal People and the Law. What unfolded for me there was the concept that Australian ‘modern’ laws are a *malpa* — the Pitjantjatjara word for friend — to the ancient protocols, manners and rules I had learnt about in my Aboriginal community and life education. And I realised that these rules needed greater prominence when talking about Australian laws.

It is my perspective that Indigenous law is not a part of Australian modern law, but that Australian modern law is a continuation of the Indigenous laws that have kept peace, order and good governance in the Australian continent for thousands of years.

These public rules and protocols I am speaking about have many different names depending on whom you speak to in the Indigenous community. In the Ngaanyatjarra Pitjantjatjara Yankunytjatjara (‘NPY’) region in Central Australia, these rules are bundled up in the word *Tjukurpa*.

*Tjukurpa* is sneaky, hiding itself in the oral tradition of storytelling, in art, in songlines, in the landscape and in everyday decisions. This is the wonder of our legal system. It is transportable, visual and is akin to an ecosystem or an operating rhythm; the sum parts keep harmony.

This rules-based, rhythmic order has maintained peaceful governance for 5000 generations and still exists today. Invasion, settlement, institutions and racism, poor laws and policies have endeavoured to stifle *Tjukurpa*. It has been challenged and despite this, it is still here today.

Over the past 10 years, during my time at the NPY Women’s Council, I have worked with the senior women of the region. I have seen senior practitioners of *Tjukurpa* apply their minds to complex issues, with the same style of forensic thinking as legal practitioners from other places. They have used a high bar of probity, integrity and
oversight to maintain peace, order and good governance to find a balanced position that is inclusive of culture and the modern world. I have observed a high standard of cultural acumen, a significant knowledge of culture that enables good consideration and decision making.

I formed the view in this law school, that the rules-based order, or governance operating rhythm, from my Indigenous nation, stood as a friend, and not an inferior system to Australian laws.

Surely good law finds good law in other places, especially when the result is the maintenance of peace, order and good governance for all. Surely, in our modern democracy, the benefits of enabling Indigenous Australians to have a co-governance arrangement are clear. To enable the Indigenous governance operating rhythm and the mainstream government operating rhythm to work in a synergistic relationship is for the greater benefit of all Australians.

The Uluru Statement from the Heart offers Australians an opportunity to anchor Indigenous governance operating rhythms to constitutional recognition.

The Statement says the following:

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are alienated from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny, our children will flourish. They will walk in two worlds and their culture will be a gift to their country.

We call for the establishment of a First Nations Voice enshrined in the Constitution.

Makarrata is the culmination of our agenda: the coming together after a struggle. It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination.

We seek a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about our history.
In 1967, we were counted; in 2017, we seek to be heard. We leave base camp and start our trek across this vast country. We invite you to walk with us in a movement of the Australian people for a better future.23

V A Reconciled Future

What is stalling us from moving into this reconciled future is the same situation faced by the South Sea Islanders and the Stolen Generation. We, as a nation, are too comfortable with the status quo. As David Morrison said, ‘the standard we walk past is the standard we accept’.24

The opportunity for Indigenous constitutional recognition, intertwined with the notion of voice, offers Australians a chance to discard the concept of exclusion of colour and move to embrace colour, to inform and create a better nation and to allow knowledge from Indigenous governance operating rhythms to raise the bar of better law in Australia.

In 1982, five Indigenous Meriam men, Eddie Koiki Mabo, Reverend David Passi, Celuia Mapoo Salee, Sam Passi and James Rice, began their legal claim for ownership of their traditional lands on the island of Mer in the Torres Strait.25 They claimed their people had continuously inhabited and exclusively possessed their lands, lived in permanent settled communities and had their own political and social organisation.

In June 1992, the Meriam people won the case. The High Court ruled that they were entitled to possession, occupation, use and enjoyment of most of their lands. The judgement of the High Court inserted the legal doctrine of native title into Australian law and drew a line across the legal fiction of terra nullius.26

The Law of Malo and the Stars of Tagai helped to explain Eddie Mabo’s right to ownership.27 This knowledge was drawn from his ancestors’ knowledge, passed

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23 Referendum Council (n 20).
26 Mabo v Queensland (No 2) (1992) 175 CLR 1 (‘Mabo’).
27 The Law of Malo is the law of the land, and the law of the Stars of Tagai is the law of the heavens. These stars are, to some Torres Strait Islander Peoples, representative of their ancestral sky hero. The use of these stars by Torres Strait Islander Peoples for navigation, agriculture, and telling the seasons was used by the Court in Mabo as evidence of the Meriam people’s ongoing connection to their land — it proved that they were not nomadic: Ragbhir Bathal, ‘How Astronomy Paved the Way for Terra Nullius, and Helped to Get Rid Of It Too’, The Conversation (online, 14 October 2016) <https://theconversation.com/how-astronomy-paved-the-way-for-terra-nullius-and-helped-to-get-rid-of-it-too-66703>.
down through the ages. The Law of Malo and the Stars of Tagai explained the Meriam people’s governance operating rhythm. A rhythm that gave structure to their laws and social organisation and, in Mabo’s case, their ownership or title to country.

This is the quality of insight needed to create better laws and policies. Advice from Indigenous leaders, with an understanding of Indigenous operating rhythms, advising the Parliament by providing insight by drawing out more knowledge for better laws.

I believe the result would be better laws giving Indigenous people and communities a greater chance of activating individual and collective agency of our lands, language, law and families.

Is this not the nation Australians seek to share with Indigenous Australians? Critically, this approach would keep the Parliament and the government from taking top down approaches with Indigenous Australians. It would activate an Indigenous approach to negotiating change and seeking solutions through an inside-out approach. In addition, it would encourage speaking to agents in Indigenous communities who are best placed to give agency to solutions. I believe this is a fuller expression of what was spoken of in the Uluru Statement from the Heart.

Without a movement involving all of the Australian people, this constitutional change may not happen. My concern is that if things do not change, the default position will remain and the exclusion of Indigenous people in many and varied forms will continue indefinitely: casually, passively, actively, and structurally.

This does not have to be the case, but it will be if nothing changes. I believe in the ability of the Australian people to discern between hatefulness and ambivalence, and kindness and justice. I stated at the beginning of this article that all Australians are connected to Aboriginal and Torres Strait Islander Australians through our shared history, but not every individual Australian has personal stories of friendship and understanding with Aboriginal and Torres Strait Islanders. Our shared history is our story to own as well as to reflect on. Our past helps us to understand the present, and why there is hatefulness and ambivalence as well as kindness and justice in our country. Our history helps us to feel what it is like to live with and without these qualities and, more importantly, that it is in our power to choose our nation’s qualities.

More than ever, Australians have to discern these differences. Sometimes it is like splitting hairs, but I believe we are up to the task: to lean, step towards and then walk on the right side of history.

Do Australians see a representative voice enshrined in the Constitution as a way of changing the power structure for Indigenous Australians? Do Australians accept that there are power structures limiting Indigenous agency, because of how policies and laws are structured? What is the cost to all Australians for this powerlessness to continue? Importantly, is there a benefit to all Australians if, in

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28 See Chaney (n 5).
this generation, we address constitutional recognition? These are all important questions.

I have been an Aboriginal person all of my life. As I age, I am more comfortable with who I am and the people who give me meaning and purpose. I am a member of an Australian Aboriginal nation whose relationship with country goes back 65,000 years. This reality is a wonder to me, it grounds me and it anchors me.

When Australian leaders in the business, social and services sectors discuss reconciliation and recognition, these conversations are genuinely positive. However, for the federal government, the current default position seems to be equality under the law. This stalls conversation in infancy, with the argument that one group cannot have a greater voice over another in Australia. From my perspective, this argument misses a critical element, that the exercise of equality is no longer equality when the effect is inequality.

I think the best example of this that I can give was when, in 2013, the former Prime Minister, Tony Abbott, took primary responsibility for women’s issues, along with Indigenous affairs, deregulation and national security. Abbott held his position as Minister for Women for about two years. I do not need to explain how confusing it was for Australian women to have a man as a figurehead for women’s progress and empowerment. As women, we have our operating rhythm constructed from personal perspectives on a daily basis.

This does not take away from the Australian value of equality between men and women, but on matters important to women, women should lead. So if men and women are equal, what is the role or influence of culture? Does this need to be factored in?

Of course, we know culture can provide a framework for understanding ourselves and the world around us. This is definitely my experience as a Ngaanyatjarra and Kronie woman. Can culture be a way to strengthen peace, order and good governance in Indigenous communities? In my experience I think it can, if it is understood to be part of a broader governance operating rhythm.

Our federal Parliament is a ‘WEIRD’ Parliament; it is full of mostly people who are Western, Educated, Industrialised, Rich and Democratic.29 When I was named the 2017 Northern Territory Australian of the Year, I said that Central Australia is the heart of the nation and if the heart is healthy, then the nation is healthy. If Central Australia is where our national heart is, then where is the brain and how healthy is it?

Taking this idea one step further, I would have to say that our brain is the federal Parliament. The question today is, ‘what is the Aboriginal and Torres Strait Islander

cultural neuroscience of our national Parliament?’ Do members understand the cultures of Australia’s Indigenous peoples and their unique governance operating rhythms? Do they understand their cultural worldviews? Are our law makers understanding of the balance needed for Aboriginal and Torres Strait Islanders to walk well in two worlds and how this balance is struck in law?

I would have to say that at times their understanding is satisfactory and other times unsatisfactory. Our Federal Parliament could be aiming for even better laws and policies for the benefit of Indigenous and non-Indigenous Australians.

Well time is up, the genie is out of the bottle. Aboriginal and Torres Strait Islander Peoples are asking the nation to change and this change is a gift that Australian people can give to Indigenous Australians. Indigenous Australians want to move from knocking on the doors of Parliament to moving inside the institution — validated by law and through the will of the people — to give voice to the aspiration and hopes of our people and communities for the benefit of all Australians.

VI Conclusion

In conclusion, I want to say that Eddie Mabo gave a great gift to this nation by challenging the notion of terra nullius. He freed all of us. And we know that he did this by drawing on his people’s governance operating rhythm to demonstrate his unbroken title.

The use of Malo’s Law and the Stars of Tagai in Mabo helped to bring the Meriam people’s governance operating rhythm from invisibility to visibility. These laws and practices had served his people well for thousands of years.

Imagine hundreds of Indigenous people who understand the balance, considering complex issues, drawing from their own operating rhythms as well as the laws of modern Australia, and speaking through an enshrined representative voice and under a framework of probity, integrity and transparency. Could this reality be possible in the third decade of the 21st century?

I hope it matters to Australians that in our commitment to reconciliation and recognition, a central mission is to see better laws for our communities. Laws based on, among other things, the best of our operating rhythms, of both western and non-western traditions. An Australian democracy that embraces co-governance because both traditions seek to anchor progress in our identity, history and our humanity.

So where do a bird and a fish build a home together? It is built where the bird and the fish can both live in the house; it is built on the land and in the sea.
All stand’. As I made my way to the centre of the bench I glanced at the large flat screen fixed to the wall. There could be seen the applicant, a young Aboriginal man, 26 years of age, dressed in prison issue garb. My eyes travelled to the coat of arms hanging on the wall behind the bench — Dieu et mon droit — a reminder, if anyone needed one, that in this courtroom the power of the coloniser vested in the colonists that first came to this land, and imposed on those who first owned the land, was to be exercised by a successor in title. Unabashed, unapologetic, Dieu et mon droit. So much for reconciliation. So much for recognition.

I will call the applicant William. That is not his name. I have changed it for the purposes of this article for the obvious reason.

William was in an audio-visual suite located in Port Augusta Prison. I was sitting in Adelaide. This was an application for the review of a grant of bail.

William did have what I would call an English name — I wondered, is that really your name or have you adopted an English name in dealing with the authorities? Surely there is no longer any need to do so (if there ever was). Surely as a community we have grown in maturity and know that the use of a person’s preferred name is important to investing a sense of dignity, equality and acceptance. Perhaps not.

William was represented by a lawyer from the Aboriginal Legal Rights Movement (‘ALRM’). He was robed and seated in Court as was the Crown Prosecutor.

I had been told that William was a traditional Aboriginal man for whom English was a second language. I had also been told that an interpreter would not be necessary — I wondered: how much of this application will he follow as we descend into formality and legal speak? I assume his grasp of English is sufficient to understand his predicament and to give instructions, but court proceedings are dynamic. Should I accept counsel’s assurance? Surely counsel, and ALRM in particular, are vigilant to guard against any risk of unfairness. I let the issue lie.

The Prosecutor relayed the allegations; William had been charged with causing harm to another intending to cause harm, and with breaching an intervention order. He had been drinking in one of the pubs in Port Augusta, had become very drunk, and was
Ejected. He had been drinking with his partner. She too was ejected. I will call her Lillian, but that is not her name.

Lillian was also drunk. She walked out of the pub first. William and Lillian were upset at being thrown out. William stopped at the door to let security know exactly how he felt. He was pretty charged up, and pretty angry. He was yelling but otherwise was not violent. Lillian walked on, proceeding to cross the road in front of the pub. As she reached the median strip she turned back and yelled at William in language. William broke off his tirade directed at security and ran over, as best he could, to where Lillian stood. With his left hand he grabbed the hair on the back of her head and with his right, punched her in the face twice before she fell to her knees. As he was gearing up to punch her a third time, security officers from the pub and an off-duty police officer intervened. The police were called. William was arrested and charged with the offences to which I have referred.

Lillian was taken to the nearby hospital. Nothing was broken but her right eye was almost closed due to swelling and the right side of her face was very sore and very bruised.

It was not the first time that William had bashed Lillian. In fact, she was the protected person under the intervention order. The terms of that order prohibited him from, amongst other things, assaulting her.

The incident outside the pub had occurred some three months ago. William was refused bail by the police. He did not apply for bail when he first appeared in the Magistrates Court. He was only prompted to apply for bail when a cousin died in a car accident. He wanted to attend sorry camp. Sorry camp would take place in Finke in the Northern Territory and last up to two weeks.

As I have said, William was only 26 years old. He was an initiated Arrernte man. He spent his time in the communities and towns between Alice Springs and Port Augusta. The Magistrate was told that he was close to his cousin and that culturally he was expected to attend sorry camp.

Some months before the bail application the Australian Law Reform Commission had published its report entitled, Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples. The Magistrate had regard to this report. It makes plain the overrepresentation of Aboriginal people in the Australian prison system:

Australian Law Reform Commission, Pathways to Justice — An Inquiry into the Incarceration Rate of Aboriginal People and Torres Strait Islander Peoples (Report No 133, December 2017).
The impact on Aboriginal and Torres Strait Islander people

5.20 There has been a general upsurge in remand populations nationwide, and this has been especially pronounced for the Aboriginal and Torres Strait Islander prisoner population.

5.21 In 2016, the national Aboriginal and Torres Strait Islander remand prisoner population accounted for 30% (3,221) of Aboriginal and Torres Strait Islander prisoners, which amounted to 27% of all prisoners held on remand. By June 2017, 33% (3735) of the national Aboriginal and Torres Strait Islander prisoner population were in prison held on remand.

5.22 Aboriginal and Torres Strait Islander peoples have continued to be over-represented on remand by a factor of over 11 compared to non-Indigenous remandees since 2010 — in 2016, the rate of remand for Aboriginal and Torres Strait Islander peoples was 432 per 100,000 and 38 per 100,000 for non-Indigenous people.

5.23 In 2016, Aboriginal and Torres Strait Islander people were most likely to be held on remand when accused of offences categorised as ‘acts intended to cause injury’ (42% of the Aboriginal and Torres Strait Islander remand population); ‘unlawful entry with intent’ (13%); and sexual assault (7%). The category of ‘acts intended to cause injury’ is broadly defined and can include low-level instances of offending. For example, 33% of Aboriginal and Torres Strait Islander peoples held on remand for ‘acts intended to cause injury’ were charged with a serious assault not resulting in injury and 12% for common assault. This is not to say that all Aboriginal and Torres Strait Islander people held on remand for ‘acts intended to cause injury’ were held for low-level offending: 54% in this category were held on remand for charges of serious assault resulting in injury.2

My mind wandered. Those statistics shame us all. The haunting truth contained in the Uluru Statement came to mind:

Proportionally, we are the most incarcerated people on the planet.3

I had previously written that if in all the circumstances of a case it is appropriate that an Aboriginal offender be gaol or refused bail, then judges and courts must do so. Otherwise they would not be doing their duty. But if the case for incarceration or detention was finely balanced, the statistics should loom large and push the court

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2 Ibid 152–3.
to avoid a custodial outcome. I paused to think about the statistics for a moment longer. They reflect unfairness in the system. The observations of the former Chief Justice of Western Australia, Wayne Martin, came to mind:

The system itself must take part of the blame. Aboriginal people are much more likely to be questioned by police than non-Aboriginal people. When questioned they are more likely to be arrested rather than proceeded against by summons. If they are arrested, Aboriginal people are much more likely to be remanded in custody than given bail. Aboriginal people are much more likely to plead guilty than go to trial, and if they go to trial, they are much more likely to be convicted. If Aboriginal people are convicted, they are much more likely to be imprisoned than non-Aboriginal people, and at the end of their term of imprisonment they are much less likely to get parole than non-Aboriginal people. Aboriginal people are also significantly over-represented amongst those who are detained indefinitely under the dangerous sexual offenders legislation. So at every single step in the criminal justice process, Aboriginal people fare worse than non-Aboriginal people.

... 

[O]n a lawyer’s analysis, these laws cannot be said to discriminate against Aboriginal people, or to result in unequal treatment, because they do not discriminate by reference to Aboriginality, but rather by reference to characteristics with which Aboriginal people are much more significantly associated.

This is where I think, with respect, the sociological approach espoused by Professor MacKinnon makes rather more sense than the lawyer’s approach. Put bluntly, if one looks at the outcome of a system and sees that they are skewed, it is a fair inference that the system is not working fairly. We know that the outcomes of the criminal justice system are significantly skewed in relation to Aboriginal people. Some of the sources of that skew can be seen in the examples that I have given. Move-on orders are more likely to be issued against Aboriginal people, Aboriginal people are more likely to be denied bail because they are homeless, or because of their prior criminal records, and the mandatory sentencing legislation in WA has a much greater impact upon Aboriginal people than upon non-Aboriginal people, as does the dangerous sexual offender legislation.

There cannot be any doubt that Aboriginal people are significantly disadvantaged within our criminal justice system in almost every aspect of that system’s operation. Even if a lawyer might describe the system’s treatment of Aboriginal and non-Aboriginal people as equal, the outcomes of the system’s operations are grossly unequal. Whether you attribute those outcomes to disadvantage or to discrimination, it does not alter the tragic effects of those outcomes on the descendants of the longest unbroken cultural grouping on the planet.

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This reminds me of the Royal Commission into Aboriginal Deaths in Custody’s observations of institutional racism:

When Aboriginal people say they lived with racism every day they are not meaning to say that all day every day they met non-Aboriginal people who insulted them and called them names (some of the time, of course, they did), but that every day the system of inequality put them down. They are talking about the laws, the systems, that were put in place pursuant to the laws which operate every day whether the people who operate the system are well meaning and helpful or personally racist.6

Am I about to contribute to this unfairness, this disadvantage — to perpetuate institutional racism? In the Magistrates Court William was granted bail, but his release was deferred upon the prosecution indicating an intent to review the decision.7 The review proceedings were promptly instituted.

Before me the Crown Prosecutor submitted that the grant of bail should be revoked. William, it was contended, was a prescribed applicant under the Bail Act 1985 (SA) with the consequence that he could not be granted bail unless and until he established that special circumstances existed justifying his release.8 No special circumstances existed in this case, it was submitted; the inability to attend family celebrations, events and funerals must necessarily have been contemplated by Parliament as an ordinary and expected consequence of the reversal of the presumption of bail.

Counsel for William emphasised the importance to William and his mob of his attendance at sorry camp. He repeated the submission made before the Magistrate that culturally William was expected to attend. The submission was bland and presumed I understood the cultural significance of sorry camp. I understood that it is important for people to say goodbye, to grieve, and to grieve with family. Was this the same?

Again my mind wandered; I needed help to understand this. William’s culture was very different to mine as, no doubt, was his view of the world. I recalled Irene Watson’s description of the ruwi:

Our laws of ruwi are ancient. They come from a time the old ones called Kaldowinyeri — the dreaming, the place of lawfulness, a time before, a time now, and a time we are always coming to. A time when the first songs were sung, as they sung the law. Laws were birthed as were the ancestors — out of the land and the songs and stories recording our beginnings and birth connections to homelands and territories now known as Australia. Our laws are lived as a way of life, they are not written down because the knowledge of the law comes through the living

6 Royal Commission into Aboriginal Deaths in Custody (National Report, April 1991) vol 2, [12.1.27].
7 This was made under the Bail Act 1985 (SA) s 14.
8 Ibid s 10A.
of it, as law is lived, sung, danced, painted, eaten, walked upon, and loved; law lives in all things. It is law that holds the world together as it lives inside and outside of all things. The law of creation breathes life as we walk through all of its contours and valleys. It holds a continuity as there is no beginning or ending, for the constant cycles of life are held together by law.

It is law which lives in the lives of the community of animals who were brought together to determine a resolution to the problem of the giant frog and its need and greed. The animals’ determination was expressed by an act that posed no harm or threat to the future existence of the frog. Instead the animals pursued an inquiry into the frog’s trauma, which in turn led them to decide that through laughter the frog could be brought to release the life-giving waters back to the land. There was no retaliatory action taken but rather an understanding of the continuity and balances of life and law and the need to reduce the frog without taking from it its future. As all things have a right to life, the power to determine otherwise is of muldarbi origins not of law.9

Is it the same for an Arrernte man? Watson writes of being ‘one of the voiceless amidst the chaos seeking to write my way out of the rubble that buries’.10 I glanced across at William then up to the portrait of one of Her Majesty’s Justices, and back to William. Is he voiceless? Am I part of another layer of rubble? An Aboriginal Justice Officer (‘AJO’) was in attendance. He was an Arabana man working in Port Augusta with extensive experience of the desert peoples’ culture and the importance to an initiated man of discharging his cultural obligations. I asked him for his help in trying to understand culture. He told me, amongst other things, that he has been with Aboriginal men in custody who are prevented from attending sorry business. He did his best to convey the depth of the despair that these Aboriginal men experienced as they sat in a cell ruminating on what is taking place without them. ‘It is important for your Honour to get [William] to sorry camp if you can. I’ve spoken to [William]. He understands that he’s gotta come back and he says he will when sorry business is finished’. I trust the AJO’s judgement.

My mind wandered. The Aboriginal people’s conception of family is different to my own. Was William’s cousin a cousin in the European sense? Does it matter? I doubt it. My mind wandered further. I had recently been reading about intergenerational trauma. Chances are this was not the first sorry camp William had needed to attend. How healthy and happy was his mob? Is intergenerational trauma just a different way of describing the compounding burden of Watson’s layers of rubble? Is this what the AJO is trying to tell me in his own way? In the government’s 2017 report into the Aboriginal and Torres Strait Islander Health Performance Framework it is said that for Aboriginal and Torres Strait Islander people health is not just about the physical wellbeing of the individual, but the social, emotional and cultural wellbeing of the

10 Ibid 253.
whole community.\textsuperscript{11} In the course of explaining this the report states that social and economic disadvantage amongst Aboriginal and Torres Strait Islander communities is interconnected with historical loss of land (which was the economic and spiritual base for Aboriginal and Torres Strait Islander communities), damage to traditional social and political structures and languages; child removals; incarceration rates and intergenerational trauma.\textsuperscript{12}

If the health and wellbeing of William’s mob and William’s health and wellbeing are inextricably linked, then taken with the importance of sorry camp, do you not have special circumstances justifying his release on bail? Was the Magistrate not right?

But what of the law’s duty to protect Lillian? As I have said, William’s arrest for bashing Lillian was not a first. In fact, I was advised that the current offences with which he was charged occurred barely three days after his release from Port Augusta Prison for a previous assault upon Lillian. On that occasion alcohol was also involved and Lillian suffered soreness and bruising. After pleading guilty William was sentenced to three months’ imprisonment and the intervention order imposed.

Despite only being 26, William had many other convictions. These included assaults, disorderly behaviour, drink driving, resisting arrest, property damage and failure to comply with bail agreements. Alcohol was almost invariably a factor.

Again my mind wandered. Do I treat William like any other violent drunk? Then again, isn’t his alcohol abuse symptomatic of the devastation that colonisation has wrought upon the Aboriginal people and cultural rules and obligations? What can I do about this sitting here? My mind returned to Lillian. If I treat colonisation and the destruction of Aboriginal society as in some way contributing to special circumstances will I be re-victimising Lillian and Aboriginal women in her position? Perhaps I need to hear from Lillian or the community at Finke and in particular the Aboriginal women. William’s family may want him at sorry camp and so may the men, but what about the women? I glanced again at his criminal history — four prior convictions for assault. What if the victim in each case was an Aboriginal woman? I imagine that intervention orders and bail conditions issued by the police and courts are of little effect in the remote communities of South Australia. But I had heard of some communities that had their own programs designed to protect women and children in particular from violence. Can the community guarantee Lillian’s safety if I grant William bail?

Will there be drink at sorry camp, I asked. Neither counsel knows whether Finke is a dry community. Even if it is, what are the chances of there being drink? High it is thought. Alcohol has been a contributor to the destruction of cultural mechanisms


\textsuperscript{12} Ibid.
of social control, I have read. But what if the laws and the police through bail conditions reinvested power in the community to police William’s behaviour? It is not that I begrudged him a drink. My primary concern was the risk of alcohol fueled violence, and, more particularly, to protect Lillian.

I was told Lillian and William had been in a relationship for around two years. She too was Aboriginal. Her people were members of the Far West Coast mob and her country in the south western part of South Australia. I was told that culturally she was not expected at sorry camp, but would go if William’s only way of getting there was for her to drive him. William did not have a driver’s licence and was disqualified from obtaining one.

When was sorry camp to commence, I asked. It already had, but it would continue for some time and the funeral itself was not for six days. I adjourned to the following morning, but before doing so made plain that I would like to hear from Lillian, if possible, that I wanted to know if there was a police station in Finke, and lastly, that I would welcome the assistance of any elders in Finke who would be attending the sorry camp and who, culturally, William would listen to and obey.

Again my mind wandered. What are the chances of Lillian willingly coming to court to speak to me? If she distrusted the police and judges, that would be understandable. So too would it be understandable if she did not wish to be seen or thought of as assisting the authorities. I turned back to counsel, having thought more about it; all I need to know from Lillian was whether she intended to go to sorry camp. I would leave my questions about William’s reputation in the community for any elder to whom I might speak.

Before leaving the bench, I turned to explain to William what had happened. It is a habit of mine to speak directly to the accused before adjourning. It is a small thing, but in the midst of the despondency of the criminal courts it serves as a reminder to me to treat the accused no matter who they are and no matter what they have done with respect and dignity.

I was frank with William. I told him what concerned me and why I wanted more information. I did not invite questions or a response. I am cautious that he should not unwittingly forego the protection of counsel. I finish by telling him that if he has any questions he should ask his lawyer who, I am sure, will answer them for him. He nods as I speak. I finish by asking him, ‘Do you understand?’ ‘Yes, boss’, he answers. I turn to my associate, about to call for the Court to be adjourned, when William offers, ‘I can catch the bus, boss.’ I am relieved; he has understood. Language has not been the barrier I feared it might. He is prepared to catch the bus to avoid travelling with Lillian. Some discussion follows. Can we put William on a bus that would take him to the centre of Australia? The bus doesn’t travel to Finke itself, I am told, but William will get off at a road house some 150 km south of Alice Springs and wait for a lift which he is certain will come. The Prosecution is opposed. Now more than before I need the help of the police and the elders. I adjourn so that inquiries can be made. I make plain to William that I have not decided to let him go as yet. I want to know more. ‘Yes, boss.’
I left the bench wondering, ‘Yes, boss’, respectful like, ‘Yes, Sir’, but it troubles me. I think it is the historic overtone of colonialism that is bothering me. Is William just surviving within the imposed system, being deferential and respectful because he has learnt that there is no other way when confronted by the might of the coloniser? I would rather he felt that he was being treated fairly and equitably, but who am I kidding, how can I expect him to think like that bearing in mind the havoc that history has wrought and the systemic disadvantage and unfairness of which Wayne Martin AC speaks. My mind travels to Paul Keating’s Redfern speech:

it was we who did the dispossessing. We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers. We practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.13

Layer upon layer of rubble. All the more reason to look to his community and the elders for help.

I then began to think of the prospect of speaking to an elder or elders. How would I know if these people were senior people within the community? How do I involve the community without causing trouble for the community? Do I need to speak to both male and female elders? If I do not speak to the women, how can I know if permitting William to return will not create problems? Will there be cultural barriers to me obtaining the information I need? Perhaps I am overthinking this, but, amongst other things, I have in mind the work of Professors Davis and Langton and the risk of Aboriginal women being lost in a conception of colonisation and Aboriginal communities that is male dominant and marginalises Aboriginal women.14 Involvement of the community must be a matter of choice and that choice must be exercised by all in the community concerned. How will I know? I had no time to investigate these issues and will have only imperfect information. The best I can do is tap the knowledge of the AJO.

Resuming the following day, the Prosecutor advises that there is a police station in Finke but it is not permanently staffed. Rather, the police spend two to three days in Finke every two to three weeks. They are not in Finke at present but plan to be within the week, depending on duties elsewhere. Even if the police were in Finke, the prosecution remains opposed to any grant of bail. Special circumstances do not exist

and even if they did, and even if Lillian did not travel to sorry camp, it is unlikely William will return voluntarily to Port Augusta Prison.

I had hoped for greater assistance. I had hoped that effective policing of the communities would mean that the police could assist me in identifying elders or Aboriginal organisations that might play a part in policing any grant of bail made in William’s favour. People and organisations with whom they had worked in the past and for whom they could vouch. I had also hoped that the police station might be open in order that William could report from time to time whilst in Finke. Then I wanted to know about sorry camp from the police’s point of view and whether William’s attendance presented any issue out of the ordinary.

I inquire of the Prosecutor; are the officers available to give evidence over the phone? Not immediately; they are on the road and then a satellite phone is required. I turn to counsel for William. We are under some pressure of time. The next bus for Alice Springs leaves Port Augusta the following morning at 10am. If William is to get to sorry camp in time for the funeral then ideally he should be on that bus.

Lillian, I was told, cannot be found. However, her aunty who lives in Port Augusta does not think she is going to Finke. Counsel tells me that most of the sort of people from William’s community who can assist the Court are already at sorry camp and are proving difficult to contact. Arrangements have been made, however, for William’s sister and his uncle to be at the general store in Finke at 2pm so the Court can speak to them. Other than the police station the general store is the only place with a landline. The AJO advised that bus tickets for William can be easily arranged and that Corrections will deliver him to the bus station in time if I grant bail. The Prosecutor remains opposed. You do not know anything about the people to whom you will speak on the telephone. There are no special circumstances. You cannot be satisfied that William will return.

The AJO boldly speaks up. I welcome it. He is confident William will return. He has spoken to William and William understands that if he does not come back the chances of any ‘Aboriginal fella’ in similar circumstances getting bail in the future will suffer.

I decide to adjourn to 2pm. I want the assistance of the people in Finke to understand better the importance of sorry business and to satisfy myself that if I were to grant William bail it would be welcomed by all in Finke. I also wanted to know whether they would assist me to make sure William stayed out of trouble and returned. I tell the Prosecutor that I would also like to speak to the police officers if that is possible.

Resuming at 2pm, the Prosecutor stands. Before any calls are made, he says, the Court should be aware that the moment proceedings are adjourned the police intend to charge William with the offence of threaten life. It appears that late on the previous day he made threats whilst in custody to kill Lillian upon his release. Those threats were made in a context of him blaming her for his being in gaol and for his current predicament. He will be charged. The police will refuse him bail. He will have to
apply afresh for bail in the Magistrates Court. A sense of gloom and frustration descends.

This is news to counsel for William. I allow him a brief adjournment to take instructions.

Whilst waiting my mind wanders. Was the threat real, or was he just sounding off in frustration? How would the authorities have gauged this? The police are probably ‘damned if they do, damned if they don’t’ act. What would Lillian think?

We return to Court. Counsel for William advises that the application is no longer opposed. Bail should be revoked. William will start again once charged with the fresh offence.


‘All stand’.

‘You rubbish’. It is William. My mind returns to Paul Keating’s Redfern Speech:

it might help us if we non-Aboriginal Australians imagined ourselves dispossessed of land we had lived on for fifty thousand years — and then imagined ourselves told that it had never been ours. Imagine if ours was the oldest culture in the world and we were told that it was worthless. Imagine if we had resisted this settlement, suffered and died in the defence of our land, and were told in history books that we had given up without a fight. Imagine if non-Aboriginal Australians had served their country in peace and war and were then ignored in history books. Imagine if our feats on sporting fields had inspired admiration and patriotism and yet did nothing to diminish prejudice. Imagine if our spiritual life was denied and ridiculed. Imagine if we had suffered the injustice and were blamed for it. It seems to me that if we can imagine the injustice we can imagine its opposite. And we can have justice.15

And to the Uluru Statement:

Proportionally, we are the most incarcerated people on the planet. We are not an innately criminal people. Our children are aliened from their families at unprecedented rates. This cannot be because we have no love for them. And our youth languish in detention in obscene numbers. They should be our hope for the future.

These dimensions of our crisis tell plainly the structural nature of our problem. This is the torment of our powerlessness.

15 Keating (n 13).
We seek constitutional reforms to empower our people and take a rightful place in our own country. When we have power over our destiny our children will flourish. They will walk in two worlds and their culture will be a gift to their country.\textsuperscript{16}

William’s point has force.
INTERNATIONAL LAW IN AUSTRALIA REVISITED

I Introduction

Congratulations to the Adelaide Law Review on reaching its fortieth anniversary! Reading through the issues of the Review since its inception takes one of us (Crawford) back to days as a Student Editor in the late 1960s, then as a Staff Editor in the 1970s; to articles on public law,¹ and to preparing the edition in honour of Chief Justice Bray.²

But the focus of this piece is on international law in Australia, as manifested inter alia in the Review. The very first article to be published by the Review was a piece on the 1958 Geneva Conference on the Law of the Sea, based on a speech given in Adelaide by the then Solicitor-General of Australia, Sir Kenneth Bailey.³ Thereafter the Review stuck to its vocation as a national, even local, law review, but starting with volume 16, in 1994, it branched out more frequently into matters of international law,⁴

* Judge, International Court of Justice; BA, LLB (Hons) (Adel), DPhil (Oxon); Member of the Adelaide Law Review’s Editorial Board. In 1974, Crawford took up a position at the Adelaide Law School and was awarded a personal chair in 1982.

** Associate Legal Officer, International Court of Justice; LLB (Hons) (Monash), LLM (Cantab).


² A special edition of the Adelaide Law Review celebrated the retirement of Chief Justice Bray from the Supreme Court of South Australia in 1980 (volume 7).


as befitted a law school with a distinguished record of teaching and research in the field.⁵

In 1983 Crawford wrote of Australia’s ‘comparative isolation’, which rendered Australia’s full participation in international law difficult.⁶ However, as Michael Kirby has written in the Review, ‘international law grows in harmony with the technology of international flight, shipping, trade, satellites and telecommunications’.⁷ Nowhere has that been more true than in Australia. Sixty-one international airlines flew to and from Australia in 2018, with international scheduled passenger traffic in December 2018 alone recorded at almost 4 million.⁸ The total number of passengers that travelled in and out of Australia by air in 2018 was about 40 million; in the mid-1980s, that number was approximately 5.4 million.⁹ Notwithstanding its isolated geographical position, Australia is no longer ‘remote’ in terms of engagement with international affairs.¹⁰

It should not be forgotten that Australia has always, despite the historical remoteness from international affairs, manifested its support for a global rules-based order. It has done so by seeking to develop international law, by proclaiming an intention to abide by it, and by engaging with international organisations. Australia was first able to take its own steps in this regard following the First World War, as it began to acquire a recognised international personality and participate in its own name in international forums.¹¹ Australia was separately represented at the Versailles Conference (albeit as part of the British Empire delegation) and gained separate membership in its own right of the League of Nations.¹² Australia was no longer a ‘colony within

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⁵ As witness Faculty members such as DP O’Connell, Ivan Anthony Shearer, James Crawford, Hilary Charlesworth and Judith Gardam, not to mention current members of staff with interests in the field (eg, Rebecca LaForgia, Nengye Liu, Dale Stephens, Matthew Stubbs, and Nobu Teramura).

⁶ JR Crawford, ‘Teaching and Research in International Law in Australia’ (1981–83) 10 Australian Yearbook of International Law 176, 195 (‘Teaching and Research’).


¹⁰ Crawford, ‘Teaching and Research’ (n 6) 195.


¹² Ibid 179.
an empire’.\(^{13}\) It accepted the compulsory jurisdiction of the Permanent Court of International Justice.\(^{14}\) Furthermore, it acquired full treaty-making power through the Imperial Conferences of 1926, 1930 and 1937, and set up its Department of External Affairs in 1935.\(^{15}\) After the end of the Second World War, Australia began setting its own foreign policy, independent of the United Kingdom.\(^{16}\) Australia was a founding member of the United Nations and an elected member of the United Nations Security Council in 1946.\(^{17}\) It assumed the Presidency of the United Nations General Assembly in 1948–49.\(^{18}\)

Australia was thus quickly, and substantially, engaged in the post-war international legal order. In more recent years, federal governments of all political stripes have continued to advocate for an international rules-based order and have demonstrated support for international institutions which promote respect for international law.\(^{19}\) Australia successfully ran for a seat on the Security Council for 2014 and has announced a bid for a seat in 2029–30.\(^{20}\) Australia also successfully ran for a seat on the Human Rights Council for 2018–20.


\(^{14}\) Declaration signed at Geneva on 20 September 1929, approved by the Parliament in 1930.


\(^{17}\) Australia was also an elected member of the United Nations Security Council in 1956, 1973, 1985 and 2014.


\(^{20}\) *2017 Foreign Policy White Paper* (n 19) 82.
Australia’s engagement with international law has continued in key areas such as the law of the sea and nuclear non-proliferation. As to the latter, in 2017 Australia announced its aim to strengthen the Treaty on the Non-Proliferation of Nuclear Weapons (‘NPT’), notably through the 2020 and 2025 review cycles of the NPT. Australia continues to support the Joint Comprehensive Plan of Action (‘JCPOA’), despite the United States’ withdrawal, and advocates the coming-into-force of the Comprehensive Nuclear-Test-Ban Treaty. It is a proponent of a treaty banning the production of fissile material for nuclear weapons and was a member of the group of experts tasked by the General Assembly with preparing a draft text for the elaboration of an international agreement on the subject. However, Australia has not signed the 2017 Treaty on the Prohibition of Nuclear Weapons and continues to adopt an express policy of extended deterrence, dependent on the United States’ maintenance of its nuclear arsenal.

In relation to the law of the sea, as Bailey identified in the first edition of this Review, one of Australia’s major concerns as an island nation has been the openness of the seas for the benefit of Australia’s ‘economy, [its] safety and … the existence of [its]...

21 See the East Asia Summit Statement on Non-Proliferation on 8 September 2016: Yooree Lee, ‘Non-Proliferation of Nuclear Weapons and Other Weapons of Mass Destruction’ (2017) 35 Australian Yearbook of International Law 502, 502; Crawford, ‘Teaching and Research’ (n 6) 196; 2017 Foreign Policy White Paper (n 19) 7, 94.
24 For a draft of this treaty, see Richard Butler AM, Adoption of the Agenda and Organization of Work Comprehensive Test-Ban Treaty, 5th sess, Agenda Items 8 and 65, UN Doc A/RES/50/245 (26 August 1996) annex.
26 Treaty on the Prohibition of Nuclear Weapons, opened for signature 20 September 2017 (not yet in force). Nor did Australia participate in the elaboration of its text.
27 2017 Foreign Policy White Paper (n 19) 39, 84.
communications, by sea and by air, in peace and in war’. 28 This historical concern for the maintenance of freedom of navigation, consistent with international law, 29 has continued. 30 Australia was an early signatory of the 1958 Geneva Conventions on the Law of the Sea 31 and played an active role during their elaboration, especially regarding negotiations on the territorial sea and contiguous zone. 32 More recently, Australia has been supportive of the 1982 United Nations Convention on the Law of the Sea (‘UNCLOS’), which it ratified in 1994. 33 It has made use of UNCLOS procedures, for example in relation to the proclamation of its continental shelf. 34 Australia was the first state — jointly with New Zealand — to initiate an Annex VII Arbitration under UNCLOS. 35 Australia’s election to Category B of the Council of the International Maritime Organization in December 2017 confirms Australia’s engagement with the regulation of maritime transport. 36 It has also played a role in the further development of the law of the sea, 37 for example advocating a new international agreement under UNCLOS on the conservation and sustainable use of marine biodiversity in the high seas. 38

28 Bailey (n 3) 5. Australia has the world’s third largest Exclusive Economic Zone.
29 Ibid 14.
30 2017 Foreign Policy White Paper (n 19) 47.
31 Bailey (n 3) 11.
32 Ibid 21.
35 See Southern Bluefin Tuna cases (New Zealand v Japan; Australia v Japan) (Award on Jurisdiction and Admissibility) (International Tribunal for the Law of the Sea, Case No 3 & 4, 4 August 2000). For further discussion of the case, see Bill Campbell, ‘International Dispute Resolution: Australian Perspectives and Approaches’ (2018) 35 Australian Yearbook of International Law 1.
37 Bailey noted in 1960 that Australia also played a role in the development of the law of the sea, for example with its work on the definition of ‘natural’ resources during the negotiations of the 1958 Geneva Conventions on the Law of the Sea, see Bailey (n 3) 10.
38 2017 Foreign Policy White Paper (n 19) 95; Australia, Submission by Australia to the Preparatory Committee on Conservation and Sustainable Use of Marine Biological Diversity of Areas Beyond National Jurisdiction, 6 December 2016 <https://www.un.org/depts/los/biodiversity/prepcom_files/rolling_comp/Australia.pdf>.
Other areas of international law which Australia is seeking to develop, rather against the tide, include the World Trade Organization (‘WTO’) and peaceful uses of outer space. Australia led calls within the WTO, along with Singapore and Japan, for talks on international legal measures concerning ecommerce.\(^{39}\) It has also actively campaigned for the non-militarisation of outer space.\(^{40}\) On this last aspect the University of Adelaide Law School is contributing to the debate by developing the Woomera Manual, which aims to clarify existing international law applicable to military space operations.\(^{41}\)

II Increased Participation of Australia in International Dispute Settlement

Australia has made use of international dispute settlement in a wide array of international forums, including the International Court of Justice (‘ICJ’), the Permanent Court of Arbitration (‘PCA’) and the WTO.

In relation to the ICJ, Australia played a significant role in its work from the beginning, by participating in the United Nations Conference on International Organization at San Francisco in 1945, nominating its nationals for the Bench (not always successfully), and by participating in certain contentious cases and advisory proceedings.\(^{42}\)

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\(^{42}\) The first case in which Australia played a substantial role was in the Certain Expenses advisory opinion in 1962: Crawford, ‘Dreamers of the Day’ (n 3) 529. Australia made written and oral submissions in Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) (International Court of Justice, General List No 169, 25 February 2019), Legality of the Threat or Use of Nuclear Weapons in Armed Conflict (Advisory Opinion) [1996] ICJ Rep 66 (request of
As Crawford has written elsewhere, the nascent relationship between Australia and the ICJ in the years following the Second World War reflects more generally Australia’s foreign policy priorities, most notably a firm belief in a system for the peaceful settlement of international disputes, including the ICJ.43 This demonstrates the capacity of a ‘middle power’ to influence the development of international law — even at the risk of being seen as one of the ‘dreamers of the day’.

Where possible, Australia has engaged domestic as well as foreign counsel to appear before the ICJ and has consistently appointed judges ad hoc of Australian nationality.

Australia has been the applicant in two cases before the ICJ. The first, the Nuclear Tests case, involved a claim by Australia that nuclear testing by France in the Pacific violated international law.46 In the lead-up to Australia’s application to the ICJ in 1973, three Australian State Governments had commissioned legal opinions from DP O’Connell. O’Connell, having been appointed to the University of Adelaide’s Law Faculty in 1953, taught international law there from 1958 to 197247 and served as Dean from 1962 to 1964.48 O’Connell concluded that there was merit in bringing the case to the ICJ.

In response to Australia’s request for provisional measures, the Court ordered inter alia that France ‘should avoid nuclear tests causing the deposit of radio-active fall-out on Australian territory’.50 However, at the merits phase the Court declined to give judgment, having found that the ‘object of the claim [had] clearly disappeared’,51 based on statements by the French Government which ‘conveyed to the world at large, including [Australia], its intention effectively to terminate [the] tests’.52 The passage of the Court’s judgment in relation to circumstances in which unilateral statements by states may entail legal obligations has been reiterated

the World Health Organization) and Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226 (request of the General Assembly), the latter two requests having been heard simultaneously.

43 Crawford, ‘Dreamers of the Day’ (n 3) 521.
44 Ibid.
45 Campbell (n 35) 11.
46 ‘Application Instituting Proceedings’, Nuclear Tests (Australia v France) (International Court of Justice, General List No 58, 9 May 1973) [17].
47 Shearer (n 15) 75–6.
52 Ibid 269 [51].
since. The second case which Australia brought to the International Court was *Whaling in the Antarctic*. Australia alleged that Japan was breaching its obligations pursuant to the *International Convention for the Regulation of Whaling* (‘ICRW’) by pursuing a program of whaling under the auspices of Article VIII of the ICRW. The case involved written and oral expert evidence called by both parties, and is often mentioned as one of the few cases before the ICJ in which effective cross-examination of witnesses occurred. Ultimately the Court found, inter alia, that Japan’s program was not covered by Article VIII. The Court consequently ordered Japan to cease the whaling program. Hilary Charlesworth was appointed judge ad hoc for Australia in the proceedings. Subsequently, Japan amended its optional clause declaration, excluding from the Court’s jurisdiction any dispute concerning ‘research on, or

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53 Eg, *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile) (Judgment)* (International Court of Justice, General List No 153, 1 October 2018) [146].


56 See, eg, ‘Statement of Mr Lars Walløe (Expert Called by Japan)’, *Scientific Review of Issues Raised by the Memorial of Australia Including its Two Appendices* (International Court of Justice, 9 April 2013); ‘Statement of Mr Marc Mangel (Expert Called by Australia)’, *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales* (International Court of Justice, 15 April 2013) and ‘Statement of Mr Nick Gales (Expert Called by Australia)’, *Statement by Dr Nick Gales BVMS PhD* (International Court of Justice, 15 April 2013).


58 See for example Campbell (n 35) 12.


60 Ibid 300 [247(7)].
conservation, management or exploitation of, living resources of the sea’. 61 Furthermore, Japan has given notice of withdrawal from the ICRW. 62

Australia has also participated before the ICJ as respondent, notably by arguing points of jurisdiction and admissibility. 63 In Certain Phosphate Lands (Nauru v Australia), Australia raised preliminary objections relating to admissibility which led to the further development of the Court’s jurisprudence on the ‘Monetary Gold principle’. It argued that Nauru’s Application was inadmissible because any adjudication by the Court in relation to Australia’s discharge of its trusteeship obligations vis-à-vis Nauru would necessarily involve a determination of the international responsibility of two other states, namely New Zealand and the United Kingdom. 64 The Court however held that it could proceed to hear the case because ‘the determination of the responsibility of New Zealand or the United Kingdom is not a prerequisite for the determination of the responsibility of Australia, the only object of Nauru’s claim’. 65

Three years later, in 1995, the Court upheld a similar argument by Australia relating to admissibility in East Timor (Portugal v Australia). In that case Portugal claimed inter alia that Australia had failed to observe its obligation to respect the duties and powers of Portugal as the administering power in East Timor. 66 The Court held that it could not exercise jurisdiction because, in order to settle the dispute, ‘it would have to rule, as a prerequisite, on the lawfulness of Indonesia’s conduct in the absence of that State’s consent’. 67

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63 See Campbell (n 35) 6.


67 East Timor (Portugal v Australia) (Judgment) [1995] ICJ Rep 90, 105 [35]. Australia was also respondent in a third case, Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia), which was settled after a decision on provisional measures: Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia) (Provisional Measures) [2014] ICJ Rep 147.
As to the PCA, Australia’s most significant outing has been the Conciliation with Timor-Leste\textsuperscript{68} and the ensuing treaty,\textsuperscript{69} which settled a long-running dispute. According to Australia’s 2017 \textit{Foreign Policy White Paper},

\begin{quote}
[...] the agreement is a testament to the way in which international law, in particular [UNCLOS], reinforces stability and allows countries to resolve disputes peacefully without resorting to force or coercion. It is an example of the rules-based order in action.\textsuperscript{70}
\end{quote}

As to the WTO, Australia has been a complainant in nine cases, respondent in 16 cases, and third party in 107 cases.\textsuperscript{71} The number of cases as complainant and respondent is broadly comparable to the equivalent figures for other states with similar GDPs,\textsuperscript{72} although some developed economies have not yet had recourse to the WTO dispute settlement mechanism as complainant.\textsuperscript{73}

Australia’s participation in international forums of dispute settlement has therefore concerned disputes with states both within and outside its own region. But all the contentious cases have had a regional focus (as most contentious cases involving ‘middling powers’ do).\textsuperscript{74} To Australia’s regional focus we now turn.

\section*{III The Regional Focus of International Law for Australia}

Australia’s 2017 \textit{Foreign Policy White Paper} expresses ‘the primary importance to Australia’ of the ‘Indo-Pacific’ region,\textsuperscript{75} which it defines rather comprehensively as the region ranging from the eastern Indian Ocean to the Pacific Ocean connected by Southeast Asia, including India, North Asia, and the United States.\textsuperscript{76} Australia relies on international legal agreements to formalise its relationship with other states

\begin{itemize}
\item \textsuperscript{68} Conciliation Between the Democratic Republic of Timor-Leste and Australia (Report and Recommendations of the Compulsory Conciliation Commission Between Timor-Leste and Australia) (Permanent Court of Arbitration, Case No 2016–10, 9 May 2018).
\item \textsuperscript{69} Treaty Between Australia and the Democratic Republic of Timor-Leste Establishing their Maritime Boundaries in the Timor Sea, signed 6 March 2018, [2018] ATNIF 4 (not yet in force).
\item \textsuperscript{70} 2017 \textit{Foreign Policy White Paper} (n 19) 105.
\item \textsuperscript{71} For example, Australia was a third party in Panel Report, \textit{China — Domestic Support for Agricultural Producers}, WTO Doc WT/DS511/12 (29 April 2019) and in Appellate Body Report, \textit{Brazil — Certain Measures Concerning Taxation and Charges}, WTO Doc WT/DS472/AB/R/Add.1, WT/DS497/AB/R/Add.1 (13 December 2018).
\item \textsuperscript{72} Eg, Republic of Korea: 20 as complainant, 18 as respondent; Indonesia: 11 as complainant, 14 as respondent; Mexico 25 as complainant, 15 as respondent.
\item \textsuperscript{73} Eg, Iceland, Greece, France, United Kingdom.
\item \textsuperscript{74} At least outside the multilateral trade context of the WTO.
\item \textsuperscript{75} 2017 \textit{Foreign Policy White Paper} (n 19) 3.
\item \textsuperscript{76} Ibid 1.
\end{itemize}
in the region, for example through free-trade agreements or treaties of cooperation. As consensus in broad-membership organisations has proved difficult, Australia has increased its use of bilateral agreements with other Indo-Pacific states.77

The importance of trade, and the regulation of trade, between Australia and other states in Asia, is not new. In fact, it was in the minds of those involved in the development of the Adelaide Law School.78 Following on from longstanding free-trade agreements, for example the *Australia-New Zealand Closer Economic Relations Trade Agreement*,79 Australia has more recently made free-trade agreements with newer trading partners in the Indo-Pacific. On this topic, the Secretary of the Department of Foreign Affairs and Trade (‘DFAT’) Frances Adamson stated in a speech to the Australian National University in October 2018 that Australia ‘will have to work intelligently and creatively, to support the international order that enables [it] to benefit from others’ rise’.80 Specifically, Adamson noted that Australia would be ‘more prosperous in a region in which open markets facilitate the free flow of trade’.81

In 2017–18, members of the Asia-Pacific Economic Cooperation (‘APEC’) accounted for 73.5% of Australia’s total trade.82 Australia’s biggest two-way trading partners in 2017 were in the Indo-Pacific region: China, Japan, the United States, South Korea and India.83 Australia has ratified free-trade or economic partnership agreements with the first four, and negotiations began in 2011 for a *Comprehensive Economic Cooperation Agreement* with India. Australia has also been involved, since 2012, in negotiations for a *Regional Comprehensive Economic Partnership* which aims to establish an extensive regional free-trade area between all ASEAN nations,84 as well

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77 Ibid 59.
78 C H Bright and Alex C Castles, ‘New School of International Law’ (1962) 1(3) *Adelaide Law Review* 339. Regrettably, nothing came of the initiative for a School of International Law at the University of Adelaide discussed in this article.
80 Frances Adamson, ‘Shaping Australia’s Role in Indo-Pacific Security in the Next Decade’, (Speech, Australian National University, 2 October 2018).
84 Association of Southeast Asian Nations: Brunei, Cambodia, Laos, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Vietnam.
as Australia, China, India, Japan, South Korea and New Zealand.\(^{85}\) Most recently, in March 2019, Australia signed free-trade agreements with Indonesia\(^ {86}\) and Hong Kong.\(^ {87}\) Finally, mention must be made of the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (‘CPTPP’)? which represents over US$10 trillion in collective GDP between the signatories.\(^ {89}\) The CPTPP proceeded despite the United States’ decision to withdraw, in 2017, from the original Trans-Pacific Partnership (‘TPP’) trade agreement, with all original participants except for the United States. Australia has stated that it sees the CPTPP as a step towards an even wider free-trade area.\(^ {90}\)

Beyond trade, international legal instruments have been used in Australia to formalise defence alliances and ‘strategic partnerships’ with other states in the Indo-Pacific. While Australia remains bound by historical agreements of cooperation with the United States\(^ {91}\) it has also committed to cooperation with other states in the region. Most recently, Australia has formed ‘strategic partnerships’ which cover defence and

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\(^{85}\) See also 2017 *Foreign Policy White Paper* (n 19) 5, 101. Another recent, extensive, trade agreement is the *Pacific Agreement on Closer Economic Relations Plus*, opened for signature 14 June 2017, [2017] ATNIF 42 (not yet in force) (‘PACER’). The PACER has been signed by Australia, New Zealand, Cook Islands, Kiribati, Nauru, Niue, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.


\(^{87}\) *Free Trade Agreement Between Australia and Hong Kong, China* (‘A-HKFTA’), signed on 26 March 2019, [2019] ATNIF 20 (not yet in force).

\(^{88}\) *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATS 23 (entered into force for Australia on 30 December 2018). Eleven countries have signed this treaty: Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam.

\(^{89}\) Frances Adamson, ‘Australian Perspectives on the Indo-Pacific’ (Speech, Victoria University of Wellington, 12 October 2018).

\(^{90}\) Ibid.

\(^{91}\) *Australia, New Zealand, United States Security Treaty* (‘ANZUS Treaty’), signed 1 September 1951, [1952] ATS 2 (entered into force 29 April 1952). See for example 2017 *Foreign Policy White Paper* (n 19) 4, 7, 37, 42. Australia’s turning to the United States, over the United Kingdom, might be said to date back to Curtin’s speech: John Curtin, ‘The Task Ahead’, *Sydney Morning Herald* (Melbourne, 27 December 1941) in which he said ‘[w]ithout any inhibitions of any kind, I make it quite clear that Australia looks to American, free of any pangs as to our traditional links or kinship with the United Kingdom’; see also Remarks by United States’ Secretary of State Michael Pompeo during the 2018 Australia-US Ministerial Consultations Conference: Michael R Pompeo, United States Department of State, ‘Press Availability With Secretary of Defense James Mattis, Australian Foreign Minister Julie Bishop, and Australian Defense Minister Marise Payne’ (Press Conference, 24 July 2018).
security cooperation with ASEAN, Vietnam and Indonesia. Areas of concern for Australia, which it seeks to combat through formalised regional ‘strategic partnerships’, include the threat of terrorism, nuclear proliferation, and transnational organised crime.

The regional focus of international law for Australia has other facets. Australia seeks to reinforce respect for international law in the Indo-Pacific. It also attempts to steer multilateral legal institutions to focus on the Indo-Pacific region, for example in relation to the international regulation of climate change. However, for Australia to conclude regional trade and strategic agreements, encourage respect for the international rule of law overseas and exert influence within multilateral legal institutions,

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92 2015-2019 Plan of Action To Implement The ASEAN-Australia Strategic Partnership, signed 5 August 2015, [1.2]; Adamson, ‘Shaping Australia’s Role in Indo-Pacific security in the next decade’ (n 79).


95 2017 Foreign Policy White Paper (n 19) 71.

96 Mexico, Indonesia, the Republic of Korea, Turkey, Australia (‘MIKTA’) joint statement on the North Korean nuclear test: MIKTA, ‘MIKTA Foreign Ministers’ joint statement on the North Korean nuclear test’ (Joint Statement, 9 January 2016): ‘We, the Foreign Ministers of Mexico, Indonesia, the Republic of Korea, Turkey and Australia (MIKTA), deplore North Korea’s fourth nuclear test, which constitutes a clear threat to international peace and security’.

97 2017 Foreign Policy White Paper (n 19) 72–3.

98 Ibid 46; Adamson, ‘Shaping Australia’s Role in Indo-Pacific Security in the Next Decade’ (n 80).

99 2017 Foreign Policy White Paper (n 19) 81. In 1983, Australian legal research was already focused on what could be loosely described as the Asia Pacific region: Crawford, ‘Teaching and Research’ (n 6) 186.

it must rely on well-trained and well-educated international lawyers. More broadly, for Australia to engage successfully in international dispute settlement and insist on adherence to an international rules-based order, its universities must provide young Australian lawyers with a sound knowledge of the principles and processes of international law.

IV The Development of International Law Teaching and Research in Australian Universities

Writing in the *Review* in 1983, Richard Blackburn, Dean of the Adelaide Law School from 1951 to 1957, was invited to formulate his ideal undergraduate law degree (LLB) curriculum. He did not include international law in this fictional curriculum. However, in 2019 ‘International Law’ is a compulsory unit for all undergraduate law students at the University of Adelaide. This can even be seen as something of a reversion, for when the Law School started operating, in 1883, international law was immediately included as a subject taught in its undergraduate law degree. Ivan Shearer, who was writing about teaching at the University of Oxford during the same period, remarked that at Oxford, international law was also a compulsory subject, although ‘International Law might be omitted by a candidate who did not “aim at a place in the first or second class”’.

Back at the University of Adelaide, in 1888 a proposal was made to teach two separate subjects, ‘Private International Law’ (in the fourth year of a five-year undergraduate course) and ‘Public International Law’ (in the fifth year). Ultimately a shorter undergraduate course of four years was decided upon, with ‘International Law (Public and Private)’ to be taught in the fourth and final year. Similar courses were being taught elsewhere in Australia. However, in 1906 international law no longer formed part of the undergraduate law course at Adelaide and it was not until 1959

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103 Shearer (n 15) 63. Shearer was writing in relation to 1872.

104 Edgeloe (n 102) 15.

105 Ibid 16. This course was ultimately called simply ‘International Law’: ibid. Public International Law was also an available subject to qualify for the Master of Laws from at least 1924: at 26.

106 Shearer (n 15) 69.
that it was restored to the curriculum. By then, O’Connell, who specialised in international law, had joined the Law School. He became Professor of International Law from 1962 to 1972, before taking up the Chichele Chair of International Law at the University of Oxford.

In relation to all Australian universities, in 1983 Crawford wrote that ‘international law [was] offered in some form in each of the ten university law schools in Australia, as well as at the New South Wales Institute of Technology Law School’. Today, the following observations can be made in relation to the teaching in Australia of international law. In 2019 no fewer than 35 Australian universities offer an LLB and every one of them offers a unit on international law. Some of these, including the University of Adelaide, have made international law a compulsory subject for all undergraduate law students. Within the 35 law schools which offer an LLB, there are specialised international law subjects offered, such as ‘Interpretation in International Law’ and ‘Climate Change Law’ at the University of Adelaide. Moreover, even the general international law unit offered by these universities covers specialised topics. For example, as part of the compulsory unit ‘International Law’ at the University of Adelaide, students will be taught space law and international fact-finding. Australian law schools have also embraced the Jessup International Law Moot and it is offered in many Australian law schools, including at the University of Adelaide, as an LLB subject. Australia first entered the Jessup Moot Court Competition in 1975: between then and 2019, Australian law schools have won

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107 Editors, ‘Obituary: D P O’Connell’ (1977) 7 Australian Yearbook of International Law xxiii, xxiii. International Law had become a non-compulsory subject at the University of Melbourne by 1933 and at the University of Sydney in 1959: see Shearer (n 15) 76.

108 Edgeloe (n 102) 35.

109 Crawford, ‘Teaching and Research’ (n 6) 183.

110 This is based on the authors’ own study of university literature and uses as a starting point the full list of universities in Australia, compiled by the Australian government: Australian Government, List of Australian Universities (Web Page) <https://www.studyinaustralia.gov.au/english/australian-education/universities-and-higher-education/list-of-australian-universities>.

111 See, eg, the University of Southern Queensland (Public International and Human Rights Law), Australian National University (International Law), Charles Sturt University (International Public and Private Law), Macquarie University (International Law), the University of Newcastle (Public International Law), University of Technology Sydney (Public International Law).


113 Eg, Monash University, LaTrobe University, Griffith University, University of Southern Queensland, the Australian National University, Southern Cross University and the University of Adelaide.

114 Shearer (n 15) 77.
the Jessup Moot no less than 14 times. In 1979, the University of Adelaide was runner-up in the international rounds in Washington DC.

Although the picture painted above is overwhelmingly positive, there are calls for greater study of international law within Australian law degrees, particularly undergraduate degrees. A 2010 report by the Australian Learning and Teaching Council (an initiative of the Federal Department of Education) remarked that ‘the globalisation of law and legal services has meant that contemporary law students ought to be provided with opportunities to develop international and comparative perspectives on the law’. In the same vein, a 2017 report by the Law Society of New South Wales on the future of legal practice recommended that ‘[i]n a changing environment, the skills and areas of knowledge likely to be of increasing importance for the [Law] graduate of the future include … international and cross-border law’. Finally, the Council of Australian Law Deans maintains, as one of its current projects, ‘Internationalising the Law Curriculum’. The Council recommends four ways in which a law school might internationalise the curriculum, namely (paraphrasing):

(i) the ‘aggregation approach’, which involves offering units of study relating to international law;

(ii) the ‘segregation approach’, by which a university can create a separate institute or centre devoted to international law;

(iii) the ‘immersion approach’, which involves creating opportunities for students to study abroad; and

(iv) the ‘integration approach’, by which a university seeks to incorporate aspects of international law across the entire curriculum.

115 1981 (Australian National University), 1988 and 1993 (both University of Melbourne), 1996 (University of Sydney), 2000 (University of Melbourne), 2003 (University of Western Australia), 2005 (University of Queensland), 2007 (University of Sydney), 2010 (Australian National University), 2011 (University of Sydney), 2014 (University of Queensland), 2015 (University of Sydney), 2017 (University of Sydney), 2018 (University of Queensland).

116 Australian Learning and Teaching Council, Bachelor of Laws Academic Standards Statement (Report, December 2010) 8. Monash University has re-structured its LLB based on the 2010 report.


It is this last strategy which Justin Gleeson (former Australian Solicitor-General), speaking at the 2017 Future of Australian Legal Education Conference, appeared to espouse. Asking the question ‘Can Australian Lawyers of the Future Afford Not to Be Internationalist?’ he argued that ‘[i]nternational and comparative law perspectives should not be left as optional add-ons late in the university curriculum. Rather, they should be integrated into the teaching of virtually every subject’.\textsuperscript{120} We agree.

We do not suggest that the study of specialised areas of international law should be mandated as part of an LLB. Australian universities already teach specialised international law subjects to undergraduate students, such as the law of the sea or international trade law, and it is desirable that such specialised subjects remain on offer as electives. The proposition, following Gleeson, is that every undergraduate law course, such as criminal law or property law, should deal with the relevant international or comparative law aspects of that unit.\textsuperscript{121} Some Australian law schools are certainly implementing this idea. The University of Notre Dame, for example, engages students with international law relevant to their unit offered in mental health law. The approach should be extended to the core units of the LLB undertaken by all students.

But there is still a need for a core course in international law, studying basic issues. As Shearer has written in the Review, there is a danger in the trend towards specialisation within the general field of international law that

\[\text{unless students taking these courses are also offered … a thorough course in general principles of international law, specialized studies are likely to produce only superficial results. The roots of international law run deep into history and legal theory; time is needed to acquire a feel for it … Students coming to the subject must have a genuine interest in history and current affairs, and a conception of Australia’s place in the world.}\textsuperscript{122}\]

Shearer summed up this idea as follows: ‘the foundations were regarded [in the past] as of greater importance than the superstructure’.\textsuperscript{123} Students cannot be expected to understand the superstructure of specialised international law units, or comparative aspects of predominantly domestic law subjects (like criminal law), unless they are concurrently exposed to the basics of international law.

Turning to research and practice in international law, in 1983 Crawford surmised that there was not yet a national tradition of international lawyering.\textsuperscript{124} Since then, the position has been transformed. Research in international law in Australia has

\begin{itemize}
  \item \textsuperscript{120} Justin Gleeson SC, ‘Can Australian Lawyers of the Future Afford Not to Be Internationalist?’ (Conference Paper, Future of Australian Legal Education Conference, 12 August 2017) 4.
  \item \textsuperscript{121} Ibid 15.
  \item \textsuperscript{122} Shearer (n 15) 78.
  \item \textsuperscript{123} Ibid 77.
  \item \textsuperscript{124} Crawford, ‘Teaching and Research’ (n 6).
\end{itemize}
been probing and dynamic. As examples within Australia, we would mention the following: Anthea Roberts’ study on the way international law is taught, perceived and practised in different countries;\(^\text{125}\) Hilary Charlesworth’s feminist study of international law (with Christine Chinkin);\(^\text{126}\) Margaret Young’s work on international environmental law; and Robert McLaughlin’s work on the law of armed conflict.

Lawyers seeking to practise in international law in Australia can do so within the Attorney-General’s Department, the Australian Government Solicitor’s office or DFAT.\(^\text{127}\) The latter established, in 2017, a program of Visiting Legal Fellows to enhance dialogue between academia and the Department’s legal advisers, in the sphere of international law.

While opportunities to practise and teach international law in Australia have grown, Australian international lawyers have an increasing presence overseas, including a large number of Australians in professional roles at the WTO\(^\text{128}\) and the International Criminal Court.\(^\text{129}\) Australians have also been appointed to UN fact-finding Missions related to the international rule of law, including Michael Kirby (UN Commission of Inquiry on North Korea in 2013), Christopher Sidoti (Independent International Fact-Finding Mission on Myanmar in 2017)\(^\text{130}\) and Philip Alston (UN Special Rapporteur on extrajudicial, summary, or arbitrary executions from 2004 to 2010). They have also served in important positions in non-governmental organisations concerned with international law, such as Helen Durham, who has been the Director of International Law and Policy at the International Committee of the Red Cross since 2014.

V Conclusion

The strength of international law teaching and research in Australian universities will sustain the future growth of international law in Australia. It is overwhelmingly a positive picture. In 1983, Crawford wrote that there was ‘the potential for increased involvement on the part of individual international lawyers in international activity


\(^{127}\) Attorney-General, *Legal Services Directions 2017* (29 March 2017), Appendix A — Tied areas of Commonwealth Legal Work, section 2. The Australian Government Solicitor is a group within the Attorney-General’s Department.

\(^{128}\) Roberts (n 125) 258–9.

\(^{129}\) Ibid 7, 257. Australians Helen Brady and Tim McCormack are the Head of Appeals Section of the Office of the Prosecutor and Special Adviser on International Humanitarian Law to the Prosecutor, respectively. McCormack is also Professor of Law and Dean of the Faculty of Law at the University of Tasmania.

of a variety of kinds’. This prediction has largely been fulfilled. For its part, the Adelaide Law School will no doubt continue to equip local and foreign students with an education that permits them to be active participants, and leaders, in international legal matters.

131 Crawford, ‘Teaching and Research’ (n 6) 190.
I Introduction

Volume 19 of the *Adelaide Law Review*, published in 1997, contains the papers of a symposium held at the University of Melbourne Law School in September 1996 entitled ‘Feminist Interventions into International Law’. The opening address of the symposium was presented by Christine Chinkin, currently Professor Emerita at the London School of Economics. Professor Chinkin is a pre-eminent international lawyer and is acknowledged as being at the forefront of bringing the lens of Western feminism to bear on her discipline. In her 1997 address, written some six or seven years after feminism first found its voice in international law at a conference at the Australian National University in 1990, Professor Chinkin assessed to what extent gains had been made in developing an international legal system that ‘takes seriously the interests of all women’. In her address she also identified potential challenges to further progress. As an aside, it is worth noting that the thoughts Professor Chinkin expressed at that time are still cited by scholars and remain as influential today as they were then.

In 2015, a quarter of a century after the Australian National University conference, Professor Chinkin was interviewed on the eve of her retirement and asked to reflect on her career. In doing so, she was asked how she perceived the feminist project today within international law and institutions. In this article, I take her observations at these two points of time in the trajectory of the feminist project in international law and see what insights they provide today for those interested in this field of scholarship.

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1 One of the two themes of that conference was a feminist analysis of selected areas of international law and the papers are published in (1992) 12 *Australian Yearbook of International Law*.


II An Assessment of the Fledgling Feminist Intervention into International Law

It is in the area of human rights that Professor Chinkin identified the most gains for women in the early stages of feminist encounters with international law. This was particularly evident in the case of the impact of gender-specific violence on women’s enjoyment of their human rights. She pointed to a recognition of the significance of gendered imbalances in societal power in determining the outcome for women in international initiatives to confront such violence. In her opinion, such an appreciation opened up the possibility of structural change.\(^5\) Certainly this idea of transformative change, namely a fundamental reworking of existing gender relations, was very much part of the vision of legal feminists at that time.\(^6\) There was a clear appreciation of the limitations of equality discourse in achieving real change as long as underlying structures of systemic inequality and discrimination against women continued to prevail. What was required were strategic initiatives designed to deliver substantive, not merely formal, equality.

Another positive development identified by Professor Chinkin at the time, although still within the framework of women’s human rights and gender based violence, was the ground-breaking emergence of criminal accountability for such violence in times of armed conflict. This was being achieved through the work of the ad hoc international criminal tribunals established by the Security Council — the International Criminal Tribunal for the Former Yugoslavia in 1993, and the International Criminal Tribunal for Rwanda in 1994.

Even at this early stage, however, there were signs of obstacles to progress. In particular, as Professor Chinkin observed, there was little indication that a comprehensive feminist approach to international law generally was ever going to eventuate. Feminist scholars were confining their critiques to a limited number of topics of international law such as human rights law, international humanitarian law (‘IHL’) (dealing with the victims of armed conflict) and international criminal law. The bulk of international law and its core areas, such as state responsibility and the law of treaties, remained unexamined.

A further concern was whether there was in fact any real prospect of the feminist project in international law delivering true transformative change. Although optimistic of such an outcome in the middle of the 1990s, Professor Chinkin had already observed the ‘add women and stir’ approach that mistook the formal inclusion of women in international fora with real integration and required no radical rethinking of policies or gender awareness.\(^7\)

I now turn to Professor Chinkin’s observations of the feminist project in international law some 22 years after her *Adelaide Law Review* article.

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\(^5\) Chinkin (n 2) 15.


\(^7\) Chinkin (n 2) 18.
III The Feminist Project in International Law
A Quarter of a Century on

The fears expressed by Professor Chinkin in the middle of the 1990s as to the vigour of the feminist project in international law have come to pass. First, it is the case that the bulk of international law remains unchallenged in feminist scholarship and practice. There is very little work that engages with international law as a whole. This is partly a product of the increasing fragmentation of international law itself through diversification and expansion. This phenomenon, in the words of the International Law Commission, creates ‘the danger of conflicting and incompatible rules, principles, rule-systems and institutional practices’. This process has had distinct implications for the feminist project that remain relatively unexplored. One author has described the current system for women in times of conflict as a ‘scattered landscape of international legal regulation … in which there is no evident hierarchy, a lack of substantive enforcement, disjointed expertise, and ongoing norm splintering’. Moreover, even the considerable in-depth and thorough feminist engagement with specialist areas of international law that has occurred over the years has been received with ‘vast indifference’ by the mainstream legal fraternity. Hardly an encouraging state of affairs for further commitment of time and effort.

Secondly, maintaining a focus on gender and its connection with discrimination against women, a concern expressed by Professor Chinkin the middle 1990s, has proven to be just as challenging in the international context as it has been in the domestic context. Indeed, this failure to recognise the difference in the way gender is experienced by men and women can be seen in hindsight as one of the main obstacles to the international legal system ‘taking seriously the interests of women’. In the 1990s the concept of ‘gender’ was primarily used in feminist encounters with international law to explain that women’s life experiences were different from that of men and that this had implications for international law. The vulnerability of women was based to a large extent on the unequal power relations of men and women deriving from their socially-constructed gender roles. It was argued that international law

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12 Chinkin (n 2).
failed to reflect this reality, with very adverse consequences for women. Over the intervening years, this link between gender and discrimination against women to some extent has been lost. ‘Gender equality’, in the sense of formal equality, and/or ‘gender neutrality’, have become in many cases the preferred terms in international initiatives relating to women and less frequently is the concept of a gender hierarchy acknowledged. This change in how gender is employed is proving to be problematic for women. For example, in the context of violence against women, Rashida Manjoo, the United Nations Special Rapporteur on Violence Against Women, has noted that this perceived need for gender equality or neutrality suggests that male victims of violence require, and deserve, comparable resources to those afforded to female victims thus ignoring the reality that violence against men does not occur as a result of pervasive inequality and discrimination.

Consequently, we are not dealing with equals in terms of the way such violence is experienced. For a start, the level of violence against women vastly exceeds that experienced by men and, moreover, takes different forms and is almost exclusively inflicted by men.

We find Professor Chinkin lamenting a refusal, amongst state delegates to the 2011 negotiations leading to the adoption of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, to recognise violence against women as a gendered crime at the domestic level let alone at the international level. This Convention is the first binding instrument to prevent and combat violence against women, from marital rape to female genital mutilation. The objection was made by delegates from some states that men also suffer violence, so why should there be such a concentrated focus on what happens to women?

This is not an isolated illustration of the failure to differentiate the impact of gender on women and men, but part of a growing resistance against efforts to improve protections for women in not only legal initiatives but much more broadly, such as in the provision of humanitarian assistance. For example, it is argued that the centering of women and girls in humanitarian action over gender-based violence and the focus on the punishment of such violence in times of armed conflict has in some way contributed to preventing an appreciation of the extent and ways in which men

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16 Lang and Marks (n 4) 212.
experience such violence during these times. It has been suggested that Security Council Resolution 1820, dealing with sexual violence against civilians, was framed and implemented in a manner that ‘has had the impact of contributing to the relative silence through the exclusion of male victims from its framework’.

These concerns that the focus on women is detrimental to men have spread into the field of operation of IHL. It is one of the specialist areas of international law that has come under intense scrutiny from feminist scholars, although the scrutiny is very much limited to sexual violence during times of armed conflict. So we find in the case of IHL that the term ‘gender’ is now often used to argue that men have been overlooked in either its implementation and/or its provisions. Much is made currently of the ‘special’ and extra provisions of IHL for women and why these are not also applicable to men. For instance, it has been said that

> [t]here are myriad other issues found within IHL that could benefit from a gender examination. For example, the obligations found in the 1977 Additional Protocols relating to the prohibition of the death penalty for ‘mothers having dependent infants’ and ‘mothers of young children’ raises a range of questions in relation to situations when fathers are exclusively raising young children.

This type of analysis completely overlooks the gendered nature of this provision. It is designed to protect children, not women, and will lapse as the children acquire independence from their mothers. Moreover, how often do men exclusively raise children and is that experience commensurate with women undertaking the same task?

This failure to recognise the relationship between gender and discrimination and an insistence on a gender-neutral approach, risks the triumph of form over substance and the effective blocking of transformative change. The overall effect of framing the debate in these terms tends to blunt gender’s radical edge as a tool to address the structural disadvantages that exist in all societies for women. A somewhat cynical observer might be drawn to the conclusion that the focus in the case of conflict situations is moving inexorably back to men and their experiences during such times.

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In addition, the meaning to be attributed to the terms ‘women’, ‘sex’ and ‘gender’ and the idea of the construction of the ‘masculine’ as premised on a binary construction of the ‘feminine’ as its devalued opposite, has become a source of deep difference between feminists themselves. The lack of clarity about the conceptual basis on which so much of the feminist project is based has been accompanied by a failure of strategy. Gender mainstreaming has been the major strategy adopted within the United Nations and its institutions to progress the empowerment of women. The idea behind this initiative was to assess the implications for men and women of any policy, programme or legislation in any area and at all levels with the ultimate aim to achieve gender equality. It was originally viewed as of great promise and having the potential to overcome the problem that the treatment of women’s issues by specialist bodies had the effect of consigning their issues to the margins. It has, however, to date turned out to be a disappointment in practice.

Many feminists, including Chinkin, are highly critical of the manner in which this strategy has been deployed. There is the perception that the application of the policy has undermined the goal of achieving true equality between men and women. Once again it is the way the various terms are utilised that has been a factor limiting its effectiveness. It has been assumed throughout the gender mainstreaming policies of international institutions that ‘gender’ means only ‘women’. This assumption, however, fails to recognise that true substantive equality not only requires changes for women, but also for men, in the sense of dismantling the gender hierarchy.

It is in this context that the ‘add women and stir’ approach that Chinkin observed in the 1990s has become pronounced. It is a particular criticism of what was initially seen by many as the zenith of feminist international law strategy — the adoption in 2000 by the Security Council of Resolution 1325 on Women, Peace and Security. To have women on the agenda of the Security Council, the organ of the United Nations that deals with the maintenance of international peace and security, was seen as a great triumph for women. This is despite the fact that Resolution 1325

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21 See, eg, Dianne Otto, ‘International Human Rights Law: Towards Rethinking Sex/Gender Dualism’ in Margaret Davies and Vanessa Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Routledge, 2013) 197.


23 Not all feminists, however, view the language of gender or indeed gender mainstreaming as without transformative potential. See, eg, Otto (n 21) 206–10.


was not adopted under Chapter VII of the Charter, and is therefore not binding on states. The overall goal of the resolution, the empowerment of women, was to be achieved primarily through gender mainstreaming. However, the application of the strategy has consisted primarily of increasing the participation of women in various fora without addressing the deeper conceptual issues. Despite the initial hopes for what this strategy might achieve on the ground, it has not fulfilled its potential. For example, in 2014 a UN Women Guidance Note on Gender Mainstreaming in Development Programming declared that ‘the strategy design itself and implementation of gender mainstreaming, particularly at country level, are in urgent need of re-clarification and revitalisation’.

IV Conclusion

International law feminists remain deeply divided on the meaning and use of the terms ‘women’, ‘sex’ and ‘gender’, and whether there is a need to dismantle the masculine/feminine binary so that feminism’s ‘brief’ can cast a wider net than just women. As a result of this intense focus, there is nowadays increasing concern as to the widening of the division between theory and practice, and much reflection on the failure of feminist strategy and why.

It is not being suggested that there needs to be universal agreement on what are complex and unstable terms, but as Chinkin and Charlesworth write in the context of the United Nations, nowadays the terms women and gender are used interchangeably without any attempt at intellectual coherence. In such circumstances, how can strategic action have any prospect of being effective? On the one hand it is reassuring to read one feminist’s view that this dissonance between theory and practice is not deterring women utilising some of the institutional achievements without any soul searching as to the purity of its feminist theoretical credentials. This is as it should be. On the other hand when leading feminist international law practitioners, such as Michelle Jarvis, Deputy Head of the United Nations Mechanism for Syria and an Adelaide graduate, lament in conversations with myself the fact that she and her practitioner colleagues find so much of the recent feminist theory completely inaccessible, there is cause for concern. In such circumstances, we should not be surprised if we just talk amongst ourselves.

26 Lang and Marks (n 4) 210.
27 UN Women, Gender Mainstreaming in Development Programming (Guidance Note, November 2014) 7.
29 See Joanne Conaghan, ‘Feminism, Law and Materialism: Reclaiming “the Tainted Realm”’ in Margaret Davies and Vanessa Munro (eds), The Ashgate Research Companion to Feminist Legal Theory (Routledge, 2013) 31, 33.
30 O’Rourke (n 3) 1019.
31 Charlesworth and Chinkin (n 24) 49.
32 O’Rourke (n 3) 1043–5.
HOW LAWS ARE MADE

I INTRODUCTION

The man who united modern Germany, Otto von Bismarck, (in)famously stated that to retain respect for sausages and laws, one must not watch them in the making.¹

I wish to offer my perspective — as a parliamentarian of some 17 years and now as Attorney-General — on the nature of lawmaking. Whilst the topic may seem unnecessarily opaque, I choose to ignore Bismarck’s assessment and present my account, if only to allow all persons to more fully understand the process. I imagine a few readers would be rolling their eyes at this point, believing this to be the province of a high-school civics class — a Minister introduces a Bill to Parliament, which passes both Houses in the same format. A good student would add that the Governor needs to give the Bill Royal Assent. That is all true — but it is only half the story.

In addition to the legal considerations behind any Bill, there are parliamentary and bureaucratic dimensions that need to be traversed. I believe how laws are made, from beginning to end, is not widely understood. Certainly, aspects of lawmaking are very well understood by differing persons, and I do not propose to create the authoritative guide here, but a simple overview of Cabinet and parliamentary process.²

II THE ROLE OF CABINET

All Bills introduced by the Government are done by Ministers, which requires Cabinet approval. There are principally two different sorts of Bill: those that come up from the Department, typically matters that are routine or ‘tidy-ups’ to previously

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passed legislation, and those that enact new policies that typically come from the Government of the day. Usually, there are two Cabinet submissions for any Bill: the first, to draft and consult on a Bill; the second, to introduce to Parliament. This two-step process is in place so that Cabinet members are across the work of other departments from proposal to introduction, as well as ensure that Bills have support in the Cabinet before considerable work is undertaken.

Usually what happens in my Department is that I or one of my staff instruct a solicitor in the Legislative Services Division of the Attorney-General’s Department (‘AGD’) about the approved policy — what its objectives are, scope for enforcement, and the like. In other departments, the relevant officers are not usually solicitors but expert policy officers. The solicitors from the Legislative Services Division are specialists in the interaction between policy and law with respect to legal related matters, and therefore provide strategic legal and policy advice. It is a fallacy that policy expertise, speaking at least for the AGD, has been hollowed out from the public service. These solicitors are responsible for liaising with Parliamentary Counsel about the proposed Bill and/or regulations. These Counsel draft the text of the Bill in close consultation with Legislative Services, and advise on what is legally possible to be drafted. Whether something is desirable from a policy perspective is not within their remit, and Parliamentary Counsel are used by all Members of Parliament to draft Bills and amendments. They are impartial and accessible to all Members.

Once Parliamentary Counsel have returned with a Bill, which has been approved by the relevant solicitor in my Department, or a policy officer when speaking of another Minister’s Bill, and internal and external consultation as appropriate has been conducted, a Cabinet submission is drafted. The content of Cabinet submissions varies depending on the subject of the Bill; however, the following are topics are usually considered:

1. Synopsis of the proposal;
2. Discussion, including background;
3. General impact;
4. Consultation, communication, and engagement;
5. Implementation and accountability; and

All draft Cabinet submissions in the AGD are considered by a Ministerial Adviser for comment. There are occasions when the content needs to be edited for its audience — and political staff usually have a different perspective of the concerns or details that other Cabinet Ministers would want to see (aside from their respective departments). After approval has been given and the draft Cabinet submission has been returned to the solicitor, it is required to be circulated to Treasury for a costing comment and
to Cabinet Office for a policy comment.\(^3\) Rules instituted by our Government mean that any costing above a certain threshold need to be referred to the Budget Cabinet Committee, which has its own rules in place and is the bane of many a Minister with brilliant — but expensive — ideas.\(^4\) The return of an adverse comment of these agencies can, at times, be frustrating. However, the comments made can identify defects in either the proposal or how the submission or Bill is worded — requiring the submission to be revised prior to its final consideration by Cabinet, or the item being left off the Cabinet agenda.

The deadlines for a submission to be considered by Cabinet are immutable.\(^5\) They need to be submitted by Thursday for consideration by Cabinet 10 days later — but there is a formalised ‘late’ submission process, where they need to be submitted by the Tuesday of the following week if Cabinet Office accepts your excuse. Even if that excuse is accepted, its status as ‘late’ is recorded in big red capitals on the Cabinet agenda. The papers for Cabinet are distributed the Friday before consideration. During this time, Cabinet Office circulates these papers to agencies with an interest in the matter.

A subsequent submission is usually done for the Bill’s introduction, which, depending on several factors, may be introduced in the next sitting week or deferred. Whilst the above summary sounds relatively simple, it is usually the result of many months of hard work, and of significant consultation with external stakeholders and one’s own party colleagues before even arriving in the Parliament!

### III The Role of Parliament

With respect to the parliamentary dimensions behind any Bill, I propose to illuminate some of these factors with respect to a Bill that recently passed. The Statutes Amendment (Liquor Licensing) Bill 2019 (‘Liquor Licensing Bill’) is an example of a ‘tidy-up’ Bill. It was designed to clean up and modernise liquor licensing classes by removing obsolete conditions from liquor licenses — such as a requirement to limit noise or collect refuse, which are the province of local government. From an administrative standpoint, the Liquor and Gambling Commissioner had no power to enforce such provisions and retaining them on a liquor licence for a business may have only served to confuse individual licensees about their own obligations — especially

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when these conditions may have been retained for a former business located at the same premises!

After I introduce the Bill, my office offers briefings to all Members of Parliament on the content and implications of the Bill. Usually, it is only the Opposition Shadow who takes up this offer and perhaps one or two diligent Members, but this depends on how controversial the Bill is. With respect to the Liquor Licensing Bill, and, unusually for a technical Bill, there were several speakers in debate — principally from Government. Whilst the Second Reading of the Bill is supposed to provide a speaker with 20 minutes to debate the merits of the Bill or elucidate its practical implications for an industry or one’s community, in this case Members of Parliament used the Bill to promote and praise hotels in their own electorate.6

I am sure many Members learnt a great deal about the varied food and beverage options all across South Australia. Whilst there is an upward trend, I think, of irrelevant contributions made in debate, it only serves to highlight that the Parliament is a political forum first and foremost — and opportunities arise that may yield a political benefit. Grievance debates, following Question Time for instance, are used to officially highlight the wonderful work of community groups — transcripts or videos of which are later sent to members of the same. I do believe that ill-informed, off-topic contributions on significant legislation does the Parliament a disservice, and overlooks the fact that Second Reading speeches are an interpretive tool and guide to the judiciary. I also note, without offering a view in this particular case, that the lead speaker for the Opposition considered the multiple contributions on the Liquor Licensing Bill as a vehicle for occupying the time allotted for Government business.

It is fair to say, however, that the length, nature, and number of contributions on any given business in the Chamber is also governed by other factors: whether there is sufficient time left in the day; whether the Bill is time sensitive; or whether it supports a theme the Government is aiming to get up that week in the media (e.g. supporting regional South Australia). Perhaps unusually, this Bill attracted several questions in Committee following the Second Reading in the House of Assembly (wherein the Government controls a majority) but very few in the Legislative Council, where more forensic scrutiny of a Bill usually takes place. Standing orders in the Lower House also allow for only three questions per clause in a Bill, whereas in the Council there are no such restrictions. This perhaps contributes to why Legislative Councillors never feel the need to rush their deliberations, despite usually commencing their parliamentary day at 2:15pm.

During the Committee stage in the Assembly, questions were asked — most of which had been answered in the previous briefings. It was not that the Members had not done their homework (but that does happen). Rather, it is a forum for either getting their concerns on the public record (even if they do eventually vote in favour), assuaging the interests of an affected group, or as a means of tying the Government’s colours

to the mast. Clarification of a particular clause is not usually the motive for asking questions. Briefings are also offered to the Opposition and independent Members prior to its consideration by the Council. It is usually when the Bill is before the Council that the Government may agree to amendments to secure its final passage, which, if not controversial, are usually at first instance the subject of negotiation between political advisers and Members, prior to Ministers meeting. Beyond what one would expect, most negotiation occurs off the floor of Parliament.

Working with the Legislative Council to pass one’s own Bill is often an experience. One can be allies with respect to some matters — for example, Tammy Franks from the Greens and I have worked closely together on abortion law reform and decriminalisation of sex work — but can be vehemently opposed when it comes to the Government’s proposal, in extreme cases, for a family to make an application to the Youth Court for mandatory drug treatment for children addicted to illicit drugs. The value of the Legislative Council is that members of the Crossbench — and their staff — are quite good at picking up the inadvertent consequences of a Bill’s drafting and file amendments to rectify this, resulting in a better Bill. Frustratingly, at times, they obstruct — or, as happened previously, change their position on a Bill whilst on their feet!

Should, for whatever reason, the Legislative Council pass amendments to a Bill that the Assembly has passed, which are then rejected, a Deadlock Conference between the Houses is organised — with representatives from each House. This is often a useful mechanism to thrash out a compromise on subject matters where broad agreement usually applies. It remains a quaint, albeit farcical tradition, however, that representatives from each Chamber, irrespective of political party, make submissions in alignment with those of their own Chamber! It is quite disconcerting to watch one’s colleague advance Opposition arguments from across the table.

IV Post-Parliament

Once a Bill has finally passed both Houses in the same format, several formalities need to take place. A ‘fresh’ copy of the Bill is created by Parliamentary Counsel, which needs to be signed by the presiding officers in the Chamber where the Bill originated (eg, the Speaker and the Clerk), and they forward me a memorandum assuring me, insofar as they are aware, of its legal validity. As Attorney-General, I am also required to sign a letter to the Premier for the purposes of advising the Governor stating that, in my opinion, there is no legal impediment to the Bill being passed.

At Executive Council, the Governor must sign the Bill already signed by the presiding officers, as well as grant Royal Assent. This requires his own signature and that of two other members of Executive Council. It is also worth noting in every Act the date of commencement. If the Bill reads at a date to be fixed at proclamation, it remains technically possible for a Bill to pass and be assented to, with the Government never having any intention of proclaiming it for whatever reason — which is problematic for obvious reasons.
V Conclusion

From my experience, the best laws are thoroughly researched and considered. Bills prepared and progressed in haste frequently fail to comprehensively remedy the defect. I am certain that a lengthy tome could be written on both the model practice of developing Cabinet submissions, in addition to the tips and tricks of navigating arcane parliamentary process and procedure — as well as some of the deficiencies and inefficiencies. However, I have chosen to leave a more thorough examination of this to someone else’s Masters thesis. I hope that readers understand slightly more about the Cabinet process and work behind the scenes in Parliament and how it pertains to lawmaking and lawmakers — and disregard the misguided ramblings of the Iron Chancellor.
Catherine Branson*

HUMAN RIGHTS PROTECTIONS: NEED WE BE AFRAID OF THE UNELECTED JUDICIARY?

I Introduction

On 14 December 2018, the Australian Human Rights Commission announced a new major project titled Free and Equal: An Australian Conversation on Human Rights.¹ The project asks the community ‘what makes an effective system of human rights protection for 21st century Australia?’² It seems inevitable that this project will reopen debate on whether the Commonwealth Parliament should enact a Human Rights Act.

We last had this debate 10 years ago when the then Commonwealth Government established a committee (‘Consultation Committee’) to conduct a nationwide consultation on human rights.³ Issues on which the Consultation Committee sought public views included whether human rights were sufficiently protected and promoted in Australia and how we could better protect and promote human rights.

As President of the Commission at the time, along with Commission staff, I spent considerable time assisting members of the public whose voices are rarely influential

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² Ibid.
in public debate to express their views to the Consultation Committee. These people included Aboriginal and Torres Strait Islander people, the homeless, the elderly, individuals with disability, those whose first language was not English, and women who had experienced domestic violence. Listening to their experiences persuaded me that greater legal protections for human rights in Australia are vital if we are to achieve our ambition of a ‘fair go’ for all.

While the work of the Consultation Committee led to a number of important changes, such as the Parliamentary Joint Committee on Human Rights, it did not lead to greater legal protections of human rights in Australia. The objections to such legal protections came primarily from parliamentary and legal circles, and the majority of their concerns related to the role of the judiciary under a proposed Human Rights Act.4

This article critically examines the strength of those objections, particularly in light of more recent experience. It argues that the focus on the views of opponents from parliamentary and legal circles meant that excessive weight was attached to theoretical difficulties of limited practical significance. It contends that experiences elsewhere have shown that the roles of the executive and the legislature in the protection of human rights are significantly more important than the role of the judiciary. Finally, it suggests that the capacity of a Human Rights Act to make the Australian community and all branches of our government more sensitive to the rights and needs of individuals in important practical ways was downplayed.

II RECOMMENDATIONS OF THE NATIONAL HUMAN RIGHTS CONSULTATION REPORT

The National Human Rights Consultation Report (‘NHRC Report’), published in September 2009, contained 31 recommendations to improve the protection and promotion of human rights in Australia.5 Many of those recommendations were accepted by the government, but none of the recommendations for greater legal protection were accepted. In particular, the recommendation that Australia adopt a Human Rights Act was rejected.6

A The Proposed Human Rights Act

The Consultation Committee was not authorised to recommend a constitutionally entrenched bill of rights.7 Its recommendation in favour of a Commonwealth Human Rights Act was not accepted.

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4 See especially ibid 281–95.
5 Ibid xxix.
7 NHRC Report (n 3) 383.
Rights Act was necessarily for an ordinary statute of the Commonwealth Parliament. Such an Act would not have superior status to other Commonwealth legislation. It would be able to be repealed or amended (explicitly or impliedly) in the same way as other legislation. It could not be seen as a bill of rights constitutionally imposed on the legislature as in the case of the United States, or imposed by a superior legislature as could be seen to be the case in Canada.

The Consultation Committee recommended that Australia adopt a Commonwealth Human Rights Act based on the ‘dialogue model’ — a term used to describe the kind of human rights Acts adopted in New Zealand, the United Kingdom, the Australian Capital Territory and Victoria. Under this model, the legislative branch of government (Parliament), while required to consider whether proposed legislation would comply with human rights standards, retains the final say on the content of laws and may therefore pass laws that override human rights. Under this model, the judiciary is required to interpret legislation in a manner consistent with human rights if such an interpretation is available. It is ordinarily allowed to make declarations of incompatibility if such an interpretation is not available. Such a declaration does not affect the validity of the legislation but signals to Parliament that it might consider amending the legislation.

Importantly, under the model recommended for Australia by the Consultation Committee, only the High Court of Australia would have the power to make a declaration of incompatibility. Should giving such a power to the High Court have proved impractical, the Consultation Committee’s recommendation was that no court be given the formal power to make a declaration of incompatibility. Subsequently the High Court has indicated that it is unlikely that the Constitution vests in it the power to make such declarations.

It is also significant that the Consultation Committee recommended that only civil and political rights be justiciable under a Commonwealth Human Rights Act. That is, it did not recommend that the proposed Act give the courts power to adjudicate disputes concerning economic, social and cultural rights.

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8 Ibid xxxiv.
9 *United States Constitution* amends I–X.
10 *Canada Act 1982* (UK) c 11, sch B pt I (‘Canadian Charter of Rights and Freedoms’).
11 *NHRC Report* (n 3) xxxiv.
13 *NHRC Report* (n 3) xxxvii.
14 Ibid.
15 *Momcilovic v The Queen* (2011) 245 CLR 1, 70 [101] (French CJ), 241 [661] (Bell J) (‘Momcilovic’).
16 *NHRC Report* (n 3) xxxv.
The Consultation Committee recommended that the Act include a general limitation clause modelled on clauses included in the comparable Australian Capital Territory and Victorian legislation. Each of these clauses recognises that, generally speaking, rights are not absolute and must be balanced against one another, and against other competing private and public interests.

B Support for a Human Rights Act

The Consultation Committee reported that ‘the clearest division of opinion at all stages of the [c]onsultation was over the question of an Australian Human Rights Act’. Nonetheless, a majority of parties and persons consulted expressed support for such an Act. More than half of those who attended community roundtables favoured a Human Rights Act, as did 87.4% of those who presented submissions to the Consultation Committee. In a national telephone survey of 1,200 people, 57% expressed support for a Human Rights Act and only 14% were opposed.

III Reasons for the Rejection of a Human Rights Act

In justifying the decision to reject the recommendation for a Human Rights Act the then Commonwealth Attorney-General, Robert McClelland, said:

The [g]overnment believes that the enhancement of human rights should be done in a way that as far as possible unites, rather than divides, our community.

What were the views that were so strongly held by those who opposed a Human Rights Act, that the adoption of such an Act was thought likely to divide our community?

One of the main arguments against a Human Rights Act was that human rights were already adequately protected in Australia. Putting that argument aside for the moment, the NHRC Report reveals that at the heart of the majority of the arguments against a Commonwealth Human Rights Act were concerns about a change in the relationship between, on the one hand, the popularly elected legislature and on the other, the unelected judiciary. More specifically, fear was expressed that power would be transferred ‘from the [P]arliament (which is answerable to the community through the electoral process) to the judiciary (which is not)’. There was concern that a Human Rights Act would require judges to make decisions about ‘vague, open-ended and

17 Ibid.
18 Ibid 361.
19 Ibid 362.
20 See Australia’s Human Rights Framework (n 6) 1.
21 NHRC Report (n 3) 281
23 Ibid 284.
abstract propositions’, and that the requirement for courts to interpret legislation in a manner consistent with human rights standards would ‘fundamentally change the way courts interpret legislation’ and transfer power to unelected judges. The then Attorney-General of New South Wales went so far as to submit that

[p]arliaments would face unacceptable political pressure from the judiciary. By declaring incompatibility with human rights, even when such a violation is entirely practical, reasonable and necessary, or by invoking the interpretation division, democratically elected representatives are branded human rights abusers and held accountable to unelected appointees.

A Are Existing Protections Adequate?

One of the primary arguments put forward against a Human Rights Act was that it was unnecessary because Australia already offers adequate protections of human rights through democratic institutions, constitutional provisions, specific pieces of legislation and the common law. In this area, as in many others, necessity is an inherently subjective criterion. While many from legal and parliamentary circles judged further human rights protections to be unnecessary, the Consultation Committee, which received 35,000 submissions and consulted extensively around Australia, held the opposing view. It concluded that insufficient attention is paid to human rights by the Commonwealth government and Parliament when formulating policy and legislation. It further concluded that instilling a human rights culture in the Commonwealth public sector is integral to the enhanced protection and promotion of human rights in Australia.

The Consultation Committee’s conclusions, based on what was almost certainly the most extensive public consultation ever undertaken in Australia, deserve respect. The conclusion reached by the Consultation Committee was consistent with what I heard when speaking with individuals vulnerable to breaches of their human rights — that is, those intended to benefit most from a Human Rights Act. It might also be seen as consistent with recent tragic revelations of serious human rights abuses against

24 Ibid 285.
25 Ibid 286.
26 Ibid 287.
27 Ibid 286 (emphasis in original).
29 NHRC Report (n 3) 355.
members of vulnerable groups in our communities including children, elderly individuals suffering dementia and people with disability.31

B Relationship between the Legislature and the Judiciary

The proposed Commonwealth Human Rights Act, if enacted, would not have constitutional force. That is, it would not have superior status to other Commonwealth legislation. It would in no way diminish the legislative powers of the Parliament. The Parliament would retain the same powers as it has now to pass laws incompatible with the full enjoyment of human rights. The judiciary would not be given any increased powers to strike down laws of the Parliament.

The contention that the requirement for courts to interpret legislation in a manner consistent with human rights would ‘fundamentally change the way courts interpret legislation’32 appears to overlook well-established principles of statutory construction and, as appears below, has since been contradicted by the High Court of Australia.

A longstanding principle of statutory construction, sometimes described as the principle of legality,33 is that parliaments should be presumed to legislate in accordance with — not contrary to — fundamental rights and freedoms, unless such an intention is clearly manifest in unambiguous statutory language. Another well-established principle of statutory construction is that where legislation is ambiguous, courts should favour an interpretation that accords with Australia’s international obligations.34 Among Australia’s international obligations are those arising from its ratification of the major human rights conventions, including the International Covenant on Civil and Political Rights (‘ICCPR’).35

The reasoning behind the first of the above principles of statutory construction (legality) was clearly articulated by the High Court in Coco v The Queen:

The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms or immunities but has also determined upon abrogation or curtailment

31 See, eg, Royal Commission into the Protection and Detention of Children in the Northern Territory (Final Report, 17 November 2017) vol 1; Royal Commission into Aged Care Quality and Safety (Letters Patent, 6 December 2018); Royal Commission into Violence, Abuse and Neglect and Exploitation of People with Disability (Letters Patent, 4 April 2019).

32 NHRC Report (n 3) 286.

33 Momcilovic (n 15) 46–7 [43] (French CJ).

34 Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs (1992) 176 CLR 1, 38 (Brennan, Deane and Dawson JJ).

of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention must be clearly manifest by unmistakable and unambiguous language. General words will rarely be sufficient for that purpose if they do not specifically deal with the question because, in the context in which they appear, they will often be ambiguous on the aspect of interference with fundamental rights.36

Chief Justice French more recently highlighted a possible link between the above two principles, stating in *Momcilovic* that

> [t]he principle of legality has been applied on many occasions by this Court. It is expressed as a presumption that Parliament does not intend to interfere with common law rights and freedoms except by clear and unequivocal language for which Parliament may be accountable to the electorate. It requires that statutes be construed, where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law. … [T]he principle is a powerful one. … It has also been suggested that it may be linked to a presumption of consistency between statute law and international law and obligations.37

Having regard to the above principles of statutory construction, it is perhaps unsurprising that Crennan and Kiefel JJ, in *Momcilovic*, stated that s 32 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) — which requires that, so far as possible, statutory provisions be interpreted in a way that is compatible with human rights standards — ‘does not state a test of construction which differs from the approach ordinarily undertaken by courts towards statutes’.38

**C Judicial Decisions on ‘Vague, Open-Ended and Abstract Propositions’**

It may be assumed that those who expressed concern about judges being asked to make decisions on ‘vague, open-ended and abstract propositions’39 were thinking principally of decisions concerning economic, social and cultural rights. Few of the rights intended to be the subject of litigation under the proposed Commonwealth Human Rights Act (ie, civil and political rights) can be argued to be of this character. Where such rights are expressed in terms of abstract propositions, such as the right to freedom of expression40 or the right to privacy and reputation,41 they have a content broadly understood by the community and by the Australian judiciary.

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37 *Momcilovic* (n 15) 46–7 [43].
38 Ibid 217 [565]. According to French CJ, ‘there is … nothing in its text or context to suggest that the interpretation which it requires departs from established understandings of that process’: at 50 [50].
39 *NHRC Report* (n 3) 285.
40 *ICCPR* (n 35) art 19.2.
41 Ibid art 17.
In any event, Australian courts are regularly required to construe provisions that might be thought to fit the description of ‘vague, open-ended and abstract’. The *Constitution* itself contains a number of provisions that can fairly be described in this way.\(^4^2\) Yet the courts, and in particular the High Court, have been able to adjudicate constitutional disputes in an effective and broadly acceptable manner.

Perhaps more relevantly, there are many examples of Acts passed by the Commonwealth Parliament containing terms which can be fairly characterised as ‘vague, open-ended and abstract’. Examples include legislation under which courts are asked to determine whether particular conduct is ‘unconscionable’,\(^4^3\) ‘unfair’,\(^4^4\) or ‘reasonable’,\(^4^5\) or whether a payment is ‘equitable’.\(^4^6\) Australian judges have proved capable of giving practical content to expressions of this character in ways that have ensured the sensible operation of the legislation. Indeed, it might be considered a core feature of the common law system that judges are asked to make judgements of this kind.

D Sources of Guidance

Importantly, Australian judges would not be working in isolation were they to be asked to construe a Commonwealth Human Rights Act. As French CJ confirmed in *Momcilovic*,

> [c]ourts may, without express statutory authority, refer to the judgments of international and foreign domestic courts which have logical or analogical relevance to the interpretation of a statutory provision.\(^4^7\)

Australia is the only common law liberal democracy without overarching legislative protections of human rights. This means that Australian judges would be able to look to comparable jurisdictions such as the United Kingdom, New Zealand, Canada and South Africa to see how their judiciaries have construed and applied such legislative protections. They would also be able to look to decisions from the two other Australian jurisdictions (the Australian Capital Territory and Victoria) that have already adopted legislation to protect civil and political rights. Additionally, they would be able to draw guidance from international jurisprudence, including that of the United Nations Human Rights Committee (‘UNHRC’).

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\(^4^2\) See, eg, *Constitution* ss 52 (xxix) (‘external affairs power’), (xxxii) (‘acquisition of property on just terms’), (xxxix) (‘incidental power’) and ss 92 (‘trade within the Commonwealth to be free’), 100 (‘Commonwealth not to abridge right to use water’).

\(^4^3\) *Competition and Consumer Act 2010* (Cth) sch 2 pt 2-2.

\(^4^4\) Ibid pt 2-3.

\(^4^5\) *Corporations Act 2001* (Cth) s 588X.

\(^4^6\) *Copyright Act 1968* (Cth) ss 135ZZZK, 135ZZZN.

\(^4^7\) *Momcilovic* (n 15) 36–7 [18].
The rights that the Consultation Committee recommended be justiciable under a Commonwealth Human Rights Act are rights recognised by the *ICCPR*. It is a principle of Australian law that where a provision of a treaty is transposed into a statute, the assumption is that the language of the statute should carry the same meaning as in the treaty. For this reason, international human rights jurisprudence touching on the proper interpretation of the *ICCPR* would be a primary source of assistance — although crucially non-binding — for any Australian judge seeking to understand the intended content of such rights and how they might be balanced against each other when required. A principal source of such jurisprudence is the UNHRC. This is the body of international experts responsible for monitoring the implementation and observance of the *ICCPR* by state parties. It does so in three distinct ways: by issuing ‘general comments’ on particular articles of the *ICCPR*; by its rulings on individual complaints made to the UN under the *ICCPR*; and by its ‘concluding observations’ on the mandatory reports submitted by state parties.

**E ‘Necessary Violations’**

When giving evidence to the Consultation Committee, the then Attorney-General of New South Wales spoke of unacceptable political pressure from the judiciary, concerning human rights violations that were ‘entirely practical, reasonable and necessary’. The notion of a human rights violation that is ‘practical, reasonable and necessary’ but would nonetheless attract judicial criticism appears to overlook an important aspect of international human rights law. This is the principle of proportionality. The Consultation Committee recommended that this principle be incorporated into the proposed Commonwealth Human Rights Act.

The *ICCPR* recognises few absolute rights or freedoms. Those that it does not allow to be restricted by governments are known as non-derogable rights and freedoms.

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51. *NHRC Report* (n 3) 286.

52. This article does not engage in the debate on whether a ‘proportionate’ measure is a legitimate departure from human rights standards or no departure at all. See, eg, Julie Debeljak, ‘Proportionality, Rights-Consistent Interpretation and Declarations under the *Victorian Charter of Human Rights and Responsibilities*: The *Momcilovic* Litigation and Beyond’ (2014) 40(2) *Monash University Law Review* 340.

53. See *NHRC Report* (n 3) xxxv.

54. *ICCPR* (n 35) art 4.2.
These are: freedom from being arbitrarily deprived of life;\textsuperscript{55} freedom from torture;\textsuperscript{56} freedom from slavery;\textsuperscript{57} freedom from imprisonment for inability to fulfil a contractual obligation;\textsuperscript{58} freedom from conviction under a retrospective criminal law;\textsuperscript{59} the right to recognition as a person before the law;\textsuperscript{60} and freedom of thought, conscience and religion.\textsuperscript{61} It ought to be unthinkable that any Australian government would regard a violation of any of these freedoms as ‘practical, reasonable and necessary’. Other than in respect of the arbitrary detention of refugees and asylum seekers, and possibly other matters encompassed by our national security laws, it is almost unthinkable.

As to the other rights and freedoms recognised by the \textit{ICCPR}, although they do not expressly include a proportionality test, international law recognises that civil and political rights may be restricted by governments within defined boundaries, with the aim of protecting competing interests. Objectives capable of justifying a restriction on a right or freedom include the protection of public safety or security, the protection of public order, and the protection of the rights and freedoms of others.\textsuperscript{62}

The Consultation Committee recommended that the Commonwealth Human Rights Act contain an express limitation clause for derogable civil and political rights similar to that contained in the \textit{Human Rights Act 2004 (ACT)} and the \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)}.\textsuperscript{63} Both of these Acts allow rights to be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society’.\textsuperscript{64} These provisions embody what is known as the ‘proportionality test’.\textsuperscript{65} The European Court of Human Rights has implied a similar qualification into the \textit{European Convention on Human Rights (‘ECHR’)},\textsuperscript{66} and the proportion-

\textsuperscript{55} Ibid art 6.
\textsuperscript{56} Ibid art 7.
\textsuperscript{57} Ibid arts 8.1–2.
\textsuperscript{58} Ibid art 11.
\textsuperscript{59} Ibid art 15.
\textsuperscript{60} Ibid art 16.
\textsuperscript{61} Ibid art 18.
\textsuperscript{63} \textit{NHRC Report} (n 3) xxxv.
\textsuperscript{64} \textit{Human Rights Act 2004 (ACT)} s 28(1); \textit{Charter of Human Rights and Responsibilities Act 2006 (Vic)} s 7(2).
\textsuperscript{65} \textit{Momcilovic} (n 15) 39 [22] (French CJ), quoting Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 4 May 2006, 1291 (Rob Hulls, Attorney-General).
ality test has been adopted in the Human Rights Act 1998 (UK). It is therefore instructive to look at the jurisprudence of United Kingdom courts in considering and applying this Act.

The Act gives domestic effect to rights and freedoms guaranteed under the ECHR. In decisions under the Human Rights Act, United Kingdom courts have consistently called for the rights of individuals to be balanced against the general interests of the community.

This approach is well illustrated by Lord Bingham’s statement in Attorney-General’s Reference (No 2 of 2001):

In the exercise of individual human rights due regard must be paid to the rights of others, and the society of which each individual forms part itself has interests deserving of respect.68

It is further illustrated by the comment of Lord Steyn in Brown v Stott that ‘[t]he fundamental rights of individuals are of supreme importance but those rights are not unlimited: we live in communities of individuals who also have rights’.69 His Lordship also observed in R (McCann) v Crown Court at Manchester that the relevant ‘starting point is ... an initial scepticism of an outcome which would deprive communities of their fundamental rights’.70

To similar effect, in Wilson v First County Trust Ltd (No 2), Lord Rodger stated that

[i]t is well recognised ... that Convention rights are to be seen as an expression of fundamental principles rather than a set of mere rules. In applying the principles the courts must balance competing interests.71

A good illustration of the practical application of the above approach is found in the speeches of the Law Lords in R (SB) v Governors of Denbigh High School.72 In that case, a female Muslim high school student claimed that her school had excluded her and unjustifiably limited her right to manifest her religion or belief. She expressed the wish to wear a jilbab (a long, coat-like garment) to school, but the school would not permit this breach of its uniform policy. After wide consultation, including with parents and Islamic leaders, the school had earlier approved a uniform option that was widely regarded as satisfying the requirement of modest dress for Muslim girls, but it had not approved the jilbab. In the particular circumstances of that case, a majority

68 [2004] 2 AC 72, 84 [9].
71 [2004] 1 AC 816, 875 [181].
72 [2007] 1 AC 100.
of the Law Lords concluded that there had not been an infringement of the student’s right to manifest her religion or belief. However, even those who did conclude that her right had been infringed joined with their colleagues in determining that the school was justified in acting as it had. Their Lordships noted that Parliament had intended to allow individual schools to make their own decisions about uniforms and that this was something that the courts should accept. The Lordships further noted that Denbigh High School legitimately wished to avoid clothes that were perceived by some as signifying adherence to an extreme version of the Muslim religion and to protect girls against external pressures to wear such clothes. The majority of their Lordships expressed agreement with Lord Hoffmann that ‘[t]hese are matters which the school itself was in the best position to weigh and consider’.74

The Supreme Court of Canada has also emphasised that the principle of proportionality ‘should be applied flexibly, so as to achieve a proper balance between individual rights and community needs’.75 A similar approach has been adopted by the Supreme Court of New Zealand76 and by the Constitutional Court of South Africa.77

As these authorities demonstrate, an unlawful violation of a human right under the ICCPR that is ‘entirely practical, reasonable and necessary’ amounts to a contradiction in terms. To the extent that there are legislators who think otherwise, it would surely be in the public interest for them to be required at least to turn their minds to the standards from which they propose to depart, and to justify that departure.

**IV Practical Benefits of a Human Rights Act**

Australia has signalled its commitment to the human rights recognised in international law by ratifying all of the major United Nations declarations and conventions on human rights. It has asserted a particular commitment to the rights contained in the ICCPR by empowering the Australian Human Rights Commission to enquire into alleged breaches of such rights.78

A Commonwealth Human Rights Act would help to ensure that the protection of human rights is a cooperative enterprise, with responsibility shared by each of the three branches of government. As Dame Sian Elias (the former Chief Justice of New Zealand) recently said:

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73 Ibid 125 [64] (Lord Hoffmann, Lord Nicholls agreeing at 119 [41], Lord Scott agreeing at 132 [91], Baroness Hale agreeing at 135 [99]).
74 Ibid 125 [65].
76 *R v Hansen* [2007] 3 NZLR 1, 28 [64] (Blanchard J).
Human rights resonate in law because they are rights. But it would be a big mistake to see human rights simply as rules. Statements of right are points of reference for all society. They provide organising principles of practical help to decision-makers in ensuring equality of treatment and in promoting the values of the rule of law. …

And in the increasingly pluralist societies in which we live today adherence to values that are shared also seems good policy because we need all the common ground we can find.79

While it is for the legislature to set human rights standards in legislation, and for the judiciary to interpret such legislation when it is in dispute, the delivery of human rights in practice is very much the responsibility of the executive.80 It is the executive that is responsible for the protection of the vulnerable in a day-to-day sense — through the delivery and oversight of services including aged care, health, education and social services. Thus, it is principally through the executive that we in Australia can make our democracy more sensitive to people’s rights in concrete and practical ways.

A Commonwealth Human Rights Act would provide a shared and accessible framework within which all public decision-making could be justified. The publication of logical reasons for decisions is no longer a responsibility of the judiciary alone. The modern climate of openness, freedom of information and accountability, facilitated by social media, requires all institutions of government to be able to justify their decisions. Again adopting the words of Dame Sian Elias,

[s]ecuring human rights, like securing the rule of law, is inevitably a whole of government responsibility and the work of many hands. A preoccupation with the role of the judiciary seems … to miss the point.81

The use of human rights as standards for good public administration would be entirely consistent with our existing legal framework. As noted above, the Australian Human Rights Commission is already responsible for conducting inquiries into acts or practices that may be inconsistent with or contrary to any human right recognised by the ICCPR.82 A former Commonwealth Ombudsman has acknowledged that human rights claims are always present, overtly or subtly, in the work of the Ombudsman’s

79 Dame Sian Elias, ‘Human Rights in Middle Age’ (Catherine Branson Lecture Series, Flinders University, 5 April 2018) 4–5 <www.courtsofnz.govt.nz/speechpapers/1CBLT.pdf>.
81 Dame Sian Elias (n 79) 6.
office and that ‘complaint handling and administrative investigation is a practical and effective way of protecting people’s rights’. ³³

Efforts to protect individuals’ rights would be enhanced by the legal enforceability of rights recognised by Australian domestic law. A Human Rights Act would give both the legislature and the executive, but particularly the executive, the explicit benefit of what has been described as ‘a set of navigation lights’ to ensure that they respect human rights. ³⁴

The judiciary, which already regularly draws on human rights standards, would also benefit from such standards being recognised in legislation. While fundamental human rights standards are immanent in the common law, their content is contestable and judges invoking them are presently at risk of being charged with judicial overreach.

In short, a Commonwealth Human Rights Act should ensure that all branches of government — the legislature, the executive and the judiciary — demonstrate the application of human rights in practice. This should result in the following outcomes: legislation that is more respectful of rights (particularly the rights of minorities); public administration that is more respectful of individuals and their inherent dignity; and judicial decision-making guided by values that are explicitly endorsed by national legislation.

Of course, at the end of the day, whether human rights are observed will depend on whether they are valued and understood by the wider community. Their statement in an ordinary Act of the Commonwealth Parliament would make them readily accessible to Australians in a way that international conventions, even those which Australia has chosen to ratify, are not. Such an Act would play an important educative role and could be expected to lead to cultural change of the kind that followed the enactment of Australia’s anti-discrimination legislation.

V Conclusion

Across the world, public confidence in democracy is diminishing. ³⁵ In our own country, political power increasingly appears to lie with Prime Ministers, political parties with limited membership, or even with factions sometimes controlled from outside Parliament. Traditional safeguards against the misuse of public power such


as the sense of fair play of Ministers, the professional integrity of public servants, the influence of a free and vigorous press and a well-informed public opinion no longer seem adequate to support public confidence in our system of government.

On the other hand, as reports of the most vulnerable members of our society being treated in wholly unacceptable ways become more common, there is increasing public recognition of the need for basic human rights to be recognised and protected.

I am persuaded that we can improve our national institutions — that we can make them more sensitive to people’s rights and needs and limit the number and severity of occasions when human dignity is disregarded.

The time is right for Australia to abandon its exceptionalism with respect to human rights protections. We should join other comparable western liberal democracies by ensuring their legal enforceability.
REFLECTING ON THE WATERS: PAST AND FUTURE CHALLENGES FOR THE REGULATION OF THE MURRAY-DARLING BASIN

I INTRODUCTION

The regulation of the waters of the Murray-Darling Basin has caused tension between New South Wales, South Australia and Victoria since before Federation. It is an issue that evokes strong emotions in South Australian politicians, sometimes leading to threats of litigation to resolve these tensions. Prior to Federation the river system was first used as an important transport route, providing access to inland Australia. In particular, the river was vital for the transportation of the wool clip from farms in South-Eastern Australia to the South Australian ports for export. As the railways expanded inland, the need for the river system as a means of transport declined. At the same time, the waters of the Basin were starting to be used for irrigation.

As the downstream state, South Australia is at the mercy of the upstream states when it comes to the allocation of the waters of the Basin. South Australia’s geographical position, coupled with uncertainty as to the legal rights it has to a share of the water from the Basin, places the State in a challenging negotiating position.
II Reflecting on the Past

The legal uncertainty over the rights of the states to a share of the waters of the Basin was left unresolved by the *Australian Constitution*. Instead, the rights of the states have been defined by intergovernmental agreement since the signing of the River Murray Waters Agreement in 1914.6

Since 1914, the intergovernmental agreement between the Commonwealth and states on the regulation of the Basin has been revised and amended on a number of occasions. One such amendment occurred in 1981, when the then River Murray Commission was given the power to monitor water quality and conduct water quality investigations. In an article published in the *Adelaide Law Review* entitled ‘The River Murray Waters Agreement: Peace in Our Time?’, Sandford Clark examined the 1981 amendments and considered some of the broader legal uncertainty surrounding the regulation of the waters of the Basin.7 The article is an important contribution to the field of water law in Australia, highlighting some of the challenges associated with regulating the waters of a river system that flows through more than one state. As an aside, in this special issue for volume 40 issue 1 of the *Review*, Clark’s contribution to the very first volume of the *Review* as an editor must also be acknowledged.8

Since the publication of Clark’s article in 1983, the regulation of the waters of the Basin has evolved further. The most significant reform over the past 30 years — prompted by the millennium drought (2001–09) — has been the passing of the *Water Act 2007* (Cth) (‘*Water Act*’) and the making of the *Basin Plan 2012* (Cth) (‘*Basin Plan*’) under the *Water Act* ss 41–44. By placing environmental considerations at the forefront and addressing the over-extraction of water from the Basin, the *Water Act* and *Basin Plan* are intended to reform how water within the Basin is shared.

While the agreement between the Commonwealth and states has evolved considerably since the publication of Clark’s article, many of the legal uncertainties that Clark identified still exist today. With that in mind, it is important to recognise the question mark in the title of Clark’s article. The author was well aware of the protracted history of the dispute over the waters of the Basin, acknowledging towards the end of the article that any goodwill displayed by the upstream states must be treated with some caution:

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6 Agreement was reached on 9 September 1914 when the Prime Minister and the Premiers of New South Wales, South Australia and Victoria signed the River Murray Waters Agreement. The agreement was implemented by the Commonwealth and those States passing separate but substantially similar legislation: see *River Murray Waters Act 1915* (Cth); *River Murray Waters Act 1915* (NSW); *River Murray Waters Act 1915* (SA); *River Murray Waters Act 1915* (Vic).


8 Clark was a Case Note Editor for volume 1 issue 1 (1960), Book Review Editor for volume 1 issue 2 (1961) and Assistant Editor and Book Review Editor for volume 1 issue 3 (1962).
As things stand, South Australia’s interests in the matter of water quality continue to depend on the goodwill of the upstream States. There is nothing in the history of the Murray question to create sanguine expectations of the continuance of that goodwill or that any solution which depends upon it will be permanent.9

Clark’s words of caution are still relevant today and are apposite in light of the more recent events that led to the establishment in 2018 of the South Australian Murray-Darling Basin Royal Commission.

Clark’s article is also instructive in emphasising that much can be learned from examining the history of this dispute. That is still true today. This is not the first time that South Australia has established a royal commission to examine the use of the waters of the River Murray. In 1887, the South Australian Government established a royal commission to investigate

the questions of utilising the waters of the River Murray for irrigation purposes, and the preservation of the navigation and water rights of this province in the river; and, for that purpose, to confer and consult with any Commission appointed, or to be appointed, by the Governments of New South Wales and Victoria on the same subject.10

While much has changed since 1887 in the way in which the waters of the Basin are utilised, some of the underlying tensions between governments remain.

III THE SOUTH AUSTRALIAN MURRAY-DARLING BASIN ROYAL COMMISSION

In July 2017 an ABC Four Corners investigation identified matters of non-compliance with the Basin Plan, particularly in New South Wales and Queensland.11 Amongst other things, the program alleged ‘misappropriation, maladministration and misconduct in the New South Wales Government’.12 Shortly after the broadcast, the Turnbull Government ordered a review by the Murray-Darling Basin Authority (‘MDBA’) as well as an independent review of ‘compliance and enforcement regimes for water management in the Murray-Darling Basin’.13 The report from these reviews noted a ‘lack of transparency in NSW, Queensland and Victoria’, highlighting that ‘[f]or NSW and Queensland, water compliance is bedevilled by patchy metering, the

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9 Clark (n 7) 138.
10 Royal Commission on the Utilisation of the River Murray Waters (Progress Report, May 1890) iii.
challenges of measuring unmetered take and the lack of real-time, accurate water accounts.\textsuperscript{14}

The report sparked outrage in South Australia. In response to the findings of the report, the South Australian Premier, Jay Weatherill, said: ‘What [the report] documents is theft by the upstream states, theft by New South Wales and Queensland of water that should be put back in the river to restore the river to health’.\textsuperscript{15} The Premier announced a royal commission to investigate the ‘water theft’ by the upstream states in the Murray-Darling Basin.\textsuperscript{16} Prominent Sydney barrister, Bret Walker SC, was appointed Commissioner and the Murray-Darling Basin Royal Commission formally commenced its work on 23 January 2018. The Commissioner spent the next 12 months examining the operation of the Water Act and the implementation of the Basin Plan, delivering his 750-page report to the Governor of South Australia on 29 January 2019.\textsuperscript{17}

The Commissioner noted that the passing of the Water Act was a ‘world first’ insofar as it recognised the environmental degradation that had been caused to the Basin and sought to address it:

\begin{quote}
If the core achievement of the Water Act was preceded by anything similar anywhere else in the world, or for that matter emulated since, this Commission did not discover it. It looks as if the political success of 2007 is a deserved distinction for this country. It has its special and defining quality in the combination of a legislated acceptance of a basal fact about environmental degradation, a legislated requirement that it be redressed, and a legislated insistence that the administration of the statutory scheme to do so must be based on science.\textsuperscript{18}
\end{quote}

However, the Commissioner’s report was less complimentary about the operation and implementation of the Water Act and Basin Plan, noting that ‘[k]ey aspects of the Basin Plan have not been enacted or implemented in accordance with the objects and purposes of the Water Act’.\textsuperscript{19}

The Commissioner called into question the approach taken by the MDBA in determining the amount of water that must be recovered in order to achieve an


\textsuperscript{17}Murray-Darling Basin Royal Commission (n 12).

\textsuperscript{18}Ibid 17 (emphasis added).

\textsuperscript{19}Ibid 53.
environmentally sustainable level of take from the Basin. The *Water Act* requires the MDBA to prepare a Basin Plan. The Basin Plan must include the ‘maximum long-term annual average quantities of water than can be taken, on a sustainable basis, from … the Basin water resources as a whole’. The long-term average sustainable diversion limit (‘SDL’) must reflect an environmentally sustainable level of take (‘ESLT’). To determine the ESLT the MDBA adopted what has been described as a ‘triple bottom line’ approach, taking into account environmental, economic and social outcomes. This approach is supported by legal advice from the Australian Government Solicitor. The Commissioner described reliance on that advice as ‘erroneous’ and concluded that the MDBA’s approach in determining the ESLT was contrary to the *Water Act*:

> The determination of an ESLT, and the setting of a SDL that reflects it, do not involve political compromise under the relevant provisions of the *Water Act*. They are to be based on the ‘best available scientific knowledge’. Socio-economic considerations, ideology and realpolitik are not involved in this process if it is to be lawful. Best available scientific knowledge is neither secret nor classified. It is available to the scientific community, and the broader public. It involves processes and actions that represent science — that is, that are capable of being reviewed, checked and replicated.

If the Commissioner’s conclusions about the proper construction of the *Water Act* are correct, it would have implications for how much water is required to be recovered for the environment. Based on the evidence before the Royal Commission, the Commissioner concluded that water recovery for the environment of between 3,980 GL and 6,980 GL was necessary to achieve an ESLT and to give effect to what he considered to be the correct interpretation of the *Water Act*. This is a much higher range of water recovery than the 2,750 GL agreed to by Commonwealth Water Minister Tony Burke in 2012 when approving the *Basin Plan*.

In highlighting what he perceived to be the improper construction of the *Water Act*, the Commissioner’s report provides a guide as to how the existing *Basin Plan* could be challenged on the basis that ‘[k]ey aspects of the *Basin Plan* have not been enacted or implemented in accordance with the objects and purposes of the *Water Act*’.

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20 *Water Act 2007* (Cth) s 19(3).
21 Ibid s 22 item 6.
22 Ibid s 23(1).
24 *Murray-Darling Basin Royal Commission* (n 12) 53.
26 *Murray-Darling Basin Royal Commission* (n 12) 200.
27 Ibid 53. See also ch 5.
However, with the Labor Weatherill Government losing the 2018 state election, it seems unlikely that South Australia will seek to mount a legal challenge any time soon.

In addition to a challenge to the Basin Plan on the basis that it does not comply with the Water Act, the Commissioner’s report also notes that there is some constitutional uncertainty regarding the Commonwealth’s legislative power to implement the Water Act in the absence of a referral of power from the states. The Commonwealth was never provided with a constitutional head of legislative power that expressly relates to the regulation of the Basin. Instead, the Commonwealth relies upon a number of heads of legislative power to support the Water Act, including external affairs (s 51(xxix)), trade and commerce (s 51(i)), and corporations (s 51(xx)), as well as a referral of legislative power from states (s 51(xxxxvii)). The Commissioner noted the uncertainty should a state revoke their referral of legislative power provided to the Commonwealth:

Should a Basin State revoke its referral of legislative power to the Commonwealth that in part currently underpins the Water Act and the Basin Plan, it will be a complex constitutional question as to whether all of the Water Act or Basin Plan would continue in force.

This raises interesting questions as to the validity of the Water Act should any state follow through with their previous threats to withdraw the referral of power to the Commonwealth.

Furthermore, if the Water Act and Basin Plan were not able to continue in force there is further uncertainty as to what law might exist (if any) to define the rights of the states. This question is not new, and was one that Clark considered in his article in the Review in 1983. In the event of a dispute between the states Clark noted that

[t]he question arises, then, whether South Australia would be better off to resile from the Agreement and seek to assert her common-law rights, both as to a reasonable quantity and reasonable quality.

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28 Although, this idea was considered at length during the Australian Constitutional Convention Debates in the 1890s: see John M Williams and Adam Webster, ‘Section 100 and State Water Rights’ (2010) 21 Public Law Review 267.

29 Murray-Darling Basin Royal Commission (n 12) 52. See also ch 2.

30 It was stated by Andrew Cripps, Queensland Minister for Natural Resources and Mines, that ‘the Newman Cabinet was considering the possibility of withdrawing the State Government’s 2008 referral of power to the Commonwealth to manage water resources in the Murray-Darling Basin catchment in Queensland.’: Andrew Cripps, ‘Queensland Concerns Still Not Addressed in Basin Plan’ (Media Statement, 2 July 2012) <http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=79726>.

31 Clark (n 7) 137.
This, of course, presupposes that there are some underlying ‘common-law rights’ that South Australia can draw upon. As Clark acknowledged, there is a risk that the High Court might not recognise the existence of such rights. Furthermore, even if such rights do exist, there is a question of whether the rights would provide more water to South Australia or result in better environmental outcomes for the Basin. There is uncertainty as to the substantive legal principles that underpin such an interstate common law right. Would, for example, it be based on a doctrine of ‘equitable apportionment’ (as is the case in the United States)? Or should rights be allocated on a ‘first in time’ basis?

While legal questions concerning the distribution of water between states have been given extensive consideration in the United States, the states of Australia have not resorted to the courts to resolve interstate water disputes. As the Commissioner noted:

> Historically, South-Eastern Australia has largely avoided the litigious bitterness and economic strife that can be seen, say, in the water struggle among some of the United States of America. But it would be naïve in the extreme not to acknowledge the continuing upstream-downstream tensions affecting South Australia’s place in the present administration and future stewardship of the Basin’s water resources.

The existence of such rights in the absence of an intergovernmental agreement is highly speculative and uncertain. The fact that for over a century South Australia has not litigated this issue despite numerous opportunities might tell us something about just how speculative and uncertain such a case would be. In addition, litigation would be a high-stakes game: if the High Court were to rule against the existence of any such interstate water rights, South Australia’s negotiating position would be crippled. Despite these legal uncertainties, the very threat of legal action might still be an important and powerful tool in the negotiating process.

Given the recent change in government in South Australia, it seems unlikely that these legal questions will be tested anytime soon. However, if history is any guide, they will no doubt continue to play a role in determining how best to regulate the waters of the Basin.

32 Ibid.
34 Murray-Darling Basin Royal Commission (n 12) 38.
IV Navigating the Future

If litigation is not the answer, how do we resolve the tensions over the waters of the Basin? As the Commissioner noted in his report, the answer must lie in cooperative federalism: ‘the reform that is the Water Act clearly calls for and requires a whole of Basin co-operative approach to its regulation’.36 The starting point must be to identify an environmentally sustainable level of take that reflects the available scientific evidence. The challenge, of course, is to shift from interested parties (states, irrigators, environmentalists) jockeying for the best deal for their own interests to a position where all parties are focused on ensuring the long-term environmental sustainability of the river.

36 Murray-Darling Basin Royal Commission (n 12) 52.
Margaret White*

YOUTH JUSTICE AND THE AGE OF CRIMINAL RESPONSIBILITY: SOME REFLECTIONS

I Introduction

Twenty six years ago, in an article published in this journal, Christopher Darby concluded that the implementation of a ‘justice’ model for young offenders by enactment of the Young Offenders Act 1993 (SA) had done little to improve protections afforded under the previous ‘welfare’ based regime.1 Across Australia, at about that time, the perceived failures of the ‘care’ approach suggested that the justice model, ameliorated by special rules for children, would be more fit for purpose.2 Australia had ratified the United Nations Convention on the Rights of the Child3 (‘Convention’) just a few years earlier in December 1990.

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2 Judy Cashmore, ‘The Link Between Child Maltreatment and Adolescent Offending’ [2011] (89) Family Matters 31, 36. See also Committee Appointed by the Secretary of State for Scotland, Children and Young Persons Scotland (Report, April 1964) (‘Kilbrandon Report’), in which the Committee concluded that neither the ‘crime-responsibility-punishment’ nor the ‘care and protection’ models were able to prevent what was then described as ‘juvenile delinquency’ within a framework of justice.

3 Opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990). Australia ratified the Convention on 17 December 1990 with one minor reservation to Article 37 — which required children to be detained separately from adult prisoners. The reservation was to the effect that if, for family reasons, the child’s best interests included accommodation within an adult facility, the provision would not apply. The Convention has been accepted by 196 countries including all member states of the United Nations except the United States of America.
Legislation in each state and territory since ratification of the Convention is broadly consistent with Australia’s international treaty obligations. However, the United Nations Committee on the Rights of the Child observed in 2012 that ‘... the juvenile justice system of [Australia] still requires substantial reforms for it to conform to international standards’. The principal criticism was the low age of criminal responsibility — 10 years — across all Australian jurisdictions. Although the Convention does not specify a minimum age for criminal responsibility, the Committee on the Rights of the Child has recommended that 12 years should be the minimum age. There are many jurisdictions where the minimum age for criminal responsibility is greater than 12 years.

Since 1994, policy makers appear to have had little success in understanding the underlying factors involved in bringing children into contact with the youth justice system. Consequently, progress in systematically addressing these factors — including physical and mental health needs — has been slow, limiting opportunities for meaningful and lasting rehabilitation of young offenders. There have been, and are, some positive developments, particularly more recently. But often they are driven by individual champions for change and not as a result of entrenched policy.

While youth justice policymakers may act with the best intentions, they are routinely limited by difficult budgetary and social circumstances. Consequently, their work is often influenced by sensationalist headlines, inadequate and insufficient rehabilitation programs, deficiencies in the welfare system, and indifference from an unengaged community.

In this same period, there were a number of different therapeutic and rehabilitative approaches adopted in some jurisdictions outside Australia to manage children and young people demonstrating antisocial and criminal behaviour which had

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4 It has taken many years for Queensland to move to keep 17-year-olds out of adult prisons with amending legislation being passed in November 2016 and coming into force in February 2018. See Youth Justice and Other Legislation (Inclusion of 17-year-old Persons) Amendment Act 2017 (Qld).


6 Committee on the Rights of the Child, General Comment No 10: Children’s Rights in Juvenile Justice, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].

7 See generally The Law Reform Commission of Hong Kong, The Age of Criminal Responsibility in Hong Kong (Report, May 2000). The Report compares the age of criminal responsibility in Hong Kong with that set in various other common law jurisdictions.

8 See Office of the Children’s Commissioner, ‘I Think I Must Have Been Born Bad’: Emotional Wellbeing and Mental Health of Children and Young People in the Youth Justice System (Report, June 2011), especially the Foreword at 5–6. The Commissioner and Deputy Commissioner for Children in England make a similar observation on the course of improvements to the youth justice system in the United Kingdom.
documented successes over many years. Not only did those initiatives give the young people concerned an opportunity for better lives, they also made their communities safer.

The decision of the Council of Attorneys-General in November 2018 to establish a committee to investigate raising the age of criminal responsibility from 10 years, together with rapid developments in neuroscience and advances made in understanding and measuring the effect of exposure to trauma on children, suggest that it is timely for this journal to consider the topic of youth justice again.

II Data Snapshot of Young People in the Justice System in Australia

In 2018, the Australian Institute of Health and Welfare (‘AIHW’) published a report on youth justice in Australia for the period 2016–17 concerning children and young people between the ages of 10 and 17 years. It analysed data provided by the states and territories on young people under youth justice supervision orders, either in the community or in detention, because of their involvement or alleged involvement in crime.

On an average day in Australia, 5,359 children and young people were under supervision — that is, about 1 in 500 of the juvenile population. Most were supervised in the community while 17% were in detention. Of those, a disturbing 60% were unsentenced. The average period under all supervision was six months. The overall rates of supervision in both the community and detention dropped over the years from 2012–13 when the last survey had been undertaken, except for Aboriginal and Torres Strait Islander young people. That cohort rose from being 15 times more likely than non-indigenous young people to be under a supervision order in 2012–13 to 18 times

9 Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (Final Report, November 2017) vol 2B (‘Royal Commission Report’): see especially 358–405. A number of approaches in different jurisdictions are discussed. New Zealand Youth Aid police divert more than 80% of young people away from the justice system and 83% of those young people do not reoffend. See also: CJ Harding and AJ Beecroft, ‘10 Suggested Characteristics of a Good Youth Justice System’ (Conference Paper, Pacific Judicial Development Programme, Family Violence and Youth Justice Workshop, 12–15 February 2013) cited in Peter Johnstone, ‘Early Intervention, Diversion and Rehabilitation from the Perspective of the Children’s Court of NSW’ (Speech, 6th Annual Juvenile Justice Summit, 5 May 2017) [156]–[158].

10 AIHW, Youth Justice in Australia 2016–17 (Report, 25 May 2018) (‘Youth Justice in Australia’).

11 There are some qualifications to the results published because of small sample sizes for some areas of review; the failure of one or more jurisdictions to provide certain figures; and limited inclusion/exclusion of data outside the 10–17 years range. For some topics there are significant differences between jurisdictions, but the broad undifferentiated figures are sufficient to explore the issues I wish to canvass here.
more likely. Alarmingly, Aboriginal and Torres Strait Islander young people were found to be 24 times more likely to be in detention.\textsuperscript{12}

Although the postcode criterion used by the AIHW is a blunt measure, the alignment of material poverty and engagement with the criminal justice system for young people is demonstrated by the figure that 38 per 10,000 children and young people under supervision on an average day come from the lowest socio-economic areas compared with 5 per 10,000 from the highest. Broadly, those from the poorer areas are seven times more likely to be under a supervision order than those from the higher socio-economic group.\textsuperscript{13}

The data from another AIHW report reveals that young people under youth justice supervision were nine times as likely as the general population of juveniles to be in the child protection system,\textsuperscript{14} and Aboriginal and Torres Strait Islander young people were 17 times as likely as non-indigenous youth to be in both the child protection system and under youth justice supervision.\textsuperscript{15}

Among the 980 young people in detention on an average night in Australia in the June quarter 2018, 90% were male, 60% of whom were unsentenced and 54% of whom identified as Aboriginal or Torres Strait Islander.\textsuperscript{16} The AIHW further reports that of young people aged 10 to 17 years who were under sentenced supervision at some time from 2000–01 to 2016–17, 39% returned to a supervised sentence before turning 18. Of the young people aged 10–16 years in 2015–16 who were released from community supervision, 26% returned to sentenced supervision within six months and 50% within 12 months. Of those released from sentenced detention, 59% returned within six months and 82% within 12 months.\textsuperscript{17}

These figures are a powerful indicator of the overall failure of the present way of managing young people who offend.

\section*{III \textsc{The Characteristics of Young People in Detention}}

It is well accepted that the main causes of youth offending are family dysfunction, child abuse, neglect, poor attendance at school, mental health problems and neurological disabilities.\textsuperscript{18} In June 2011 the Office of the Children’s Commissioner for England published its disturbing report, ‘I Think I Must Have Been Born Bad’:

\begin{itemize}
\item \textsuperscript{12} \textit{Youth Justice in Australia} (n \textit{10}) v.
\item \textsuperscript{13} Ibid 11.
\item \textsuperscript{14} AIHW, \textit{Young People in Child Protection and Under Youth Justice Supervision: 1 July 2013 to 30 June 2017} (Report, 16 October 2018) 13.
\item \textsuperscript{15} Ibid.
\item \textsuperscript{16} AIHW, \textit{Young People Returning to Sentenced Youth Justice Supervision 2016–2017} (Report, 27 August 2018) 5.
\item \textsuperscript{17} Ibid.
\item \textsuperscript{18} Cashmore (n \textit{2}) 31–41.
\end{itemize}
Emotional Wellbeing and Mental Health of Children and Young People in the Youth Justice System’. In the Foreword to that report the Commissioner and Deputy Commissioner wrote that

[children who end up in prison are some of the most troubled and disaffected in our society … [t]he majority of children who commit offences have awful histories of abuse, abandonment and bereavement often compounded by learning difficulties and disabilities which all too often have been inadequately addressed.]

These observations are equally true for the juvenile detention population in Australia.

The 2011 Report prompted the Office of the Children’s Commissioner to conduct a literature review into the mental health of detained young people. The ensuing report showed that there were likely to be large numbers of young people in secure settings in England who had undiagnosed neurodevelopmental conditions which had directly contributed to their offending.

In Australia the most comprehensive investigation into the mental and cognitive health of young people in detention was undertaken in Western Australia by the Telethon Kids Institute. It set out to investigate the prevalence of Fetal Alcohol Syndrome Disorder (‘FASD’) in the Banksia Hill Detention Centre detainee population, releasing its findings in February 2018. The results are deeply troubling.

Nine out of ten incarcerated youth at Banksia Hill, the only youth detention facility in Western Australia, had some form of serious neuro-disability. Of the 99 young people between 10 and 17 who completed a full assessment, 36 — more than one in three — had FASD. And, despite long contact with education, child protection and the justice system in Western Australia, only two had been previously diagnosed.

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19 Office of the Children’s Commissioner (n 8).
20 Ibid 5–6.
22 Fetal Alcohol Syndrome Disorder is an umbrella term to describe a spectrum of conditions caused by fetal alcohol exposure during pregnancy and is recognised as one of the most common causes of intellectual disability in the Western world. See, eg, Royal Commission Report (n 9) vol 1, 140.
This, the researchers concluded, was the highest known prevalence of FASD in a custodial setting in the world.

No less concerning, the Banksia Hill Project found that 89% of sentenced young people in their study had at least one severe neurodevelopmental impairment, whether or not they had FASD. Again, this is amongst the highest reported rate of neurodisability for sentenced young people in the world. Two-thirds had at least three domains of severe neurodevelopmental impairment and a staggering 23% had five or more severely impaired domains. They included problems with executive function, such as not being able to relate cause and effect or to plan, and problems with memory, cognition, motor skills, attention, social skills and adaptive behaviour. Almost half had severe problems with language, as well as how to listen and understand, and how to reply and explain what they thought. About a quarter were found to have an intellectual disability with an IQ score at or below 70.

The Banksia Hill Project Report has revealed, but much more starkly, what many who work in the youth justice area suspected — while these children and young people had engaged in antisocial behaviour and criminal conduct, some very serious — they were also profoundly impaired. This is not to seek to excuse their conduct and the effect on their victims, but to make quite clear that the solution can never be found in a ‘tough on crime stance’.24

Because the figures of young people in detention in Australia are actually quite small, it is possible to address therapeutic intervention realistically. After completing their assessments, the Banksia Hill team prepared a report for each of the 99 young people in custody which aimed to help detention centre staff — and the detainees’ wider circle of care — to understand each young person’s specific difficulties, allowing them to create tailored rehabilitation plans building on and complimenting their relative strengths. This kind of quality intervention requires significant investment in a highly trained and dedicated workforce, appropriate infrastructure, long-term policy commitment outside the electoral cycle, and the engagement of the whole community.25

24 Royal Commission Report (n 9) vol 2B, 149.
25 Should this occur the likely economic benefits are compelling. The Royal Commission engaged Deloitte Access Economics to model the potential cost and benefits to the Northern Territory in adopting reforms to youth justice of the therapeutic type recommended. The analysis concluded that implementation of the reforms would produce a net benefit of $335.5 million dollars for the Northern Territory over a 10-year period. Recidivist rates would fall from an estimated 75% of youth to 46% of youth, meaning that both youth and adult crime rates would fall: see Royal Commission Report (n 9) vol 2B, ch 28, 466–9.
IV Childhood Abuse and its Effect

I propose to drill down a little deeper into what may lie beneath these stark figures of disability in the detention population acknowledging, however, that it is far from my area of expertise.26

Developments in neuroscience help us to understand what had previously been recognised in a behavioural and clinical sense. Many health researchers, clinicians and scientists have closely followed these developments, but government policy writers, police, educators, courts and practising lawyers in Australia have generally been very slow to realise the implications of these new discoveries.27 Notwithstanding that observation, the vital importance of the first 1,000 days in the life of an infant in building healthy brain architecture is understood in a general way even if the physiological reasons are not. A child’s risk of developmental delay is compounded directly by experiences of adversity in early life. If these experiences are not addressed, there is a high likelihood the child will continue to suffer from symptoms of adverse mental and physical health into adulthood, with an associated risk of passing these traits on to subsequent generations.28

The environment both before and after birth provides the context for organising the developing brain. That which causes sustained stress is toxic for brain development. Adverse childhood experiences include actual physical, sexual and verbal abuse; physical and emotional neglect; ethnic abuse; having a family member with diagnosed depression or other mental illness or who is addicted to alcohol or other substances; a close family member being in prison; witnessing a mother being abused; or losing a parent to separation, divorce or death.29

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26 I wish to acknowledge the assistance of Professor Pankaj Sah, Director of the Queensland Brain Institute at the University of Queensland, for guiding my reading and understanding of this subject for which I am most grateful.

27 Andrew Becroft, as the Principal Youth Court Judge of New Zealand (presently his Honour is the New Zealand Children’s Commissioner), has been credited by Judge Peter Johnstone, President of the Children’s Court of New South Wales, as being one of the first Judicial Officers to highlight the importance of understanding neuroscience, and how that understanding may assist the justice system in meeting the need to match policy and legislation to the factual realities revealed by science. See Judge Johnstone’s address: Johnstone, (n 9) [60]. His Honour has been a forceful advocate for an understanding of the science behind the brain in children and adolescents in the development of policy and its application in the juvenile justice system.

28 See, eg, Royal Commission Report (n 9) vol 1, 134.

When the molecular structure of DNA was discovered in 1953 it was accepted that DNA and its coded information could not be altered in any way by the environment or by how a person lived their life, although the environment could stimulate the expression of a gene. The structure of the DNA neighbouring the gene provides a list of instructions — a gene programme, if you like — which determines under what circumstances a gene is expressed. It was thought that those instructions could not be altered by the environment. However, the developing field of epigenetics, especially over the past decade, has shown not only that gene expression is influenced by environmental factors, but that it may very likely be heritable. The genes themselves are not affected, but the way in which they are read is, by blocking access to certain genes and preventing their expression. This mechanism may be the hidden cause behind such conditions as anxiety, depression and paranoia.

Many clinical studies have shown that adverse childhood experiences can give rise to health problems in adults — heart disease, cancer, mood and dietary disorders, alcohol and drug abuse, infertility, suicidal behaviour, learning deficits and sleep disorders. Research from laboratories in a number of centres around the world from about 2003 onwards was able to identify the genetic mechanisms why this is so.

As an example, the body and the brain normally respond to danger frightening experiences by releasing a hormone, a glucocorticoid, which controls stress. It prepares us for these challenges by adjusting our heart rate, energy production and brain function. It binds to a protein — the glucocorticoid receptor — in nerve cells of the brain. In a normal situation, as we all know from our own experiences of getting a fright, when the danger passes, our stress symptoms gradually ease and then cease.

In a recent paper, after analysing over a decade of findings about epigenetics, the authors noted that the gene for the receptor is inactive in people who have experienced childhood stress and, as a result, those people produce fewer receptors. Without receptors to bind to, glucocorticoids cannot shut off their own production, so the hormone keeps on being released and the stress response continues, even if there is no immediate threat.

This helps to explain evidence heard in the Royal Commission of children and young people with a history of dysfunctional family life exhibiting highly anxious

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32 Rosenfield and Ziff (n 30) 36.
33 Ibid.
35 Turecki and Meaney (n 34) 92.
behaviour in a detention setting and elsewhere: ‘fight or flight’, if you will, as a constant state.

This effect, known as methylation, is long lasting, and the consequences may be chronic inflammation, diabetes, heart disease, obesity, schizophrenia and major depressive disorder. Hearteningly, there is some evidence to suggest that it may be reversible.36

Many of the children and young people who come into contact with the youth justice system demonstrate or admit to a heavy use of non-therapeutic drugs of addiction such as nicotine, alcohol and unlawful drugs.37 While it is currently accepted that 50% of the risk for addiction to any drug is genetic, the other 50% is thought to reflect a variety of environmental exposures through epigenetic mechanisms in the brain.38

The greater likelihood of suicide in a person who has been exposed to childhood trauma has been demonstrated in humans by comparing the genes of samples from the Canadian Brain Bank of those who have died by suicide with a history of childhood abuse and samples from those who died in a sudden non-suicide related event. The brain samples of those who died by suicide but who had not been exposed to childhood trauma did not show epigenetic marks.39

Perhaps even more concerning however, are the experiments that demonstrate that animals which have not been exposed directly to traumatic circumstances — such as those still in their mother’s womb during stressful or traumatic events — have blocked receptor genes. It is postulated that this is due to the transmission of glucocorticoids from the mother to the fetus via the placenta.40 This quite foundational research shows that stress caused by war, prejudice, poverty and other forms of childhood adversity may have consequences both for the person affected and for their future unborn children not only

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36 Nelson (n 29).
37 AIHW, Overlap Between Youth Justice Supervision and Alcohol and Other Drug Treatment Services: 1 July 2012 to 30 June 2016 (Report, 13 July 2018) 1–2.
for social and economic reasons [which were well known] but also for biological ones.41

These findings, albeit specialised, are widely known by non-experts and ought to be at the forefront of youth justice policy design.

V Adolescent Maturity and the Brain

Even in optimal developmental circumstances, after a child leaves the highly vulnerable age of infant dependence and approaches adolescence, brain structure and processes undergo considerable change. Since its advent, magnetic imaging has shown that the adolescent brain is structurally different to that of a mature adult and, particularly in the area devoted to impulse control and decision-making, inclined to risk taking.42

Neural connections proliferate during childhood and adolescence, peaking at about 11 for girls and 12 for boys. Thereafter the brain embarks on a process of pruning those connections rarely used, making itself more efficient and specialised. Those neural connections that survive the pruning process become more adept at transmitting information and increase brain integration.43

The prefrontal cortex is the last area of the brain to show these structural changes. It is the part of the brain which coordinates higher order cognitive processes and executive functioning. It is used for goal-directed behaviour ‘including planning, response inhibition, working memory and attention’. In everyday parlance, these skills ‘allow an individual to pause long enough to take stock of the situation, assess his or her options, plan a course of action and execute it’.44 Conversely, poor executive functioning leads to difficulty with planning, attention, using feedback, and mental inflexibility, all of which undermine judgment and decision making: a not atypical teenager!

With age, the necessary skills grounded in the prefrontal cortex are matured, explaining the well-known phenomenon of young people ‘growing out of’ unwanted behaviour. This supports a strong diversion policy to keep a young person out of the criminal justice system, for it is established that any period in juvenile detention will likely lead to time in an adult prison.45

41 Rosenfield and Ziff (n 30) 36.
43 Johnson (n 42) 217.
44 Ibid.
45 See generally Youth Justice in Australia (n 10). See also Royal Commission Report (n 8) vol 2B, 283–5.
A positive aspect of this maturation process is that the very immaturity which can lead to offending behaviour makes the young person apt for change where adult offenders may be more intractable.\textsuperscript{46} It supports a strong diversionary policy aimed at keeping a young person at the very least out of detention, but also out of the formal criminal justice system.

\textbf{VI THE PURPOSE AND CONTINUING ROLE OF AN AGE OF CRIMINAL RESPONSIBILITY}

With the information which is now available to inform policy makers, legislators and the courts about the make-up of the majority of young people who offend, it is timely to reconsider the age of criminal responsibility from which the irrebuttable presumption operates, as well as its associated rebuttable presumption of \textit{doli incapax}.

The approach to criminal responsibility in young children has been to resile from attributing legal blame to them because of their moral and physical immaturity. Societal response to wrongdoing by children has been, progressively, to raise the age at which they are deemed to be criminally responsible for their acts. The \textit{Convention} requires each signatory state to seek to promote the establishment of laws, procedures and institutions specifically applicable to children ‘alleged as, accused of, or recognised as having infringed the penal law’.\textsuperscript{47} In particular, states are required to establish a minimum age below which children shall be presumed not to have the capacity to infringe the penal law. As mentioned earlier, no specific age is nominated, although the United Nations Committee charged with monitoring compliance with the \textit{Convention} has criticised those jurisdictions in which the minimum age is less than 12 years old.\textsuperscript{48}

The \textit{UN Standard Minimum Rules for the Administration of Juvenile Justice} (‘The Beijing Rules’) made under the \textit{Convention} explain this further:

The minimum age of criminal responsibility differs widely owing to history and culture. The modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour. If the age of criminal responsibility is fixed too low or if there is no age limit at all, the notion of responsibility would become meaningless. In general, there is a close relationship between the notion of responsibility for delinquent or criminal behaviour and other social rights and responsibilities.\textsuperscript{49}

\textsuperscript{46} Gruber and Yurgulen-Todd (n 30); Johnson (n 42) 330–1.
\textsuperscript{47} \textit{Convention} (n 3) art 40(3).
\textsuperscript{48} Committee on the Rights of the Child, \textit{General Comment No 10: Children’s Rights in Juvenile Justice}, 44\textsuperscript{th} sess, UN Doc CRC/C/GC/10 (25 April 2007) [32].
\textsuperscript{49} \textit{The Beijing Rules} by GA Res 40/33, 40\textsuperscript{th} sess, 96\textsuperscript{th} plen mtg, Agenda Item 98, UN Doc A/RES/40/30 (29 November 1985).
In Australia across all jurisdictions, the statutory minimum age below which children are deemed incapable of committing a *criminal* act is 10 years. The language used varies. The South Australian *Young Offenders Act 1993* (SA) provides succinctly in s 4 that

[a] person under the age of 10 cannot commit an offence.

On the other hand, the New South Wales *Children (Criminal Proceedings) Act 1987* (NSW) provides rather more compendiously in s 5 that

[i]t shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence.

The Queensland *Criminal Code Act 1899* (Qld) avoids any judgement by a simple policy statement in s 29(1):

A person under the age of 10 years is not criminally responsible for any act or omission.

All states and territories, either by the retention of the common law presumption or by legislative enactment, have retained the legal concept of *doli incapax*. This is a rebuttable presumption that a child aged between 10 and 14 years is excused from criminal responsibility unless it is proved by the prosecution to the criminal standard that, at the time of committing the offence, the young person had the capacity to know that he or she ought not to have performed that act (or omission). In England, the presumption was removed legislatively in 1994 by s 34 of the *Crime and Disorder Act 1998* (UK).

There are many countries in which the minimum age for criminal responsibility is higher, some by a considerable margin. For example, in Belgium it is 18 years; it is 16 years in Japan, Portugal and Spain; in the United States there are various ages (18 years in some states and 16 years in others); in the Scandinavian countries and Iceland, it is 15 years; in Austria, Germany and other European countries, it is 14 years; for New Zealand it is effectively 14 years (except for murder and manslaughter which is 10); and in Canada, Ireland, Greece and the Netherlands, it is 12 years.\(^{50}\)

Scotland is a rather special case. As a result of recommendations made by the Kilbrandon Committee in 1964, virtually no child under the age of 16 years who has committed an offence is prosecuted in the criminal courts. Those children are brought before welfare panels for training and rehabilitation and do not appear in any court.\(^{51}\) While a discretion to prosecute a young person remains, it is used rarely and

\(^{50}\) See generally *Report on the Age of Criminal Responsibility in Hong Kong* (n 7).

in exceptional cases. In 2016 only 24 children out of a total population of 5.4 million were prosecuted.\textsuperscript{52}

The origin of the proposition at common law that a child ought not be held criminally responsible for acts or omissions under a particular age is ancient, and predicated on the assumption that a young child does not have the ‘discretion to discern between good and evil’.\textsuperscript{53} In other words, children are not fully formed or complete persons. Nor was it acceptable that young children should be exposed to both the rigors of an adult trial and the usually severe punishment which followed. By the 1820s there were said to be some 200 offences which attracted the death penalty, although by 1841 only eight remained on the statute books.\textsuperscript{54} As a general proposition, from the time of Sir Matthew Hale the common law accepted that children under the age of seven years were incapable of distinguishing between good and evil and thus not subject to the criminal law. Between the ages of eight and 14 years they continued to be deemed incapable, but that presumption could be rebutted by the prosecution. After the age of 14 young people were deemed capable and subjected to the ordinary criminal law.

In truth there is no scientific or, indeed, any other evidence to support these or any ages for fixing the imposition of criminal responsibility. The Kilbrandon Committee concluded that

\begin{quote}
[the legal presumption by which no child under the age of [eight] [then the law in Scotland] can be subjected to criminal proceedings is not therefore a reflection of any observable fact, but simply an expression of public policy to the effect that in no circumstances should a child under the age of [eight] be made the subject of criminal proceedings and thus liable to the pains of the law. Equally, at various intermediate stages prior to adulthood, the effect of statute law is to exempt juveniles below certain ages from certain forms of judicial action … It is clear, therefore that the ‘age of criminal responsibility’ is a largely meaningless term, and that in so far as the law refers to the age of [eight] as being the minimum age for prosecution, this is essentially the expression of a practical working rule
\end{quote}

\textsuperscript{52} Royal Commission Report (n 9) vol 2B, 364–5. Independent charitable providers are the main suppliers of grant-supported residential services, including secure accommodation. One such provider, the Kibble Education and Care Centre, is discussed at 365–9.


\textsuperscript{54} The matter is discussed in AN Wilson, The Victorians (Arrow Books, 2003), at 38. Enactment of the Forgery, Abolition of Punishment of Death Act 1832, 2 & 3 Wm 4, c 123 reduced the number of capital crimes to approximately 60, the Offences Against the Person Act 1837, 7 Wm 4 & 1 Vict, c 85 to approximately 16, and the Criminal Law Consolidation Acts 1861, 24 & 25 Vict, c 84–100 to four (murder, high treason, arson in a royal dockyard and piracy).
determining the cases in which a procedure which may result in punishment can be applied to juveniles.55

This want of an evidentiary basis for conclusions about criminal responsibility is reflected in many of the decisions about doli incapax culminating in R v JBT,56 the decision which brought to a complete end the presumption in English law, either as part of the prosecution case to be proved or as a defence. Decisions quashing convictions imposed on juveniles were described as ‘inconsistent with common sense’.57 Lord Phillips described the rebuttable presumption as ‘an anachronism’,58 and quoted with approval Professor Glanville Williams:

In this climate of opinion, the ‘knowledge of wrong’ test no longer makes sense … [it] stands in the way not of punishment, but of educational treatment. It saves the child not from the gallows, but from the probation officer, the foster-parent or the approved school. The paradoxical result is that, the more warped the child’s standards, the safer he is from the correctional treatment of the criminal law.59

Threaded throughout these relatively recent decisions are generalisations that, in past times when the presumption was developed, ‘children did not grow up as quickly as they do now’,60 or that universal education has inculcated in children the difference between right and wrong. Perhaps that might have been so for the shielded children of the prosperous, but for those of the poor sent to work as young as six years old, or the victims of the widespread starvation and privation which were features of both rural and city life before the welfare state, it might be supposed that they hardly experienced childhood. Observations today about ‘helicopter’ and ‘snowplough’ parents suggest that, at least their children, remain essentially immature for much longer than their more deprived ancestor counterparts. It is certainly a consideration that dedication to an artificial online world might also blunt the moral compass of the young people engaged with it.61

How, then, can the law accommodate natural brain immaturity in children, the impacts of adverse childhood experiences on adolescent behaviour, and the likelihood of repeat offending? It is said that raising the age of criminal responsibility will give modern day Fagins a larger pool to draw on and those children will be outside any remedial jurisdiction. In all Australian jurisdictions, ‘care and protection’ orders are

55 Kilbrandon Report (n 2) [65].
60 C (A Minor) v DPP [1996] 1 AC 1, 9 (Laws J).
made to endeavour to tailor a plan for each child at risk. It is not the case that children not subject to the criminal law are or will be left to drift eventually into a life of crime.

The science in general, and the specific neurobiological profiles for the cohort of young people who are the subject of sentenced supervision orders, suggests that 12 is still too low an age. If the rebuttable presumption of incapacity were to be absorbed into the irrebuttable, the age of criminal responsibility would rise to 14 years consistently with many other countries with which Australia would see itself as culturally aligned. Any age, even into early adulthood, is arbitrary, and even then, some young adults — particularly some young males — are not fully formed.

A public health and welfare model to drive policy about children and young people who demonstrate offending conduct, rather than a justice model, presents the greatest prospect of successfully rehabilitating what is largely a damaged group. It will be quite insufficient merely to raise the age of criminal responsibility. As Scotland’s much praised Kilbrandon Committee recognised well over 50 years ago, taking young people who offend out of the criminal justice system for training and education is the surest way to rehabilitation, and the evidence convincingly demonstrates that communities will be safer. So much more is now known about the fundamental damage that exposure to poverty, violence, neglect and the other calamities of life do to the structure of the brain, with consequences of mental, cognitive and physical ill health than when our legal responses to childhood delinquency were developed. It is irrational to continue to base a system on processes that do not produce beneficial outcomes when other, more successful approaches are known and not beyond reach. Accordingly, there can be no advocating for anything other than a welfare (in the best sense of that much maligned word) approach.
THE LAW, EQUALITY AND INCLUSIVENESS IN A CULTURALLY AND LINGUISTICALLY DIVERSE SOCIETY

I Introduction

Among the many contributions made to Australian legal scholarship of its first 39 volumes, the Adelaide Law Review has highlighted issues facing culturally diverse groups in the community in a series of important contributions analysing Indigenous Australians’ experience of the legal system in relation to customary law and criminal justice, and in legal education.

This article draws on these contributions and extends the discussion to the relationship between cultural diversity in Australia and aspects of the law. Given the importance of embracing and benefiting from the cultural diversity that defines Australian society, it will no doubt be important for the Review in future volumes to consider this issue.

Part II briefly outlines the ubiquity and significance of cultural diversity in Australia. Part III identifies key barriers to accessing justice in our culturally and linguistically diverse society, focussing upon the challenge that linguistic diversity poses to effective participation in the justice system, including the Judicial Council on Cultural Diversity’s guidelines on working with interpreters in courts and tribunals. Part IV discusses the role of Australia’s anti-discrimination law. Finally, Part V considers cultural diversity within the legal profession and the courts, and the proactive steps required to address discrimination and inequality more broadly.

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II Cultural Diversity in Australia

Australia is one of the most culturally diverse societies in the world today. Aboriginal and Torres Strait Islander peoples have the longest continuing culture in the world, and are estimated to number 798,400, or 3.3% of the total population of Australia.\(^4\) The Australian Bureau of Statistics reports that in 2018, 7.3 million people resident in Australia, or 29% of the population, were born overseas.\(^5\) The 2016 Census revealed that Australia is a nation of people from over 190 different countries and 300 different ancestries.\(^6\)

Further, when account is taken of all of the languages spoken in Australia, including those spoken by Indigenous peoples, the 2016 Census reported that over 300 different languages are spoken in Australian homes, and that approximately one-fifth (21%) of Australians speak a language other than English at home.\(^7\) Of these, approximately 3.5% reported that they spoke English ‘not well’ or ‘not at all’.\(^8\) There are also considerable variations in the composition and needs of different regions within Australia with, for example, 88% of people in Tasmania speaking only English at home as opposed to 58% in the Northern Territory.\(^9\)

III Access to Justice

A The JCCD

The Judicial Council on Cultural Diversity (‘JCCD’), which reports to the Council of Chief Justices, was formed to address the needs of Australia’s culturally and linguistically diverse society in accessing justice. Its purpose is to develop a framework

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\(^9\) Australian Bureau of Statistics (n 7).
to support procedural fairness and equality of treatment for all court users regardless of race, colour, religion, or national or ethnic origin, and to promote public trust and confidence in Australian courts and the judiciary.

B The Complexity of Issues Posed by Cultural and Linguistic Diversity

The existence of many and complex barriers to access to justice for members of Aboriginal and Torres Strait Islander communities is well documented. Tragically, these may result in some of the most vulnerable members of those communities failing to seek help through the court system when it is most required. As, for example, the JCCD report on Indigenous women’s experience of the courts explained:

Factors such as intergenerational trauma and experiences of discrimination, racism and poverty all form a key part of Aboriginal and Torres Strait Islander experiences. In addition, Aboriginal and Torres Strait Islander women’s perspectives of the justice system were shaped by dealings with the justice system overall — police, child protection, registry staff, corrections authorities, lawyers and judicial officers.10

Issues repeatedly raised included fear that reporting violence would result in the authorities removing children, and that the court was seen as a potentially unsafe place and not a place for resolving problems.11

Equally, while many of the barriers to justice differ, from the perspective of migrants and refugees, proceedings in our courts are proceedings in a foreign court, in a foreign land, conducted in a foreign language. Some may also fear and distrust government and the courts, particularly those seeking asylum from broken or corrupt states, and they are likely to lack an understanding of Australian law and court procedures.

The impression of justice in our courts that such litigants will take away with them will be affected in large part by the respect with which they are treated, how well they understand the proceedings, and how well they are understood. The importance of according respect within the system was borne out by the JCCD report on migrant and refugee women’s experience of the courts, which found that positive experiences in the court system tended to assist in the healing process and, importantly also that:

women’s satisfaction with court processes was, in the clear majority of cases, not linked to whether they received the outcome they sought. Rather, it was linked to how accessible the courts and court processes were, how women were treated and whether they felt listened to.12

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10 Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women’s Experience of the Courts* (Report, 20 March 2016) 7 (‘Aboriginal and Torres Strait Islander Women’s Experience of the Courts’).

11 Ibid 7–8.

I have earlier referred to some of the statistics illustrating the extent of linguistic diversity within Australia. While indicative of the scale of the issue, these statistics still mask the extent and complexity of the problem of ensuring that those coming before our courts and tribunals are linguistically present. For example, the figure of 300 languages ignores the prevalence of dialects within those broad language descriptions which may play out in differences not only in accent or words, but also in grammatical structure and tense usage. Further, a person who may communicate competently in ordinary day-to-day interactions, may nonetheless lack sufficient proficiency to understand the complexity of language and concepts in a courtroom setting and the stresses of that alien environment may compound these difficulties. Cultural and other sensitivities of the litigant or witness may also need to be taken into account.

Finally, there are widespread concerns about the availability of professional interpreters, particularly at the higher levels of accreditation. Indeed, for over two thirds of the languages spoken in Australia (and often those spoken by new arrivals) there are no accredited interpreters. Practitioners are also leaving the interpreting profession due to poor working conditions and rates of pay.

Not surprisingly, therefore, language is one of the chief barriers faced by migrants and refugees seeking to engage the court system. Ensuring the availability of quality interpreters for court interpreting is an issue calling for a long term, strategic and collaborative approach with the interpreting profession.

C The Significance of Interpreters in the Legal System

It is trite that participants in the justice system must have the ability to understand and to be understood in the proceedings: the entitlement to a fair hearing for all who come before our courts demands no less. A failure to meet that requirement can result in a mistrial or, in the administrative context, an invalid decision. As such, for those with no, or limited, proficiency in the language of our courts and tribunals, interpreters make their participation possible and are key to the administration of justice.

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14 Perry and Zornada (n 13) 210.
The quality and accuracy of interpretation is vital at all stages of the legal process. For example, the 2014 Western Australian case of an Aboriginal speaker of Pintupi charged with murder has highlighted problems for non-native speakers of English in understanding the right to silence in police interviews. In a pre-trial hearing in this case, Hall J ruled that the suspect’s confession to murder was not voluntary because he did not understand the right to silence, and he should have been provided with an interpreter.\textsuperscript{18}

D \textbf{The JCCD Recommended National Standards}

In late 2017, the \textit{Recommended National Standards for Working with Interpreters in Courts and Tribunals} adopted by the JCCD were published with the approval of the Council of Chief Justices. This followed consultation in the first instance to identify particular concerns arising from the experiences of Indigenous women and migrant and refugee women in the courts.\textsuperscript{19} It also followed public consultation on draft recommended standards with relevant stakeholders, which provided valuable feedback taken into account in finalising the recommended standards.\textsuperscript{20} Further, the working group which prepared the recommended standards (of which I was chair) was a specialist group including judges and tribunal members including from high volume jurisdictions, academics, and representatives of the interpreting profession including the Chief Executive Officer of the National Accreditation Authority for Translators and Interpreters (‘NAATI’).

The recommended standards are directed at interpreters and each of the participants in the justice system who engage with interpreters in the courtroom or in preparation for court hearings: judicial and tribunal officers, court and tribunal staff, and members of the legal profession. Linguistic, as well as physical, presence in the courtroom is best achieved if communication is seen as a shared responsibility between the interpreter and all participants in the justice system. The intention is to improve the court and tribunal system’s engagement and management of translation and interpreting services.

Many of the recommended measures can be implemented by changes in practices without additional resources and costs. Model Rules, accompanied by a Model Practice Note,\textsuperscript{21} were prepared to provide a mechanism whereby the recommendations may be given legal effect. It is intended that these documents can be adapted by courts and tribunals to meet their particular needs and resources.

Such measures illustrate the benefits to be gained from the legal community as a whole being proactive in developing practices and procedures to address the barriers

\textsuperscript{18} \textit{Western Australia v Gibson} (2014) 243 A Crim R 68.

\textsuperscript{19} \textit{Aboriginal and Torres Strait Islander Women’s Experience of the Courts} (n 10); \textit{Migrant and Refugee Women’s Experience of the Courts} (n 12).

\textsuperscript{20} \textit{Recommended National Standards for Working with Interpreters in Courts and Tribunals} (n 15) v.

\textsuperscript{21} Ibid 17, 24.
which restrict effective engagement with the legal system for many within our culturally diverse society. They also illustrate the importance of collaboration so as to learn from different communities about their needs and concerns and with other relevant stakeholders. As Bathurst CJ recently said, such steps are necessary ‘if we [as judicial officers] are to maintain our commitment to serving “all manner of people”’, as barristers ‘to be servants of all’, and as a profession to provide the community with access to justice.

**IV The Role of Anti-Discrimination Laws**

Turning to my second theme, in Australia’s evolution into a culturally diverse society, the enactment of its anti-discrimination laws stands out as a critical juncture. These laws were borne of a period of great change in Australian history, where Australian domestic laws sought to embody the fundamental values that the international community accepted as the minimum standard. In 1966, the *Public Service Act 1902* (Cth) was amended so that women who were employed in the Australian Public Service no longer had to resign from their positions when they married. The early 1970s then saw a dynamic period of law reform that included no-fault divorce, environmental protection legislation, and the taking of the final steps to dismantle the White Australia Policy by removing race as a factor in Australia’s immigration provisions. More so perhaps than ever before in Australian history, the law was being used as a positive force for social change.

The first anti-discrimination legislation in Australia was the *Prohibition of Discrimination Act 1966* (SA). The South Australian Parliament was quick to act as the *International Convention on the Elimination of All Forms of Racial Discrimination* had been unanimously adopted by the UN General Assembly less than a year earlier in December 1965 (106 votes to none). The need to guard against some of the evils of racial discrimination had long been recognised in South Australia, although tragically not acted upon in the colony’s early days. It is a little-known fact that the Letters Patent erecting and establishing the then province of South Australia in 1836 provided that nothing in the Letters Patent ‘shall affect or be construed to affect the rights of any Aboriginal Natives of the said Province to the actual occupation

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or enjoyment … of any Lands therein now actually occupied or enjoyed by such Natives …’26

In Lionel Murphy’s biography, author Jenny Hocking refers to a letter sent from Fred Hollows to Senator Murphy, then Commonwealth Attorney-General, describing Hollows’ visit to the small town of Enngonia, located 100 km north of Bourke and close to the New South Wales border with Queensland.27 On 9 November 1973, Hollows and his team arrived in Enngonia where he was carrying out a trachoma eradication program through the Bourke District Hospital. The only accommodation in Enngonia was the Oasis Hotel. On arriving, Hollows was approached by the licensee and told that the Aboriginal members of his party would not be served in the hotel’s bar and lounge area. If they required refreshments, he said, they must walk to the back of the hotel where they would be served through a small hatchery whilst remaining outside.

Refusing to remain at the hotel, Hollows wrote to Senator Murphy stating that the ‘discrimination makes my work both as an ophthalmologist to the total community and as a person especially interested in improving Aboriginal health very difficult’. Twelve days later, the Racial Discrimination Bill was introduced in the Australian Parliament which would make unlawful the very conduct employed by the licensee at the Oasis Hotel.

Nonetheless, at the time the legislation was seen by some as inadequate in addressing the roots of racism in Australian society. A commentator, writing when the Racial Discrimination Act 1975 (Cth) (‘the Act’) became law, observed that:

[d]iscrimination is not a mere growth upon the body politic which can be neatly removed by skilful legislative surgery. Rather, it is a symptom of an ill that is within that body, a manifestation of a state of ill-health which requires treatment as a whole.28

While it cannot be denied that the Act has not eradicated racial discrimination, to expect it to do so would be unrealistic. Nonetheless, as the Race Discrimination Commissioner wrote in reflections on the 40th anniversary of the Act: ‘While no law can ever eradicate the social evil of racism — no law can ever banish hatred, ignorance and arrogance — an instrument like the Racial Discrimination Act does make us stronger and more united.’29

The Act also heralded a new era for anti-discrimination protections with largely bipartisan support. In 1977 the Attorney-General, Bob Ellicott, introduced the Human Rights Commission Bill 1977 (Cth) and announced the intention to introduce Sex Discrimination legislation. Four years later in 1981, Senator Susan Ryan, the first female Senator for the Australian Capital Territory and first woman to hold a Cabinet post in a federal Labor Government, introduced a Sex Discrimination Bill as a private member’s Bill. That Bill was designed to give effect to Australia’s international obligations. There seems little doubt that Senator Ryan’s Bill was motivated in part by her own experience. Her teaching career was cut short when, after becoming engaged, she was told that she could not complete her studies and would have to repay her scholarship funds. Her male peers, however, were free to marry and continue their studies on full scholarships.

The road to erect these reforms was not always smooth. It was not until 1984 that Senator Ryan’s vision of a federal law rendering discrimination on the grounds of sex unlawful was realised, although such laws had existed earlier at state and territory level. The Racial Discrimination Act 1975 (Cth) barely survived a challenge to its constitutional validity in 1982 in the High Court. And there was a long and heated debate during 1983 over the Sex Discrimination Bill, with warnings of social disaster and an 80,000 person petition opposing the Bill. This suggests that laws such as these sought to shape, rather than necessarily to reflect, popular opinion at the time, capturing the aspirational values of a more equal and fair society.

The first major litigation under this suite of new laws was Ansett Transport Industries v Wardley (‘Ansett’), decided in 1980. The High Court held that Deborah Wardley’s application for employment as a trainee air pilot could not be rejected because of her gender. While the Airline Pilots Agreement was deemed to be an award under Commonwealth law and did not constrain the airline’s ability to choose its employees or terminate their employment, that did not exclude the operation of the Equal Opportunity Act 1977 (Vic). The High Court held that there was no inconsistency between the State and Commonwealth laws. Nonetheless, as Beth Gaze remarked on the 25th anniversary of the Sex Discrimination Act 1984 (Cth), the Ansett case illustrates all

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32 Burke (n 30).
35 Neil Rees, Katherine Lindsay and Simon Rice (n 34) 3.
too well the difference between a legal victory and broad social change, as female airline pilots are still significantly in the minority.

The limited capacity of law alone to effect social change was recognised when these laws were enacted. Consequently, education is one of the express functions of anti-discrimination laws. This function is clearly essential if the irrational and unconscious fears that drive racism are to be addressed. It is only with the elimination of such fears that an environment may be created in which mutual respect between people of different cultural and ethnic backgrounds can develop to the benefit of each of us and of society as a whole.

V CULTURAL DIVERSITY IN THE LEGAL PROFESSION AND THE JUDICIARY

Despite Australia’s diverse society, the Human Rights Commission recently reported that in corporate Australia, the ranks of senior leadership in ASX 200 companies were overwhelmingly dominated by those of Anglo-Celtic and European background, and that of 39 university vice-chancellors, only one is from a non-European background, while the others have an Anglo-Celtic or European background.

The legal profession fares little better. For example, a report prepared by the Asian Australian Lawyers Association in 2015 found that while Asian Australians comprise approximately 9.6% of Australia’s population, they account for only 3.1% of partners in law firms nationally and 1.6% of barristers.

As I explained in an article in the South Australian Law Society Bulletin on women in the courtroom, it is important that the increasingly culturally diverse nature of society finds reflection in the composition of the legal profession and ultimately in senior partners, senior appointments at the Bar, and judicial appointments:

40 Leading for Change Revisited (n 39) 10.
Seeking to achieve these goals is vital because it contributes to maintaining and promoting public confidence in the legal system generally and in the judiciary. Both the appearance of justice and its realisation are equally essential. People must feel confident that we have an independent Bar and an independent and impartial judiciary if they are to have confidence in bringing disputes to the courts for resolution, and in this diversity can play a significant role.

This doesn’t mean that our different cultural backgrounds or gender lead us to make different decisions. Ultimately as judges we are all constrained by proper judicial methods of reasoning. Nonetheless, our experiences help us all to appreciate the impact that our decisions may have on individuals and on society generally, and to understand how to make our processes fairer. Ideally, the legal system as a whole should be a microcosm of Australian society.42

These observations apply equally to court and registry staff, as it is necessary as an aspect of public confidence that institutions involved in the administration of justice reflect the composition of society.

To effect real change, therefore, a proactive approach is required. We need to be proactive in our desire to learn from diversity, and self-reflective about our biases and prejudices. In this, training and education remain pivotal, as the Human Rights Commission report, *Leading for Change*, recommends.43 We must also be aware of the prejudices that exist in the institutions and professions within which we work. For example, our workplaces too often reward leadership styles that may over-value self-promotion and assertiveness, while undervaluing or misinterpreting the deference and respect for seniority which is common in Asian leadership styles.44

### E  Looking Forward — Drawing Inspiration from the Past

In looking forward, I believe that we can draw inspiration from significant improvements in the participation of women in the Australian legal profession as evidence that the legal profession will adapt to reflect the diversity of Australian society. This is so even though there is some way yet to go in achieving gender equality within the legal profession.

The story of the Honourable Justice Mary Gaudron, the first woman to sit on the bench of the High Court, is one among others which has particularly inspired me. Despite the heights which her Honour achieved, in 1963 she was required to resign from her position with the Commonwealth Crown Solicitors’ Office when she

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43 *Leading for Change* (n 39) 3.

married. The *Public Service Act 1902* (Cth) deemed her as a female member of the public service to be retired upon her marriage.45

Upon graduating from Law School with a University Medal in Law, Justice Gaudron was unable initially to buy into chambers at the Bar on the basis of her gender,46 and when her Honour was appointed to the Commonwealth Conciliation and Arbitration Commission in 1974, the *Sydney Morning Herald* ran the headline: ‘The Law and the Laundry. Australia’s Youngest Judge Has No Time for the Ironing.’47

Overcoming all of these barriers and slights, her Honour had a brilliant career at the Bar followed by a brilliant career on the Bench. Her other achievements included her appointment as New South Wales Solicitor-General. Her Honour was not only the first woman in Australia to hold the office of Solicitor-General, but also the youngest person to do so.48

As Justice Margaret McMurdo, the former President of the Queensland Court of Appeal, remarked upon Justice Gaudron’s retirement, Justice Gaudron is ‘proof that no doors are permanently closed, even if sometimes they do not seem very open’.49

### VI Conclusion

The law does not present a perfect solution to the issue of discrimination in a culturally diverse society. Anti-discrimination laws can never alone eradicate discrimination. Education remains key, among other measures, to bring about change and to break down both conscious and unconscious biases.

Universities in particular provide a virtually unparalleled opportunity for people from culturally and linguistically diverse backgrounds to meet, to form friendships and professional associations, and to learn that the differences between us are less significant than what we share. We all have much to learn from each other. That learning is enhanced when the cultural diversity within society is reflected in the composition of the different communities within which we mix throughout our lives, both professionally and personally.

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48 Ibid 3.

49 Ibid 5.
The *Adelaide Law Review*, through its rigorous scholarship and by publishing articles highlighting issues facing culturally diverse groups such as Indigenous Australians, has made commendable progress in furthering this goal. I am confident that articles in the next 40 volumes of the *Review* will continue to expand upon this important contribution.
Brent Fisse*

PENAL DESIGNS AND CORPORATE CONDUCT:
TEST RESULTS FROM FAULT AND SANCTIONS
IN AUSTRALIAN CARTEL LAW

I Introduction

Several papers in the *Adelaide Law Review* in the 1970s, and much of my other research work in Adelaide and elsewhere, reflect the basic postulate that corporate criminal law and corporate civil penalties are unlikely to be effective unless they reflect the nature of corporate conduct. The present law in Australia, as in other jurisdictions, has yet to come fully to grips with that postulate. Many gaps remain to be surveyed, filled and built upon. The scope for further exploration, design, and construction is very large.

The present law has been much influenced by methodological individualism and anthropomorphism. Methodological individualism has it that all social action, including that of corporations, is to be explained in terms of the actions of individual persons. Thus, it has often been said that corporations don’t commit offences;

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people do. Anthropomorphism treats corporations as if they are akin to human persons (they are juristic persons), so that a ‘corporation is merely a legal fiction’. However, such slogans, and the methodological individualism and anthropomorphism on which they are based, misrepresent key features of corporate action and corporate responsibility. One key feature is corporate blameworthiness, which is not reducible simply to the blameworthiness of individual persons:

The fact is that organisations are blamed in their capacity as organisations for causing harm or taking risks in circumstances where they are expected to have acted otherwise. We often react to corporate offenders not merely as impersonal harm-producing forces but as responsible, blameworthy entities. When people blame corporations, they are not merely channelling aggression against the ox that gored. Nor are they pointing the finger only at individuals behind the corporate mantle. They are condemning the fact that the organisation either implemented a policy of non-compliance or failed to exercise its collective capacity to avoid the offence for which blame attaches.

The mistakes of methodological individualism and anthropomorphism need to be corrected by taking due account of the corporate features of corporate action and corporate responsibility.

Cartel conduct is a prime example of unlawful conduct committed on behalf of corporations, and has received considerable attention legislatively and in case law. However, Australian cartel law under the *Competition and Consumer Act 2010* (Cth) (‘CCA’) neglects the corporate condition in several fundamental respects. The first is that the fault element for corporate liability for a cartel offence is defined partly on the basis of attribution of a human representative’s state of mind, which is not the same as corporate fault. The second is that the criminal and civil sanctions used against corporate defendants are governed by an incentive theory of deterrence, not a theory that focusses on the corporate impacts that sanctions are supposed to have on corporate defendants. The discussion in Parts II and III below traces these failures and sketches what may be done to rectify them.

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7 Beaton-Wells and Fisse (n 2).
II CORPORATIONS AND FAULT IN AUSTRALIAN CARTEL LAW

Cartel offences were introduced in 2009 with much fanfare but scant attention to corporate fault. The rules under s 84 of the CCA, which attribute the conduct and states of mind of human representatives to a corporation, were extended to the cartel offences as well as to the civil cartel prohibitions. The principles of corporate liability under the Criminal Code Act 1995 (Cth) (‘Criminal Code’), which include several provisions geared to corporate fault, were excluded. No defence of corporate reasonable precautions was provided. The relevance or otherwise of corporate fault to prosecutorial discretion or determination of sentence was not addressed.

A Vicarious Responsibility under CCA s 84

The attribution rules under s 84 impose vicarious responsibility for cartel offences. Vicarious responsibility is questionable:

- The orthodox view is that criminal liability for serious offences requires blameworthiness. Vicarious responsibility is a species of strict responsibility; it is not contingent on organisational blameworthiness.

- Criminal liability based on blameworthiness is more likely to induce respect for the law and willingness to comply.

- If criminal liability can be imposed without fault, legislators may be reluctant to provide additional punitive sentencing options against corporate offenders.

- Unless criminal liability is fault-based, courts may be constrained from imposing sanctions of sufficient severity and deterrent capability.

Little weight was given to these considerations when the cartel offences were first enacted. Today, however, corporate criminal liability is exposed to keener scrutiny. Major corporations, including banks, have been prosecuted for cartel offences.

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8 Ibid 209–10 [7.1.1].
9 Criminal Code Act 1995 (Cth) ss 12.3(2)(c)–(d), (3).
10 Competition and Consumer Act 2010 (Cth) s 6AA(2); Russell Miller, Miller’s Annotated Competition and Consumer Act (Lawbook, 41st ed, 2019) 136. Miller misleadingly omits the effect of s 6AA(2).
11 Technically, ss 84(1)–(2) of the CCA make the state of mind and conduct of a director, employee, or agent the state of mind and conduct of the corporation: see Trade Practices Commission v Tubemakers Australia Ltd (1983) 47 ALR 719, 740 (Toohey J). However, the effect is to impose vicarious responsibility in the sense of strict responsibility for the state of mind or conduct of another. The term ‘vicarious responsibility’ is used here in the latter commonplace sense.
and may be expected to agitate against questionable liability rules.\textsuperscript{13} The recent \textit{Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry} has spurred widespread public debate about corporate misconduct and the standard of conduct expected of banks and other financial institutions.\textsuperscript{14} The Australian Competition and Consumer Commission (‘ACCC’) campaign for more severe penalties under the \textit{CCA} has sparked inquiry into whether hard-hitting sanctions for cartel offences should require corporate fault instead of merely vicarious responsibility.\textsuperscript{15}

**B Vicarious Responsibility and Corporate Fault under the Commonwealth Criminal Code**

The \textit{Criminal Code} provisions on corporate fault in Part 2.5\textsuperscript{16} avoid the extremes of the \textit{CCA} vicarious responsibility model under s 84 and the narrow \textit{Tesco Supermarkets Ltd v Nattrass} common law principle of corporate responsibility for the fault of a directing mind.\textsuperscript{17} Vicarious responsibility is limited to the physical elements of an offence.\textsuperscript{18} It is sufficient that the conduct is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of her or his employment, or within her or his actual or apparent authority. By contrast, s 84 of the \textit{CCA} imposes vicarious responsibility in relation to the fault elements as well as the physical elements of an offence. By way of further contrast, the \textit{Tesco} directing mind


\textsuperscript{14} \textit{Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry} (Final Report, February 2019) (‘Royal Commission’).


\textsuperscript{17} [1972] AC 153 (‘Tesco’). Under the \textit{Tesco} identification doctrine, the conduct and the state of mind of a director or other ‘directing mind’ of a corporation acting on behalf of the corporation are attributable to the corporation for the purpose of imposing corporate liability.

\textsuperscript{18} \textit{Criminal Code Act 1995} (Cth) s 12.2.
principle applies in relation to the physical elements as well as the fault elements of an offence.19

The fault element of an offence is attributable to a corporation on the basis that fault existed on the part of a ‘high managerial agent’.20 The concept of a ‘high managerial agent’ is broadly defined and is wider than the concept of a directing mind under the 
_Tesco_ principle. The managerial agent provision is a variant of the discredited 
_Tesco_ directing mind principle and suffers from much the same defects, especially undue narrowness and a failure to reflect the concept of corporate fault.21 However, where s 12.3(2)(b) applies, a defence of due diligence is available under s 12.3(3). This defence requires corporate due diligence and is based on the concept of corporate fault.

The fault element of an offence is also attributable to a corporation on the basis that the corporation had a culture that led to non-compliance or failed to create and maintain a corporate culture that required compliance with the relevant provision.22 The element of corporate culture roughly reflects the concept of corporate blameworthiness.

Why were the _Criminal Code_ provisions on corporate criminal liability excluded under the _CCA_? No official explanation has been given, but the main concern appears to be underreach of cartel and other criminal prohibitions under the _CCA_. The attribution of fault of the board of directors or a ‘managerial agent’ to a corporation under the _Criminal Code_ would not apply where the fault required for a cartel offence existed at a lower level within a corporation:

> Cartel offences are often committed by sales managers and others who may not be ‘high managerial agents’. The classic heavy electrical price-fixing conspiracies in the US in the late 1950s and early 1960s are a prime test case. Would the prosecutions against General Electric, Westinghouse and the other larger transformer

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21 Fisse, ‘Reconstructing Corporate Criminal Law’ (n 19) 1186–8.

22 _Criminal Code Act 1995_ (Cth) ss 12.3(2)(c)–(d). The term ‘corporate culture’ is defined in s 12.3(6) to mean ‘an attitude, policy, rule, course of conduct, or practice existing within the body corporate generally or on the part of the body corporate in which the relevant activities takes place.’
companies have succeeded if the DOJ [Department of Justice] had been required to establish liability under the Criminal Code provisions for corporate criminal responsibility? Considerable difficulty would have been encountered given that the companies assiduously blamed middle management for breaching the antitrust compliance policy that each company had in place. In particular, the companies would have answered that no high managerial agent was implicated in the price fixing.23

Another reason for excluding the Criminal Code provisions appears to be that the concept of ‘corporate culture’ in ss 12.3(2)(c) and (d) is unworkable:

The concept of a ‘corporate culture’ has yet to be tested and appears to require proof of conditions and attitudes within an organisation that go considerably beyond merely proving that the managers immediately involved in the cartel conduct acted with the requisite state of mind. Moreover, expert sociological evidence would seem relevant to prove or disprove the existence of a corporate culture. Given that usually there are many diverse cultures within a corporation, the concept of some homogenous corporate culture seems unworkable as a fault element. There is also the concern that ‘official’ corporate cultures typically are exhortatory and bear little resemblance to actual views, attitudes, habits and proclivities within organisations.24

C Better Approaches?

Given this experience in the testing ground of Australian cartel law, the Criminal Code principles relating to corporate fault invite revision. There is a case for a fundamental revision that redefines corporate criminal liability in terms of: failure to take reasonable proactive steps to prevent the commission of an offence by officers, employees, or agents;25 and failure to take reasonable reactive steps to remedy the harm caused by the unlawful conduct and to guard against future unlawful conduct of that type.26

23 Beaton-Wells and Fisse (n 2) 232.
26 On the principle of ‘reactive corporate fault’, see Fisse, ‘Reconstructing Corporate Criminal Law’ (n 19), 1183–213; Fisse and Braithwaite, Corporations, Crime and Accountability (n 6) 210–3.
A more modest proposal may be advanced for improving the law in the interim. The first step would be to repeal the concept of a ‘managerial agent’ in s 12.3(2)(b) and to redefine ss 12.3(2)(b)–(d) in terms of fault on the part of an officer, employee or agent acting within the scope of their actual or apparent authority. This attribution rule would be subject to the defence of corporate due diligence under s 12.3(3) or, better still, a defence of corporate reasonable precautions and due diligence.

Secondly, the concept of corporate culture in s 12.3(2)(c) and (d) should be replaced by the concept of a corporate failure to take reasonable corporate precautions and exercise due diligence to prevent the conduct charged. That concept is plainly a concept of corporate fault: the standard of care required is not that of any given individual but that expected of a corporation in the position of the defendant corporation. One model is s 65 of the Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth). Section 65, in relevant part, provides as follows:

(1) Where, in proceedings for an offence against this Act, it is necessary to establish the state of mind of a body corporate in relation to particular conduct, it is sufficient to show:

(a) that the conduct was engaged in by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority; and

(b) that the director, servant or agent had the state of mind.

(2) Any conduct engaged in on behalf of the body corporate by a director, servant or agent of the body corporate within the scope of his or her actual or apparent authority shall be taken, for the purposes of a prosecution for an offence against this Act, to have been engaged in also by the body corporate unless the body corporate establishes that the body corporate took reasonable precautions and exercised due diligence to avoid the conduct.

If s 12.3 of the Criminal Code provisions were revised in the way proposed above, it is difficult to see why s 12.3 should not apply to cartel offences under the CCA. Alternatively, s 84 of the CCA could be amended by making the application of s 84 to the cartel offences subject to a defence of reasonable corporate precautions and due diligence.

The potential application of a defence of reasonable corporate precautions and due diligence to the cartel offences is discussed in detail elsewhere. It may be contended that a defence of reasonable corporate precautions and due diligence

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27 There are numerous similar examples in Commonwealth legislation including s 152EO of the CCA.
28 Beaton-Wells and Fisse (n 2) 234–5 [7.4.5].
would be too difficult or too time-consuming for juries to assess in the context of the cartel offences. Two responses may be given.

First, the Royal Commission has aroused awareness. The day to day revelations about rank misconduct by pillars of business, and the relentless media attention devoted to them, have opened up the internal workings of corporations to public scrutiny. The focus of the Royal Commission on what the institutions under the spotlight proposed to do to prevent misconduct and to remedy the harm caused, coupled with the extensive media exposure, has done much to remind the community about bad organisation behaviour and the importance of internal organisational controls.

Second, criminal liability is a special form of social control that is subject to various constraints designed to reinforce that it is special and not merely civil penal liability. 29 One is that liability be proven beyond a reasonable doubt. Another is that liability for serious offences requires fault. Some regulators and politicians want to deploy the criminal law regardless of these and other constraints. They need to be called out for being unprincipled and cavalier. The cartel offences were introduced in 2009 without adequately discriminating between criminal liability and liability for civil penalties. The fault element required for the cartel offences verged on token 30 and no effort was made to create a distinctive regime of criminal sanctions. 31

III Corporations and Sanctions in Australian Cartel Law

Criminal and civil sanctions against corporate defendants in Australian cartel law are governed by an incentive theory of deterrence that glosses over and dodges the limitations of fines and monetary penalties against corporations. 32 The discussion below sets out a different approach that focuses on achieving corporate deterrent impacts that are desired, and avoiding or reducing corporate impacts that are not.

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30 Beaton-Wells and Fisse (n 2) 28.
31 Ibid ch 11.
32 See ibid, which sets out the sentence and penalty options and the serious flaws in the principles governing their use against corporate defendants in Australian law.
A Limitations of Monetary Sanctions against Corporations

The limitations of fines and monetary penalties against corporations are generally known. They have been recognised by the Australian Law Reform Commission (‘ALRC’) in several reports. Three major limitations are:

1. Monetary sanctions are an indirect method of achieving sanctioning impacts on managers and other personnel in a position to control corporate behaviour. However, they may have little impact on those in a position of control. Instead, they may inflict substantial loss on shareholders. Alternatively or additionally, they may have adverse spillover effects on employees, consumers, and other innocent bystanders. The worst case scenario for spillover effects on consumers is where all members of an oligopoly are fined for their participation in a cartel, have sufficient market power to be able to pass the fines on to their customers and are able to rely on


34 For these and other limitations: see Brent Fisse, ‘Cartel Offences and Non-Monetary Punishment: The Punitive Injunction as a Sanction against Corporations’ in Caron Beaton-Wells and Ariel Ezrachi (eds), Criminalising Cartels: Critical Studies of an International Regulatory Movement (Hart Publishing, 2011) ch 14; Christopher Hodges and Ruth Steinholtz, Ethical Business Practice and Regulation: A Behavioural and Values-Based Approach to Compliance and Enforcement (Bloomsbury, 2017) ch 3.


some form of tacit collusion to coordinate future prices. In theory, a fine is a sunk cost and will not be passed on to consumers: rational economic actors look to what they should do in future and do not try to recover sunk costs. However, whether or not or when corporations treat fines as sunk costs is an empirical question. Moreover, if fines are treated as sunk costs, they emerge as a relatively weak form of deterrent punishment.

2) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by taking internal disciplinary action against those implicated in the offending conduct. The cheapest and least embarrassing response may be simply to write a cheque in payment of the fine and continue with business as usual. Corporations have incentives not to undertake extensive disciplinary action. A disciplinary program may be disruptive, embarrassing for those exercising managerial control, encouraging for whistle-blowers, or hazardous in civil litigation against the company or its officers.

3) Monetary sanctions, no matter how large, do not ensure that corporate offenders will respond by revising their internal operating procedures in such a way as adequately to guard against re-offending. The response may be to treat the offence as an isolated incident and simply to write a cheque in payment of the fine, hoping or expecting that the incident will not be repeated.

B Incentive Theory of Deterrence

The limitations of monetary sanctions do not seem to be recognised by the incentive theory of deterrence. For example, they are not discussed in the OECD Report, Pecuniary Penalties for Competition Law Infringements in Australia that was commissioned by the ACCC in an apparent lobbying exercise. The discussion in that report accentuates the positives of monetary penalties but does not articulate their

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38 However, there are many reasons why corporations may not pass on fines, including the risk of losing market share and the 'stickiness' of prices. On the latter, see generally Alan Blinder et al, Asking About Prices: A New Approach to Understanding Price Stickiness (Russell Sage Foundation, 1998).


41 See Stone (n 2) ch 6.

shortcomings. The OECD Report makes no mention of the ALRC Reports on the topic. Unless and until the limitations of monetary sanctions against corporations are recognised, attempts to improve the design and application of monetary penalties are unlikely to be made or will suffer from lack of direction.

The OECD Report does not explore all of the deterrent impacts that monetary penalties against corporations have or could impel. The Report assumes that imposing a large enough monetary penalty on a corporation will achieve deterrence, by giving the corporation a sufficient incentive to refrain from similar contravening conduct in the future. This incentive theory is consistent with optimal (or suboptimal) economic theories of deterrence. The incentive theory has much to commend it. Financial profit and loss are an essential means of propulsion in commerce, and monetary sanctions are geared to that engine. And monetary incentives can be deployed without intervention in the internal affairs of corporations. However, the incentive theory is not the only theory of monetary sanctions against corporations that is relevant and significant. I will now outline the deterrent impacts theory.

C Deterrent Impacts Theory

The deterrent impacts theory first specifies the main intended deterrent impacts of monetary penalties:

1. a monetary penalty on a corporation is to be felt by management with limited pass-through to shareholders or consumers;
2. to the extent possible, those implicated in a contravention are to be held accountable; and
3. internal operating procedures (including compliance programs) are to be reviewed and revised to guard against similar contravention in future.

Secondly, the deterrent impacts theory requires that

1. monetary penalties be used in ways calculated to reinforce and achieve the intended impacts specified above; and

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The deterrent impacts theory is not based on neoclassical economic theory, nor on principal-agent theory. It does not assume a rational human actor or rational unitary actor model of corporate behaviour. Consistent with theories of organisational behaviour, the deterrent impacts theory recognises that threats or incentives directed to corporations do not operate in the same way as threats or incentives directed to individuals. Deterrent signals or incentives are received and processed by a corporate system for receiving and managing external information. Managers and employees participate in that management process but the output is not merely self-restraint or self-activation — the input of deterrent signals or incentives is fed into the internal controls of the organisation. Those internal controls include policies, procedures and processes. If the external threat or incentive is to be heeded, those policies, procedures or processes need to be applied and, if necessary, revised.

A full account of the implications of the deterrent impacts theory for the design and application of monetary sanctions against corporations is provided elsewhere. These are some basic points:

- The deterrent impacts theory complements the incentive theory — pluralism is called for, not one-eyed preoccupation with economic incentive.
- Enforced self-regulation could be used to induce a corporate defendant to come up with ways of making management feel the impact of a monetary penalty and limiting the pass-through of monetary penalties to shareholders or consumers.

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46 John Braithwaite, ‘Enforced Self-Regulation: A New Strategy for Corporate Crime Control’ (1982) 80(7) Michigan Law Review 1466. Enforced self-regulation is the strategy of allowing corporations to regulate their own conduct but insisting that self-regulation does in fact occur. Compliance is more likely to ensue if nurtured in a spirit of cooperation (enforcement policies should avert organised business cultures of resistance). Efficiency considerations are also important and require that intervention in the internal affairs of corporations be kept to a minimum. Another precept of enforced self-regulation is the utilitarian principle of least drastic means; more drastic means are available but are used primarily as a contingent threat.

47 See also Beaton-Wells and Fisse (n 2) 425 n 14.


49 Fisse and Braithwaite, Corporations, Crime and Accountability (n 6) 73–4; Timothy Malloy, ‘Regulating by Incentives: Myths, Models, and Micromarkets’ (2002) 80(3) Texas Law Review 531.

50 Fisse, ‘Reconstructing Corporate Criminal Law’ (n 19) 1159–66.

51 Fisse, ‘Taking the Deterrent Impacts of Fines and Monetary Penalties Against Corporations Seriously’ (n 44).

52 See also John Braithwaite, ‘The Limits of Economism in Controlling Harmful Corporate Conduct’ (1982) 16(3) Law and Society Review 481.
The extent and quality of the corporation’s proposal would be taken into account when determining the amount of the penalty. A null or anaemic response should be treated as an aggravating factor. There is no need to go to the extent of imposing legislative requirements that corporations recover a minimum specified percentage of a monetary penalty from management by means of levy or denial of bonus, or that they absorb a penalty and not pass it on to consumers.53

- Enforced self-regulation could be used in much the same way to induce a corporate defendant to prepare a self-investigative report detailing the internal disciplinary steps that have been taken to impose individual accountability on those who were concerned in the contravention or who were in a position to have done more to prevent it. This approach is set out in detail elsewhere, with safeguards against scapegoating and corporate cheating.54

- The same applies in relation to other internal controls including compliance programs, whistleblowing procedures, and incident reporting procedures.55

D Deterrent Impacts Theory and Non-Monetary Sanctions Against Corporations

Another dimension of the deterrent impacts theory is that deterrent impacts on corporations depend not only on financial incentives but also non-monetary inducements.

Non-monetary sanctions against corporations are available under the CCA.56 Punitive adverse publicity orders may be made under s 86D. Non-punitive and non-monetary orders may be made under s 86C including:

- information disclosure orders;
- advertisement publication orders;
- community service orders; and
- probation orders.

54 Fisse and Braithwaite, Corporations, Crime and Accountability (n 6) chs 5–6.
55 See also Beaton-Wells and Fisse (n 2) ch 12.
Section 86C is the leading example in Australia of an attempt to provide for non-monetary sanctions against corporations. However, it is a flawed model. Section 86C has a number of limitations, which I will now discuss.  

First, the orders that may be made under s 86C(2) are explicitly non-punitive and hence cannot be used as a punitive sanction. That limit is highly questionable given the limitations of monetary sanctions and the deterrent value of non-monetary sanctions. It is also difficult to reconcile with the introduction of cartel offences in 2009. For example, a punitive community service order would be an appropriate and superior alternative to imposing a monetary penalty or a fine for cartel conduct in some situations.

Secondly, the court is unlikely to impose a punitive community service order unless given the power expressly to do so. Section 86C should be amended accordingly, with additional examples. A further weakness of s 86C is that the power to make an order under the section depends on application by the ACCC or, in the context of cartel offences, the Commonwealth Director of Public Prosecutions. There is no good reason why the discretion of the courts when sentencing corporations or making orders in relation to civil contraventions should be fettered in such a way.

Thirdly, the examples of probation orders in s 86C do not include an order requiring a corporate defendant to prepare and provide an internal discipline report detailing who was implicated in the corporate contravening conduct and what internal disciplinary measures have been taken against them in order to prevent similar conduct in future. Individual accountability is a fundamental pillar of social control but is imposed in enforcement actions by the ACCC to a limited and selective extent. Internal discipline orders are a means of making individual accountability count in cases where, as is common, few of the individuals implicated in contravening conduct can be proceeded against and held liable under ss 76 or 79 of the CCA. Section 86C should provide expressly for internal discipline orders.

57 Beaton-Wells and Fisse (n 2) 453–4 [11.3.5].
58 See Fisse ‘Cartel Offences and Non-Monetary Punishment’ (n 34) 315-17. See also Australian Law Reform Commission, Compliance with the Trade Practices Act 1974 (n 33) [10.14], [10.17] (recommending that community service orders be introduced as a penalty, not merely as a remedy).
59 The question does not appear to have been on the drawing board of the architects of the cartel offences: see Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth) 82–83 [6.14]–[6.15].
The concept of redress facilitation is also reflected obliquely and inadequately by s 86C in its current form. Information disclosure orders and advertisement publication orders may be used to facilitate redress but these represent only two such forms of redress facilitation. The potential of redress facilitation as a sanction is unachievable unless a wider range of orders are covered and authorised by the section. This includes orders to

(a) disclose information about the circumstances of the contravention, the nature of the loss likely to have been caused and the persons or classes of persons likely to have incurred the loss;

(b) give notice to persons who may have suffered or may suffer loss as a result of corporate wrongdoing;

(c) cooperate with someone acting on behalf of victims by making employees available for interview, waiving confidentiality obligations, and providing documents and data and explanations of them; and

(d) establish a collective redress scheme.

Further, it has been held in several cases that there is no power under s 86C to require that a compliance program be independently audited.62 This is cramped and unsatisfactory. Independent auditing is often required in undertakings under s 87B as a safeguard against corporate cheating or laxity. Section 86C should be amended to include the power to require independent auditing as part of an order or consequential order under the section.

Section 86C also leaves courts in the dark about the factual basis of sentencing, assessment of penalty or design of remedy. Courts should have the power to require a corporate defendant to provide a detailed report setting out what steps have been taken by the corporation since the contravention:

(1) to improve its internal controls and to discipline the persons implicated in the contravention; and

(2) to compensate victims or to facilitate the compensation of victims.

Proposed amendments to s 86C to overcome the limitations indicated above are detailed in another paper.63

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Punitive injunctions have been proposed by the author elsewhere. The punitive injunction is a punitive variant of the mandatory civil injunction or a corporate probationary order. It is intended to serve as a sanction against corporations for serious offences and serious civil contraventions without going to the extremes of disqualification from conducting business, or dissolution. The punitive element is to require a corporate offender to act in a demanding way that may go beyond the limits of remedial action. The demanding response required is non-financial in terms of its direct impact within a corporation. The punitive effect sought to be achieved is to produce a positive regulatory outcome. The main kinds of positive regulatory outcome sought to be achieved in the context of cartel conduct are

1. the imposition of internal accountability for the cartel offence or contravention;
2. the revision of organisational precautions against future possible cartel offences or contraventions; and
3. the facilitation of civil redress to the victims of a cartel offence or contravention.

### IV Conclusion

Corporate criminal and civil penalty liability have developed much under the influence of methodological individualism and anthropomorphism. This is evident in Australian cartel law, perhaps the main arena where corporate issues of penal liability have been tested in Australia. Methodological individualism and anthropomorphism have obscured the implications of the corporateness of corporate conduct. As a result, the present law continues to have no coherent and workable concept of corporate fault. Nor does it have a clear and cogent sense of the deterrent impacts that need to be achieved by sanctions against corporations. Better approaches are entirely possible and long overdue. Doubtless the *Adelaide Law Review* will be receptive, as ever, to explorations of constructive solutions.

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64 See Fisse, ‘Cartel Offences and Non-Monetary Punishment’ (n 34).
65 A review by the ALRC into Australia’s corporate criminal responsibility regime was announced on 10 April 2019; see ALRC, ‘Review into Australia’s Corporate Criminal Responsibility Regime (Webpage, 10 April 2019)’ <https://www.alrc.gov.au/inquiries/review-australias-corporate-criminal-responsibility-regime>. The report is due on 30 April 2020.
ORDINARY CORPORATE VICES
AND THE FAILURE OF LAW

‘[T]hey did because they could’: Kenneth Hayne

I INTRODUCTION

This paper had its beginning in an unpublished paper I gave more than 20 years ago. I was looking at the problem of corporate governance and expectation gaps. My particular focus was the difficulty, in the context of corporate governance principles, of legislating in such a way that ethical considerations would become part of the mainstream of corporate decision-making. The examples I used to illustrate the problem were drawn from the behaviour of Australian banks. One can ask, has the world changed at all?

Given the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (‘Banking Royal Commission’) exposing the recent, and ongoing, misdeeds of our large banks, it seems an opportune time to re-examine the issue and the question of why such large and prestigious institutions fall so short of community expectations. Is there any way to better align the behaviour of these institutions with community expectations? What can our corporate governance framework do to curb or contain the ease with which corporate actors adopt what is essentially anti-social behaviour? How did we end up where we are?

My principal conclusion is that much of our corporate law historically, and currently, supports ordinary corporate vices, and only discourages bad conduct when it becomes extreme. This failure of law to restrain anti-social behaviour by our major corporate players needs attention. My comments will be brief, lacking any detailed description of specific case histories. However, there is no shortage of examples to be found in the Final Report of the Banking Royal Commission. The ‘fees for no service’ scandal comes easily to mind. That scandal is already costing hundreds of millions of dollars in remediation of fees wrongly paid to the major banks.

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1 Observation of Commissioner Kenneth Hayne in the Introduction to his Final Report on the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry: Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Final Report, February 2019) vol 1, 2 (‘Banking Royal Commission Final Report’).

2 Ibid 136.
The paper is divided into three parts: (1) a description of ordinary corporate vices; (2) a few observations on corporate theory and why these vices sit easily within the framework of corporate legal principles; and (3) a few suggested legal reforms to corporate governance principles that could help reset the starting point for a change in corporate behaviour.

In this discussion I am using the term ‘corporate governance’ rather than ‘corporate law’ because it connotes the overall approach to the enterprise’s activity and decision-making framework, rather than the narrower and somewhat unfortunate ‘race to the bottom’ suggestion of minimal compliance and legal prescription that ‘corporate law’ describes. It is true that ‘corporate governance’ is a vague term. But it derives much of its charm from that vagueness. For the purposes of this paper I would describe ‘corporate governance’ as those principles which determine the structure and standards applied to corporate decision-making activity. In particular, I am concerned with how to better incorporate ethical and social considerations regarding conduct into principles of corporate governance. I hope to avoid the cynical view that ‘corporate ethics’ are to ethics what ‘corporate culture’ is to culture.3

My purpose in focusing on vices (rather than virtues) is an attempt to identify and reframe my questions in order to understand more precisely what it is that leads to negative corporate behaviour. That may put us in a better position to define what we mean when we talk about ethics in a corporate context. For example, greed may not be good but is it illegal? And, if it is illegal, when? People may expect better behaviour from their corporations, but do they have a right to it? What does it mean to say something is bad, or unfair, (as a matter of ethical judgment) as opposed to what it means to say something is unlawful (as a matter of legal judgment)? Have we drawn the lines correctly? Serious wrongdoing will always be unjust and almost always illegal. But to what extent should the law try to control behaviour just below the legal bar? Who should bear the responsibility for the ethical stance of a corporation and how should that responsibility be articulated?

A Corporate Ethics

In discussing ‘corporate ethics’, I will concentrate on vices commonly identified with corporations or corporate culture rather than vices identified with particular individuals such as managers and other employees (although agency law may have something to say there). This permits me to narrow my consideration from business ethics generally to ‘corporate ethics’ in particular, if, indeed, that can be done.

There are serious theoretical problems with the path I am taking. For one thing, corporations may be legal persons but they are not generally considered to be moral agents. Popes have excommunicated corporations and kings have charged them with treason. But we are all familiar with the observation that a corporation has ‘no soul

to damn’, and ‘no body to kick’. How can something which isn’t a moral agent have ethics of any kind? Yet, we know that despite this theoretical objection, empirical studies have suggested again and again that individuals do act differently within a corporation than they do ‘on their own’. And, that difference is not always for the better.

II  ORDINARY CORPORATE VICES

What I am calling ordinary corporate vice includes conduct that is considered normal but which we all agree is bad, or at least sub-standard, even though it may or may not be so bad as to be illegal. This includes conduct which strikes one as unethical, anti-social or both. I am going to use an example from 1995, which is when I was first considering this problem. It is something of a prototype or precursor to the recent fees for no service example investigated by the Banking Royal Commission during the past year, although the dollars involved were much less. It is also an example of how long the fees problem has been around.

In January 1995, Westpac publicly apologised to 9,000 customers used in a secret trial of banking fees. Certain customers were told in October 1994 that they would be charged $5 per month for accounts with less than $1,500. The customers were not told that this was a test to see if ‘low account customers’ would accept higher fees (the fee was three times the normal fee). Nor were they told that the test was only being conducted on customers in the Newcastle and Hunter Valley regions of New South Wales. In other words the bank did not lie but it did not ‘tell all’.

When the test came to light there was a public outcry. Westpac defended the test but also engaged in ‘damage control’. It apologised to the customers; stated that it would refund the excess fees charged; and promised it would give those customers a full year free of fees on their savings accounts. The last gesture was reported to involve a projected cost to the bank of more than $400,000 in foregone income.

What was wrong with what Westpac did? It was clearly unfair to treat different customers differently. But banks do that all the time. The Bank defended their actions by saying that it had to recover costs associated with low balance accounts. After all, corporations are supposed to make a profit. But only the fee is relevant to profit, not the non-disclosure of the marketing trial. Other reactions to what the Bank had done were not so kind. Interestingly they characterised what the Bank did in different ways, but all of them bad. National Australia Bank, for example, said it would never attempt a secret trial because that sort of thing would not suit their values or style of management. In sum, support for the Westpac fee trial was thin on the ground, although one newspaper columnist pointed out that banks do not have to be universally loved.

If one sorts out reactions to how the Bank action was described, a list of typical corporate bad behaviour results:

(a) deception (lying, hypocrisy, dishonesty, non-disclosure, misleading statements or conduct, obfuscation, manipulation);
(b) greed (usury, intemperance, overreaching, meanness);

(c) abuse of power (arrogance, misuse of power, misuse of information, manipulation, intimidation, domination, oppression);

(d) disloyalty (conflicts of interest, untrustworthiness, taking advantage, cheating, betrayal);

(e) lack of diligence (laziness, apathy, negligence, inefficiency);

(f) recklessness (carelessness, rashness, inattentiveness, negligence); and

(g) poor citizenship (social irresponsibility, discrimination, disrespect, wastefulness).

A Deception (Lying, Hypocrisy, Dishonesty, Non-Disclosure, Misleading Statements or Conduct, Obfuscation, Manipulation)

Deception would get my vote for the vice that people associate most with corporations. Not deception on a grand scale — although that does happen — but more commonly deception on a minor but all-pervasive scale. Corporations are thought to lie about everything from how good their products are to how great their profits are, or whether indeed they are making a profit. Deception includes misleading statements and misleading conduct as well as failure to disclose relevant information.

Take the Westpac example: it is clear that many who commented on the situation thought the bank was not only lying about the trial but also the need to recover costs associated with low balance accounts. This is not surprising. At the Westpac Annual General Meeting, where the Chairman of Westpac claimed the fee trial was ethical, the bank also outlined a plan to double Westpac’s profit thereby joining an elite club of Australian publicly-listed companies earning a net profit of $1 billion or more. How is the low account holder complaining about a $5 fee expected to reconcile those two statements? A similar divergence between what was being said and what was being done appears in the Report of the Banking Royal Commission, although this time involving National Australia Bank and causing the Commissioner to question the credibility of two of NAB’s top executives.4 Is there any way the law can or should deal with this problem?

Of all the vices I have considered I would say the law tries the hardest when it comes to deception. There are all kinds of regulations in the Corporations Act 2001 (Cth) and in other statutes about what a corporation can say and when it can say it. But the regulation of low-level lying, mild misrepresentation or silence, overly enthusiastic marketing and chronic optimism often proves too difficult. For example, one can be lied to because the right question is asked of the wrong person at the wrong time. Furthermore, it is difficult to trace the threads of responsibility in many corporate

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4 Banking Royal Commission Final Report (n 1) 411.
situations. In the Westpac example, we do not know who actually authorised the trial of higher fees.

**B Greed (Usury, Intemperance, Overreaching, Meanness)**

Greed deserves equal prominence with deception as a major corporate vice. My impression is that most people think of corporations as both greedy and mean at the same time, a view attributable to the fact that one person’s gain is usually another’s loss. When a corporation fails it is often said that greed has been the root problem. But such situations generally involve personal greed amounting to fraud and that kind of greed is illegal. What is more difficult is ordinary corporate greed that is often described by the corporation as pursuit of the profit objective. In the Westpac fee trial, the bank’s defence is an example of that kind of unfair treatment and low-level meanness dressed up as pursuit of profit. With fees, for example, the relationship of a fee to the actual cost of providing a service is often an accounting sleight of hand, or simply what the market will bear.

In many ways corporate law supports greed. Greed is merely the extreme of a fundamental building block of capitalism: the profit incentive. What is often referred to as the economic objective of the corporation. It is difficult to encourage the production of wealth while discouraging the accumulation of it. The classic formulations of directors’ duties would support the Westpac profit plan despite new fees, branch closures, and the other restructuring and rationalisations that resulted.

**C Abuse of Power (Arrogance, Misuse of Power, Manipulation, Intimidation, Domination, Oppression)**

Abuse or misuse of power is a frequent complaint about corporations. A corporation can have an unfair advantage over an ordinary person. It is often both big and anonymous. It will usually have more money and more resources. And, the conclusion is often as the Banking Royal Commission Report opined: ‘entities and individuals acted in the ways they did because they could’.\(^5\) This is especially true in the area of fees. Fees, often hefty, are charged for everything in this era of ‘user pays’ and they may not have any relationship to the actual cost of the service. Also, while it is usually easy to see which individuals or groups are being dominated, the question of who within the corporation is responsible for the misuse of power is not so easy. Have you ever tried to complain to a large corporation about something? It is a kind of exquisite torture. And, if you think a fee is excessive, there really isn’t anything you can do about it.

**D Disloyalty (Conflicts of Interest, Self-Indulgence, Untrustworthiness, Taking Advantage, Cheating, Betrayal)**

Corporations are generally seen as being loyal only to their own enterprise. The basic rules on conflicts of interest are ignored or buried under and between layers

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\(^5\) *Banking Royal Commission Final Report* (n 1) 2.
of corporate activity. Loyalty is expected of employees but loyalty to employees is not part of the dialogue. When corporations do talk of loyalty it is loyalty to the corporate objective. Such loyalty is promoted by the corporations law. But it can be overdone. The need for whistle-blower legislation is itself a result of too much blind loyalty. And, what about loyalties beyond the corporation? For example, in the Westpac situation, loyalty to the customer was an issue in the complaints by those outside the bank. However, I should point out that despite community expectations, loyalty to customers or employees is not supported by corporate law except when it is aligned with the best interests of the corporation or because the corporation is acting as a fiduciary. ‘Wider community responsibilities’ as such have never been part of Australian corporate law. And the concept of loyalty has been relegated to a description of programmes that award free air flights or free cups of coffee.

E Lack of Diligence (Laziness, Apathy, Negligence, Inefficiency)

Corporations are often thought to be complacent, lazy and very, very slow when it suits them. The debate about bank fees can be characterised as a debate about the nature of the banking business. Are banks supposed to earn a profit by efficiently managing your money as opposed to simply charging fees? Lack of diligence is an easy vice to understand in terms of corporations because of the collective nature of the corporation. And the size and bureaucracy of large corporations are often cited in defence of slowness to act and other inefficiencies. If several individuals are responsible for a given task, they will feel personally less responsible than they would if they were the only one responsible or if they were one of two responsible. The vicious tendency of members of a large entity is to let someone else do it, or at least to hope someone else will do it. The examples of slowness in fixing mistakes and repaying improper fees and charges that came to light in the course of the Banking Royal Commission are examples of how this vice compounds others. The banks have never been quick to refund improper charges or fees. Perhaps the banks should be asked to make such reimbursements with interest at their current credit card rate.

F Recklessness (Carelessness, Rashness, Inattentiveness, Negligence)

Recklessness can be an aspect of laziness, but not always. Sometimes it appears as an extreme manifestation of competition and pursuit of profit. Trevor Sykes, in his book on Australian corporate collapses of the 1980s, singles out the banking community as one of the watchdogs that did not bark. He details how enormous deals were done with amazing speed. This tendency to rush deals through without proper risk assessments has been an aspect of many deals investigated by the Banking Royal Commission. Recklessness and an illegal lack of due care are not necessarily the same, but as a matter of corporate practice one often bleeds into the other. Again, one has to recognise that competition and pursuit of profit are both supported and encouraged by our corporate law system.

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Corporations are routinely charged with being poor citizens. More often than not, the complaint will have something to do with perceived social irresponsibility or discrimination. Corporations pollute; they make dangerous or shoddy products; they try to influence public debate and political action; they unfairly discriminate; they are wasteful; and they only consider short-term results. Of course, individuals do these things as well. And, there are some laws that prohibit particular instances of poor citizenship, like polluting, whether the polluter is a person or corporation. But, there are no laws requiring anyone to exercise his or her citizenship in a particular way. There is, however, a difference between an individual and a corporation because of the corporation’s greater ability to do public harm, and its ability to dominate in the political arena. It is also the case that a corporation holds a franchise from the public and should therefore have enhanced accountability to the public due to its quasi-public persona.

III Problems with Corporate Theory

In a famous article about law reviews written in 1936, Fred Rodell wrote that there are two problems with almost all legal writing: one is its form, the other is its content. ‘That’, he continued, ‘about covers the ground’. While his observation is not true of this law review, the same observation can be made about corporate theory. There are two problems. One problem is the corporate form and the other is regulatory content; and again, that about sums it up.

A The Corporate Form

While the corporation is deemed to be a legal person, it is not a natural person, it is in fact a collective. This means that you have a fictitious person that has no moral agency to whom we wish to ascribe responsibility and blame for vices that are collective vices. The collective nature of the entity and the collective nature of the vices make ordinary ethical analysis problematic. Ethical analysis usually requires the examination of motive and intention. This is difficult when many people are involved. It is also the case that in corporations there are various levels of actors — from the corporate entity itself to official organs or offices to individual moral actors (real people). And outside the corporation there can be any number of related parties and intermediaries, many of whom will be other corporations or corporate groups.

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Whose intention in such cases is the operative intention and operative responsibility? One is left looking for a directing mind or principal decision-maker or some other construct to which one can attribute intention. This is not as easy as it may seem. Yet, without intention it is hard to ascribe moral culpability (or criminal mens rea for that matter). Think of how many times during the Banking Royal Commission you heard the phrases, ‘I don’t know’, ‘I don’t remember’, ‘I don’t know the details’, that ‘wasn’t my area of responsibility’ or ‘someone else was in charge of that service’. We have to find better ways of dealing with the problem of corporate intent.

A further problem with the corporation as a legal person is that the corporate entity has never been viewed as having any citizenship or social responsibility beyond obeying the law. This is despite the fact that all corporations have a franchise and privilege from the state to act as legal persons and to enjoy the benefits of legal personhood. Also, to the extent that corporations themselves wish to contribute to the community, there is an inbuilt tension with their legal objective to maximise profit for their shareholders.

Lastly, in corporate theory it is the shareholders who are the gatekeepers. They are ultimately responsible for the good governance of the corporation. And, indeed, as the owners, they have the most to lose when things go very wrong. But, as we all know, in the modern large corporation they are often the last to know about corporate misbehaviour. This is particularly true with the widespread use of intermediaries (agents, brokers, contractors etc) to perform every day corporate activities.

B Corporate Law Content

We need to refocus the content of the corporations law. It is surprising that ordinary corporate vice and anti-social behaviour are often supported to some extent by the law. Of the seven vices I mentioned, deception, greed, disloyalty and poor citizenship are all at least indirectly supported by traditional concepts of corporate law theory such as the profit objective. Even if you disagree that the law tacitly supports ordinary vices, you would have to admit that in many areas, such as good citizenship, the law gives no support for what is generally perceived as positive social behaviour. We need to take steps to rebalance the moral imperatives of our corporate law.

We also need to simplify and clarify our law. It is much too long. This has been tried before but must be revisited. A law that is less complex is also easier to enforce. One of the recommendations of the Banking Royal Commission is to simplify the law governing financial services so that its intent is met. It is the case that the entire corporations law also needs simplification so that the law’s unifying and informing principles are more readily recognisable. As it is, one cannot see the forest for the trees.

Flexibility has also been damaged by the exhaustingly prescriptive content of the corporations law. Much of the corporations law can be described as reactive legislation.

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9 Banking Royal Commission Final Report (n 1) pt 1.4.1.
That is, regulation created to deal with a particular problem. Reactive legislation is the reason Australia has a corporations law running to more than 1,500 sections, many with multiple sub-sections. This kind of regulation is typically not flexible enough to deal with changing corporate practice. This magic pudding of legal provisions makes the law both impenetrable and rigid. That is not an optimal combination. We can do better.

IV Revising Corporate Jurisprudence

With the above observations in mind, what can we say about the reframing of corporate governance principles? What can we do in terms of improving corporate behaviour and closing expectation gaps? How can we draft standards that are clear, flexible and promote positive behaviour?

First, we have to look closely at those legal principles that have been most successful in dealing with a wide range of behaviour — the heavy lifters of corporate law. I have in mind provisions like the duty to act honestly, diligently and carefully,10 and the prohibition against oppression and unfair conduct.11 These provisions contain statements of principle, not detail. These concepts and others such as materiality, relevance and reasonableness have traditional legal meanings but they also have flexibility both in terms of adaptation to particular circumstances and in terms of development over time. The Banking Royal Commission has focused on acting ‘efficiently, honestly and fairly’12 in the provision of financial services as the most relevant to the bad practices it uncovered in the financial services industry. This provision applies to those with a license to provide financial services and was amended in March 2019 to add substantial civil penalties for its breach.13

We should move beyond only financial services and articulate a general duty of good faith and fair dealing that requires all corporations to act fairly in their decision-making and in dealings with others. This principle would include dealing in good faith, full disclosure and consideration of the position of the other party. And, it would apply in all circumstances to all corporations. Substantial civil penalties would be triggered by non-compliance. We are already part way there with some of the provisions in our consumer law.

Secondly, we should make more use of presumptions and shifting burdens of proof where elements of intention are concerned and where conduct is open to a variety of interpretations. Presumptions promote flexibility while permitting the introduction of evidence to defeat the presumption. Presumptions can be used to establish

10 Corporations Act 2001 (Cth) ss 180, 184.
11 Ibid s 232.
12 Ibid s 912A(1)(a). See also ASIC v Avestra Asset Management Ltd (2017) 348 ALR 525, 561 [191] (Beach J) for an exposition of the meaning of this phrase.
13 Ibid s 912(5A), as inserted by Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019 (Cth) s 76.
a framework for the attribution of responsibility and intention within a corporation. Agency law can also be relevant given the multiple levels of corporate responsibility and where corporations make use of intermediaries from outside the corporation.

Finally, our statutes should articulate some form of social objective as a limitation on the economic objective of the business corporation. The best model that currently exists of which I am aware is that in the American Law Institute’s *Principles of Corporate Governance* and a consideration of that provision would be a good place to start.

Section 2.01(a) of the ALI *Principles of Corporate Governance* sets forth the economic objective of the corporation, which is the conduct of business activities with a view to enhancing corporate profit and shareholder gain. That economic objective is then qualified by s 2.01(b). It provides that even if corporate profit and shareholder gain are not thereby enhanced, a corporation in the conduct of its business

1. is obliged, to the same extent as a natural person, to act within the boundaries set by law;

2. may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business; and

3. may devote a reasonable amount of resources to public welfare, humanitarian, educational, and philanthropic purposes.

The official comments to the section state that it is meant to reflect a recognition that the corporation is a social as well as an economic institution, and accordingly that its pursuit of the economic objective must be constrained by social imperatives and may be qualified by social needs.

The Interim Report and Final Report of the Banking Royal Commission have focused only on misconduct in the provision of financial services. But, they have given us a clear idea of the scope and depth of the misconduct by large corporations. The analysis of corporate wrongdoing in those reports is an excellent place to start the reform discussion. The *Final Report* has also given us principles (pt 1.1.5.1) and norms of conduct (pt 1.1.5.2) that the financial services industry should follow, as well as an extended discussion of the ‘pursuit of profit’ (pt 6.3.2.1). We need to extend our reconsideration of those principles and norms to corporate theory generally. Like it or not, our social and financial interactions will continue to be mediated through corporations. What is at issue here are fundamental jurisprudential ideas about the role of the corporation in modern society. That is, whether corporations can be said to have any positive obligations of citizenship and who should answer for corporate misbehaviour.

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SOUTH AUSTRALIAN ADMINISTRATIVE LAW:
40 YEARS ON

I Introduction

It is often instructive to pause and look back at a little history to understand how contemporary law functions. This special issue for volume 40, issue one of the Adelaide Law Review offers an excellent opportunity to do that for administrative law. The Adelaide Law Review was established in 1960, but it was not until the 1970s that administrative law featured within its pages. In 1977 Michael Harris, then Senior Lecturer in Law at the University of Adelaide, surveyed recent developments in South Australian administrative law in an article in volume 6. The 1970s was an important time for administrative law in Australia, and in 1977 the ‘revolution’ that came to be known as the ‘new administrative law’ was underway, at least at a Commonwealth level. The 1970s were also a decade of major social and legal change in South Australia, but with the exception of the appointment of the first Ombudsman, administrative law reform would be a much slower process in this State. Despite some early recommendations by the Law Reform Committee of South Australia, judicial review of administrative action in South Australia did not follow the codification project commenced by the Commonwealth. With some procedural modifications, South Australia has preserved its common law foundations. The State offers an interesting vantage point from which to observe the waxing and waning of

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3 Law Reform Committee of South Australia, Relating to Administrative Appeals (Report No 82, 11 April 1984).

4 In the form of orders ‘formerly available by prerogative writ’ for prohibition, certiorari, mandamus and quo warranto: Supreme Court Civil Rules 2006 (SA) r 199.
the influence of statutory judicial review in other jurisdictions, the codification of grounds and the resurgence of jurisdictional error.

II An Emerging Field

In 1964 Lord Reid stated in the House of Lords: ‘[w]e do not have a developed system of administrative law — perhaps because until fairly recently we did not need it’.5 In the 1970s it was still necessary to commence an article on administrative law by recalling AV Dicey’s6 ‘vigorous denial of the very existence of the subject’.7 In his 1977 article Harris reassured his readers that

[t]he period of paranoia in which the very foundations of the common law were perceived as threatened by the detested bureaucracy and [the] equally detested … droit administratif, has long-since gone, and for this we should be grateful. It is far healthier to face the reality of the presence and permanence of an administrative law system and to work for its improvement.8

Citing English scholar William Wade, Harris noted that ‘the State has “seized the initiative, and has put upon itself all kinds of new duties”’.9 Wade was referring to the expanding role of governments in the 20th century with the expansion of regulatory control in many fields and the provision of ‘elaborate social services’.10 Governments were no longer confined to the realms of ‘defence, public order, [and] the criminal law’.11 With the expansion of governmental activities12 came the slow acceptance that the exercise of expanded public powers should come with obligations of accountability to external and independent review bodies.

This emerging field offered new opportunities for lawyers. When Harris was writing his 1977 article, administrative law was taught as an elective in the University of

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6 19th century English constitutional theorist AV Dicey investigated the body of French law — droit administratif — that regulated government action in specialised courts, and compared it to English law. He concluded: “administrative law” … is utterly unknown to the law of England, and indeed is fundamentally inconsistent with our traditions and customs’: AV Dicey, Introduction to the Study of the Law of the Constitution (Macmillan, 3rd ed, 1889) 190.
7 Harris (n 1) 77.
8 Ibid.
10 Ibid (n 9) 1.
11 Ibid.
Adelaide Bachelor of Laws\textsuperscript{13} and had been taught (on and off) since 1961.\textsuperscript{14} It was not to become a core course in the degree until 1985,\textsuperscript{15} when administrative law was seen as a ‘sunrise industry’ for lawyers\textsuperscript{16} and academics\textsuperscript{17} alike.

This ‘new’ field of administrative law was partially built on some very old foundations that were, in relation to judicial review, the system of common law prerogative writs.\textsuperscript{18} What was being recognised by the postwar English\textsuperscript{19} and Australian\textsuperscript{20} textbook writers in the 1950s,\textsuperscript{21} and the law school courses of the following decades, was a discrete body of law known as ‘administrative law’. Once recognised, demands for reform soon followed.

\section*{III The ‘New’ Administrative Law}

The 1957 Franks Committee proposed significant changes to administrative law in England,\textsuperscript{22} but it took a few years for the possibility of reform to be considered

\textsuperscript{13} University of Adelaide, ‘Calendar of the University of Adelaide for the year 1977: Vol II Details of Courses’ (1977) 865, 877.

\textsuperscript{14} Originally a composite subject called Administrative, Local Government and Industrial Law, offered as an alternative to Mercantile Law II: University of Adelaide, ‘Calendar of the University of Adelaide for the year 1960’ (1960) 600, 822.

\textsuperscript{15} Administrative Law I, along with the basic principles, offered ‘an introduction to the “new administrative law”’: University of Adelaide, ‘Calendar 1985: Vol II Details of Courses’ (1985) 818, 824. ‘Administrative law [was] still not a required subject in many law degree courses’ at that time and the questions ‘what is administrative law’ and ‘why should [it] be taught’? were still being asked: John Goldring, ‘Administrative Law: Teaching and Practice’ (1986) 15(1) \textit{Melbourne University Law Review} 489, 489–90.


\textsuperscript{18} For a history of the prerogative writs see: John Baker, \textit{Introduction to English Legal History} (Oxford University Press, 5\textsuperscript{th} ed, 2019) 153–64.


\textsuperscript{21} In 1963, John Garner traced the first book to be published in England bearing the title ‘Administrative Law’ to one published in 1929 (Frederick Port, \textit{Administrative Law} (Longmans, 1929) although it did not have the scope of the modern works: JF Garner, \textit{Administrative Law} (Butterworths, 1963) v.

\textsuperscript{22} Committee on Administrative Tribunals and Enquiries, \textit{Report} (Cmnd 218, 1957), 91–9.
in Australia. The beginning of Australian interest has been dated to 1965 when Justice Else-Mitchell delivered a paper on the Franks Committee to the Commonwealth and Empire Law Conference in Sydney and a series of papers were also presented on ‘The Proper Scope of Judicial Review’. The Administrative Review Council called the conference a ‘watershed in administrative law reform in Australia and ideas advanced there have become in time the conventional wisdom.’ A series of law reform committee reports followed in the early 1970s. The descriptor ‘new’ for Australian administrative law refers to the reforms implemented at a Commonwealth level that introduced ombudsmen, merits review by administrative tribunals, and statutory judicial review in response to the Kerr, Bland and Ellicott Reports. Although not included in the original Kerr Report reforms, freedom of information later became the fourth element in this reform package.

The 1970s was a decade in which South Australia was renowned for its progressive law reform in fields such as Aboriginal rights, anti-discrimination, the decrimi-

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28 Kerr Report (n 12).


32 Lindsay Curtis has suggested that the other Kerr Committee reforms ‘made freedom of information legislation inevitable in the end’: (n 17) 46.

33 See eg *Aboriginal Lands Trust Act 1966* (SA); *Aboriginal and Historic Relics Preservation Act 1965* (SA); *Aboriginal Heritage Act 1979* (SA).

nalisation of homosexuality and the criminalisation of rape in marriage.\(^\text{35}\) That progressive spirit did not extend to major reforms of administrative law. The Law Reform Committee of South Australia\(^\text{36}\) produced a number of recommendations for reform of laws governing administrative action that were never implemented including data protection,\(^\text{37}\) and the question of standing regarding public participation in environmental protection.\(^\text{38}\) The State also had a mixed record in relation to implementing the administrative law reforms that were being pursued at a Commonwealth level at that time. South Australia was very early with the establishment of an Ombudsman’s Office in 1972,\(^\text{39}\) following Western Australia,\(^\text{40}\) but ahead of the other Australian states,\(^\text{41}\) and the Commonwealth.\(^\text{42}\) Harris commenced his 1977 survey of recent developments in his *Adelaide Law Review* article with the newly established South Australian Ombudsman.\(^\text{43}\)

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\(^{36}\) The Law Reform Committee of South Australia was established in 1968 and operated until 1987 with Justice Howard Zelling as its Chair. The Committee produced 106 reports over that time. The current law reform body in South Australia is the South Australian Law Reform Institute which was established in December 2010 by a joint agreement between the University of Adelaide, the Law Society of South Australia and the South Australian Government and is based at the Adelaide Law School: Adelaide Law School, ‘South Australian Law Reform Institute’, *University of Adelaide* (Web Page, 24 April 2019) <https://law.adelaide.edu.au/research/south-australian-law-reform-institute>.


\(^{39}\) *Ombudsman Act 1972* (SA).


\(^{41}\) *Ombudsman Act 1989* (ACT); *Ombudsman Act 1974* (NSW); *Ombudsman (Northern Territory) Act 1978* (NT) as repealed and replaced by *Ombudsman Act 2009* (NT); *Parliamentary Commissioner Act 1974* (Qld) as repealed and replaced by *Ombudsman Act 2001* (Qld); *Ombudsman Act 1978* (Tas); *Ombudsman Act 1973* (Vic).

\(^{42}\) *Ombudsman Act 1976* (Cth).

\(^{43}\) Harris (n 1) 78–86.
The other ‘new’ administrative law reforms took much longer to arrive in South Australia. Despite early exploration of freedom of information (‘FOI’) in the 1970s there was no follow-up and South Australia was to become part of the 1990s group of Australian states that adopted this reform. South Australia followed the New South Wales FOI model and was ‘marginally ahead of FOI developments in Queensland, Western Australia and Tasmania’.

Despite recommendations by the Law Reform Committee of South Australia in 1984 for the establishment of a general appeals tribunal, similar to the Commonwealth Administrative Appeals Tribunal, and the hopes of academic commentators at the time, a South Australian administrative appeals tribunal took very much longer. As the Commonwealth Administrative Review Council noted ‘[i]n all Australian jurisdictions tribunals had been established whenever a need was seen without reference either to other existing tribunals, or to the place of the new tribunal in the overall pattern of government decision-making’. At the time the South Australian Law Reform Committee was researching for its 1984 report, there was an array of specialist appeal and review bodies, but no ‘one stop shop’ administrative review body was

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50 Castles and Harris (n 35) 382–3. In his 1977 Article Harris noted there were no plans for Administrative Decisions (Judicial Review) Act 1977 (Cth) style reforms in South Australia, and that it would be necessary to wait ‘for a while longer’: Harris (n 1) 105.

51 Administrative Review Council, First Annual Report 1977 (n 2) 1 [3].

52 A list of statutes from 1976–84 with rights of appeal or review was compiled by an Associate to Justice Zelling and included many very specialised bodies such as the Water Resources Appeals Tribunal, Poultry Farmer Licensing Review Tribunal, Business Franchise (Petroleum) Appeal Tribunal, and Handicapped Persons Discrimination Tribunal: Memorandum from Justice Howard Zelling to Law Reform Committee Regarding Administrative Appeals, 23 February 1984 (State Records of South Australia, GRS 6201, 1, Unit 4). This complex array of review bodies continued
forthcoming for South Australia. Instead, the South Australian Government established a separate division of the District Court to deal with administrative appeals, that provided a modified form of merits review. It was not until 2015 that the South Australian Civil and Administrative Tribunal commenced operation.

Of the four accountability regimes in the federal ‘new’ administrative law that became models for reforms in the state jurisdictions, South Australia was an early adopter of the Ombudsman, but waited a decade to introduce freedom of information, and nearly four decades to introduce an administrative tribunal. When it comes to the fourth — statutory reform of judicial review — South Australia has watched from the sidelines as that reform has gone in, and perhaps out, of favour elsewhere. When Harris surveyed decisions of the Supreme Court of South Australia in 1977 he disclosed ‘a surprising number of administrative law cases’. Those cases are of interest to a contemporary reader as a snapshot of the old prerogative writ system that the 1970s Kerr and Ellicott committees sought to reform. When Harris was writing, the Administrative Decisions (Judicial Review) Act 1977 (Cth) (‘AD(JR) Act’) had only just been passed and it received only a brief mention in the article. From a contemporary viewpoint it is interesting that Harris explained the reforms in terms of the procedures associated with the remedies, rather than the listing of grounds that was to become influential.


‘Review of the Administrative Appeals System Needed’ (n 52) 4.

District Court Act 1991 (SA) as at 1 June 1995 included an Administrative Appeals Division with jurisdiction expressly conferred by statutes: s 8(3). This was amended to include a Disciplinary Division by the Land Agents Act 1994 (SA) sch 3. See discussion in: Peter Johnston, ‘Recent Developments Concerning Tribunals in Australia’ (1996) 24(2) Federal Law Review 323, 325.


Harris (n 1).

Curtis (n 17) 40.

Kerr Report (n 12).

Ellicott Report (n 30) 2–3.

Harris (n 1) 105–110.
**IV  Statutory Judicial Review Reforms**

The Kerr Report made recommendations for a modern system of administrative law in Australia concerning review of administrative decisions on the merits,\(^\text{62}\) the establishment of an Administrative Review Council and a General Counsel for Grievances (Ombudsman),\(^\text{63}\) and legislation to simplify the procedure and ‘set out the legal grounds upon which [judicial] review may be granted’.\(^\text{64}\)

Both the Kerr\(^\text{65}\) and Ellicott\(^\text{66}\) Reports concluded that the existing procedures surrounding the judicial review prerogative writs were complex, unwieldy, rigid\(^\text{67}\) and outmoded:

> A perusal of the cases in which the prerogative writs have been involved shows that a great portion of the court’s time is frequently taken up with argument about whether the particular remedy involved is the correct one, or whether the decision sought to be reviewed is subject to review, or whether the correct court has been chosen, rather than with the substantial matter in dispute, namely, the correctness of the decision sought to be reviewed.\(^\text{68}\)

The recommendations in these reports led to the introduction of the *AD(JR) Act*\(^\text{69}\), and statutory judicial review was subsequently introduced along the same lines in the Australian Capital Territory,\(^\text{70}\) Queensland,\(^\text{71}\) and Tasmania.\(^\text{72}\) The *AD(JR) Act*, and its state and territory equivalents, codified common law judicial review, and ‘introduc[ed] a simplified procedure for applying for review, a list of grounds and flexible

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\(^{62}\) *Kerr Report* (n 12) 115 [17].

\(^{63}\) Ibid 115–17 [22]–[32].

\(^{64}\) Ibid 112 [390]. Another recommendation was a new Administrative Court to exercise a ‘general supervisory jurisdiction over administrative action’: at 76 [251]. This function was undertaken by the Federal Court when it was established in 1976.

\(^{65}\) Ibid 20 [58].

\(^{66}\) Ellicott Report (n 30) 2–3.


\(^{69}\) Taylor (n 27) 808.

\(^{70}\) *Administrative Decisions (Judicial Review) Act 1989* (ACT).

\(^{71}\) *Judicial Review Act 1991* (Qld).

\(^{72}\) *Judicial Review Act 2000* (Tas).
remedies expressed in plain language’. The other non-statutory judicial review jurisdictions have simplified the complex procedures formerly associated with the prerogative writs, without a full codification.

In 1984 the South Australian Law Reform Committee recommended that

> there should be a right of approach to the Courts wider and more flexible then the present prerogative writ procedures, based on the Commonwealth *Administrative Decisions (Judicial Review) Act 1977*.  

This proposal included the adoption of the enumerated grounds as listed in the *AD(JR) Act*. The ‘question of whether there is a case for the enactment of judicial review legislation in South Australia’ was still being discussed 20 years later.

## V Simplification without Codification and Jurisdictional Error Lives On

The *Supreme Court Rules 2006 (SA)* have reformed procedure and provide for the making of orders for judicial review ‘in the nature of an order formerly available by prerogative writ’ for prohibition, certiorari, mandamus and quo warranto. It is possible to trace the slow modernisation of these procedures over the years. For example, when introduced in 2006 rule 199 adopted an old formulation and referred to orders for judicial review by the Supreme Court made against ‘another court or a tribunal that has a duty to act judicially’. It has long been recognised that

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75 Law Reform Committee of South Australia, *Relating to Administrative Appeals* (n 3) 16.

76 Ibid 51–3.

77 See report of then Solicitor-General Chris Kourakis’ paper presented to the 2003 Public Sector Lawyers Seminar: ‘Review of the Administrative Appeals System Needed’ (n 52) 4.

78 Commencement of actions is by summons: *Supreme Court Civil Rules 2006 (SA)* r 200A.

79 Ibid r 199.

80 *Supreme Court Civil Rules 2006 (SA)* r 199, later amended by *Supreme Court Civil Rules (Amendment No 26)*.
references to administrative tribunals should be broadly interpreted as intended ‘to
designate any decision making body whether a court, tribunal in the narrow sense,
administrative decision maker or otherwise’. The current r 199 refers to orders
against an ‘authority’, reflecting the reality that judicial review actions are brought
against a wide range of administrative decisions made by executive government as
well as tribunals.

Whilst the procedures for commencement of judicial review actions have been
simplified, the Supreme Court rules have not made any substantive changes and the
orders sought reflect the traditional forms of prerogative relief.

An order for judicial review is an order in the nature of an order formerly available
by prerogative writ and includes

- an order preventing an authority from acting beyond its jurisdiction or in contra-
  vention of the requirements of procedural fairness (prohibition);
- an order setting aside the decision of an authority because of absence or excess of
  jurisdiction, jurisdictional error or error of law on the face of the record, failure to
  observe the requirements of procedural fairness or fraud (certiorari);
- an order compelling an authority to perform a public duty (mandamus);
- an order preventing a person from wrongfully exercising, or purporting to
  exercise, functions of a public character (quo warranto).

South Australia has not introduced other reforms to judicial review beyond these basic
procedural changes. It has not imposed a general statutory duty on administrative

81 Maxcon Constructions Pty Ltd v Vadasz (No 2) (2017) 127 SASR 193, 230 [122] (Blue
J) (‘Maxcon No 2’).

82 Defined as: ‘a court, tribunal, decision maker or person or body exercising or
  purporting to exercise or having power to exercise administrative or judicial
functions’: Supreme Court Civil Rules 2006 (SA) r 198A(1).

83 ‘The rigid distinction between the administrative and the judicial or quasi-judicial
decision is no longer the touchstone of judicial review. The distinction has been eroded
by statute [AD(JR) Act] as well as judicial comment. [F.A.I. Insurances Ltd v Winneke

84 Public Service Association of South Australia v Federated Clerks’ Union of Australia,
South Australia Branch (1991) 173 CLR 132, 140 (Brennan J), discussing the former
Supreme Court Rules 1987 (SA) r 98.01.

85 Supreme Court Civil Rules 2006 (SA) r 199.
decision-makers\textsuperscript{86} to provide reasons.\textsuperscript{87} Nor has South Australia expanded the record to include reasons for decisions (relevant to error of law on the face of the record)\textsuperscript{88} as New South Wales\textsuperscript{89} and Victoria\textsuperscript{90} have done. Nevertheless, specific statutes may impose a duty to provide reasons\textsuperscript{91} and in so doing may incorporate those reasons into the record.\textsuperscript{92}

South Australia’s uncodified judicial review system became a ‘time capsule’ that gave rise to the influential High Court decision \textit{Craig v South Australia} (‘Craig’),\textsuperscript{93} one of a group of cases that have ‘established a distinctly Australian [judicial review] jurisprudence’.\textsuperscript{94} \textit{Craig} concerned judicial review by the Supreme Court of South Australia of a decision of the District Court. The District Court judge had ordered a stay of proceedings in a criminal trial applying \textit{Dietrich v The Queen}\textsuperscript{95} because the defendant was unrepresented by counsel. The State of South Australia applied to the Supreme Court for judicial review arguing that the judge had made an error of law. By majority, the Supreme Court held that the District Court judge had not taken relevant considerations into account in relation to Craig’s dealings with his assets,\textsuperscript{96}

\textsuperscript{86} ‘[T]here is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions’: \textit{Public Service Board (NSW) v Osmond} (1986) 159 CLR 656, 662 (Gibbs CJ) (‘Osmond’).


\textsuperscript{88} \textit{Maxcon Constructions Pty Ltd v Vadasz} (2018) 351 ALR 369, 373 (‘Maxcon’).

\textsuperscript{89} \textit{Supreme Court Act 1970} (NSW) s 69(4).

\textsuperscript{90} \textit{Administrative Law Act 1978} (Vic) s 10.

\textsuperscript{91} See, for example, \textit{Building and Construction Industry Security of Payment Act 2009} (SA) s 22(3)(b) considered in \textit{Maxcon} (n 88).

\textsuperscript{92} ‘[I]n accordance with the requirement imposed by s 22(3)(b) [\textit{Building and Construction Industry Security of Payment Act 2009} (SA)] the adjudicator included his reasons as part of his determination’: \textit{Maxcon No 2} (n 81) 240 [155].

\textsuperscript{93} (1995) 184 CLR 163.

\textsuperscript{94} Robin Creyke and John McMillan, ‘Administrative Law Assumptions … Then and Now’ in Robin Creyke and John McMillan (eds) \textit{The Kerr Vision of Australian Administrative Law: At the Twenty-Five Year Mark} (Australian National University Press, 1998) 1, 1. Creyke and McMillan also listed the following cases, all decided within a decade of each other and still influential today: \textit{Kioa v West} (1985) 159 CLR 550 (‘Kioa’); \textit{Minister for Aboriginal Affairs v Peko-Wallsend Ltd} (1986) 162 CLR 24 (‘Peko-Wallsend’); \textit{Australian Broadcasting Tribunal v Bond} (1990) 170 CLR 321; \textit{Attorney-General (NSW) v Quin} (1990) 170 CLR 1 (‘Quin’): at 1, n 1.

\textsuperscript{95} (1992) 177 CLR 292 (‘Dietrich’).

\textsuperscript{96} \textit{South Australia v Judge Russell} (1994) 62 SASR 288, Matheson and Prior JJ (‘Russell’). This was relevant to whether Craig was unable to obtain legal representation ‘through no fault on his … part’: \textit{Dietrich} (n 95), 315 (Mason CJ and McHugh J), discussed in \textit{Craig} (n 93) 183.
and had misunderstood the legal test to be applied. These errors, the majority held, amounted to jurisdictional errors and warranted an order in the nature of certiorari to quash the District Court’s stay order.

Justice Matheson cited the following passage from Lord Reid in Anisminic v Foreign Compensation Commission (‘Anisminic’):

It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.

In turn, South Australia relied upon that passage in the High Court appeal by Craig. The House of Lords case of Anisminic concerned an administrative tribunal (the Foreign Compensation Commission), but the case had subsequently been applied to courts ‘with the result that the distinction between jurisdictional error and error within jurisdiction has been seen as effectively abolished in England’. Craig gave the Australian High Court the opportunity to clearly state that the “distinction has not … been discarded in this country”, and that Anisminic was not an authoritative statement of what constitutes jurisdictional error in Australia for inferior courts. The High Court overturned the South Australian Supreme Court decision in Craig: if the District Court had made an error of law, it had not been jurisdictional and so was
not to be quashed by an order for certiorari. The High Court identified the ‘critical distinction which exists between administrative tribunals and courts of law’ when determining whether an error of law has been made within, or beyond, jurisdiction. The Court also emphasised the distinction between jurisdictional error and error of law on the face of the record. Subsequent cases such as Kirk have demonstrated how decisions of inferior courts may make jurisdictional errors, but the distinction between courts and administrative decision-makers, including tribunals, remains part of a distinctive Australian judicial review jurisprudence.

Craig was an important ‘reminder that the technicalities of jurisdictional error and error on the face of the record are alive and well’ in Australia. This has been emphasised by the High Court in cases where a statutory privative clause has failed to oust judicial review because of the constitutional entrenchment of review for jurisdictional error. Privative clauses remain valid and have been left with some limited work to do in relation to ouster of review for error of law on the face of the record.

The High Court also took the opportunity in Craig to reject arguments being made at the time that the ‘modern’ record included both the reasons for decision and the complete transcript of proceedings. If accepted, that would have ‘go[ne] a long way towards transforming certiorari into a discretionary general appeal for error of law’. The High Court maintained that the record was limited to the ‘documents initiating and defining the matter in the inferior court and the impugned order or determination’, thereby significantly restricting the availability of certiorari for error of law on the face of the record. Without access to the reasons as part of the ‘record’ it is very difficult to show error of law on the face of the record. It then becomes necessary to establish jurisdictional error to obtain an order to quash a decision (certiorari). The High Court left any expansion of the record to the

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104 Ibid.
105 Ibid 176.
106 Kirk v Industrial Court of New South Wales (2010) 239 CLR 531 (‘Kirk’).
107 Sackville (n 68) 89, n 16.
110 Craig (n 93) 180–1.
111 Ibid 181
112 Ibid 180
legislature. This has been done in New South Wales and Victoria where reasons are part of the record, but not in South Australia — the birthplace of Craig.

Of course, by the mid 1990s when Craig was decided the AD(JR) Act had been operating for nearly 20 years with its simplified procedures, including abolition of the distinction between jurisdictional and non-jurisdictional errors of law. It is necessary to understand this traditional distinction to make sense of the AD(JR) Act s 5(1)(f) ground of review: ‘that the decision involved an error of law, whether or not the error appears on the record of the decision’. The decision in Craig illustrate[d] the significance of this apparently technical change in the pre-existing law.115

Craig is one example of significant High Court precedent emerging from cases that originated in those states that have not opted for AD(JR) Act style statutory judicial review procedures. These jurisdictions have had an influence on the way the High Court has developed an Australian judicial review jurisprudence. However, the body of case law coming out of the High Court’s original jurisdiction reviewing decisions under the Migration Act 1958 (Cth) has had the greatest impact on that development.

VI The Resurgence of Jurisdictional Error

A battle for control over migration decisions for around three decades has led to a winding back of the judicial review reforms that came out of the ‘new’ administrative law reforms in one of the major case load areas for the federal courts. A series of amendments have attempted to limit access to judicial review before the Federal Court and the High Court in migration cases in a variety of ways: migration decisions have been excluded from the AD(JR) Act118 and Judiciary Act 1903 (Cth) s 39B review;119 and at one point, a restricted code for judicial review was incorporated within the Migration Act 1958 (Cth).120 When faced with these restrictions, applicants have had to resort to the original jurisdiction of the High Court.121 The

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113 Ibid 181.
114 Supreme Court Act 1970 (NSW) s 69(4); Administrative Law Act 1978 (Vic) s 10.
115 Sackville (n 68) 93, n 35.
116 Other examples include: FAI Insurances Ltd v Winneke (1982) 151 CLR 342; Osmond (n 86); Quin (n 94); City of Enfield v Development Assessment Commission (2000) 199 CLR 135; Kirk (n 106) and Wingfoot Australia Partners Pty Ltd v Kocak (2013) 252 CLR 480.
117 Constitution s 75(v).
118 AD(JR) Act (n 87) sch 1.
120 Migration Reform Act 1992 (Cth) which curtailed the grounds of review: Ibid 522 [19]. See discussion in Sackville (n 68) 88–9.
121 Constitution s 75(v); Administrative Review Council, Federal Judicial Review in Australia (n 31) 117 [6.12].
legislative response was then a ‘savage-looking’,\textsuperscript{122} and ultimately unsuccessful,\textsuperscript{123} privative clause, and conferral of judicial review jurisdiction on the Federal Circuit Court that mirrors the High Court’s jurisdiction.\textsuperscript{124} These many legislative changes in relation to migration decisions, and the large volume of migration cases,\textsuperscript{125} have dominated federal judicial review for decades and have ‘led to the expansion of constitutional judicial review’\textsuperscript{126} with its traditional writs of mandamus and prohibition.\textsuperscript{127} This is a long way from the simplified statutory judicial review proposed by the Kerr and Ellicott Reports.

Battles over privative clauses have also contributed to the resurgence of jurisdictional error as a central concept in judicial review in Australia.\textsuperscript{128} Privative clauses are statutory provisions that purport to prevent courts from judicially reviewing certain decisions. At a Federal level it was a privative clause introduced into the \textit{Migration Act 1958 (Cth)}\textsuperscript{129} in an attempt to further limit judicial review of migration matters,\textsuperscript{130} and at a state level a privative clause to oust review of industrial matters.\textsuperscript{131} The High Court has held that privative clauses cannot remove the constitutionally protected supervisory role of the High Court and the state Supreme Courts to review for jurisdictional error.\textsuperscript{132} This lead one commentator to ask whether governments and legislatures have ‘shot [themselves] in the foot’ when enacting privative clauses.\textsuperscript{133}

\begin{itemize}
  \item\textsuperscript{123} \textit{Plaintiff S157} (n 108).
  \item\textsuperscript{124} \textit{Migration Act 1958 (Cth)} s 476(1). See discussion of these many migration law amendments in Aronson, Groves and Weeks (n 122) 52–3; John Basten, ‘Judicial Review: Can We Abandon Grounds?’ (2018) 93 (November) \textit{AIAL Forum} 22.
  \item\textsuperscript{125} The Federal Court provided statistics to the Administrative Review Council 2012 review on the \textit{AD(JR) Act} (n 87) and \textit{Judiciary Act 1903 (Cth)} s 39B applications to the Federal Court and the then Federal Magistrates Court (now Federal Circuit Court). The statistics show the significant impact the migration cases have had: see Administrative Review Council, \textit{Federal Judicial Review in Australia}, (n 31) 65–71 [3.77]–[3.92].
  \item\textsuperscript{126} Administrative Review Council, \textit{Federal Judicial Review in Australia} (n 31) 117 [6.11].
  \item\textsuperscript{127} Along with injunctions: \textit{Constitution} s 75(v). The High Court can also grant certiorari as ancillary to mandamus or prohibition: \textit{Re Refugee Review Tribunal; Ex parte Aala} (2000) 204 CLR 82, 90–91 [14]; \textit{Plaintiff S157} (n 108) 507 [80]–[81].
  \item\textsuperscript{129} \textit{Migration Act 1958 (Cth)} s 474.
  \item\textsuperscript{130} See \textit{Plaintiff S157} (n 108).
  \item\textsuperscript{131} \textit{Industrial Relations Act 1996 (NSW)} s 179; \textit{Kirk} (n 106).
  \item\textsuperscript{132} \textit{Plaintiff S157} (n 108); \textit{Kirk} (n 106).
  \item\textsuperscript{133} Alan Freckelton, ‘Effect of Privative Clauses on Judicial Review of Immigration Decisions’ (2015) 22(2) \textit{Australian Journal of Administrative Law} 87, 87.
\end{itemize}
According to the Administrative Review Council ‘[t]he primary lesson is that attempting to restrict or exclude judicial review entirely will not be successful’. 134 Another lesson might be that you risk ending up with a complex and entrenched system. The focus by the High Court upon jurisdictional error as a central organising concept,135 and maintenance of its separation from non-jurisdictional errors of law that can be detected on the face of a very limited record,136 have set boundaries for the scope of judicial review.137 At the same time, jurisdictional error’s constitutional protection makes it unassailable.

Jurisdictional error is at once central to Australian constitutional and common law judicial review, and at the same time a notoriously difficult and illusive concept.138 In Hossain,139 Kiefel CJ, Gageler and Keane JJ recently explained jurisdiction and jurisdictional error as follows:

Jurisdiction… refers to the scope of the authority which a statute confers on a decision-maker to make a decision of a kind to which the statute then attaches legal consequences. It encompasses in that application all of the preconditions which the statute requires to exist in order for the decision-maker to embark on the decision-making process. It also encompasses all of the conditions which the statute expressly or impliedly requires to be observed in or in relation to the decision-making process in order for the decision-maker to make a decision of that kind. A decision made within jurisdiction is a decision which sufficiently complies with those statutory preconditions and conditions to have ‘such force and effect as is given to it by the law pursuant to which it was made’.140

Jurisdictional error, in the most generic sense in which it has come to be used to describe an error in a statutory decision-making process, correspondingly refers to a failure to comply with one or more statutory preconditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it.141

134 Administrative Review Council, Federal Judicial Review in Australia (n 31) 118 [6.15].
135 Spigelman (n 128).
136 Craig (n 93).
139 Hossain v Minister for Immigration and Border Protection (2018) 359 ALR 1 (‘Hossain’).
140 Quoting Minister for Immigration and Multicultural Affairs v Bhardwaj (2002) 209 CLR 597, 613 [46].
141 Hossain (n 139) 7 [23]–[24].
What is clear from these passages is that it is statutory interpretation and the construction of the specific statutory power relevant to the case before the judicial review court that is central to the analysis, rather than external standards being imposed by the traditional grounds of review. That the scope of the authority which a statute confers includes conditions which the statute impliedly requires to be observed, provides opportunities to argue that Parliament intended the power to be exercised in compliance with traditional judicial review standards such as procedural fairness and reasonableness. Nevertheless, as Will Bateman and Leighton McDonald have argued, over the ‘last 40 (or so) years’ there has been a shift ‘away from an approach which gives prominence to the identification and articulation of “grounds of review” towards an approach which gives increasing emphasis to statutory interpretation and particulars’.142

It might have been otherwise. Chief Justice Kiefel, Gageler and Keane JJ suggested in Hossain that:

> [h]ad statutory mechanisms for judicial review (such as that contained in [the AD(JR)Act]) been enacted to cover judicial review of statutory decision-making more comprehensively, the terminology of jurisdiction and of jurisdictional error in its application to administrative action may well have fallen into desuetude in Australia. Indeed, there was a time in the 1980s and 1990s when the terminology was little used, and doubts were expressed even afterwards as to its continuing utility.143

It was not to be. Whilst the migration cases have dominated the High Court’s attention and influenced the development of constitutional and common law judicial review, the AD(JR) Act has languished and its relevance and future are now questioned. Specifically, one of the defining reforms introduced by the AD(JR) Act — the codification of grounds — is being questioned, along with the common law counterparts.144

There were high hopes for the AD(JR) Act reforms in the early days. Writing in its first annual report in 1977 the Administrative Review Committee foresaw ‘the development of a body of law which lays down a logical and practical basis for the Court’s review of administrative action’.145 Initially the AD(JR) Act was very influential,146 although it never did oust the common law remedial model.147 A major substantive reform introduced by the AD(JR) Act was the codification of the common

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142 Bateman and McDonald (n 138), 153. Bateman and McDonald have named these the ‘grounds approach’ and the ‘statutory’ approach.
143 Hossain (n 139), 7 [21].
144 Basten, ‘Judicial Review: Can We Abandon Grounds?’(n 124) 29.
law grounds, achieved by providing a list of grounds in sections 5 and 6.\textsuperscript{148} The listing of the grounds of review was intended to provide certainty.\textsuperscript{149}

Writing in 1996 Robin Creyke identified the advantages of the ‘list’ of grounds of review in the statute:

A major advantage of the codification of the common law grounds of judicial review in the \textit{AD(JR) Act} is that it has fostered the development of a discrete jurisprudence for each ground. ... By contrast, in jurisdictions which have not followed the codification route, the tendency has been to conflate the grounds into the categories identified in \textit{R v Minister for the Civil Service; Ex parte Council of Civil Service Unions} [1985] AC 324, namely, procedural impropriety, rationality, legality and possibly proportionality. That approach arguably conceals rather than heightens awareness of the difference between the grounds of review.\textsuperscript{150}

Similarly writing in the 1990s, John McMillan was also optimistic about the \textit{AD(JR) Act} approach to grounds of review, specifically because they provided standards that could be identified by government decision-makers

In the area of administrative review a chief requirement is that there must at the end of the day be some agreed standards to guide administrative decision making. Ambiguity will never be removed, but it can at least be contained.\textsuperscript{151}

McMillan often expressed concerns about the legal standards imposed by judicial review courts (including jurisdictional error) that introduce uncertainty and do not have self-apparent meaning for administrators who must strive to act lawfully.\textsuperscript{152} Looking at the particularised \textit{AD(JR) Act} grounds from the perspective of the courts, rather than the administrative decision-makers, Mark Aronson saw the weakening of the links between the grounds and the concept of jurisdictional error as more problematic:

The grounds nevertheless remain highly particularised, and to the extent that they sever the link with jurisdictional error, they offer no readily apparent principles to keep the court on the path of judicial review and away from merits review.\textsuperscript{153}

\textsuperscript{148} The \textit{AD(JR) Act} grounds are ‘substantially declaratory of the common law’: \textit{Peko-Wallsend Ltd} (n 94) 39 (Mason J). See also \textit{Kioa} (n 94) 566–7 (Gibbs CJ), 576 (Mason J), 625 (Brennan J).

\textsuperscript{149} \textit{Ellicott Report} (n 30) 6 [19]. For a discussion of the influence of early (mid 20\textsuperscript{th} century) textbook writers on the development of grounds in judicial review see Bateman and McDonald (n 138) 160.


An early criticism of the particularisation of the grounds in the *AD(JR) Act* was that it might lead to ossification while the common law could continue to develop. The inclusion of the final ground ‘otherwise contrary to law’\(^{154}\) allowed for ‘judicial development of additional grounds’\(^{155}\) as the common law developed. However, the ‘otherwise contrary to law’ ground has long been declared a ‘dead letter’.\(^{156}\) The *AD(JR) Act* grounds have not evolved.

This itemisation of the review grounds had one practical advantage: ‘an educative effect for the profession’,\(^{157}\) along with law students. Writing in 1986 Goldring was optimistic that ‘[t]he new administrative law [had] provided a structure for an administrative law course’ when compared with courses in the 1970s that ‘began with a study of the remedies, and then moved on to substantive grounds’ and effectively took students around in a circle.\(^{158}\) As we have seen in the discussion above, with the resurgence of jurisdictional error — the circularity remains.

### VII Conclusion

We began this dip into history by looking at administrative law reform from a South Australian perspective. South Australia offers an interesting vantage point from which to observe the waxing and waning of the influence of statutory judicial review and the particularisation of grounds because it was a reform project that was never adopted in this jurisdiction.

Reading Harris’ survey of 1966–76 Supreme Court of South Australia cases reviewing administrative acts, decisions and subordinate legislation in his 1977 *Adelaide Law Review* article, which he organised ‘according to general conceptual categories of administrative law … doctrines, grounds and remedies for judicial review’,\(^{159}\) is enlightening. Much of the survey is, as one might imagine after 40 years, quaintly historical and the cases themselves are no longer familiar. However, the underlying concepts are surprisingly recognisable today, which would, I think, be quite astonishing to the 1970s reformers who planned Australia’s ‘new’ administrative law.

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154 *AD(JR) Act* (n 87) ss 5(1)(j), 6(1)(j).
155 *Elicott Report* (n 30) 9 [41].
157 Aronson, ‘Is the ADJR Act Hampering the Development of Australian Administrative Law?’ (n 153) 91. It has also been called a ‘useful checklist’: Basten, ‘Judicial Review: Can we abandon grounds?’ (n 124).
159 Harris (n 1) 86.
SUCCESSION LAW:
REFLECTIONS AND DIRECTIONS

I Introduction

Succession law impacts the lives of all Australians. The transfer of property from one generation to the next is a rite of passage,1 and the making of a will is considered a ‘social norm’.2

It is estimated that almost 60% of adult Australians have a will.3 Moreover, 54% of those that do not have a will, intend to make one.4 The likelihood of having a will increases with age and the accumulation of assets;5 93% of Australians over the age of 70 have a will.6

This enthusiasm of Australians to be testate implies that will-making is treated as important. It suggests that Australians wish to exercise their testamentary freedom. The studies reveal that these will-makers act responsibly; they wish to provide for their families,7 and overwhelmingly, they wish to make their intentions clear about what is to happen with their estate.

* LLB (Hons) (Adel); Retired Justice of the Supreme Court of South Australia. The author acknowledges the assistance of Madeleine Thompson LLB (Hons) (Adel), BA, in the preparation of this article.

3 Ibid 8.
4 Ibid.
5 Ibid.
6 Ibid.
II Reflections

A The Foundation of Testamentary Freedom

The Wills Act 1837, 7 Wm 4 and 1 Vict, c 26 (‘Wills Act 1837’) is a lynchpin of modern succession law. The premise of the legislation is testamentary freedom.8

Section 3 of the Wills Act 1837 provided

[t]hat it shall be lawful for every Person to devise, bequeath, or dispose of, by his Will executed in manner herein-after required, all Real Estate and all Personal Estate which he shall be entitled to, either in Law or in Equity, at the Time of his Death ...

This provision established testamentary freedom subject only to the requirement of due execution. Due execution was dealt with in s 9. Section 7 limited testamentary freedom to a person over the age of 21 years. Section 8 provided that ‘no Will made by any Married Woman shall be valid, except such a Will as might have been made by a Married Woman before the passing of this Act’. The Act provided by s 15 that any gift to an attesting witness was void.

The Wills Act 1837 has been substantially re-enacted throughout the common law world.9 It forms the basis of succession law in every State and Territory of Australia.10

B Statutory Developments

There have been statutory developments since 1837. Some have advanced testamentary freedom and others have eroded that freedom. Legislation has addressed changing societal attitudes and needs as has the judicial interpretation and application of statutory discretions.

One important development relates to the formalities of will-making. Formalities for the witnessing of wills were first required by the Statute of Frauds 1677,
By the 1970s, John Langbein was writing on the ‘harsh and relentless formalism’ of the law of wills and agitating for change in the United States. At about the same time, legislation was enacted in South Australia empowering the court to excuse harmless errors. This allowed the Supreme Court of South Australia to admit to probate and thereby enforce a will that was conceded to be exercised in partial violation of the formal requirements of the *Wills Act 1936* (SA). Langbein recently wrote in the *Adelaide Law Review* that this development made South Australia ‘the epicentre of a notable development in the law of wills’. Legislation in the other Australian States soon followed, although the precise wording of the enactments contains significant differences to the terms of the South Australian enactment. The power has been used extensively since that time.

**C Family Maintenance Legislation**

While the change to the formality requirements was indeed notable, its significance pales in comparison to the rise of family maintenance legislation.

The agitation for women’s rights which led to the enactment of modern family provision legislation ‘grew out of the humanitarian and democratic ideas which emanated from the French Revolution of 1789’. Norris asserts that

the French Revolution lit up the horizon for the suffrage movement, and it was Mary Wollstonecraft — a voice crying in the wilderness — who began what

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12 Langbein (n 11) 489.

13 *Wills Act Amendment Act (No 2) 1975* (SA) s 9, amending *Wills Act 1936* (SA) s 12(2).


15 See *Wills Act 1968* (ACT) s 11A; *Succession Act 2006* (NSW) s 8; *Wills Act 2000* (NT) s 10; *Succession Act 1981* (Qld) s 18; *Wills Act 2008* (Tas) s 10; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 32. The power has also found its way into some jurisdictions in the United States: ibid 6.


17 Rosalind Frances Atherton, “‘Family” and “Property”: A History of Testamentary Freedom in New South Wales with Particular Reference to Widows and Children’ (PhD Thesis, University of New South Wales, 1993) 132. However, legal tensions between testamentary freedom and family maintenance can be traced back to the Voconian Law in Ancient Rome: see, eg, Dixon (n 11).
became known as the Women’s Movement, with the publication in 1792 of the *Vindication of the Rights of Woman* as a direct challenge to the French Declaration of the Rights of Man.\(^{18}\)

As a matter of historical interest, the push for family maintenance legislation is less novel than it might seem. For example, succession law in ancient Rome contained sophisticated principles that constrained testamentary freedom and sought to protect the rights of family members. Contemplating the ‘evils’ of unlimited testamentary freedom (at the expense of familial relations) in an early issue of the *Adelaide Law Review*, John Bray notes the broader historical context of the relatively recent developments:

> The evils which this [Roman] system was designed to remedy, for long left unre-addressed by the [English] common law, have now been met by statutes in various jurisdictions such as our Testators Family Maintenance Act.\(^{19}\)

Modern testator’s family maintenance legislation was first introduced in New Zealand.\(^{20}\) The enactment coincided with the growth of the women’s movement and the increased popularity of a more interventionist style of government. The enactment of the *Testator’s Family Maintenance Act 1900* (NZ) was soon followed in Australia.\(^{21}\) Family provision legislation has been enacted in every Australian jurisdiction.\(^{22}\)

Chief Justice Gleeson relevantly observed in *Vigolo v Bostin* that

> [t]he general structure of the [*Inheritance (Family and Dependants Provision) Act 1972* (WA)] follows a form familiar in all Australian States, and pioneered in New Zealand … The power of a court to make an order under the Act is enlivened by the formation of an opinion that the disposition of the deceased’s estate effected by will, or the law relating to intestacy, is not such as to make adequate provision from his estate for the proper maintenance, support, education or advancement in life of a person mentioned in s 7. The court is empowered, at its discretion, to order that such provision as the court thinks fit is made out of the estate of the deceased for that purpose.\(^{23}\)

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20 Atherton (n 17) 132.

21 Ibid 135.

22 *Family Provision Act 1969* (ACT); *Succession Act 2006* (NSW); *Family Provision Act 1970* (NT); *Succession Act 1981* (Qld); *Inheritance (Family Provision) Act 1972* (SA); *Testator’s Family Maintenance Act 1912* (Tas); *Administration and Probate Act 1958* (Vic); *Family Provision Act 1972* (WA).

Chief Justice Gleeson also referred to the historical development of the Testator’s Family Maintenance Act 1900 (NZ), noting that

[the statute did not confer new rights of succession. It did not respond to the mischief identified by re-instatting a right akin to dower, or otherwise by creating legal rights of inheritance. It preserved freedom of testamentary disposition, but subjected that freedom to a new qualification. The statute gave courts a discretionary power to make orders which would have the legal effect of altering the provisions of wills.]

As the High Court has observed, the application of testator’s family maintenance legislation has varied to meet the needs of our changing society. There has been an increasing use of this legislation over time. A number of factors are in play, in particular the increase in the wealth of our community and the changing nature of family relationships. Yet some are now calling for reform on the grounds that family maintenance legislation is being used opportunistically and is curtailing testamentary freedom too significantly.

D The Probate Jurisdiction, Rectification and Judicial Discretion

Another place where judicial discretion is exercised is in the probate jurisdiction. This jurisdiction raises interesting and challenging questions of fact and law. Cases involve people; everyday people who find themselves in court without ever expecting to be there. Generally, they are there through an act of a ‘benefactor’. It is a jurisdiction in which it is important to bring matters to a just resolution in a sensible, speedy and low-cost manner.

The probate jurisdiction of the Supreme Court of South Australia is a busy jurisdiction addressing many and varied aspects of probate and succession law. The Court addresses a wide range of issues including problems associated with will kits and the interpretation of home-drawn wills; the interpretation of complex wills; disputes about capacity; issues under the family inheritance jurisdiction; forfeiture where the testator or intestate dies unlawfully; the exercise of the jurisdiction to order

24 Ibid 199.
27 Re Czerny [2015] SASC 111.
rectification of a will; and the exercise of the jurisdiction to make a statutory will for the young or infirm.

In the probate jurisdiction, judges are able to apply flexible procedures crafted to suit the particular litigation. The *Probate Rules 2015* (SA) include a dispensation power and where appropriate the court may embark upon a ‘quasi-inquisitorial’ process. Flexible procedures enhance the process of a sensible, speedy and cost-effective resolution.

The judicial discretion given by the statutes is now as a matter of practice broadly interpreted and, as a consequence, both the legislation itself and its judicial interpretation have operated as a major restriction on testamentary freedom.

It is to be noted that the High Court has encouraged a uniform approach to interpretation, despite different legislative wording across Australian jurisdictions.

The Court of Chancery made use of rectification both of documents made inter vivos and of wills. However, after the *Wills Act 1837* it was presumed that the Act did not permit rectification of wills. This remains the position in the United Kingdom and other common law jurisdictions.

Legislation has now been enacted throughout Australia empowering courts to rectify a will. The purpose of rectification is to enable a court to give effect to a testator’s intention in circumstances where an error has been established. The legislation of the Australian States and Territories differs in important respects. Legislation in South Australia and the Australian Capital Territory provides a broad power to rectify a document where the document does not accurately reflect the testamentary intentions of the deceased. In the other Australian jurisdictions, the court has a power to rectify a will to carry out the intentions of the testator if the court is satisfied that the will does not carry out the testator’s intention because a clerical error was made or the will does not give effect to the testator’s instructions.

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34 *Probate Rules 2015* (SA) r 5(8).
36 *Wills Act 1968* (ACT) s 12A(1); *Wills Act 1936* (SA) s 25AA(1).
37 *Succession Act 2006* (NSW) s 27(1); *Wills Act 2000* (NT) s 27(1); *Succession Act 1981* (Qld) s 33(1); *Wills Act 2008* (Tas) s 42(1); *Wills Act 1997* (Vic) s 31(1); *Wills Act 1970* (WA) s 50(1).
E Capacity and Statutory Wills

The Court of Queen’s Bench in *Banks v Goodfellow*[^38] considered the scope of the *Wills Act 1837* and, in particular, the notion of testamentary capacity. It is to be noted that the Act made no reference to capacity apart from the sections addressing infants and married women. The judgment of the Court was delivered by Cockburn CJ. This judgment has been treated as establishing a golden rule concerning testamentary capacity[^39].

The testamentary capacity test in *Banks v Goodfellow* requires, in summary, that the testator

- understand the nature and effect of a will;
- understand the extent of their property;
- comprehend and appreciate the claims to which they ought to give effect; and
- be suffering from no disorder of the mind or insane delusion that would result in an unwanted disposition[^40].

Kelly Purser has questioned whether the test in *Banks v Goodfellow* is still relevant. In her article[^41], she undertakes a detailed study of the applicability of the test in the modern day. She addresses the growing problem of dementia and discusses whether the test takes into account the ‘complexity of modern estate planning and testamentary structures’.[^42] Purser draws attention to a growing ‘tension and misunderstanding’ between the medical and legal professions in assessing testamentary capacity.[^43]

Purser’s conclusion, however, is that the *Banks v Goodfellow* test remains the best test of capacity, notwithstanding the problems that have arisen. She further contends that ‘mechanisms need to be established which facilitate the satisfactory assessment of testamentary capacity’ and promote ‘transparent and substantiated determinations regarding an individual’s testamentary capacity or lack thereof with reference to the legal test and standard on which the assessment is based’.[^44] Purser notes that this ‘requires an interdisciplinary approach utilising the skills and knowledge of both

[^38]: (1870) LR 5 QB 549.
[^40]: *Banks v Goodfellow* (1870) LR 5 QB 549, 565.
[^42]: Ibid 855.
[^43]: Ibid.
[^44]: Ibid 878.
legal and medical professionals’ and that ‘[c]lear assessment processes based on national guidelines and supporting principles will help counter any miscommunication and misunderstanding that can exist between the legal and medical professions, especially with respect to discipline-specific vocabularies’.45

The status of the Banks v Goodfellow test is important given that the problem of dementia is now profound and commonplace. Society now faces dementia almost as a norm rather than an exception. In 2016, there were an estimated 400,800 Australians living with dementia.46 This bring us to the discretion to make a statutory will, which applies in a ‘lost capacity’ case as well as a ‘no capacity’ case.

The historical background of statutory wills can be traced to the English parens patriae jurisdiction where the Crown possessed ‘power, and a corresponding duty, to protect the person and property of those unable to do so for themselves, including both minors and persons of unsound mind’.47 This doctrine originated in England during medieval times with the lord of the manor having ‘guardianship over the person and property of people with disabilities’.48 By the 14th century, this duty was ‘assumed … by the crown’49 which delegated responsibility to the chancellor:

Thus, the chancery courts, with the chancellor acting as the “supreme guardian”, assumed the duty of protecting “all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns”.50

This jurisdiction was addressed by the Mental Health Act 1959, 7 & 8 Eliz 2, c 72.

In Australia, legislation was first enacted in South Australia granting a judicial discretion to make a statutory will.51 That legislation was soon followed in the other States and Territories.52

49 Griffith (n 48) 287.
50 Ibid (citations omitted).
51 Wills Act 1936 (SA) s 7, inserted by Wills (Wills for Persons Lacking Testamentary Capacity) Amendment Act 1996 (SA) s 3.
52 Williams and McCullough in their comprehensive work on statutory wills have traced the development of statutory wills legislation in Australia: Williams and McCullough (n 47).
The statutory discretion of a judge to make a statutory will is of recent origin. It is a far-reaching power. Courts are developing precedent and it appears that the making of statutory wills may well be a jurisdiction that is frequently exercised as the advances of medical science extend physical life expectancy but not ongoing mental capacity.

F Technological Challenges

Finally, the increasing use of technology by testators will create many challenges for courts considering probate matters in years to come. As testators become technologically astute, courts will be confronted with testamentary dispositions made in non-traditional forms, and by non-traditional methods. This is illustrated by Australian decisions considering the admission to probate of electronic documents.

In Re Trethewey,53 the Court considered whether an informal electronic document could be admitted to probate. It was reasoned that the electronic file was within the broad definition of ‘document’ for the purposes of the Interpretation of Legislation Act 1984 (Vic).54 The document clearly recorded the testamentary intentions of the deceased.55 The Court considered that the typed name at the foot of the document was equivalent to a signature.56

In Mahlo v Hehir,57 the Court considered that a document for the purposes of the Succession Act 1981 (Qld) included any document in electronic form.58 In the particular circumstances the Court could not be satisfied that an electronic word document was intended to be the final will as the deceased understood that to make a new will she was required to do more than type and modify a Microsoft Word document.59

In Re Yu,60 the Court admitted to probate one of a series of documents on the ‘Notes’ application created by the deceased on his iPhone shortly before death.61 The document “commenced with the words, “This is the last Will and Testament” of the deceased …’ and expressed a clear intention that it was to form his will.62 The deceased’s name, typed at the end of the document in the place where in a paper document a signature would appear, was followed by the date and his address.

54 Ibid 409 [13]–[14].
55 Ibid 409 [15].
56 Ibid 409 [21].
57 (2011) 4 ASTLR 515.
58 Ibid 517 [3].
59 Ibid 526 [41].
60 (2013) 11 ASTLR 490.
61 Ibid 491 [1].
62 Ibid 492 [9].
This, together with the formal identification of the deceased at the start of the document, was held to demonstrate an intention that the document be operative.63

In Re Wilden,64 a DVD was admitted to probate along with other writings. The Court considered the DVD to be a document for the purposes of the Wills Act 1936 (SA) as a consequence of the definition of ‘document’ in s 4(1) of the Acts Interpretation Act 1915 (SA).65 As the DVD was an article or material from which sounds and images were capable of being reproduced with the aid of another article or device it was considered to be a document for the purposes of s 12(2) of the Wills Act 1936 (SA).66

These cases demonstrate that the courts are prepared to accept the use of electronic documents as wills in appropriate cases.

III Directions

In light of these reflections on the past, we can expect that there will be significant societal changes in the future, indeed perhaps even more dramatic ones. As earlier observed, the law is grappling with the problems of the electronic era and its adaptation and development will continue. It is difficult to predict the changes that will occur.

Societal changes taking place in Australia include recognition of many relationships, the changing definitions of marriage, and the concept of blended families. These changes all create a need for flexibility in succession law. It is of particular significance that in the development of succession law, Parliament has had the confidence to repose trust through wide discretions on the judiciary.

Australia is a multicultural society. Australians come from all parts of the world. They bring with them different traditions and practices in regard to matters of succession. Older generations often cling to the practices of their own culture, however their children quickly adopt the Australian way of life.

Estate planning has been carried out for hundreds of years and remains an important component of succession law practice. Constant changes in legislation addressing taxation, superannuation and trusts make the task of effective estate planning challenging.

Wealth transfer involves a succession lawyer addressing intergenerational issues, often with the involvement of most of the generations concerned. The problems that arise are going to confront succession lawyers.

63 Ibid.
64 (2015) 121 SASR 516.
65 Ibid 519 [12].
66 Ibid.
One of the most significant challenges that will continue to confront succession lawyers is the incidence of dementia. Over the next 20 years it is projected that the number of adults living in Australia with dementia will nearly double to an estimated 760,700 people. This will significantly impact the estate planning advice that practitioners provide in the future. Succession lawyers will need to advise their clients that in the event of dementia there is the prospect of a judge amending or remaking their will. Developments in elder law are also gaining prominence both at law schools and within the profession.

These observations demonstrate the need for succession law to remain flexible. Judges should retain wide discretions. There is little doubt that succession law will effectively address all of these changes. The core concept of testamentary freedom enshrined by the Wills Act 1837, but modified and limited by judicial decision and by legislation, remains an important cornerstone of succession law. And so it should.

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67 Brown, Hansnata and La (n 46) 6.
**Katrina Bochner**

**ALTERNATIVE DISPUTE RESOLUTION AND ACCESS TO JUSTICE IN THE 21ST CENTURY**

**I INTRODUCTION**

In 1997, Lord Woolf delivered his *Access to Justice* report to Parliament.¹ The report came at the end of a lengthy review of the civil justice system in England and Wales, and as a result of complaints about the unwieldy system in place at that time. He identified the problems that he found with the system as follows:

The defects I identified in our present system were that it is too expensive in that the costs often exceed the value of the claim; too slow in bringing cases to a conclusion and too unequal: there is a lack of equality between the powerful, wealthy litigant and the under resourced litigant. It is too uncertain: the difficulty of forecasting what litigation will cost and how long it will last induces the fear of the unknown; and it is incomprehensible to many litigants. Above all it is too fragmented in the way it is organised since there is no one with clear overall responsibility for the administration of civil justice; and too adversarial as cases are run by the parties, not by the courts and the rules of court, all too often, are ignored by the parties and not enforced by the court.²

To remedy these problems, Lord Woolf recommended wide-ranging reforms. These included simpler rules of court, less complexity in procedure, more flexibility in dealing with cases and particular issues within cases, fixed timetables for progress of matters from filing to trial, and significant changes to legal costs. Importantly, he also recommended a system where litigation was to be discouraged — and alternative dispute resolution (‘ADR’) encouraged, and funded — prior to commencement of proceedings.

In December 2009, Lord Jackson published his *Review of Civil Litigation Costs*.³ His foreword is succinct:

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² Ibid [2].

In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.4

In a preliminary report that appeared a few months prior to his final report, Lord Jackson summarised the outcome of the reforms implemented as a result of Lord Woolf’s review as follows:

It is now ten years since Lord Woolf’s reforms to civil procedure (‘the Woolf reforms’) were implemented. The Civil Procedure Rules 1998 (‘the CPR’), which implemented the Woolf reforms, came into force on 26th April 1999. Those reforms have brought huge benefits to civil litigants. Far more cases are settled before issue. Those cases which are contested proceed far more swiftly from issue to trial. We no longer have the repeated tragedy (for such it was) of meritorious claims being ‘struck out for want of prosecution’. The case management function, which the court has assumed following the Woolf reforms, prevents cases from being parked indefinitely, whilst the parties or their lawyers attend to other matters. The creation of ‘tracks’ for cases ensures that each type of case receives an appropriate allocation of resources and degree of attention from the court. The ‘fast track’ ensures that lower value cases are brought to trial with expedition and that the trial costs (although not the pre-trial costs) of such cases are fixed. The procedure for offers … has by common consent been a considerable success.5

However, Lord Jackson noted that ‘despite the general success of the Woolf reforms, the costs of civil litigation continued to rise’.6 To this end, he recognised the benefits offered by various methods of alternative dispute resolution (‘ADR’) and recommended that

[...] there should be a serious campaign (a) to ensure that all litigation lawyers and judges are properly informed about the benefits which ADR can bring and (b) to alert the public and small business to the benefits of ADR.7

In 2014, the Productivity Commission provided a report, entitled Access to Justice Arrangements,8 to the Australian Government. The Commission summarised its terms of reference as follows:

The Commission has been asked to undertake an inquiry into Australia’s system of civil dispute resolution with a view to constraining costs and ‘promoting

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4 Ibid i.
6 Ibid.
7 Jackson (n 4) 363.
access to justice’. There are many definitions of ‘access to justice’. As Justice Sackville observed:

Like other catchphrases, such as ‘fairness’ and ‘accountability’ (if not ‘democracy’ itself), the expression ‘access to justice’ survives in political and legal discourse because it is capable of meaning different things to different people.

For the purposes of this inquiry, the Commission has used the term ‘promoting access to justice’ to simply mean, ‘making it easier for people to resolve their disputes.’

The Commission identified a range of problems with the justice system in Australia, including a lack of knowledge among many in the community of when, where, and how to take action. Other problems identified included difficulties in seeking appropriate legal advice, including finding appropriate providers, assessing the quality of the advice given, and the often significant cost of professional assistance. The Commission also made a wide range of recommendations, such as the provision of community education, benchmarking of legal fees, consideration of significant changes to procedures — particularly in relation to disclosure and expert evidence — and the fixing of fees in certain jurisdictions. In relation to alternative dispute resolution, the Commission made the following recommendation:

Where alternative dispute resolution processes have been demonstrated to be efficient and effective (such as in low value litigation), courts and tribunals should endeavour to employ such processes as the default dispute resolution mechanism, in the first instance, with provision to exempt cases where it is clearly inappropriate.

In addition, courts and tribunals should endeavour to expand the use of alternative dispute resolution processes by undertaking and evaluating targeted pilots for dispute types that are not currently referred to such processes, including wills and estate matters.

These reports demonstrate that, for more than 20 years, access to justice in the United Kingdom and in Australia has been beset with problems. These problems relate to many factors, some of which are structural — such as procedures required by courts and other institutions in administering justice — while others relate to insufficient resources or excessive cost and delay faced by litigants. In each of the three reviews referred to above, the use of alternative dispute resolution has featured as part of the solution.

In this article, I deal with mediation and its part in this solution.

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10 Ibid 48.
II What is ‘Alternative’ about Alternative Dispute Resolution?

In *Mediation in Australia*, Boulle and Field say that

> while mediation espoused values and principles distinct from those of litigation, it was never accurate to portray it as an alternative system since this implied that litigation was the ‘norm’. In reality, litigation, in which parties in conflict institute legal proceedings and progress through to a hearing, has always been an out-of-the-ordinary manner of dealing with disputes.¹¹

Chief Justice Martin describes the ‘non-alternative’ nature of alternative dispute resolution in the following way:

> Achievement of a consensus has always been, and remains by far, the most common means of resolving disputes in most, if not all, societies. …

> As civilisation progressed and societies became more sophisticated, systems of law evolved together with courts capable of enforcing those laws, which enabled disputes to be resolved without resort to force, other than the coercive powers of the courts. However, while enthusiasm for litigation has waxed and waned in different societies at different times, the delay, uncertainty and expense associated with litigation has meant that, generally speaking, it has been regarded as a last resort to be utilised only when all other means of dispute resolution have failed.¹²

Thus, the ‘non-alternative’ nature of alternative dispute resolution is two-fold.

Firstly, only a tiny fraction of the disputes in which the members of a community are engaged throughout a lifetime ever reaches a lawyer’s office, let alone a court. Whether the dispute has arisen from the supply of allegedly faulty goods, unreasonable actions by a landlord or a tenant, perceived unfairness in the bequests left by a testator to family members in a will, or any other of the myriad causes of disputes in our society, the vast majority of disputes are resolved through discussion and negotiation between the parties, with no thought of legal advice being sought, or proceedings being issued.

Secondly, of those disputes for which legal advice is sought and proceedings are issued, only a small fraction has ever proceeded to judicial determination. Most disputes are settled prior to trial.

In both of these senses, determination by judicial decision-making is in fact the alternative, and far less common, method of dispute resolution. Discussion, negotiation,

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and compromise or consensus-reaching — with or without the assistance of a third party — is the way in which the vast majority of disputes in our society are resolved, and indeed have been resolved for many centuries. Perhaps the increased use of court-annexed mediation is better seen as an attempt, and a justifiable one at that, to reassert it as the norm in the resolution of complex, higher-value disputes.

As determination by judicial decision-making is the exceptional method, and in that sense, the alternative method of dispute resolution, it raises the question of the appropriateness of the deflection of judicial responsibility to the parties and mediators during non-judicial dispute resolution. Indeed, in most cases that come before the courts, the parties, have in fact, already embarked on a process (and often a lengthy one) of negotiation in an attempt to resolve the dispute, albeit on an informal basis, and have turned to lawyers and the courts as a last resort. It is only in rare cases that the defendant has had no notice of the dispute prior to the plaintiff’s consulting a lawyer or the issue of proceedings. By referring matters to mediation, are judges simply asking the parties to try again and to try harder?13

### III Does Mediation Provide Access to Justice?

That depends very much on how the term ‘access to justice’ is defined. I was interested to note that the Productivity Commission defined ‘access to justice’ as ‘making it easier for people to resolve their disputes’. Without entering into a philosophical debate about the meaning of ‘justice’, I am of the view that ‘access to justice’ means far more than this.

In his 2013 speech to the Supreme and Federal Court Judges Conference, Chief Justice French addressed this question in part. In discussing the role of courts, he noted the words of Professor Owen Fiss, who said:

[A court’s] job is not to maximise the ends of private parties, nor simply to secure the peace, but to explicate and give force to the values embodied in the authoritative texts such as the Constitution and the Statutes: to interpret those values and to bring reality into accord with them.14

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13 For example, a study conducted in 2011 indicates that the ADR process in regards to strata title development conflicts in Victoria were a cause of dissatisfaction amongst managers, due to the amount of time the process necessitated and inadequacy of the rules for engaging successfully and efficiently with conflict. See Kathy Douglas, Rebecca Leshinsky and Peter Condliffe, ‘Conflict in Strata Title Developments: the Need for Differentiated Dispute Resolution Rules’ (2016) 37(1) *Adelaide Law Review* 163, 186.


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He also referred to the role played by courts in dispute prevention, as described by former Chief Justice Gleeson:

Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.15

He then said the following:

There has been over the past half century or so a tidal wave of enthusiasm in the United States and later in Australia for ‘alternative’, that is to say non-judicial, dispute resolution mechanisms. That enthusiasm is understandably driven by concerns about the costs, delays and stresses associated with court proceedings as well as undesired publicity which they may attract to the parties. But consistently with Professor Fiss’ statement and the observations by former Chief Justice Gleeson, there have also been concerns about ‘power imbalances, the privatised nature of alternative dispute resolution and the ensuing lack of precedent’. As one United States academic observed two years before Professor Fiss:

informal institutions deprive a grievant of substantive rights. They are antinormative and urge the parties to compromise; … although this appears even handed, it works to the detriment of the party who is advancing a claim — typically the individual grievant.16

These are important concerns, and ones which the courts, as proponents of alternative dispute resolution, need to consider.

The role of the courts extends much further than simply that of dispute resolution. The interpretation and development of the law is an intrinsic role of courts and judges, and one that cannot be duplicated by any non-adjudicative dispute resolution procedure. Through its interpretation of the law — whether that be statutes or the common law — judges examine, reflect on, and articulate societal norms. This public pronouncement of the law — how it has developed, how it reflects society’s expectations, and how it is to be applied — allows others to ensure that their conduct conforms to those expectations. As Gleeson points out, by doing this, courts facilitate the prevention of disputes. In addition, through judicial consideration, the common law is regulated, adapted, modified, and expanded to meet changing circumstances and societal mores.


The resolution of disputes through mediation does not allow this public exposition of the law, or its principled modification and change. There is a risk that if the majority of disputes are resolved through mediation, the fluid nature of the common law, which allows both certainty and change with the times, would be lost. The common law would become fixed at one point in time, as it is no longer being tested and challenged, and statute law would become opaque. The ability of individuals to satisfy themselves, as well as they can, that they are complying with the law, would be greatly diminished, and the ability of lawyers to give advice to their clients, based on previous decisions would be lost.

Just as importantly, if mediation were to become the primary method of dispute resolution, the right of an individual to enforce his or her legal rights would become lost. Mediation puts the policy of pragmatism above the notion of enforcement of strict legal right. Justice — or at least the kind that can be achieved through the court system — is predicated on the determination of a person’s legal rights and the enforcement of those rights. Mediation is designed to a large extent, to ignore those rights; parties are required to put aside their strict legal entitlements and look for a practical solution to the problem that they have. While this no doubt works for some individuals, there will be those for whom a ‘practical’ solution is no substitute for the determination of the correct position at law. Further, society as a whole will be the poorer for it. The public resolution of disputes demonstrates to society at large the operation of one of the fundamental characteristics of a democracy, that disputes are resolved through the fair and impartial application of the law.

The question of power imbalance is also one that needs to be carefully examined in the context of mediation. While it is the role of the mediator to ensure that power imbalances between the parties are removed as far as possible, in reality this can be very difficult, if not impossible to achieve. This is particularly the case where one party has far more experience and knowledge of the mediation process and the likely range of outcomes than the other. An individual customer of a large corporation will often be disadvantaged in the mediation process, not only in relation to the size of the corporation’s legal budget, but also because in all likelihood, this is the first (and only) time that the individual would have been in that type of situation. A large corporation, on the other hand, may well be an experienced mediation party. Confident with the system, such companies are bolstered by a wealth of firsthand knowledge of the outcomes at mediation of other similar disputes, and, in smaller jurisdictions, often well known to the mediator. This immediately puts the corporation in a stronger position than the individual, who may have no idea of the likely outcomes in other similar disputes, and has no way of benchmarking the offers put to him or her.17

17 Kathy Mack in 1995 published an article discussing the greater difficulties women faced in the ADR process compared to men. This included disparity created by violence against women, economic and information differential, uncertain legal entitlements, and the credibility gap. See Kathy Mack, ‘Alternative Dispute Resolution and Access to Justice for Women’ (1995) 17(1) Adelaide Law Review 123.
A system which places mediation as the primary method of dispute resolution arguably gives greater power to larger organisations, which receive a significant volume of complaints and claims, over the smaller company or individual for whom a claim may be a one-off occurrence in a lifetime. It permits ‘justice’ to be carried out behind closed doors, in such a way that there are no checks to ensure that the law is being applied equally to all, with outcome-based benchmarks opaque at best and non-existent at worst.

Gleeson expressed these concerns in the following way:

The utility of judicial decision-making which follows, and sometimes establishes, precedent, is an important difference between the work of judges and that of other dispute resolvers. In the importance that is now attached to dispute resolution we some times overlook the significance of dispute prevention. Especially in the area of commercial law, there is utility in both parties to a potential dispute receiving similar advice as to what the outcome of a dispute, if litigation results, is likely to be. That is the most common and effective form of dispute prevention.

...  

Parties to litigation ordinarily want their disputes resolved as expeditiously, inexpensively, and fairly as possible. They do not want to become involved in leading cases. This, however, should not distract attention from the equally important consideration that most people do not want to become involved in litigation at all, and there is economic and social utility in the availability of a process of public adjudication in the course of which judges declare and apply legal principle rather than seek a solution to each individual dispute which appears fair to them.

There is substantial cost, both to individual litigants, and to the community, in a system of discretionary, or over-particularised decision-making, where, to use a phrase borrowed from another area of the law, individual cases simply constitute a wilderness of single instances.18

In my view, mediation does not provide access to justice. It provides access to a process that allows parties to resolve disputes on a pragmatic and cost-effective basis, regardless of the justice of the case. Parties at mediation need to put aside their strict legal rights in order to reach an outcome by compromise. In doing so, they forgo the opportunity to have their case heard in public, to have an independent third party adjudicate on the merits of the facts and the law presented by each side. They forgo the right to a public statement of the reasons for the decision made, and they agree to put aside the principle of open justice, ensuring that any benchmark for future similar cases is difficult, if not impossible, to ascertain.

18 Gleeson (n 15) 455–6.
IV What Happens to the Rule of Law?

This is not the place for a lengthy discussion about what is the rule of law, and how, if at all, it is embodied in Australian law. Suffice to say, the rule of law is invoked on a regular basis by governments and courts, and appears to embody many of the principles identified by Lord Bingham when he described the rule of law as follows:

The core of the existing principle is, I suggest, that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts. I doubt if anyone would suggest that this statement, even if accurate as one of general principle, could be applied without exception or qualification. There are, for instance, some proceedings in which justice can only be done if they are not in public. But it seems to me that any derogation calls for close consideration and clear justification.\(^{19}\)

He then identified eight sub-rules which are embodied in the principle. Three of those are particularly relevant to the question of whether mediation offers access to justice: ‘the law must be accessible and so far as possible intelligible, clear and predictable’;\(^{20}\) ‘questions of legal right and liability should ordinarily be resolved by application of the law and not the exercise of discretion’;\(^{21}\) and ‘the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation’.\(^{22}\)

Regardless of one’s views on the rule of law as a concept generally contained within Australian law, these are principles which I think the majority of people, whether they be lawyers or lay people, would endorse.

Mediation necessarily involves the flouting of each of these rules. The more disputes that are resolved through mediation, the less accessible and predictable the law becomes. Disputes are resolved through the application of values and concerns that are focussed on individual needs and interests, rather than through the application of the same law to all people with the same (or similar) dispute. The law is largely disregarded as disputes are resolved on the basis of pragmatism, risk management, or some personal value or belief. As more disputes are resolved, regardless of what the law requires, the law itself becomes a shadowy concept that plays second fiddle to these other notions and values. The resolution of disputes becomes an exercise of discretion, that discretion lying with the parties. And there is no uniformity or predictability of decision-making; indeed, the law applies to no one, and becomes merely one factor to put into the scales when weighing up one’s risk of litigation.

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\(^{20}\) Ibid.

\(^{21}\) Ibid 72.

\(^{22}\) Ibid 73.
V Conclusion

Mediation is an invaluable tool that allows individuals to resolve disputes, generally more cost-effectively and efficiently than court proceedings. Parties should be given the opportunity to mediate if they wish to do so. However, in cases where the parties have already made genuine attempts to resolve a dispute through negotiation, perhaps a court should think twice before telling the parties to try again. Parties who have been unable to resolve disputes through reasonable negotiation need a real alternative to assist the breaking of the impasse.

Courts and governments should be wary of badging mediation as ‘access to justice’. Nor should mediation be promoted to parties as the more desirable, or primary, method of dispute resolution. While there are problems with our court system as a result of which civil disputes cost too much money and take too long to resolve, mediation alone cannot provide the answer. Although mediation may offer a quicker and cheaper outcome to the parties, it may also lead, in the long term, to a more impoverished legal system, where we find ourselves without a clear articulation of the law and predictability of outcome, and are left with nothing more than a ‘wilderness of single instances’. 23

23 Gleeson (n 15) 456.
THE ‘AGE OF STATUTES’ AND ITS INTERSECTION WITH FUNDAMENTAL PRINCIPLES: AN ILLUSTRATION

I Introduction

The half-century or so since the first edition of the Adelaide Law Review coincides with what has come to be known as the ‘age of statutes’.¹

Notwithstanding their volume and reach, however, they require to be applied in the context of curial procedures which are grounded in common law traditions.² And whenever a statute adds to, or alters, the substantive or procedural law, a question may arise as to the extent of the change intended or permitted. A recent series of cases concerning statutory reform to substantive and procedural aspects of a particular aspect of the criminal law in South Australia illustrates the way in which litigants (and courts) resort to fundamental concepts sourced in the common law, and aspects of the judicial process entrenched by the Constitution, in understanding the reach and limits of the statutory law.

The cases highlight that the ‘age of statutes’ has also coincided in Australia with an era that has seen emphasis upon a ‘principle of legality’, one aspect of which is a working hypothesis that Parliament will be taken not to have abrogated fundamental common law rights or freedoms in the absence of express words or necessary implication.³ This era has also been marked by the emergence of two constitutional doctrines which mark out limits upon the otherwise plenary power of state parliaments (which are separate and distinct from limitations necessitated by the existence of a federal polity).⁴

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* LLB (Adel); Barrister, Frank Moran Chambers.
** B Comm, LLB (Hons) (Adel), BCL (Oxon); Barrister, Hanson Chambers.
² It is the duty of courts to give effect to the will of Parliament. ‘But they must do so in a trial process which ensures, so far as they can, fairness to the accused’: KBT v The Queen (1997) 191 CLR 417, 432.
In the application of the substantive and procedural criminal law, it is possible to identify a number of principles and norms that have developed. Whilst not all of them are as ancient as they are often perceived to be, they are regarded as important aspects of the accusatorial system of criminal justice inherited and developed by Australian courts.

So, for example, an accused is entitled to proper particulars of the charged offending. Generally, an accused’s conduct will only merit punishment if it contravenes the law in force at the time of the conduct. The court has a duty to ensure, and the accused has a correlative right not to be convicted other than following, a fair trial and his or her guilt is to be proved beyond a reasonable doubt. The focus of the trial is upon the evidence of the charged offending, and whilst evidence of wrongdoing on another occasion may exceptionally be admitted if it is sufficiently probative to outweigh the danger of unfair prejudice, an accused is not to be convicted for something he or she did on a different occasion, or because he or she is of bad character. If convicted, the accused is to be punished and sentenced for the offence of which he or she has been found guilty and not for other acts that are not the subject of the verdict. The punishment is to be proportionate to the offending.

The application of these norms, which to a large extent are concerned with ensuring the protection of citizens from punishment by the State without proper cause and due process, can have the consequence that it is difficult to secure convictions for particular types of criminal conduct.

A paradigm example of this is sexual offending of a repetitive kind, particularly where children are involved. The insidious nature of the offending, and the power and age imbalance that can be involved, can mean that the offending is perpetrated over a long period, and not reported — let alone tried — until much later. This, together with the trauma of the conduct, may make it difficult for victims to make complaints which permit a particular act (as distinct from the outline of a pattern of

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5 Johnson v Miller (1937) 59 CLR 467; S v The Queen (1989) 168 CLR 266; KRM v The Queen (2001) 206 CLR 221.
6 DPP (Cth) v Keating (2013) 248 CLR 459, 479.
7 Jago v District Court of New South Wales (1989) 168 CLR 23; Dietrich v The Queen (1992) 177 CLR 292.
8 Woolmington v DPP [1935] AC 462.
12 Not all of the norms may be strictly founded in logic, but rather in experience, as Oliver Wendell Holmes famously observed: Oliver Wendell Holmes, The Common Law (Harvard University Press, 1881) 1.
conduct) to be particularised and then proved beyond reasonable doubt. The perverse result may be that the more egregious the offending, the less likely the offender is to be convicted of any single act.

III LEGISLATIVE REFORM

South Australia, like other jurisdictions, has responded to this dilemma with legislative reform. Initially, in 1994, an offence of persistent sexual abuse of a child was introduced as s 74 of the Criminal Law Consolidation Act 1935 (SA).\(^{13}\) The offence was defined to consist of a course of conduct involving the commission of a sexual offence (defined by reference to other offences in the Act) against a child on at least three separate occasions, so long as the occasions fell on at least three days.

Subsequently, in 2007, s 74 was replaced with s 50,\(^ {14}\) which provided that an adult person who, over a period of not less than three days, commits more than one act of sexual exploitation of a particular child under the prescribed age was guilty of an offence. The section went on to stipulate that a person commits an act of sexual exploitation of a child if the person commits an act in relation to the child of a kind that could be the subject of a charge of a sexual offence if it were able to be properly particularised (again, defined by reference to other offences in the Act).

Section 50(4) provided that despite any other Act or rule of law, the information was required to allege with sufficient particularity the period during which the acts of sexual exploitation allegedly occurred, and the alleged conduct comprising the acts of sexual exploitation. The information was required to allege a course of conduct consisting of acts of sexual exploitation, but needed not allege particulars of each act with the degree of particularity that would be required if the act were charged as an offence under a different section of the Act. Nor did the information need to identify particular acts of sexual exploitation or the occasions on which, places at which, or order in which acts of sexual exploitation occurred.

Both s 74 and its successor s 50 carried a maximum of life imprisonment, and were retrospective in the sense of applying to acts committed prior to the introduction of the relevant sections.

The evident purpose of the creation of the offence was to permit the prosecution of offenders in cases in which the pattern of abuse was such that the child was unable to differentiate one act of sexual exploitation from another.\(^ {15}\) It has been accepted,

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\(^{13}\) Criminal Law Consolidation (Child Sexual Abuse) Amendment Act 1994 (SA).

\(^{14}\) Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2007 (SA).

\(^{15}\) Chiro v The Queen (2017) 260 CLR 425, 453 (‘Chiro’). As the Court noted in Hamra v The Queen (2017) 260 CLR 479, 490, when s 74 had been introduced, the Attorney-General referred to the difficulties confronting the prosecution in historical, persistent child sexual abuse cases arising from the application of the principles in S v The Queen (n 5).
however, that neither s 74, nor its successor s 50, created a ‘relationship’ offence.\footnote{Chiro (n 15) 436.} Proof of the offence still required proof of unlawful sexual acts, rather than proof at a generic level of sexual interest, an illicit relationship, or a particular disposition.\footnote{R v Little (2015) 123 SASR 414, 420; Chiro (n 15) 438, 452.}

While reform to address the difficulties attending the charging and proof of offending of the kind under consideration may have understandable and necessary, because the actus reus of the offence consists in a number of individual acts, the drafting of s 74 and s 50 produced a tension between the objective of the reform and the application of the norms earlier identified to the elements of the offence.

If a complainant cannot differentiate one act from another, how can an accused understand the case he or she has to meet, how are the jury to distinguish evidence of the putative offending from prejudicial evidence of surrounding misconduct, and how is the jury’s verdict to be understood so that the judge can ensure that the punishment fits the crime? In a trial by judge alone, to what extent does the judge’s obligation to give reasons require an identification or differentiation of the particular acts. And what of a case where a credible complainant cannot identify any particular acts but gives evidence which if accepted must lead to the conclusion there were at least two sexual offences committed over the prescribed period?

These and other issues emerged in a recent series of cases, leading ultimately to the repeal and retrospective substitution of a new s 50,\footnote{Statutes Amendment (Attorney-General’s Portfolio) (No 2) Act 2017 (SA).} which in terms now proscribes ‘unlawful sexual relationship’.\footnote{The offence may be proved without the trier of fact being satisfied of the particulars of any sexual act, so long as they are satisfied of the general nature or character of the acts. There is no requirement for unanimity as to which sexual acts constitute the relationship.} The application of the transitional provisions of the amending legislation has also led to a question of constitutional validity.

\textbf{IV South Australian Decisions}

Shortly after s 74 was introduced, in \textit{R v D}\footnote{(1997) 69 SASR 413, 419.} the question arose whether the stipulation of a life sentence as the maximum punishment meant that a sentence imposed under s 74 would normally be heavier than it would have been had the underlying sexual offences been charged and proved. The Court of Criminal Appeal decided that s 74 was concerned with certain procedural difficulties, but there was nothing in the provision that suggested Parliament intended that the courts should change the approach that they had taken when sentencing in respect of a course of conduct comprising specific offences. In reaching that view, the Court was plainly motivated by what might be identified as another norm: equality before the law.\footnote{See, eg, \textit{Attwells v Jackson Lalic Lawyers Pty Ltd} (2016) 259 CLR 1, 23.} The Court
thought it unlikely that Parliament intended that a person charged with the s 74 offence should be dealt with more severely for the very same conduct as a person charged with a series of offences.

Following the introduction of s 50, a number of South Australian decisions explored the implications arising from the fact that the actus reus was defined as comprising a minimum number of acts of sexual exploitation, but the information was not required to particularise each act individually. In particular, the decisions explored the requirement for an extended unanimity direction in a jury trial, and the safety of a verdict resulting from a trial in which the evidence was of a kind that may not readily have permitted agreement in the jury room upon particular incidents or episodes of offending.\textsuperscript{22}

Importantly, in \textit{R v Little},\textsuperscript{23} the South Australian Court of Criminal Appeal comprising five Judges held that in a case where multiple acts of sexual exploitation are alleged, it is an error of law to fail to direct the jury that they must agree unanimously, or by majority after four hours, that a ‘prescribed pair’ of the same two acts has been proved beyond reasonable doubt. In doing so, the Court held that s 50 was to be treated in the same way as a Queensland provision considered in \textit{KBT v The Queen}.\textsuperscript{24} The Court held that a so-called ‘extended unanimity direction’ is required because the offence comprises two or more acts of sexual exploitation about which the jury were required to be unanimous.

In the subsequent decision in \textit{R v Johnson},\textsuperscript{25} the Court allowed an appeal against conviction pursuant to s 50 following a trial before a jury because the way in which the complainant had given evidence meant that there was nothing to sufficiently differentiate one occasion of abuse from another.

\section*{V \ Three High Court Decisions}

In 2017–18, the High Court granted special leave to appeal in relation to three matters involving different, but related, issues arising out of s 50. These concerned the intersection between the reforms worked by that section and the basic norms and principles conventionally applying in criminal proceedings.

In \textit{Chiro v The Queen} (‘\textit{Chiro’})\textsuperscript{26} the issue was essentially whether in sentencing a person convicted of persistent sexual exploitation the judge was constrained to sentence by reference to the actus reus agreed upon by the jury (who had been given


\textsuperscript{23} \textit{R v Little} (n 17).

\textsuperscript{24} \textit{KBT v The Queen} (n 2).

\textsuperscript{25} [2015] SASCFC 170. The case was also appealed to the High Court on a different ground: \textit{Johnson v The Queen} (2018) 360 ALR 246.

\textsuperscript{26} \textit{Chiro} (n 15).
an extended unanimity direction), or whether, a general verdict of guilty having been returned, the judge could sentence according to the acts he or she considered were proved beyond reasonable doubt (even though the jury might not have been persuaded of the full range of offending alleged by the complainant).

The High Court held, by majority, that it was for the jury, and the jury alone, to decide the actus reus, and that in the absence of the judge having exercised his or her discretion to ask ‘special questions’ of the jury as to which acts they unanimously agreed had been committed, the court would have to sentence conservatively to avoid manifest excess. The plurality observed that although it was true that an offence under s 50 was but one single offence, if the accused was convicted, the sentence to be imposed should be determined by reference to each sexual offence which the alleged acts of sexual exploitation would constitute if charged separately, as if the accused had been convicted of each of those offences. For that reason, the principle laid down in R v De Simoni (‘De Simoni’) was instructive: ‘Plainly, an accused is not to be sentenced for an offence which the jury did not find the accused to have committed’. The consequence was that the appeal was allowed and, it now being too late to ask the jury which offences they found proved, the Court of Criminal Appeal was required to re-sentence Mr Chiro on a basis which was effectively the minimum content of the jury verdict.

In Hamra v The Queen, there had been a trial before a judge alone. Applying R v Little and R v Johnson, the judge accepted at the close of the prosecution case that there was no case to answer, and directed a verdict of not guilty. Taking the complainant’s quite generalised evidence at its highest, it was non-specific as to times and dates, making it impossible (in the view of the trial judge) to identify two or more acts of sexual exploitation. The Court of Criminal Appeal allowed the appeal, and the defendant then appealed to the High Court, contending that the trial judge had been correct to hold that if the evidence was not capable of delineating particular sexual offences one from the other, there was no process of reasoning that could satisfactorily lead to a verdict of guilty.

The defendant argued on appeal that notwithstanding its alteration to the permissible form of the information, s 50 did not ameliorate the requirement that the State must prove, and therefore that the evidence must ultimately be capable of particularising, a ‘distinct occasion’ or ‘distinct transaction’ constituting each alleged sexual offence, relying on Johnson v Miller and S v The Queen.

27 Chiro (n 15) 447.
28 De Simoni (n 10).
29 Ibid 448–9.
30 R v Chiro [2017] SASCFC 144.
31 Hamra v The Queen (n 15).
32 R v Little (n 17); R v Johnson (n 25).
33 Johnson v Miller (n 5).
34 S v The Queen (n 5).
Whilst acknowledging that this was the position at common law, the High Court unanimously rejected the contention, holding that the plain terms of s 50(4) modified the common law by providing that although the information must allege a course of conduct consisting of acts of sexual exploitation, it need not identify particular acts of sexual exploitation or the occasions on which, places at which or order in which acts of sexual exploitation occurred. The Court acknowledged that while a lack of specificity might create difficulties for a jury in agreeing on two or more of the same acts, the possibility that they might agree that all the alleged acts occurred meant there would still be a case to answer in a situation of that kind.

Finally, in DL v The Queen, the High Court was called upon to consider whether (and if so to what extent) the difficulties created by vagaries in the complainant’s evidence had to be addressed by a trial judge sitting without a jury in the reasons for verdict. The essential issue was whether the trial judge’s reasons failed to identify the two or more acts of sexual exploitation upon which the conviction was based and to disclose the process of reasoning leading to that finding. The Court accepted that the reasons would need to address the elements of the offence and therefore the actus reus, but divided on whether, properly construed, the reasons achieved that.

The minority considered that the reasons had to identify the acts of sexual exploitation comprising the actus reus and the process of reasoning that led to those findings and that, the judge having suggested some but not all of the alleged acts were proved, but without explaining which and why, the reasons were deficient. The majority construed the reasons as amounting to a finding that all of the alleged acts had been committed. On that basis, the reasons for so finding, whilst expressed at a high level, were acceptable, because they essentially involved an acceptance of the complainant’s evidence as to all of the substantive allegations.

**VI The Amending Legislation**

The decision in *Chiro* provoked a swift legislative response. The South Australian Parliament legislated not only to replace s 50 with a true ‘relationship’ offence, but to prevent other offenders — who, like Mr Chiro, had been convicted under the old s 50, but without the jury having been asked to identify the offending they found proved — receiving the benefit of the High Court’s ruling and a potentially lenient sentence.

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38 Ibid 219, 237.
39 Ibid 209.
Section 9(2) of the amending legislation applied to persons who had been found guilty but not yet sentenced, with the sole and specific exception of Mr Chiro. In such cases, the amending legislation purported to require the sentencing court to treat the jury’s verdict as finding of guilt with respect to the entire course of conduct alleged. The section then went on to authorise the sentencing court to sentence the offender on the basis of a subset of that course of conduct if the sentencing court was not persuaded of the guilt of all of the alleged acts beyond reasonable doubt.

The provision led to a question of the constitutional validity being referred to the Full Court of the Supreme Court of South Australia. In *Question of Law Reserved (No 1 of 2018)*, the Full Court unanimously held that the provision was invalid as contrary to the so-called *Kable* doctrine. That doctrine requires that state parliaments may not legislate in such a manner as to confer upon a state court a function or power which substantially impairs its institutional integrity, and which is therefore incompatible with its role, under Ch III of the Constitution, as a repository of federal jurisdiction and as part of the integrated Australian court system.

Justice Vanstone held that s 9(2) impermissibly intruded into the processes and decisions of the Court in that it was concerned with the meaning of the jury’s verdict and, retrospectively, laid it open to a fresh interpretation and one quite possibly different from the factual basis upon which it originally rested. In that way, it worked an alteration to the division of responsibility between judge and jury with respect to the determination of guilt and sentence, part way through the prosecution, constituting an interference in the process of determination of guilt and sentencing in particular cases. Justice Hinton, with whom Lovell J agreed, held that the section substantially undermined the legitimacy of the judicial process and the exercise of judicial power by directing a Court, that had adjudged a defendant’s liability to punishment after a trial by jury, to put that judgment aside and repeat the exercise without a jury and the protections a jury provides in order to determine a different basis for punishment.

**VII Observations**

The purpose of this brief survey of some of the decisions concerning the introduction and ultimate repeal of s 50 is not to critique the decisions, or to criticise the legislative endeavour, but to observe that legislative action does not occur in a vacuum. Provisions such as s 50 do not take effect like fresh paint on a blank canvas.

Subject to questions of validity, the courts are duty bound to give effect to legislative reforms, but the reforms have to be accommodated within the essential framework of a fair trial, and their proper limits (whether as a matter of construction, or validity)

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40 Statutes Amendment (Attorney-General’s Portfolio) (No 2) Act 2017 (SA).
42 Ibid [39].
43 Ibid [174].
will always be assessed by reference to fundamental working assumptions of the common law and criminal procedure. This is the fundamental common law doctrine of legality in operation.\textsuperscript{44}

The irony, it is suggested, is that the more pervasive and prescriptive the statute law becomes, the greater the need may be for an understanding of the general principles which, to a greater or lesser degree, the statutes set out to operate within or upon.

From the perspective of a student, or a lawyer, it might also be thought that the greater the burden of keeping on top of the growing volume of statutory law, the less realistic is that endeavour, and the more valuable it may instead be to focus upon fundamental concepts rather than obtaining what may be a transient knowledge of the substantive content of an ever changing body of statutory law.

Publications such as the \textit{Adelaide Law Review} continue to perform an important function in extracting and subjecting to critical analysis the overarching general principles, whether they be in the field of criminal, civil, public, substantive or adjectival law. These principles retain their vitality in the age of statutes.

\textsuperscript{44} Cf Murray Gleeson, ‘Legality — Spirit and Principle, the Second Magna Carta Lecture’ (Speech, New South Wales Parliament House, 20 November 2003).
Digital disruption is rolling across a succession of industries, and along the way transforming the social, economic and legal landscapes. The combination of big data, artificial intelligence, cloud computing and robotics is not only disrupting specific legal doctrines and practices, but is also beginning to impact the manner and process of engagement between regulators and the regulated. These changes are being driven as much by growing regulatory intensity and complexity and the escalating costs of regulatory compliance, as by the digital technologies themselves. One commentator has even suggested that we have reached a tipping point, where corporate compliance professionals may soon outnumber...
police officers, placing an unsustainable regulatory burden on participants in highly regulated sectors such as banking and finance.

To cope with the compliance challenge, a large number of automated solutions designed to facilitate regulatory compliance have begun to emerge under the moniker of ‘Regtech’. Many of these have arisen within the finance industry alongside Fintech developments that harness digitisation to create new financial products and services and deliver improved efficiencies in existing services. Examples of Regtech include the use of machine learning and biometrics to digitally verify identity and comply with ‘know your customer’ regulation, and the use of cloud computing and artificial intelligence to manage and secure customer data in order to comply with ePrivacy and consumer data rights regulation. Consequently, Regtech is often characterised as a spin-off or subset of Fintech. However, while the ‘Regtech’ label fits neatly into a stable of other ‘X’ tech monikers associated with financial services and many so-called Regtech developments are surfacing in the finance industry, the use of big data, artificial intelligence, robotics and cloud computing to facilitate and/or monitor compliance is not confined to any particular regulatory domain. In fact, Regtech has been evolving across a number of sectors including policing.


forestry management, food and hospitality, healthcare, international trade, and logistics and supply chain management. Parallel to these developments, and to further digitise compliance, attempts are being made to create whole-of-system machine-readable legislation, regulation and policy guidance. Evidently, a revolution is upon us.

By contrast with other analyses that have sought to predict the impact of these revolutionary developments on the regulatory process or upon the relevant industry sector, the purpose of this article is to study the effect of Regtech on future legal scholarship. The 40th anniversary of the Adelaide Law Review provides an ideal opportunity not only for looking back and tracing the pathway of legal development over the past 40 odd years but also for considering the future trajectory of legal scholarship in light of phenomenon like the advent of Regtech. While acknowledging the often thin and overlapping divide between different approaches to research, the article embarks on this task by examining how Regtech may affect (a) doctrinal, (b) normative/reform oriented, (c) theoretical, (d) interdisciplinary and (e) empirical forms of legal scholarship. However, before embarking on that analysis, this article commences by examining Regtech and its possibilities.

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14 For example, the Southern Nevada Health District uses an app employing geotagging and natural language processing to analyse food consumers’ Twitter data and identify sources of food-borne illness: see William D Eggers, David Schatsky and Peter Viechnicki, AI-Augmented Government: Using Cognitive Technologies to Redesign Public Sector Work (Report, 2017) 11–12.


17 For example, the mining and artificial intelligence analysis of media reports, surveillance footage and mobile phones to support modern slavery compliance: Reuters, ‘In the Fight to End Modern Slavery, Machines May Hold the Key’, Voice of America News (online, 9 August 2017) <https://www.voanews.com/a/modern-slavery-artificial-intelligence/3979776.html>.


II Regtech

There is no universally accepted definition of ‘Regtech’. The term appears to have been first used in a United Kingdom Treasury Budget Report from 2015,\(^\text{20}\) which was later elaborated in a review published by the United Kingdom’s Office for Science entitled, ‘Fintech Futures: The UK as a World Leader in Financial Technologies’.\(^\text{21}\) Others use terms such as ‘algorithmic regulation’,\(^\text{22}\) ‘smart regulation’,\(^\text{23}\) ‘dynamic/adaptive regulation’\(^\text{24}\) and — when applied to supervisory agencies like monetary authorities — ‘Suptech’.\(^\text{25}\) The common thread among these terms is the use of digital technologies to facilitate the delivery of regulatory outcomes more effectively and cheaply than traditional, non-digital forms of regulation. These traditional types of regulation are currently beset by a pastiche of methodologies and taxonomies, resource-intensive manual processing, lengthy reporting lags, and significant gaps in regulatory coverage.\(^\text{26}\) Regtech employs tools that involve the collation and analysis of big data, natural language processing, the linking of analytics with machine learning, the application of distributed ledger technology, and the automation of advanced algorithmic processes to expedite and improve compliance and regulation.\(^\text{27}\)


\(^{21}\) United Kingdom Chief Scientific Adviser (n 11).


\(^{23}\) See Zetzche et al (n 8).


\(^{25}\) Suptech or supervisory technology refers to the use of technology by supervisory agencies to support their supervisory functions: Basel Committee on Banking Supervision, *Sound Practices: Implications of Fintech Developments for Banks and Bank Supervisors* (Report, February 2018) 35 <https://www.bis.org/bcbs/publ/d431.htm>.


\(^{27}\) Anagnostopoulos (n 2) 14.
It forms part of the broader digital transformation of government that has evolved over the last 20 years, and which is culminating in more integrated and transactional governance via the cyber world.²⁸ Through these developments, governments worldwide²⁹ — including that of Australia³⁰ — plan to use digital technologies to deliver more responsive policy, a simpler and more integrated public service built around the needs of users, proactive and personalised delivery of information, advice and assistance, and more effective risk-based regulation. According to the Organisation for Economic Co-operation and Development (‘OECD’), this steady assimilation of digital technologies into government offers ‘opportunities for more collaborative and participatory relationships’³¹ between government, citizens and businesses. As a subset of the digital transformation of government, it is envisaged that the widespread adoption of Regtech will result in seamless end-to-end approvals processes across government, more dynamic interaction with regulators, and the embedding of compliance by design.³²

The Regtech field is largely populated by a growing number of private businesses, some of which have been established for many years. However, many of these businesses have emerged since the global financial crisis as regulatory requirements around transparency and accountability of business have strengthened, the volume of digitised data has vastly increased, and technological capabilities have matured.³³


These firms service the compliance and risk management needs of larger business organisations like banks. A recent survey conducted by Deloitte of 306 known private Regtech firms in the finance sector found that 40% of these were focussed on supporting compliance, 25% on identity management and control, 15% on risk management, and 9% on transaction monitoring.34

To date, financial regulators have remained on the periphery, but nonetheless supportive, of Regtech developments. However, they are increasingly demonstrating a willingness to harness Regtech themselves to enhance the efficiency and efficacy of regulatory policy formulation as well as their supervision and enforcement activities. Some, like the Monetary Authority of Singapore, are already using Regtech to detect financial market manipulation.35 Similarly, the United States’ Securities and Exchange Commission is currently using big data techniques such as topic modelling and cluster analysis to identify outlier behaviour and spot potential investment adviser misconduct.36 For the future, the United Kingdom’s Financial Conduct Authority has expressed interest in using Regtech for regulatory policy modelling and impact analysis, using real-time data to engage in more accurate risk assessment to facilitate better targeted regulatory activity and to automate some regulatory processes.37 Meanwhile, the Australian Securities and Investment Commission (‘ASIC’) is conducting several trials of Regtech: a cognitive tool that analyses the webpages of service providers in the self-managed superannuation fund sector; machine learning to conduct document analysis for forensic purposes; monitoring of social media trends; and market and graph analysis tools to identify connections between business entities.38

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34 ‘RegTech Universe’, Deloitte (Web Page, 30 May 2019) <https://www2.deloitte.com/lu/en/pages/technology/articles/regtech-companies-compliance.html#>. An initial survey of Regtech firms was conducted in 2017 and has been continuously updated. The figures outlined in the text are current as of 27 May 2019.


38 ASIC (n 26) 21 [90].
Outside of the financial services sector, code-based rules that automatically execute underlying decision-making have already begun transforming other areas of public regulation and enforcement. Police and security forces have been at the forefront of these initiatives. For instance, police in the United Kingdom are reportedly using algorithmic data technologies to support operational intelligence gathering and analysis, to predict where offences are likely to take place and to undertake risk analysis of targeted individuals. Similar activities are now mainstream in many larger police forces in the United States, which mine big data to correlate offending with geospatial information, social networks, drivers’ licenses and commercial transactions. Data analytics have also been used to predict the risk of recidivism for the purpose of informing parole and sentencing determinations. In other fields, algorithmic regulation has also been deployed (with mixed success) to assess the quality of healthcare and education under mandated quality assurance frameworks. It is also deployed by online platforms like Google and Youtube to protect the copyright of digitised work and automatically detect and remove infringing materials from the platforms. Thus, while the term Regtech originated in the financial services sector, it falls within a broader genre of digital regulation.

Regtech seeks to computationally align the business processes of regulated entities with the rules set out in the legal language of regulation. A proof of concept developed for the construction industry, which involved aligning Building Information Modelling (‘BIM’) software with a framework for automating building code compliance checking, illustrates how Regtech can work. The creators’ purpose was to establish a process that marries building code requirements such as minimum

44 According to Autodesk, BIM ‘is an intelligent 3D model-based process that gives architecture, engineering, and construction (AEC) professionals the insight and tools to more efficiently plan, design, construct, and manage buildings and infrastructure’: ‘What is BIM’, Autodesk (Web Page, 2019) <https://www.autodesk.com/solutions/bim>.
room area, ceiling height, energy efficiency, evacuation and safety, and construction quality with elements of the three-dimensional modelling of the physical and functional characteristics of buildings afforded by BIM. The proof of concept comprises the following components:

The first component requires pre-processing of the raw text of building codes using natural language processing techniques, followed by feature generation to develop a set of syntactic and semantic features of the text. During this process, a building ontology is utilised to generate semantic meaning so that words and terms found in the text can be matched to various categories within the ontology. An example might be a category that references walls. Such a category might include retaining walls, exterior walls, load bearing walls, fire walls and so on. Information extraction processes then isolate instances of these categories from the building code text, which are then transformed into logic rules. These logic rules then generate compliance checking logic clauses.

The BIM material is subjected to similar processing and, along with the transformed regulatory information, is fed into a compliance reasoning system comprised of functional inbuilt logic clauses and the utilisation of an artificial intelligence application and B-Prolog reasoner to create compliance checking reports. By this means, Regtech provides a bridge between the instruments used by architects and engineers to design and measure building performance and the standards used by regulators to ensure that buildings meet public policy objectives related to safety and sustainability.

As a result of these capabilities, a number of commentators have predicted that Regtech will not only enhance regulatory efficiency and efficacy, but that it also

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46 Zhang and El-Gohary (n 45) 48–52.
foreshadows a paradigm shift in the nature of regulation. Instead of being a reactive principle-based approach that produces standardised regulatory responses, certain commentators believe Regtech will introduce a more proactive and adaptive, insight-driven regulation that not only monitors and responds to non-compliance but also provides an enabling environment for business and consumers.\footnote{World Government Summit, *Regtech for Regulators: Re-Architect the System for Better Regulation* (Report, February 2018); Arner, Barberis and Buckley (n 33).} These predictions, therefore, assume that regulators will have broad-based access to the data generated by regulated entities through automated real-time reporting processes, and that regulators will also be able to monitor, evaluate and respond to this reporting in real-time. However, while some progress has been made in formulating the types of systems necessary to support these developments in discrete fields such as mandatory reporting of child abuse and medication error,\footnote{Mohammad Badiul Islam and Guido Governatori, ‘Rulers: A Rule-Based Architecture for Decision Support Systems’ (2018) 26(4) *Artificial Intelligence and the Law* 314.} widespread adoption remains a long way off.

Given the nascent level of Regtech development, whether these predictions come to pass or whether the Regtech sceptics will be vindicated constitutes fertile ground for legal scholarship. The potential for Regtech to deliver better regulation is clearly enticing, but normative and practical questions remain, associated with matters such as: the absence of semantic interoperability between the plethora of proprietary Regtech solutions;\footnote{Tom Butler and Leona O’Brien, ‘Understanding Regtech for Digital Regulatory Compliance’ in Theo Lynn et al (eds), *Disrupting Finance: FinTech and Strategy in the 21st Century* (Palgrave MacMillan, 2019) 85.} the variable capacity of organisations and regulators to effectively process and act on the data and insights they ascertain through Regtech;\footnote{Sarah Giest, ‘Big Data for Policymaking: Fad or Fasttrack?’ (2017) 50(3) *Policy Sciences* 367, 370–1.} the opacity of bias in algorithmic decision-making;\footnote{Robert Brauneis and Ellen P Goodman, ‘Algorithmic Transparency for the Smart City’ (2018) 21(1) *Yale Journal of Law & Technology* 103; Rory Van Loo, ‘Rise of the Digital Regulator’ (2017) 66(6) *Duke Law Journal* 1267, 1309, 1322; Wayne A Logan and Andrew Guthrie Ferguson, ‘Policing Criminal Justice Data’ (2016) 101(2) *Minnesota Law Review* 541, 545; Marijn Janssen and George Kuk, ‘The Challenges and Limits of Big Data Algorithms in Technocratic Governance’ (2016) 33(3) *Government Information Quarterly* 371, 374–5.} and the ability to manipulate data for illegitimate ends.\footnote{Packin (n 2) 214.} Consequently, Regtech is already attracting the attention of legal scholars and as this article proposes, will have a significant impact on future legal scholarship. The next section of this article therefore proffers views on the potential impact of Regtech across established methods of legal scholarship: doctrinal; normative; theoretical; interdisciplinary; and empirical forms of research.
Doctrinal research encompassing an exposition of the rules and principles of positive law\textsuperscript{54} has been characterised as the ‘core of legal scholarship’,\textsuperscript{55} and thus described as the quintessential method that distinguishes legal scholarship from the research praxis of other disciplines.\textsuperscript{56} Doctrinal research comprises the systematic interpretation and analysis of legal materials such as legislation, regulation, case law, regulatory guidance, soft law and authoritative legal texts. The essential features of this form of scholarship include: (a) the internal perspective of its practitioners who address judges, lawyers and legal policy makers in the same manner and using the same terms which they themselves use to formulate the law;\textsuperscript{57} (b) its focus on synthesis contingent upon the characterisation of the relationship between statutory material, judgments, regulatory guidance and soft law as a rational, albeit multi-layered system;\textsuperscript{58} (c) due to the law’s specialised idiom, its characterisation of that legal system as a self-referential system autonomous of other disciplines;\textsuperscript{59} and (d) its emphasis on the elucidation of the ongoing evolution of the current law.\textsuperscript{60}

With its major aims of interpretation and understanding of legal text, doctrinal legal research thus has analogical connections with hermeneutic disciplines such as history, philosophy, theology, and literature.\textsuperscript{61} Like these disciplines, doctrinal legal research seeks to provide a connection between legal text and those who need to determine its meaning.


\textsuperscript{55} Susan Bartie, ‘The Lingering Core of Legal Scholarship’ (2010) 30(3) \textit{Legal Studies} 345.

\textsuperscript{56} Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) \textit{Deakin Law Review} 83, 85.

\textsuperscript{57} Matyas Bodig, ‘Legal Doctrinal Scholarship and Interdisciplinary Engagement’ (2015) 8(2) \textit{Erasmus Law Review} 43, 46. See also Edward L Rubin, ‘The Practice and Discourse of Legal Scholarship’ (1988) 86(8) \textit{Michigan Law Review} 1835, 1847–8. Bodig argues that ‘the most distinctive feature of standard legal scholarship is its prescriptive voice, its consciously declared desire to improve the performance of legal decisionmakers’ and that the point of most doctrinal legal research is ‘to remonstrate with the judge [or legislator] for the conclusion [or policy] reached and for the rationale adopted’.

\textsuperscript{58} Bodig (n 57) 45; Gunther Teubner, ‘Substantive and Reflexive Elements in Modern Law’ (1983) 17(2) \textit{Law & Society Review} 239, 240.


\textsuperscript{60} Smits (n 54) 207–9.

In some respects, the rationales of traditional doctrinal research and aspects of Regtech mirror each other. Traditional doctrinal research aims to navigate the legal system’s complex thicket of multiple intersecting laws, each comprised of varying degrees of ambiguity, so as to provide greater clarity and hence greater certainty for the law and its subjects. It does so using organising principles that reflect historical pathways of legal development and classification as well as the development of new frameworks of analysis derived from emerging areas of the law. Likewise, one of the functions of Regtech is to produce regulatory intelligence that collates and analyses large swathes of complex regulatory data to produce reliable and comprehensible information about the regulatory environment that can be used by compliance professionals to make better informed decisions. Nonetheless, compared with traditional doctrinal research, Regtech uses methods that differ in scale, complexity and approach.

When engaged in traditional doctrinal legal research, lawyers and legal scholars currently use a variety of online legal databases that provide up to date access to primary legal sources, precedents and informed commentaries. Some of these databases are jurisdiction-specific while others provide access to material across a variety of jurisdictions. Commonly, doctrinal legal research commences with a scenario, problem, or area of exploration that leads researchers to produce a number of potential research terms. These research terms are partly based on the factual features of the relevant matter and also draw upon the expertise and experience of the researcher. Once formulated, the research terms are put through the relevant online database search engine, and, in turn, generate research results categorised according to source — the case law, legislation and regulation of various jurisdictions, as well as secondary legal materials. Following analysis for the relevance and significance of these initial results, further searches may be undertaken to determine whether the initial results have been applied consistently or inconsistently to the scenario, problem or area of exploration, whether they have been extended to analogous situations, whether related search terms yield different results, or whether exceptions and caveats apply. Generally, the process of online legal research is iterative and non-linear. Depending on the subject matter of the research and the experience and expertise of the researcher, it is also likely to be time-consuming.

Doctrinal legal research does not end with the generation of results from these legal databases. Legal information retrieval is then followed by a synthesis and analysis of

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62 Felix Frankfurter, ‘The Conditions For, and the Aims and Methods of, Legal Research’ (1930) 15(2) Iowa Law Review 129, 134: ‘[R]esearch requires the poetic quality of imagination that sees significance and relation where others are indifferent or find unrelatedness; the synthetic quality of fusing items theretofore in isolation; above all the prophetic quality of piercing the future, by knowing what questions to put and what direction to give to inquiry’. The Council of Australian Law Deans identified doctrinal research as ‘key to understanding the mystique of the legal system’s simultaneous achievement of constancy and change, especially in the growth and development of the common law’: Council of Australian Law Deans, Statement on the Nature of Legal Research (Report, May and October 2005) 3 <https://cald.asn.au/resources/>.
the results using techniques of deductive logic and inductive reasoning to produce an opinion on the meaning of the law and its likely application.

Yet, even with the luxury of access to online legal databases that provide ease of searching through keyword-text concordance, some contend that the increasing volume and complexity of the law is making it more difficult for lawyers and legal scholars to undertake doctrinal legal research in a cost-effective and comprehensively accurate manner. Using big data techniques and machine learning, Regtech applications can perform legal research tasks much faster, more accurately and at lower cost than human scholars and lawyers. Indeed, there are many examples which illustrate the efficiency advantages of Regtech technologies. One such experiment conducted by LawGeex found that when reviewing contractual documents, artificial intelligence performed the review on average at 94% accuracy within 26 seconds, whereas experienced lawyers on average performed at 85% accuracy within 92 minutes. An earlier experiment involving an algorithm based on a collection of 584 decisions was able to predict the outcomes of European Court of Justice decisions with 79% accuracy. Meanwhile, in a 2018 experiment carried out between the Commonwealth Bank (Australia), ING (Netherlands), and the United Kingdom’s Financial Conduct Authority, artificial intelligence was applied to the 1.5 million paragraphs of the European Markets in Financial Instruments Directive II to turn it into actionable compliance with 95% accuracy under two weeks, whereas it would normally take the Commonwealth Bank’s compliance team six months to complete this task.

To reduce the amount of time lawyers and legal scholars spend collecting and collating the results of legal research, publishers like LexisNexis and Thomson Reuters are already connecting their existing online databases with ‘legal analytics’ tools to discover insights such as connections between judges, parties and courts that might have previously been extremely time-consuming to find. This allows users to determine which cases are more influential than others, to quickly isolate the judicial treatment of words and phrases in visually attractive formats, to track and compare

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regulatory changes over time, and to provide more responsive suggestions to legal queries.68

Beyond enhancing the efficiency of legal research tasks, Regtech may be used to undertake regulatory tracking and policy modelling to simulate the likely impact of various initiatives upon existing regulation as well as upon the relationship between the regulated and various regulators.69 The application of artificial intelligence to large-scale contract review by international law firm, Pinsent Masons, to determine risks associated with Brexit is an example of such an approach.70 London-based Regtech CUBE, a platform that provides business with advice regarding the impact of regulatory change on their internal policies and procedures, is another example.71 To enrich regulatory impact analysis, it has also been suggested that Regtech might be applied to predict the importance of legislative initiatives to particular regulated segments of business.72 Not only can Regtech identify the relevance of legislative text for certain areas or products, but it can also scale the importance of that relevance to particular firms.

One important way that Regtech adopts a different approach to traditional doctrinal legal research can be seen in its efforts to undertake advanced forms of content and taxonomic analysis of regulator, judicial, legislative and treaty artefacts of decision-making.73 Using topic modelling techniques, analysts can evaluate a vast number of artefacts to ascertain the underlying factors that determine decision-making. By this means, for example, it is possible to identify the critical factors that will determine whether a court will undertake corporate veil piercing or impose corporate successor liability based on analysis of a dataset comprised of many thousands of judicial decisions.74 Interestingly, in the former case, the relevant researchers found that many of the factors cited by the judiciary as of relevance to


69 United Kingdom Chief Scientific Adviser (n 11) 49.


74 Fagan (n 73) 12.
corporate veil piercing, such as undercapitalisation, were simply not applied.\textsuperscript{75} There are several advantages of this form of research over traditional doctrinal research: its scalability (a far greater volume of legal material can be analysed over a shorter time frame); its relative completeness (datasets are not limited by the capacity of researchers to physically collate and analyse them); its reduction of variable selection bias; and its relative independence from the subjectivity of researchers who are guided by the variables they wish to investigate. By applying these techniques, it is thus possible to better understand the unstated motivations and reasoning of regulators and lawmakers.

Nevertheless, while it may provide insights into regulatory trends that are otherwise difficult to ascertain, many doubt the capacity of Regtech to engage with the ‘creative evolution of the legal system’.\textsuperscript{76} They argue that big data and machine learning mine the past and make predictions based on averages without accounting for the ‘lower-level variance or heterogeneity that makes legal systems adaptive and dynamic’.\textsuperscript{77} As Searle has observed, these technologies are not designed to understand the meaning of the legal data they process.\textsuperscript{78} Big data and machine learning methods conform to the precise instructions of their programmers\textsuperscript{79} and largely deal with routine, structured data.\textsuperscript{80} Therefore, they may find it difficult to take account of creative agents who continuously adapt their behaviour to take full advantage of the law and unforeseen changes in their respective environments. Big data and machine learning cannot effectively deal with legal ambiguity,\textsuperscript{81} discern the difference between bright-line rules and fuzzy principles, or create novel approaches to legal situations. Moreover, these technologies are blind to the inherent value of the rule of law and other political and constitutional values that underpin legal development. Rather than being steeped in incremental adaptation anchored by reference to established but open-ended legal principles designed to do justice, Regtech is devoid of values.


\textsuperscript{77} Devins et al (n 76).


\textsuperscript{80} Remus and Levy (n 76) 509.

\textsuperscript{81} The CBA made a finding that the accuracy of AI analysis of legal material decreased from 95% to 63% when dealing with ‘vague’ parts of regulation: Nott (n 67). See also Kevin D Ashley, Artificial Intelligence and Legal Analytics: New Tools for Law Practice in the Digital Age (Cambridge University Press, 2017) 45.
Consequently, while Regtech can considerably enhance legal information retrieval and analysis by deriving insights which volume and complexity render difficult for humans to achieve, at this stage in its development, Regtech can only work in tandem with, rather than completely replace, doctrinal scholarly analysis. To date there still appears to be a significant gap between legal information retrieval and automated legal argumentation. Regtech itself does not understand the purposes driving regulation or the teleological concepts that bind particular provisions into a system of regulation. On the other hand, high quality doctrinal research requires an ability to address indeterminacy, to creatively synthesise legal materials into a compelling narrative, to analogise and draw connections between areas of law, and to differentiate between important and unimportant precedent. Although we might expect that doctrinal research will become a more instrument-enabled form of scholarship, at this point Regtech falls short of these higher order tasks.

Nonetheless, this could change. Research is currently underway to exploit the ability of neural networks to generate legal argumentation and findings, and to employ argumentation mining and analysis to assist with producing doctrinal exegesis that will eventually lead to fully automated interpretation and implementation within business systems. Once it becomes possible to fully translate regulation into machine-readable form, it will then be possible to ensure alignment between the interpreted provisions and compliance technology that will enable automated reporting and auditing of regulated activities. If that eventuates, it does not appear to be a giant leap for algorithmic programs utilised in these tasks to learn more about legal reasoning and its potential scope of application. As a result, the central importance of doctrinal research to legal scholarship may well fall away or at the very least become far more automated and data-driven, rather than expert-driven.

B Normative/Reform-Oriented

With the aim of explaining and critiquing the efficacy of current law, doctrinal research is often associated with legal positivism, and therefore typically contrasted with normative analysis which focuses not upon the law as is, but upon what the law

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83 Ashley (n 81) 97.

84 Karl L Branting, ‘Artificial Intelligence and the Law from a Research Perspective’ (2018) 14(3) Scitech Lawyer 32; Ashley (n 81) ch 10.

85 Butler and O’Brien (n 50) 97.

86 Ashley (n 81) 383, applying Wittgenstein’s view that meaning lies in use.

should be. However, in reality, doctrinal analysis and normative prescription are inextricably connected, either covertly by mute acceptance of existing law, or overtly through critique and arguments in favour of the reform of legal institutional settings, legal policy implementation, and/or legal decision-making. At the very least, doctrinal coherence and acceptability are critical to determining whether policies will be successfully translated into law and faithfully implemented by legal decision-makers. More generally, it is hard to imagine modern legal research scholarship without an analysis of the values inherent in the law which, by definition, promulgates policy choices and behavioural norms. Arguably, legal rules and principles are only capable of intelligible doctrinal exposition in light of their underlying aims and objectives which, in turn, unavoidably incorporate social, economic or political ends.

However, it seems likely that Regtech will help to drive a shift away from manual forms of doctrinal legal research toward more empirically-based normative analysis. By providing greater insight into the efficacy of regulator activity, it will become easier to analyse the efficiency and fairness of the law and regulation. From an efficacy perspective, there may be many hidden biases at work embedded in regulatory text or regulatory behaviours that operate to undermine policy objectives. Using interconnected data sets comprised of over 380,000 judicial decisions, hundreds of judicial biographical records, speech pattern analysis of judicial decision-making, and information regarding judicial professional networks, for example, researchers have demonstrated how judicial analytics can be used to assess the psychological, political and economic factors that can influence judicial decisions. One startling finding, is that judges are more lenient toward asylum seekers before lunch and towards the end of the day than at other times when orders are made. Other research has shown that judges’ thinking about law and economics is strongly predictive of harshness in sentencing. In each case, the researchers’ aim was to produce analysis for the purpose of generating more even-handed decision-making, de-biasing the law. The same techniques can be applied to regulatory activity.

Exploring the normative aspects of regulation will become even more critical as compliance by design is gradually embedded between businesses and regulators. Currently, Regtech is only capable of ‘providing partial reasoning and modelling

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89 Bodig (n 57) 46.

90 Smits (n 54) 215.


92 Ibid 27–8.


support’ for the digital expression of legal norms. As a result of its lack of conceptual connection to the legal domain, insofar as multi-layered and open-ended legal rules are concerned, Regtech produces conflicting and inaccurate compliance verification. Accordingly, ‘adopting formalisms that are not conceptually grounded in legal practice creates a framework that is unreliable, and not suitable to be used in real-life applications’. An example of the types of normative problems that can arise in Regtech when dealing with something as relatively straightforward as ‘know your customer’ identification and verification, relates to the impact that such procedures may have on financial inclusion, particularly for people from socially disadvantaged communities. Whether a financial institution ought to incorporate financial inclusion measures into its ‘know your customer’ procedures is an ethical and social question that simply cannot be answered by current natural language processing applications. If Regtech is to become a practical reality, new modelling languages must be built in conjunction with specialist legal scholars who can articulate the normative dimensions of legal text and assist computational experts to express these faithfully.

Otherwise from a normative perspective, there is clearly great scope to research and analyse the legal, ethical and governance aspects of Regtech. Worldwide legal scholars, governments, businesses and regulators are discussing what kinds of legal frameworks may be required to govern the use of Regtech technologies especially those related to big data, machine learning and automated decision-making. There are a myriad of concerns: rights of due process, the embedding of conscious and unconscious bias in decision-making, the potentially poor quality of algorithmic decision-making, overbearing surveillance, and the lack of democratic accountability.

C Interdisciplinary

The decline of legal scholarship as a purely autonomous discipline has coincided with the falling popularity of doctrinal legal research among legal scholars. Doctrinal

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95 Ibid 298.
98 Yeung (n 22).
research in law nowadays is frequently accompanied by research about the socio-economic impact of law, extra-legal factors affecting legal actors and regulators, how law controls access to essential services, and how law allocates power and responsibility across society. As a result, interdisciplinary research methods are also inextricably linked with normative reasoning.

By being able to connect many more data points regarding law, behaviour and socio-economic phenomena, there appears to be little doubt that the advent of Regtech will advance the capacity of legal scholars to successfully undertake interdisciplinary research. First, as Regtech methods analyse huge volumes of data from interconnected datasets without the constraint of a theoretical or disciplinary frame, it is much more likely that the patterns and correlations that emerge from Regtech analysis will require interdisciplinary expertise to understand and address. Second, the use of Regtech data related to the same complex phenomena using the same analytical methods will likely lend itself to interdisciplinary collaboration. The work referred to earlier analysing how non-legal factors influence judicial decision-making demonstrates how legal scholars may need to draw upon a variety of different disciplines and interact with scholars from different backgrounds to make the most of the predictive analysis generated by big data. Among other things, the judicial analytics undertaken by the researchers draw upon psychological theories related to gamblers’ fallacy and implicit egoism, political theories regarding the impact of the electoral cycle, and linguistic analysis of judicial speech patterns.

Furthermore, there are many aspects of compliance that cannot be fully captured quantitatively. Qualitative research methods used by social scientists are likely to be required to supplement and contextualise quantitative findings so as to identify whether a regulated business not only complies with the letter of regulation but also fosters an ethical and socially responsible culture. There are an array of regulatory responses available to regulated entities ranging from minimal compliance that merely attempts to pass regulator review to a robust level of compliance that is morally defensible. Regtech alone cannot determine where in that range a business ought to sit. Alternatively, unless a business’ culture effectively supports algorithmic regulation, there are significant risks that Regtech may be manipulated in a manner that encourages lip-service to, or outright evasion of, regulatory obligations.

Interdisciplinary research will also be essential for the development and critical evaluation of computational legal reasoning modelling and its implementation. As noted above, there is a great deal of work to be done in specifying how regulatory requirements can be expressed in computational language that will facilitate automated analysis and eventually lead to automatically executed regulatory compliance. To ensure that compliance does not simply become an automated box ticking exercise but that it is fully understood and assimilated into business governance and processes,

101 Packin (n 2) 214.
102 Ibid.
this work will require an integrated approach by legal scholars, lawyers, business information systems experts, governance and ethics advisers, computational experts, and organisational management experts. Compliance does not simply execute actions based on text. It necessarily incorporates conceptual considerations drawn from several sources that are not just data points but are informed by (sometimes conflicting) policies which of themselves draw on the expertise of many disciplines. Although currently the computer science, engineering, and business and economics disciplines are the major leaders in interdisciplinary research projects that critically explore big data and machine learning, it is anticipated that as Regtech matures, the legal discipline will begin to play a more significant role in these projects.

D Theoretical

Theory building and theory testing are well-known scholarly activities. Theory building attempts to advance knowledge by explaining the relationship between cause and effect in a new or different light. By contrast, theory testing involves the evaluation of a theory or theoretical model against empirical evidence that either supports or refutes the theory. Theory building thus comprises the construction of an explanation of experiences and phenomena, whereas theory testing involves the collection and analysis of data about those experiences and phenomena.

Legal scholarship is replete with examples of theory building derived from a mix of interdisciplinary knowledge and traditional doctrinal research. Examples include the relational contract theories of Stewart Macaulay and Ian Macneil, Guido Calabresi and Douglas Melamed’s theories about liability rights and property rights, Catherine McKinnon’s feminist jurisprudence, and John Braithwaite’s theory of responsive regulation. The value of these and other legally related theories lies in their capacity to explain and predict legal development and the way in which the law

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103 Casanovas, González-Conejero and De Koker (n 96).
shapes behaviour. They can be used to explain existing law or to justify a future legal intervention.

Theory building comprises an iterative process of domain choice, data collection, description, concept specification, premise identification, synthesis of thematic patterns, and correlative and causal analysis.\textsuperscript{110} However, as many of these functions can be performed using big data and machine learning, it has been suggested that automated data mining will lead to new discoveries rendering theory building obsolete.\textsuperscript{111} By parsing thousands if not millions of legal materials, it is envisaged that Regtech techniques will be able to produce predictions and generate hypotheses of how laws will impact behaviour and vice versa bereft of any theory. Big data and machine learning can do this using probabilistic determinism.\textsuperscript{112}

It is true that Regtech can engage in predictive analysis based on probabilities inherent in past data, categorise data into groups and subgroups, make connections and map the relationship between data points, undertake similarity and divergence measures, and even simulate how parties may behave under certain parameters. Nevertheless, despite those capabilities, it does have epistemological limitations.\textsuperscript{113} The first relates to the nature of the legal hypotheses that might be generated by predictive analytics. The types of hypotheses that might currently be generated by Regtech are not comparable to grand theories about the law like Calabresi and Melamed’s theory of liability or Braithwaite’s theory of responsive regulation. Hypotheses generated by Regtech applications are currently constrained by their capacity to reduce the relevant legal text to logic rules that reflect technical terms of quite specific application. For example, if we return to the example concerning the interconnection between BIM and legal text postulated early on in this article, we can see that simply applying closed technical legal terms in a building code to building design is unlikely to generate any theory about regulation or regulatory behaviour or even any insight as to the ability of the building code to foster safe and sustainable building practices. In other words, Regtech alone cannot extrapolate beyond its limited logic rule domain.

The second problem relates to the material produced by Regtech. As we have noted earlier, Regtech can generate correlations between data and reveal patterns that are

\textsuperscript{110} Anne Galletta, Mastering the Semi-Structured Interview and Beyond: From Research Design to Analysis and Publication (New York University Press, 2017) ch 5.


\textsuperscript{113} Elragal and Klischewski (n 111).
not otherwise ascertainable. However, correlations can be arbitrary and are meaningless without the theoretical inquiry as to why they may have arisen.

Furthermore, Regtech does not operate in a jurisprudential vacuum. Regtech identifies and applies the meaning of legal text expressed as formal logic rules based upon previous findings and the judgement of legal experts. Data, including regulatory data produced by Regtech, is therefore not neutral, but the product of the particular technology and platforms used to create it as well as the organisational, legal and social practices of those that compile it. Consequently, Regtech-produced data will inevitably be shaped by the purposes of those seeking to utilise it. Accordingly, understanding the potential for human bias and framing within Regtech is essential for any critical inquiry of the data it produces.

Ultimately, Regtech is a tool that can be used to make compliance more responsive and more efficient. It is also a tool that can produce data that informs but does not replace theoretical inquiry about regulation and regulatory behaviour. While it may display a preference towards inductive methods over deductive reasoning, in practice, it will not replace the need to develop causal explanations of how the law works or understandings of the law in context.

In any event, the idea that theory building is dead is not sustainable. At the very least one would expect that Regtech would inform theories about regulation itself. A good example is the work of Karen Yeung. Yeung has developed a taxonomy of algorithmic regulation that explores how regulation operates as a means of social ordering. Yeung’s taxonomy considers algorithmic regulation as part of the following forms: outcome-based regulation; data-driven performance management; preemptive risk-based regulation; actuarial justice; and surveillant-driven social sorting. Yeung explores the drivers of algorithmic regulation and postulates upon its impact on democracy and decision-making accountability.

E Empirical Legal Scholarship

The growth in volume and impact of empirical research has been described as the most important development in legal scholarship in the last 25 years. However, like many other fields of legal scholarship, there is no universally accepted definition of this category of legal research. Some confine empirical legal scholarship to

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15 Yeung (n 22).
quantitative studies that test falsifiable hypotheses, whereas others take a broader view proffering a definition more consistent with the concept of systematic observation and analysis.\textsuperscript{117} Most agree that empirical legal scholarship draws largely from the methods and theories of the social sciences.\textsuperscript{118}

Applying big data and machine learning to legal materials is another means of engaging in empirical research. As outlined previously, by turning regulation into data, it is possible to see hidden patterns and correlations between legal materials and to develop hypotheses derived from those correlations and patterns.

Regtech promises to enhance empirical legal research in a number of ways. First, the availability of data is a major problem in undertaking empirical work. Although researchers may be able to freely access primary materials such as cases, legislation, regulation, regulatory guidance and some commentaries, data on regulatory efficacy and behaviour is much more difficult to obtain. Outside of the field of criminology, statistics on compliance, the regulatory process, and regulatory enforcement are limited. If data is not publicly available, researchers are required to identify and collect it themselves largely through qualitative methods. Consequently, much data sits in researchers’ own curated datasets or in proprietary datasets that are expensive for other individual researchers to access, and which are therefore difficult to validate.

While regulators publish annual reports that outline their regulatory activities, these annual reports normally do not provide researchers with the type of granularity that raw data provides, nor are the reports intended to constitute research data. They are written to fulfil public accountability responsibilities. Recent research apropos ASIC enforcement activity undertaken by Ramsay and Webster illustrates the current regulatory data deficit.\textsuperscript{119} Despite the fact that the researchers were engaged in ground breaking work documenting how ASIC discharges its regulatory mandate, their work was considerably hampered. This was due to the absence of precise identification of the actual misconduct activity being studied, the absence of reference to specific legislative provisions being enforced, and the failure to discriminate between enforcement outcomes where multiple offences or multiple offenders were involved. Other problems identified by the researchers included issues related to multiple and/or incorrect reporting of enforcement action, guilty pleas, and imposition of civil and criminal penalties concerning the same offenders.\textsuperscript{120} Most of all, the researchers were limited in only being able to access data about enforcement from the regulator. No data was available to them regarding the effect of ASIC’s enforcement on the regulated parties or more generally upon compliance across the marketplace. In fact,
any information about how a particular regulated business or segment of business might elect to embed compliance into their business operations and processes was distinctly lacking. As a result, we have only limited understanding of the efficacy of ASIC’s regulatory role.

By embedding automated reporting and real-time monitoring using artificial intelligence, Regtech will produce much more information about regulation than is currently available to researchers and in a machine-readable form which will be easier to mine and analyse. Given that there has been a global trend toward open data in government,121 which will make commercially sensitive information related to regulation publicly accessible in de-identified form, there appears to be a rich harvest of potential material available. Assuming that Regtech data will be made available, legal researchers with an interest in how regulation works can thus progress to more dynamic, data-rich research settings that, in turn, will enable the development of more innovative, more complex and more advanced models of regulatory behaviour.122

Additionally, theories about regulatory behaviour can be more effectively tested using data modelling and simulation modelling applications associated with big data and machine learning unavailable to researchers using traditional research methods. Research looking at discriminatory pricing for mortgage products that set about to ‘stress-test’ whether algorithmic pricing would produce less discriminatory outcomes than human-generated pricing constitutes a good illustration of this type of virtual experimentation. Interestingly, in this instance, the researchers found that simply restricting an algorithm from using discriminatory information such as race, national origin, religion, or disability status only satisfied the letter of legal requirements and would not necessarily result in non-discriminatory practices in financial services.123

All in all, Regtech is likely to be a boon to legal scholars seeking to test theory empirically and develop normative positions regarding the rationale and efficacy of regulatory activity.

III Conclusion

Regtech is bound to have a significant impact on legal scholarship. To the extent that doctrinal legal research can be automated, Regtech will enhance research efficiency and will signal a reduction in the human effort required for its production. Regtech will be able to generate predictive hypotheses about the regulatory process and


122 Kitchin (n 114) 10.

impact, and will also be able to generate underlying materials that help support the hypotheses more quickly and accurately than humans. However, reducing large and complex regulatory language to formal logic that can be used to automate compliance poses considerable practical difficulties. To date, Regtech is limited in its capacity to deal with ambiguous legal text and doubts have been raised about its capacity to draw analogies across legal areas and to synthesise findings creatively into a compelling narrative that fully captures regulatory complexity. Consequently, doctrinal research will still be a significant, albeit diminishing, field of legal scholarship.

Regtech will likely increase our capacity to develop and test theories and models about regulation and regulatory behaviour. It will also lead to greater degrees of collaboration between legal scholars and scholars from other disciplines as the correlations and patterns produced by Regtech will require interdisciplinary expertise to interpret and analyse. As a result, as more data is generated by Regtech and more is revealed about regulation and regulatory behaviour, Regtech will also increase confidence in normative aspects of legal scholarship.
SUBMISSION OF MANUSCRIPTS

In preparing manuscripts for submission, authors should be guided by the following points:

1. Submissions must be made via email to the Editors in Chief <matthew.stubbs@adelaide.edu.au>, or via ExpressO <http://law.bepress.com/expresso/> or Scholastica <http://scholasticahq.com>.

2. Authors are expected to check the accuracy of all references in their manuscript before submission. It is not always possible to submit proofs for correction.

3. Biographical details should be starred (*) and precede the footnotes. They should include the author’s current employment.


5. An abstract of between 150 and 200 words should also be included with submissions (excluding case notes and book reviews).

6. As a peer-reviewed journal, the *Adelaide Law Review* requires exclusive submission. Submissions should be accompanied by a statement that the submission is not currently under consideration at any other journal, and that the author undertakes not to submit it for consideration elsewhere until the *Adelaide Law Review* has either accepted or rejected it.

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9. Authors must sign an Author Agreement (available at <http://www.adelaide.edu.au/press/journals/law-review/submissions/>) prior to the publication of their submission. The Editors prefer that a signed Author Agreement be included at the time of submission.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Matthew Stubbs</td>
<td>1</td>
</tr>
<tr>
<td>The <em>Adelaide Law Review</em> at (Volume) 40: Reflections and Future Directions</td>
<td></td>
</tr>
<tr>
<td>Michael Kirby</td>
<td>15</td>
</tr>
<tr>
<td>Celebration of Volume 40: Sixty Years On!</td>
<td></td>
</tr>
<tr>
<td>Christian Andreotti and Holly Nicholls</td>
<td>29</td>
</tr>
<tr>
<td>40 is the New 20: The Changing Contours of the <em>Adelaide Law Review</em></td>
<td></td>
</tr>
<tr>
<td>Anthony Moore</td>
<td>45</td>
</tr>
<tr>
<td>Reflections on Publishing the <em>Adelaide Law Review</em></td>
<td></td>
</tr>
<tr>
<td>Peter Rathjen</td>
<td>47</td>
</tr>
<tr>
<td>135 Years: Reflections on the Past, Present and Future of Adelaide Law School</td>
<td></td>
</tr>
<tr>
<td>John M Williams</td>
<td>53</td>
</tr>
<tr>
<td>Constitutional Law and the <em>Adelaide Law Review</em></td>
<td></td>
</tr>
<tr>
<td>Melissa de Zwart</td>
<td>63</td>
</tr>
<tr>
<td>South Australia's Role in the Space Race: Then and Now</td>
<td></td>
</tr>
<tr>
<td>Ian Leader-Elliott</td>
<td>75</td>
</tr>
<tr>
<td>Norval Morris and the 'New Manslaughter' in the <em>Adelaide Law Review</em></td>
<td></td>
</tr>
<tr>
<td>Horst Klaus Lücke</td>
<td>89</td>
</tr>
<tr>
<td>Isaiah Berlin and Adolf Hitler: Reflections and Personal Recollections</td>
<td></td>
</tr>
<tr>
<td>John Keeler</td>
<td>109</td>
</tr>
<tr>
<td>Ruminations on Personal Injury Law Since 1960</td>
<td></td>
</tr>
<tr>
<td>Isabella Dunning, Irene Nikoloudakis and Caitlyn Georgeson</td>
<td>125</td>
</tr>
<tr>
<td>The Value of the <em>Adelaide Law Review</em> from a Student Editor Perspective</td>
<td></td>
</tr>
<tr>
<td>John Gava</td>
<td>135</td>
</tr>
<tr>
<td>Legal Scholarship Today</td>
<td></td>
</tr>
<tr>
<td>Paul Babie</td>
<td>145</td>
</tr>
<tr>
<td>Publish and Collaborate: An Invitation</td>
<td></td>
</tr>
<tr>
<td>John V Orth</td>
<td>155</td>
</tr>
<tr>
<td>Of Titles and Testaments: Reflections of an American Reader of the <em>Adelaide Law Review</em></td>
<td></td>
</tr>
<tr>
<td>Irene Watson</td>
<td>167</td>
</tr>
<tr>
<td>Colonial Logic and the Coorong Massacres</td>
<td></td>
</tr>
<tr>
<td>Andrea Mason</td>
<td>173</td>
</tr>
<tr>
<td>Where do a Bird and a Fish Build a House? An Alumna’s View on a Reconciled Nation</td>
<td></td>
</tr>
<tr>
<td>Martin Hinton</td>
<td>187</td>
</tr>
<tr>
<td>A Bail Review</td>
<td></td>
</tr>
<tr>
<td>James Crawford and Rose Cameron</td>
<td>199</td>
</tr>
<tr>
<td>International Law in Australia Revisited</td>
<td></td>
</tr>
<tr>
<td>Judith Gardam</td>
<td>219</td>
</tr>
<tr>
<td>Feminist Interventions into International Law: A Generation On</td>
<td></td>
</tr>
<tr>
<td>International Law: Need We Be Afraid of the Unelected Judiciary?</td>
<td></td>
</tr>
<tr>
<td>Adam Webster</td>
<td>249</td>
</tr>
<tr>
<td>Reflecting on the Waters: Past and Future Challenges for the Regulation of the Murray-Darling Basin</td>
<td></td>
</tr>
<tr>
<td>Margaret White</td>
<td>257</td>
</tr>
<tr>
<td>Youth Justice and the Age of Criminal Responsibility: Some Reflections</td>
<td></td>
</tr>
<tr>
<td>Melissa Perry</td>
<td>273</td>
</tr>
<tr>
<td>The Law, Equality and Inclusiveness in a Culturally and Linguistically Diverse Society</td>
<td></td>
</tr>
<tr>
<td>Brent Fisse</td>
<td>285</td>
</tr>
<tr>
<td>Penal Designs and Corporate Conduct: Test Results from Fault and Sanctions in Australian Cartel Law</td>
<td></td>
</tr>
<tr>
<td>Suzanne Corcoran</td>
<td>301</td>
</tr>
<tr>
<td>Ordinary Corporate Vices and the Failure of Law</td>
<td></td>
</tr>
<tr>
<td>Judith Bannister</td>
<td>311</td>
</tr>
<tr>
<td>South Australian Administrative Law: 40 Years On</td>
<td></td>
</tr>
<tr>
<td>Thomas Gray</td>
<td>331</td>
</tr>
<tr>
<td>Succession Law: Reflections and Directions</td>
<td></td>
</tr>
<tr>
<td>Katrina Bochner</td>
<td>343</td>
</tr>
<tr>
<td>Alternative Dispute Resolution and Access to Justice in the 21st Century</td>
<td></td>
</tr>
<tr>
<td>Marie Shaw and Ben Doyle</td>
<td>353</td>
</tr>
<tr>
<td>The ‘Age Of Statutes’ and its Intersection with Fundamental Principles: An Illustration</td>
<td></td>
</tr>
<tr>
<td>Vicki Waye</td>
<td>353</td>
</tr>
<tr>
<td>Regtech: A New Frontier in Legal Scholarship</td>
<td></td>
</tr>
</tbody>
</table>