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CLIMATE PROTEST, PUBLIC ASSEMBLIES AND THE LAW IN SOUTH AUSTRALIA

ABSTRACT

Across Australia, climate activists are testing not only the limits of what counts as lawful protest, but also the patience of commuters, as their actions shut down roads, block ports or disrupt businesses. Other groups are also taking to the streets to express their views on local, national and international issues, building on many decades of protest activity and civil disobedience that have been a feature of Australian democracy since colonisation. Authorities and legislators are responding with new police powers and increasingly harsh new penalties. The speed at which some of these new laws are made is alarming, and their impact on internationally and constitutionally recognised rights pertaining to freedom of political communication is often contested. This article explores the legislative amendments made in response to climate activist activity in South Australia in May 2023, and the ongoing legal implications for the community's right to take collective public action, including protest action. It compares legislative developments in South Australia with recent reforms in other Australian jurisdictions, discusses how the right to protest is conceptualised by Australian lawmakers and analyses how democratic listening strategies could play a role in securing a more sustainable, proportionate approach to legislating in this area.

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I Introduction

Across Australia, climate activists are experimenting with new ways to draw attention to the climate emergency confronting our society.[1] They are, for example, organising protests on university campuses,[2] suspending people from bridges over busy roadways[3] and throwing soup at art works in galleries.[4] There are differing views within the broader community as to whether the actions of climate protesters are justified, proportionate or urgently needed in response to the absence of effective domestic and international laws and policies responding to climate change.[5] Notably, however, the potential scale of the climate emergency has been articulated by scholars as accelerating 'in a way that is beyond society's capacity to manage'.[6] Justice Bromberg described the emergency in *Sharma v Minister for the Environment* as follows:

> As Australian adults know their country, Australia will be lost and the World as we know it gone as well. The physical environment will be harsher, far more extreme and devastatingly brutal when angry. As for the human experience — quality of life, opportunities to partake in nature's treasures, the capacity to grow and prosper — all will be greatly diminished. Lives will be cut short. Trauma will be far more common and good health harder to hold and maintain. None of this will be the fault of nature itself. It will largely be inflicted by the inaction of this generation of adults, in what

1 See, e.g.: Justin Healey (ed), *Activism and Protest* (Spinney Press, 2020); M Hohenhaus et al, 'Climate Warriors Down Under: Contextualising Australia's Youth Climate Justice Movement' (2023) 2(1) *Climate Action* 45; Grace Arnot et al, '"It Shows We Are Serious": Young People in Australia Discuss Climate Justice Protests as a Mechanism for Climate Change Advocacy and Action' (2023) 47(3) *Australian and New Zealand Journal of Public Health* 100048:1–7; Francine Rochford, 'Morally Motivated Protest in the Face of Orthodoxy: Environmental Crisis and Dissent in Australian Democracy' in Benjamin J Richardson (ed), *From Student Strikes to the Extinction Rebellion: New Protest Movements Shaping Our Future* (Edward Elgar, 2020) 54; Frank Bongiorno, 'The Changing Nature of Protest in Australia: Historical Reflections' (2021) 92(1) *Australian Quarterly* 12; Patrick O'Keeffe, *Power, Privilege and Place in Australian Society* (Springer Nature, 2024) 289–311.

2 See, e.g., 'Police Overreach as Students Protest Against Climate Change', *Amnesty International* (Web Page, 21 May 2021) <https://www.amnesty.org.au/police-overreach-as-students-protest-against-climate-change/>.

3 See, e.g., 'Extinction Rebellion Protesters at Morphett St Bridge Cause Traffic Delays in Peak Hour', *ABC News* (online, 17 May 2023) <https://www.abc.net.au/news/2023-05-17/extinction-rebellion-protesters-adelaide-traffic-delays/102355334> ('Extinction Rebellion Protestors').

4 Yasmin Rufo, 'Activists Throw Soup on Van Gogh Painting Again', *BBC News* (online, 28 September 2024) <https://www.bbc.com/news/articles/c243v5m0r0lo>.

5 See, e.g., the various views along the age and political spectrums discussed in Bruce Tranter, 'Political Divisions Over Climate Change and Environmental Issues in Australia' (2011) 20(1) *Environmental Politics* 78.

6 Matthew J Hornsey et al, 'Intergroup Conflict Over Climate Change: Problems and Solutions' (2025) 55(2) *European Journal of Social Psychology* 243, 247.

> might fairly be described as the greatest inter-generational injustice ever inflicted by one generation of humans upon the next.[7]

The nature and scale of the climate emergency provides the context from which to consider the diversity of public responses to government or corporate actions that negatively impact the natural environment. These range from conventional democratic representations (for example, through institutional processes like petitions, parliamentary committees or correspondence with members of parliament), to multi-media advocacy campaigns and shareholder activism, to collective action such as strikes, marches or other forms of protest activity.[8] This in turn gives rise to a range of government responses, on one hand including structural adjustments to state investments or government policy, and on the other, through criminalising forms of public protest (as discussed in detail below).[9]

Beyond climate activists, other groups are also taking to the streets to express their views on local, national and international issues, some of which are peaceful and others that are punctuated by acts of violence.[10] Other forms of protest, including acts of civil disobedience at high profile meetings or defying conventions at sporting events, build on many decades of protest activity and civil disobedience that have been a feature of Australian democracy since colonisation.[11] In response to rising mass protests on many fronts, the right to protest is also under attack internationally.[12] Governments across Australia are responding to these different forms of protest activity by introducing new laws, extending police powers and increasing penalties for existing offences.[13] The speed at which these new laws are being made

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7 *Sharma v Minister for the Environment* (2021) 391 ALR 1, 72–3 [293].

8 Robyn Gulliver, Kelly S Fielding and Winnifred R Louis, *Civil Resistance Against Climate Change* (International Centre on Nonviolent Conflict Press, 2021) 31–8.

9 Ibid 72–5. See also: Timothy Zick, *Managed Dissent: The Law of Public Protest* (Cambridge University Press, 2023); Brian Martin, 'Suppression of Dissent: What It Is and What to Do About It' (2012) 6(4) *Social Medicine* 246.

10 See, e.g., O'Keeffe (n 1). See also: Anna Walsh, 'Freedom of Expression, Belief and Assembly: The Banning of Protests Outside of Abortion Clinics in Australia' (2018) 25(4) *Journal of Law and Medicine* 1119; Eleanor Jones, 'Implementing Protest-Free Zones Around Abortion Clinics in Australia' (2014) 36(1) *Sydney Law Review* 169.

11 See, e.g.: Gary Osmond, 'Decolonizing Dialogues: Sport, Resistance, and Australian Aboriginal Settlements' (2019) 46(2) *Journal of Sport History* 288; Peter H Russell, *Recognizing Aboriginal Title: The Mabo Case and Indigenous Resistance to English-Settler Colonialism* (University of Toronto Press, 2005) 130–7; Victoria Haskins and Anne Scrimgeour, '"Strike Strike, We Strike": Making Aboriginal Domestic Labor Visible in the Pilbara Pastoral Workers' Strike, Western Australia 1946–1952' (2015) 88 (Fall) *International Labor and Working-Class History* 87.

12 See, e.g.: Zick (n 9); Illan rua Wall, 'The Right to Protest' (2024) 28(8–9) *International Journal of Human Rights* 1378.

13 Sarah Moulds, 'South Australia's Obstruct Public Place Laws: How Do They Fit within Australia's Anti-Protest Law Landscape?' (2023) 37(9) *Australian Environment Review* 187 ('Obstruct Public Place Laws'); Luke McNamara and Julia Quilter, 'Criminalising Protest through the Expansion of Police "Move-On" Powers: A Case

is alarming, as has been recently illustrated in South Australia ('SA'), where changes were made to the 'obstruction of public places' offence,[14] increasing penalties from $750 to $50,000 without consultation, and with only limited debate.[15]

Parts II and III of this article will explain the changes made to the laws in SA, and the ongoing legal implications for those in the community seeking to engage in collective public action, including protest action, to draw attention to policy issues they consider as requiring critical or urgent attention. Part IV compares legislative developments in SA with recent reforms in other Australian jurisdictions and discusses how the right to protest is conceptualised within Australia's constitutional landscape. Part V discusses how the right to protest is conceptualised by Australian lawmakers and how democratic listening strategies, coupled with other structural safeguards, could play a role in securing a more sustainable, proportionate approach to legislating in this area. Part VI concludes the article.

II The Right to Protest in Australia

Social division, exclusion and marginalisation are increasing within democracies like Australia,[16] which can lead to intergroup conflict, distrust in democratic institutions and social polarisation.[17] When this occurs, parliamentarians can struggle to generate and sustain the type of broadly shared social and political mandate needed to advance policy solutions to complex challenges like climate change.[18] We know

Study from Australia' (2019) 58 (September) *International Journal of Law, Crime and Justice* 22; David Baker, 'Public Order Policing Approaches to Minimize Crowd Confrontation during Disputes and Protests in Australia' (2020) 14(4) *Policing* 995; Greg Martin, 'Criminalizing Dissent: Social Movements, Public Order Policing and the Erosion of Protest Rights' in Leanne Weber, Elaine Fishwick and Marinella Marmo (eds), *The Routledge International Handbook of Criminology and Human Rights* (Taylor and Francis, 2017) 280.

14 *Summary Offences Act 1958* (SA) s 58 ('*Summary Offences Act*').

15 See: *Summary Offences (Obstruction of Public Places) Amendment Act* 2023 (SA); South Australia, *Parliamentary Debates*, House of Assembly, 18 May 2023, 3979 (Peter Malinauskas, Premier) ('*Parliamentary Debates*'). See also Moulds, 'Obstruct Public Place Laws' (n 13) 188–9.

16 Strengthening Democracy Taskforce, *Strengthening Australian Democracy: A Practical Agenda for Democratic Resilience* (Report, Department of Home Affairs (Cth), 15 July 2024); Mark Evans and Gerry Stoker, *Saving Democracy* (Bloomsbury Academic, 2022); R S Foa et al, *Global Satisfaction with Democracy* (Report, Centre for the Future of Democracy, January 2020); Patrick Dunleavy, Alice Park and Ros Taylor (eds), *The UK's Changing Democracy: The 2018 Democratic Audit* (LSE Press, 2018).

17 Hornsey et al (n 6).

18 See, e.g.: Alan Renwick, Meg Russell and Ben Lauderdale, 'What Kind of Democracy Do People Want, and How Should Policy-Makers Respond?', *The Constitution Unit Blog* (Blog Post, 23 November 2023) <https://constitution-unit.com/2023/11/23/what-kind-of-democracy-do-people-want-and-how-should-policy-makers-respond/>; Foa et al (n 16).

that those working within and alongside democratic institutions in Australia want to proactively engage with citizens, listen to their views on complex policy challenges and respect their diverse opinions.[19] However, younger generations of Australians — and many other groups within our community — are losing faith in conventional political and democratic processes to represent their views and to make the laws and policies needed to protect and promote their rights and interests.[20] As noted above, this is occurring at a time where the protection of the environment is considered by many international organisations, social scientists, judges and other experts as the most important socio-political issue of the 21st century.[21]

At the same time, Australian parliamentarians and law enforcers have adopted increasingly harsh responses to this form of political expression, increasing the scope of criminal offences and related penalties, and increasing the powers of police to deter, apprehend and detain participants.[22] As Luke McNamara et al explore, this helps build a discourse of criminalisation of collective public action against serious public threats such as climate change, which permeates a wide range of government and community responses to protest and protest related activity.[23] This has led the Human Rights Law Centre to publish a special report, entitled 'Protest in Peril: Our Shrinking Democracy', which observes:

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19 See, e.g., Inter-Parliamentary Union and United Nations Development Programme, *Global Parliamentary Report: Public Engagement in the Work of Parliament* (Report, 2022).

20 See, e.g.: Intifar Sadiq Chowdhury, 'Are Young Australians Turning Away from Democracy?' (2021) 56(2) *Australian Journal of Political Science* 171; Foa et al (n 16); Sarah Moulds, *Connected Parliaments: Reimagining Youth Engagement with Parliaments in Australia* (Report, Winston Churchill Trust Australia, 2022) ('*Connected Parliaments*').

21 See, e.g.: Intergovernmental Panel on Climate Change, *Climate Change 2023: Synthesis Report* (Report, 2023); Albert J Gabric, 'The Climate Change Crisis: A Review of Its Causes and Possible Responses' (2023) 14(7) *Atmosphere* 1081; Amit Rawat, Dilip Kumar and Bhishm Singh Khati, 'A Review on Climate Change Impacts, Models, and Its Consequences on Different Sectors: A Systematic Approach' (2024) 15(1*) Journal of Water and Climate Change* 104; Richard Clark and Noah Zucker, 'Climate Cascades: IOs and the Prioritization of Climate Action' (2024) 68(4) *American Journal of Political Science* 1299; Lynne Keevers et al, 'Practices Supporting Community Recovery and Healing from Climate-Related Disasters: A Systematic Review' (2024) 21(6) *International Journal of Environmental Research and Public Health* 795.

22 See, e.g.: Moulds, 'Obstruct Public Place Laws' (n 13); O'Keeffe (n 1); Greg Martin (n 13); McNamara and Quilter (n 13); Michael Head, *Democracy, Protest and the Law: Defending a Democratic Right* (Taylor and Francis, 2024); Sam Alexander-Prideaux, 'Construing the Carve-Outs: Do NSW Anti-Protest Laws Protect Industrial Picketing?' (2024) 37(1) *Australian Journal of Labour Law* 1; Catherine Zhou, 'Prior Restraint and Protest Regulation' (2025) 48(1) *University of New South Wales Law Journal* 128.

23 See Luke McNamara et al, 'Theorising Criminalisation: The Value of a Modalities Approach' (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 91.

> The steady erosion of our right to peacefully gather on public spaces should concern all of us. Our ability to peacefully protest is fundamental to safeguarding democracy and for holding those in power accountable. When this right is eroded or limited in a way that's not compatible with international human rights law and principles, it not only limits the ways that we can voice our grievances, but it also undermines the democratic checks and balances which are essential for a healthy society.[24]

The right to peacefully assemble is a fundamental human right recognised under art 21 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), a key international treaty that aims to protect and promote civil and political rights globally.[25] Australia has signed and ratified the *ICCPR*, which gives rise to obligations under international law to implement these rights domestically and to periodically report to the United Nations ('UN') Human Rights Committee on its progress.[26]

Article 21 of the *ICCPR* explains that the right to peaceful assembly cannot be restricted, unless the restrictions are imposed by law and are shown to be

> necessary in a democratic society in the interests of national security or public safety, public order … the protection of public health or morals or the protection of the rights and freedoms of others.[27]

As the UN Human Rights Committee has explained:

> The fundamental human right of peaceful assembly enables individuals to express themselves collectively and to participate in shaping their societies. The right to peaceful assembly is important in its own right, as it protects the ability for people to exercise individual autonomy in solidarity with others. Together with other related rights, it also constitutes the very foundation of a system of participatory governance based on democracy, human rights, the rule of law and pluralism.[28]

The rights to peaceful assembly and freedom of democratic expression also form part of the common law of Australia,[29] inherited from British jurisprudence dating as far back as 1215.[30] However, common law freedoms do not bestow positive,

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24 David Mejia-Canales, *Protest in Peril: Our Shrinking Democracy* (Report, Human Rights Law Centre, 2 July 2024) 5.

25 *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 21 ('*ICCPR*').

26 Ibid arts 2(2), 40. See also: Ryszard Piotrowicz and Stuart Kaye, *Human Rights in International and Australian Law* (Butterworths, 2000) 34; Brian Martin (n 9).

27 *ICCPR* (n 25) art 21.

28 Human Rights Committee, *General Comment No 37 (2020) on the Right of Peaceful Assembly (Article 21)*, 129th sess, UN Doc CCPR/C/GC/37 (17 September 2020) 1 [1].

29 See, e.g.: *South Australia v Totani* (2010) 242 CLR 1, 28–34 [30]–[39] (French CJ); *Evans v New South Wales* (2008) 168 FCR 576.

30 See, e.g., *Magna Carta 1215*, 17 John 1. See also Mejia-Canales (n 24) 6.

enforceable rights on individuals.[31] Instead, they operate as a type of 'base line' for the interpretation of other laws by the courts, and only apply insofar as they are not explicitly displaced by statute.[32] As the High Court of Australia observed in *Lange v Australian Broadcasting Corporation* ('*Lange*'):

> Under a legal system based on the common law, 'everybody is free to do anything, subject only to the provisions of the law', so that one proceeds 'upon an assumption of freedom of speech' and turns to the law 'to discover the established exceptions to it'.[33]

While fundamental democratic rights and freedoms, including the right to peaceful assembly, underpin Australia's modern democracy, it may surprise many to learn that these rights and freedoms are not set out in our *Constitution*, or in any other piece of legislation at the federal level. Australia is routinely criticised for its failure to provide comprehensive legal protection for rights contained in the international conventions it has signed.[34] Unlike almost every other democracy, Australia does not have a bill of rights. South Australia does not have a human rights act or charter, although human rights laws that include specific protection for the right to peaceful assembly have been previously introduced into the South Australian Parliament.[35] Further, in April 2025, the South Australian Parliament's Social Development Committee recommended the South Australian Government enact human rights legislation, following consultation with the community.[36] Specific protections are in place in some states and territories, including in Victoria,[37] Queensland[38] and the Australian Capital Territory ('ACT').[39] Even in these jurisdictions, the right to peaceful assembly is not an absolute right, and can be limited by other laws.[40] In other words, Australians seeking to express their political or other opinions through peaceful protest remain subject to the criminal laws that apply to actions including

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31 Tom Gotsis and Rowena Johns, 'Protest Law in New South Wales' (Research Paper No 3, Parliament of New South Wales, March 2024) 5. See also Mejia-Canales (n 24) 6.

32 See, e.g., Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35(2) *Melbourne University Law Review* 449.

33 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'), quoting *A-G v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109, 283 (Lord Goff).

34 See, e.g., Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, UN Doc A/HRC/47/8 (2 June 2021) 5 [66]–[68].

35 Charter of Human Rights and Responsibilities Bill 2020 (SA) cl 18. This Bill was introduced by the Hon Mark Parnell MLC on 2 December 2020 but lapsed before the Second Reading.

36 See Social Development Committee, Parliament of South Australia, *Inquiry into the Potential for a Human Rights Act for South Australia* (Report No 49, 29 April 2025).

37 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 16 ('*Charter Act*').

38 *Human Rights Act 2019* (Qld) s 22 ('*Qld Human Rights Act*').

39 *Human Rights Act 2004* (ACT) s 15 ('*ACT Human Rights Act'*).

40 Ibid s 28; *Charter Act* (n 37) s 7; *Qld Human Rights Act* (n 38) s 13.

obstructing public places, roads or thoroughfares, or causing disturbances in or around workplaces.

However, there are some limits on the types of laws Australian parliaments can make in response to protest activities. This is because the High Court has held, over a series of cases spanning many decades, that the *Constitution* contains an implied freedom of political communication, derived from the system of representative government secured by the text of the *Constitution* itself.[41] This implied freedom of political communication does not work as an enforceable legal right, but instead as a limit on the legislative power of the parliament.[42] It comes from the idea that the people of Australia must be able to communicate with each other about political matters, so that they can exercise their constitutional right to elect representatives to the parliament.[43] This means that while laws that limit or even remove the right to protest in Australia can be validly made, they must not disproportionately impact the right to communicate about political matters in our democracy. Over time, the High Court has developed a specific test for determining whether a law has a disproportionate impact on the implied freedom of political communication, framed as three questions:

1. Does the law effectively burden the freedom of political communication?
2. Is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of government?
3. Is the law reasonably appropriate and adapted to advance that purpose in a manner compatible with the maintenance of the constitutionally prescribed system of government? [44]

These questions should be carefully considered beyond the strict limitation enforceable by the High Court when enacting or amending laws designed to curb, deter or respond to protest activity in Australia. However, as discussed below, they do not always receive the attention they deserve by governments impatient to rush through new laws in response to disruptive protest activity. It is also clear that the

41 See, e.g.: *Brown v Tasmania* (2017) 261 CLR 328, 363–4 [102]–[104] (Kiefel CJ, Bell and Keane JJ) ('*Brown*'); *McCloy v New South Wales* (2015) 257 CLR 178, 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ) ('*McCloy*'); *Lange* (n 33) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Levy v Victoria* (1997) 189 CLR 579, 626 (McHugh J).

42 *Lange* (n 33) 560 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

43 Ibid.

44 This reflects relevant principles developed in *Lange* (n 33) 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) and *McCloy* (n 41) 193–5 [2] (French CJ, Kiefel, Bell and Keane JJ) and restated in *Brown* (n 41) 363–4 [104] (Kiefel CJ, Bell and Keane JJ). Recent jurisprudence indicates that structured proportionality — an analytical tool often employed in answering the third question relating to the implied freedom — is not mandatory in every case, though the overarching three questions remain unaffected: see: *Babet v Commonwealth* (2025) 423 ALR 83; *Ravbar v Commonwealth* (2025) 423 ALR 241.

implied freedom of political communication (at least as currently articulated by the High Court) offers only tenuous protection for the rights of protesters, or the more broadly conceptualised freedom of expression described above.[45]

III Public Assemblies and the Law in SA

South Australia has a proud history of firsts when it comes to facilitating public participation in democratic decision-making. The State's early constitutional arrangements included suffrage for all adult males (including Aboriginal people).[46] Further, in 1894 the South Australian Parliament became the first colony in Australia, and the fourth place in the world, to grant women the right to vote. It was also the first in the world to grant women the right to stand as members of Parliament.[47]

In the 1970s, SA also made history by enacting the *Public Assemblies Act 1972* (SA) ('*Public Assemblies Act*') — law designed to actively protect the right to protest in the context of a growing popular movement opposing the Vietnam War in Australia.[48] Section 4 of the *Public Assemblies Act* sets out a process for applying to host a public gathering, including a protest march, that involves seeking approval from the Chief Secretary, the Commissioner of Police or the clerk of the relevant local council at least four days before the date of the assembly.[49] Pursuant to s 4(6), an objection may be made by or on behalf of the Chief Secretary, the Commissioner of Police or the relevant council on the ground that the proposed assembly would, if effectuated, unduly prejudice any public interest.[50] If an objection has been made to a proposed assembly, the proponents or potential participants of the assembly can apply to a judge of the local or district criminal court to examine the grounds of the objection and, if the judge is not satisfied that proper ground for any objection made to the proposal exists, the objection can be quashed, and approval granted.[51] If approval is provided under the *Public Assemblies Act*, and the organisers and participants in the approved assembly adhere to the details that were contained in the approval, they will 'not incur any civil or criminal liability by reason of the obstruction of a public place'.[52] Section 6(2) of the *Public Assemblies Act* makes it clear that

45 See, e.g., Head (n 22).

46 'SA Firsts: Timeline for South Australian Firsts', *Parliament of South Australia* (Web Page) <https://www.parliament.sa.gov.au/About-Parliament/Timelines-for-SA-Firsts>.

47 Ibid.

48 Paul Sendziuk and Robert Foster, *A History of South Australia* (Cambridge University Press, 2018) 187–8.

49 *Public Assemblies Act 1972* (SA) s 4 ('*Public Assemblies Act*').

50 Ibid.

51 Ibid s 5.

52 Ibid s 6(1)(b).

> [a]n act permitted by this section is lawful notwithstanding the provisions of any other Act or law regulating the movement of traffic or pedestrians, or relating to the use or obstruction of a public place.

In 1973, the High Court considered how an earlier iteration of this provision of the *Public Assemblies Act* interacted with provisions criminalising loitering under s 18 of the then *Police Offences Act 1953* (SA). The Court confirmed that s 6 of the *Public Assemblies Act* operates as a 'positive defence' to a relevant criminal charge, that must be raised by the defendant in relevant proceedings.[53] It does not constitute an element of any related criminal offence that needs to be positively disproved by the prosecution.[54] There appears to be no further judicial interpretation of the *Public Assemblies Act*, and no record of any decisions by a local or district court with respect to an unsuccessful application for approval under the Act.

The City of Adelaide Council has a 'March, Parade or Rally Registration' online form[55] for those seeking to apply for approval under the *Public Assemblies Act*, and a 'Public Assemblies Info Sheet' available on its website.[56] This information encourages applicants to '[c]ontact SAPOL [SA Police] and/or the City of Adelaide a minimum of 1 month prior to the date of [their] activity' and '[h]ave a meeting to discuss public assembly proposal/requirements with SAPOL & a Council representative'.[57] As discussed further below, it is difficult to locate similar information or online application forms for other local government areas in SA.

A *Relevant South Australian Laws*

South Australia has a range of criminal offence provisions in place to respond to people who wilfully obstructed a public place, caused a public disruption or engaged in certain types of anti-social behaviour. For example, there is the 'obstruction of public places' offence contained in s 58 of the *Summary Offences Act 1958* (SA) ('*Summary Offences Act*') which has existed in different forms and is discussed further below. The *Summary Offences Act* also makes it an offence to engage in 'disorderly or offensive conduct or language',[58] with a maximum penalty of $1,250 or imprisonment for three months. Offences also exist for hindering police,[59] property damage[60] and the making of unlawful threats.[61]

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53 *Samuels v Stokes* (1973) 130 CLR 490, 501 (Menzies J).

54 Ibid 500.

55 'March, Parade or Rally Registration', *City of Adelaide* (Web Page) <https://customer.cityofadelaide.com.au/forms/register-march-parade-or-rally/>.

56 Ibid.

57 Ibid.

58 *Summary Offences Act* (n 14) s 7.

59 Ibid s 6.

60 Ibid pt 9.

61 *Criminal Law Consolidation Act 1935* (SA) s 19.

Under the *Police Act 1998* (SA), police security officers have express powers to detain persons where necessary for the protection of a designated person,[62] the protection of a designated place[63] or the protection of a designated vehicle.[64] It is an offence to be on premises for an unlawful purpose, carrying maximum penalties ranging from $2,500 or imprisonment for six months, to $10,000 or imprisonment for 12 months. [65] Loitering is also an offence, carrying a maximum penalty of $1,250 or $5,000, or imprisonment for three months depending on the circumstances.[66]

Under pt 14B of the *Summary Offences Act*, police also have increased powers in certain public places termed 'declared public precincts'. Section 66N of the *Summary Offences Act* empowers the Attorney-General to declare a defined area comprised of one or more public places[67] to be a 'declared public precinct'. There must be a reasonable likelihood of conduct in the area posing a risk to public order and safety, and the inclusion of each public place in the area must be reasonable having regard to that identified risk.[68] The declaration should be limited to 12 hours, unless the Attorney-General is satisfied that special circumstances exist in the particular case.[69] As the SA Police website explains,[70] if a person is in an area that has been declared a public precinct, the police are then authorised to conduct a metal detector search of a person to determine the presence of weapons,[71] search a person for drugs,[72] order a person posing a risk to public safety to leave the declared public precinct[73] and/or ban a person who behaves in an offensive or disorderly manner within the precinct for up to 24 hours.[74]

62 *Police Act 1998* (SA) s 63P(2)(e).

63 Ibid s 63Q(6)(f).

64 Ibid s 63S(2)(e).

65 *Summary Offences Act* (n 14) s 17.

66 Ibid s 18.

67 'Public place' is defined as including: (a) a place to which free access is permitted to the public, with the express or tacit consent of the owner or occupier of that place; and (b) a place to which the public are admitted on payment of money, the test of admittance being the payment of money only; and (c) a road, street, footway, court, alley or thoroughfare which the public are allowed to use, notwithstanding that that road, street, footway, court, alley or thoroughfare is on private property: ibid s 4. See also s 7.

68 *Summary Offences Act* (n 14) s 66N(2).

69 Ibid s 66N(4).

70 'Declared Public Precincts', *South Australia Police* (Web Page) <https://www.police.sa.gov.au/your-safety/declared-public-precincts>.

71 *Summary Offences Act* (n 14) s 66R.

72 Ibid s 66S.

73 Ibid s 66O(1).

74 Ibid s 66T(1).

These powers give police the ability to issue expiation notices for offences within the geographic area or to issue barring orders covering the precinct.[75] A person who is barred, but enters or remains in the declared precinct is guilty of an offence which carries a maximum penalty of $2,500.[76] Offences also apply for remaining in or re-entering a declared precinct after being ordered to leave, or behaving in an offensive or disorderly manner within the precinct.[77] A person who carries an offensive weapon or dangerous article within the declared precinct can face penalties of up to $10,000 or imprisonment for two years.[78]

It should be noted that the above 'declared public precinct' regime was described by its proponents as being necessary to address the 'perceived increase in crime and antisocial behaviours in the Adelaide CBD' rather than civil resistance to climate change or protest activity.[79] Nevertheless, the powers this regime bestows on the executive are extensive, and have the potential to restrict access to public spaces in a wide range of contexts. It was within this legislative landscape that amendments were quickly made to the 'obstruction of public places' offence.

B *Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA)*

Early on the morning of 17 May 2023, a group of people from the climate action movement Extinction Rebellion engaged in a protest near the Adelaide Convention Centre, where the Australian Petroleum Production and Exploration Association Conference was being held. The protest involved one member of the group abseiling down from the Morphett Street bridge, which crosses over North Terrace — a major thoroughfare in the Adelaide CBD.[80] In response to the protest, police blocked access to the Morphett Street bridge and restricted tram and car traffic flow on North Terrace. Although road closures and diversions were lifted by 9am, some morning commuters experienced significant delays, including those seeking to leave or enter the nearby Royal Adelaide Hospital.[81] The Extinction Rebellion member involved in the abseiling was charged with several offences, including obstructing a public place, as it was then prescribed under s 58 of the *Summary Offences Act*.

As the protest activities were unfolding, a local radio station began taking calls from commuters impacted by the traffic diversions and road restrictions.[82] The Leader of

75 Ibid s 66T.

76 Ibid s 66T(3).

77 Ibid s 66O(2).

78 Ibid s 66Q.

79 'Expansion of Declared Public Precincts: Society Seeks Evidence for Increased Police Powers', *Law Society of South Australia* (Advocacy Notes, July 2023).

80 'Extinction Rebellion Protestors' (n 3).

81 Ibid.

82 See, e.g., FIVEAA, 'WATCH LIVE: Breakfast with David and Will' (YouTube, 17 May 2023) 2:12:36–2:14:44 <https://www.youtube.com/watch?v=EZ7A0GBKDXI&t=8086s>.

the Opposition at the time, the Hon David Speirs MP, joined the on-air discussion the following day, calling for tougher penalties for protesters who cause traffic chaos.[83]

As at 17 May 2023, s 58 of the *Summary Offences Act* made it an offence for a person to 'wilfully obstruct the free passage of a public place', with a maximum penalty of $750.[84] On 18 May 2023, the day after the protest, the South Australian Premier, the Hon Peter Malinauskas MP, suspended standing orders and introduced the Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA) into the House of Assembly,[85] where it passed in under an hour. The Bill dramatically increased the maximum penalty for the s 58 offence from a fine of $750, to a fine of $50,000 or three months imprisonment. No explanatory memorandum or other statistical information was provided to support this increase. In his Second Reading Speech, the Premier described the amendments as 'simply an adjustment to the penalty regime and its application to ensure that some of the conduct that we have seen over the course of recent months is not able to occur with impunity'.[86] The Premier also noted that the amended provisions did not alter the approval process contained in the *Public Assemblies Act* and described above.[87]

However, the amendments made significant changes to the nature and scope of the existing obstruction of public places offence that extend far beyond the dramatic increases in penalties and have the potential to fundamentally alter the way many South Australians think about their freedom to peacefully assemble or protest. For example, the Bill replaced the term 'wilfully' with 'intentionally or recklessly'.[88] This broadens the scope of liability to capture circumstances including those in which a person only has to turn their mind to the possibility that an obstruction will occur, even though the consequence is entirely unintended, to be found guilty of the offence. This concerning feature of the amendments passed by the House of Assembly caught the attention of crossbench upper house members and was successfully removed when the Bill proceeded through the Legislative Council on 30 May 2023. In addition, although the public discourse about the need for the newly broadened offence regularly referred to the obstructing conduct causing a real and significant risk to the safety of persons or similar risk of serious damage to property,[89] no such requirement was included in the offence itself. In fact, the new s 58(1a) makes it clear that a person can be found guilty of an offence against this

83 FIVEAA, 'WATCH LIVE: Breakfast with David and Will' (YouTube, 18 May 2023) 2:09:10–2:14:53 <https://www.youtube.com/watch?v=qIwmnkakec>.

84 *Summary Offences Act 1953* (SA) s 58, as at 31 May 2023.

85 *Parliamentary Debates* (n 15) 3979 (Peter Malinauskas, Premier).

86 Ibid 3980.

87 David Eccles, 'Controversial Protest Law Passes Upper House after Marathon Debate', *InDaily* (online, 31 May 2023) <https://www.indailysa.com.au/news/archive/2023/05/31/controversial-protest-law-passes-upper-house-after-marathon-debate>.

88 Summary Offences (Obstruction of Public Places) Amendment Bill 2023 (SA) cl 2(1).

89 See, e.g., Government of South Australia, 'Tougher Penalties for Obstructing Public Places' (Media Release, 31 May 2023).

section if the person's conduct directly or indirectly obstructed the free passage of a place. As a result, the scope of the offence is not limited to protest activity and could apply in many contexts, such as: (1) journalists trying to take a photograph or obtain an interview with someone on a street; (2) a homeless person sleeping on the street; or (3) a community event that takes place across a park or footpath.[90]

The amended offence also includes provisions permitting the court to make an order requiring the defendant to pay reasonable costs associated with the response employed by a 'relevant entity' (such as the police or an emergency services organisation).[91] According to s 58(1c), a certificate provided by the relevant entity setting out remedial action will be accepted as proof of the costs and expenses incurred. This provision effectively transfers the onus of proof to the defendant, who would be unlikely to be in a position to test the figure put forward in a certificate, let alone present an alternate compelling view to the court as to these costs and expenses.

This cost-recovery feature of the amendments, coupled with the dramatic increase in penalties and expanded scope of the offence, led a range of community organisations and legal experts to express strong concerns about the new laws.[92] These groups explained that the provisions were unnecessary, likely to give rise to unintended consequences, and disproportionate in terms of their impact on the right to protest about matters of significance to the community, including climate change.[93] Those groups were supported in their efforts by hundreds of South Australians who 'protested against the protest laws' on the steps of Parliament on 26 May 2023.[94] At the time of writing, the new provisions have not been subject to judicial consideration, and it appears that no prosecutions have been issued, however it appears that at least one charge may have been laid.[95]

Under the current South Australian provisions, it remains challenging for ordinary people, who are contemplating participating in or organising a small, peaceful rally outside their local council chambers or member of Parliament's office to draw attention to an issue they care about, to work out how to do this *lawfully*. If they know about the amended 'obstruction of public places' offence, and are keen to avoid doing anything disruptive that would offend other pre-existing laws,

90 See, e.g., Australian Lawyers for Human Rights, 'Human Rights Lawyers Slam Attempts to Ram Through Anti-Protest Laws in SA' (Media Release, 19 May 2023).

91 *Summary Offences Act* (n 14) s 58(1c).

92 South Australian Council of Social Services, 'Joint Media Release on Proposed New Anti-Protest Laws: Undo 22 Minutes of Bad Lawmaking' (Media Release, 29 May 2023).

93 Ibid.

94 Belinda Willis, 'Protest Against the Protest Laws', *InDaily* (online, 23 May 2023) <https://indaily.com.au/news/2023/05/23/protest-against-anti-protest-laws/>.

95 See David Simmons, 'Pro-Palestine Activist Defiant after Adelaide Arrest and 17-Hour Jail Stint', *InDaily* (online, 10 October 2025) <https://www.indailysa.com.au/news/just-in/2025/10/10/pro-palestine-activist-defiant-after-adelaide-arrest-and-17-hour-jail-stint>.

what should they do? At the time the reform to the offence was rushed through Parliament, the South Australian Premier noted that the provisions of the *Public Assemblies Act* remained unchanged, and that the new offences were not intended to impact 'lawful' protests undertaken in accordance with the provisions of that Act.[96] However, accessing approval for protest activity under the *Public Assemblies Act* is not always easy to do in practice. To whom should the person apply? What form needs to be filled out? What information is required and how much time is needed? What if the application is refused? If it is granted — are there still risks in proceeding?

As noted above, s 4(4) of the *Public Assemblies Act* provides that notice of a public assembly must be

> (4) served personally or by post, at least four days before the date of the assembly on
>
> (a) the Chief Secretary; or
>
> (b) the Commissioner of Police; or
>
> (c) the clerk of the council for the area in which the assembly is to be held, and the recipient of the notice must then inform the other persons described above about the contents of the notice.[97]

Section 4(1) of the Act also requires the person providing notice to specify

> (a) the date of the assembly; and
>
> (b) the time at which the assembly will convene and the time at which it will disband; and
>
> (c) the place in which the assembly will be held, and the boundaries of the area to be occupied by the assembly, or if it is to move in procession, the route that it will follow, the extent to which it will occupy the public places through which it will pass, the places (if any) at which it will halt and the time for which it will remain stationary in each such place.[98]

However, there is no clear, publicly available information about how someone would go about preparing this notice, other than the online form that applies for proposed public assemblies taking place within the City of Adelaide. There are no key steps or online application processes available on most local council websites. As a result, it remains unclear — even to those with access to information about the relevant laws — how citizens should go about conducting a lawful and peaceful public assembly in SA. This means that without proactive support and information sharing from the legal profession, communities who assume they have a right to peacefully protest

96 'Protesters Condemn Public Obstruction Penalties in SA as "Attack on Fundamental Rights"', *ABC News* (online, 30 May 2023) <https://www.abc.net.au/news/2023-05-30/sa-protest-law-opposed-outside-parliament-house/102409004>.

97 *Public Assemblies Act* (n 49) s 4(4).

98 Ibid s 4(1).

may not have the practical means to understand and exercise their legal rights and, therefore, may be at risk of criminal prosecution under the amended South Australian laws.

There are examples of the legal complexities associated with seeking to access legal protections for public assemblies in other jurisdictions where 'protest permit' systems are in place, including in the recent case of *Commissioner of Police v Coglin*.[99] In this case, the New South Wales ('NSW') Commissioner of Police sought orders under s 25 of the *Summary Offences Act 1988* (NSW) prohibiting the holding of two public assemblies proposed by climate activist group Rising Tide in and around the Port of Newcastle. The Rising Tide group had previously served on the Commissioner of Police a 'Form 1' notice advising of their intention to hold a public assembly of approximately 10,000 people at Horseshoe Beach, Newcastle and in adjoining parkland, with the objective of protesting against the NSW Government's continuing approval of new coal projects.[100] The activities proposed by Rising Tide, including kayaking activities and a land-based 'protestival', were planned to take place over a number of days.[101] On 7 November 2024, Fagan J of the Supreme Court of NSW made the prohibition orders sought by the police.[102] The NSW Government took further action to prevent Rising Tide's activities by using its powers under the *Marine Safety Act 1998* (NSW) to issue an exclusion zone around Newcastle Harbour for the relevant period in which the proposed 'protestival' was to be held.[103] The exclusion zone order imposed a maximum $1,100 fine for breaching the zone and $3,300 fine for anyone in the vicinity who failed to comply with directions. However, the exclusion zone order was successfully challenged in the Supreme Court by a member of Rising Tide, with McNaughton J finding that a plain reading of the law was that NSW Maritime had exceeded its powers in declaring the zone.[104] Rising Tide's protest went ahead on the weekend of 22–24 November 2024, and resulted in 170 protesters being charged with offences described in the media as 'disruption of a major facility', and 'not complying with direction by authorised officer relating to safety'.[105] This example illustrates the range of intersecting laws that can come into play when individuals or groups are seeking to engage in protest

99 [2024] NSWSC 1412 ('*Coglin*').

100 Ibid [2]–[6].

101 Ibid.

102 *Coglin* (n 99).

103 *Marine Safety Act 1998* (NSW) s 12, as at 7 November 2024.

104 *Stuart v Minister for Transport* [2025] NSWSC 39, [40]–[44], [66]. See also Caitlin Fitzsimmons, 'Anti-Coal Protesters Clear Court Hurdle for Kayak Flotilla Near Port', *Sydney Morning Herald* (online, 21 November 2024) <https://www.smh.com.au/environment/climate-change/anti-coal-protesters-clear-court-hurdle-for-kayak-flotilla-near-port-20241121-p5ksdv.html>.

105 Blair Jackson and Aisling Brennan, 'More Than 100 Anti-Coal Protesters Arrested, Shipping Suspended at Newcastle', *NewsWire* (online, 24 November 2024) <https://www.news.com.au/breaking-news/more-than-100-anticoal-protesters-arrested-after-forcing-ship-back-to-port/news-story/d57dec178d3355168e2e3d535d7a0e61>.

activity, and the legal complexities associated with seeking 'permission to protest' under Australian laws.[106]

IV The Broader Legal Landscape

The rapid passing of the 'obstruction of public places' law in SA is indicative of a trend across several Australian jurisdictions, where new offences are being rushed through parliament to deter and punish those who use disruptive protest activities — particularly in connection with climate activism. For example, in Queensland, the *Summary Offences and Other Legislation Amendment Act 2019* (Qld) has significantly increased penalties for protesters who clamp themselves to buildings or other things such as plants, equipment and infrastructure. In NSW the *Roads and Crimes Legislation Amendment Act 2022* (NSW) imposes harsher penalties on protesters whose actions disrupt businesses and other economic activity. These laws mean that people can be fined up to $22,000 or jailed for up to two years for protesting illegally on public roads, rail lines, tunnels, bridges and major ports such as Newcastle and Port Botany.[107] Police in NSW and in other Australian states have 'move-on' powers, which Luke McNamara and Julia Quilter have described as being originally designed as an 'instrumental tool for addressing anti-social behaviour orientation', but are increasingly seen as 'a flexible and potent mechanism for interrupting and closing down peaceful protests that take place in "public fora"'.[108] In Tasmania, anti-protest laws have been introduced to specifically target activists looking to disrupt logging activities by increasing penalties for anyone who obstructs employees from carrying out their work or causing a risk to worker safety.[109] The Victorian *Sustainable Forests Timber Amendment (Timber Harvesting Safety Zones) Act 2022* (Vic) contains similar provisions. These laws are designed to send a 'zero tolerance' message to climate activists who hinder, obstruct or interfere with timber-harvesting operations.

When such laws are rushed through parliament, they are often poorly designed and typically fail to consider the key questions set out above with respect to the implied freedom of political communication in the *Constitution*. For example, previous versions of anti-protest laws in Tasmania have been struck down by the High Court for going too far when it comes to imposing penalties on activists seeking to disrupt workplaces, with some judges taking a strong interest in the powers given to police

106 For further examples in other jurisdictions see Maria O'Sullivan, 'Should You Need a Permit to Protest? Here's Why That's a Bad Idea (and Might Be Unlawful)', *The Conversation* (online, 8 October 2024).

107 This offence was considered by the New South Wales District Court in the case of *Glover v R* [2023] NSWDC 322. For commentary about this case see Royce Kurmvelos, 'Climate Activist Violet CoCo and Protest Laws', *The Saturday Paper* (online, 18 March 2023). See also *Coglin* (n 99).

108 McNamara and Quilter (n 13) 23.

109 *Police Offences Amendment (Workplace Protection) Act 2022* (Tas).

and other authorities under these laws.[110] In *Brown v Tasmania*,[111] Kiefel CJ, Bell and Keane JJ explained that anti-protesting laws that are drafted in vague terms, and are highly dependent on police interpretation on the ground, risk the capture or deterrence of lawful protesters.[112] When this happens, the laws may no longer be considered proportionate and may be incompatible with our constitutionally protected system of representative democracy.[113]

In the 2023 case of *Kvelde v New South Wales*[114] Ms Helen Kvelde and Ms Dominique Jacobs (two members of the Knitting Nannas, whose 'Nannafesto' states that members of the group engage in protests to raise awareness of environmental issues)[115] challenged amendments to New South Welsh laws related to protest that were enacted through the *Roads and Crimes Legislation Amendment Act 2022* (NSW). The Supreme Court of NSW declared parts of s 214A of the *Crimes Act 1900* (NSW), which sought to criminalise 'damage or disruption to major facilities', invalid for impermissibly burdening the implied freedom of political communication.[116] The Court applied the modified three-part *Lange-McCloy* test as described above to examine the validity of s 214A of the *Crimes Act 1900* (NSW). The Court reaffirmed the general proposition that protests over environmental issues constitute political communication, and that there was a real prospect that s 214A could burden various methods of political communication.[117] However, the Court also considered the fact that pre-existing criminal laws already prohibited unlawful access to, or damage of, major facilities covered by s 241A, and so sought to determine whether or not s 214A creates a 'real additional burden' on the implied freedom, having regard to the High Court's consideration of similar laws in *Brown v Tasmania*.

The Court also held that the purpose of s 214A of the *Crimes Act 1900* (NSW) was legitimate, and one that was compatible with the system of representative government provided for by the *Constitution*, as required by the *Lange-McCloy* test. The Court described the purpose of s 214A as being 'to increase deterrents to such conduct causing damage or serious disruption or obstruction to facilities and hence, to community generally'.[118] However, Walton J held that the legitimacy of this purpose did not extend to the criminalisation of conduct merely causing inconvenience to particular individuals who, for example, were redirected by protesters situated near a major facility.[119] As a result, it was held that ss 214A(1)(c)–(d) of

110 *Brown* (n 41).

111 Ibid.

112 Ibid 355–6 [73].

113 Ingmar Duldig and Jasmyn Tran, 'Proportionality and Protest: *Brown v Tasmania* (2017) 261 CLR 328' (2018) 39(2) *Adelaide Law Review* 493, 497–500.

114 [2023] NSWSC 1560.

115 Ibid [68].

116 Ibid [259], [363].

117 Ibid.

118 Ibid [434], [436].

119 Ibid.

the *Crimes Act 1900* (NSW) were not reasonably necessary, and failed to satisfy the proportionality limb of the *Lange-McCloy* test.[120] The Court declared that ss 214A(1)(c), insofar as the provision criminalised conduct that causes the closure of part of a major facility, and 214A(1)(d) impermissibly burdened the implied freedom of political communication contrary to the *Constitution*, and were therefore invalid.[121]

V Embedding a 'Democratic Listening' Approach To Avoid Reactionary Legislative Responses to Civil Resistance to Climate Change and Protest Activity

Although people become frustrated when their drive to work or school takes hours longer than usual because of the actions of climate activists, and rightly so, many individuals and communities also care deeply about climate change and the impact it has on our lives. At the time the *Summary Offences Act* was amended, Parliament failed to facilitate a public consultation process about the adequacy of existing offences relating to obstructing public places through protest, or the government's climate change policies. Nor was there an opportunity to collectively reflect on the value and precarity of our democratic freedoms, including our right to participate in peaceful protest activity. Instead, South Australian parliamentarians appeared to 'lean in' to what McNamara and Quilter have previously described as a (re)conceptualisation of 'protestors' as 'perpetrators' and the act of protest as 'anti-social behaviour' posing risks to 'ordinary' people.[122]

As soon as this type of conceptualisation takes hold, the voices of some groups in the community become immediately elevated (such as the 'ordinary person' delayed by traffic on the way to work) and others become silenced. Identities become entrenched around binary notions of 'ordinary people' and 'disruptive protesters' and we lose our collective ability to conceptualise peaceful protest as evidence of a mature and healthy democratic society.[123] For McNamara and Quilter, who explored these conceptualisations in the context of 'move on' police powers in NSW, this 'recalibration' has two dimensions:

> invocation of the rights of the 'general public' (set in conflict with the right to protest) via the ambiguous idea of 'reasonable enjoyment' of public spaces; and a repurposing of the capacious concept of 'public safety' as a vehicle for an ascendant imperative that business activities should suffer no interruption. Embedding these malleable imperatives in public order legislation further extends the capacity of the police to exercise discretion in coercive and restrictive ways that impede rather than tolerate or facilitate peaceful protest.[124]

120 Ibid [576]–[578].

121 Ibid.

122 Ibid.

123 McNamara and Quilter (n 13) 23.

124 Ibid.

The potential implications of these different public conceptualisations of 'legitimate protest' for the future of legislative responses to climate activism is something that must be carefully considered. A range of recent surveys suggest that Australians from all walks of life would like to see governments do more to address the causes and impacts of climate change,[125] and many would also like to see stronger legal protections for human rights, including the right to peaceful assembly.[126] At the same time, many groups in the community feel troubled or threatened by acts of civil disobedience or disruptive protest and are looking for reassurance from lawmakers about where the lines of legal legitimacy will or should be drawn.[127] It is imperative, therefore, that Australian lawmakers resist the temptation to participate in reactionary lawmaking or binary conceptualisations of protesters as perpetrators. They should instead seek the perspectives of a more diverse range of community members when evaluating the merits of different policy or legislative responses to acts of civil resistance to climate change, or other forms of protest.[128]

Ideally, this would involve the use of public or parliamentary forums, such as parliamentary committee inquiries or government consultations.[129] These forums allow elected representatives and community members to work together to build a shared social mandate and to avoid 'self-reinforcing cycles of intergroup enmity and policy gridlock'.[130] As Matthew J Hornsey et al have explained, this in turn demands that policymakers, legislators and other public communicators take active steps to avoid positioning 'in-groups' (such as 'ordinary commuters') as being 'in symbolic or material conflict with relevant "outgroups"' (such as environmental scientists or climate activists). When elected representatives are able to approach contested

125 Elizabeth Morison et al, *Climate of the Nation 2024* (Research Report, The Australia Institute, 2024); Australian Institute of Company Directors and Pollination, *Climate Governance Study 2024: Moving from Vision to Action* (Report, March 2024); Timothy Neal, 'The 2025 Federal Budget Fails the Millions of Voters Who Want Action on Climate Change', *University of New South Wales Newsroom* (online, 27 March 2025) <https://www.unsw.edu.au/newsroom/news/2025/03/2025-budget-fails-millions-of-voters-who-want-action-on-struggling-environment>.

126 Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Inquiry into Australia's Human Rights Framework and Laws* (Final Report, May 2024) 22; 'World Report 2024: Australia', *Human Rights Watch* (Web Page, 2024) <https://www.hrw.org/world-report/2024/country-chapters/australia>.

127 For further discussion of community concerns relating to protest and other forms of democratic expression see Scanlon Foundation Research Institute, *Mapping Social Cohesion: 2024 Report* (Report, December 2024).

128 Gulliver, Fielding and Louis (n 8) 3–4. See also: Zick (n 9); Brian Martin (n 9).

129 Sarah Moulds, 'From Disruption to Deliberation: Improving the Quality and Impact of Community Engagement with Parliamentary Law Making' (2020) 31(3) *Public Law Review* 264.

130 Hornsey et al (n 6) 1. See also: A M Bliuc et al, 'Public Division About Climate Change Rooted in Conflicting Socio-Political Identities' (2015) 5(3) *Nature Climate Change* 226; Laura G E Smith et al, 'Polarization Is the Psychological Foundation of Collective Engagement' (2024) 2(1) *Communications Psychology* 41.

policy issues from this standpoint of 'democratic listening',[131] they can increase the potential for all groups to accept the legitimacy of the policy or legislative settings that are ultimately adopted.[132] As Hornsey et al observe, this is because 'people often care about procedural justice as much as — and sometimes more than — distributive justice'.[133] The authors go on to explain:

> legal frameworks that place order, structure and a core of justice to negotiations around transitions have the potential to mitigate conflict and develop systems of compensation (e.g. for the unequal burdens of decarbonisation caused by historical emissions). Ultimately, the goal is to create a 'civic immune system' whereby issues of justice are fortressed by an ecology of transparency, integrity and accountability.[134]

If, on the other hand, rapid and reactionary lawmaking occurs in response to civil resistance to public threats like climate change, the potential for meaningful debate and the identification of sustainable policy and legislative responses is stymied; 'people heuristically accept ingroup messages as valid, moral and trustworthy, whereas outgroup messages are heuristically received with scepticism.'[135] This can then lead communities, groups or individuals to either increase the scale or disruption of their resistance activities,[136] or look to adversarial-dominated dispute resolution techniques such as litigation. In Australia, this has historically taken the form of legal actions against public and private entities using administrative law, constitutional law and tort law, but is increasingly likely to take the form of class actions.[137] As Corey Byrne observes:

> in an age where large corporations and public bodies are capable of committing harms on a mass scale the class action plays an important role in providing access to justice. Crucially, the aggregation of claims and economies of scale provided by the

131 Andrew Dobson, *Listening for Democracy* (Oxford University Press, 2014); M F Scudder, 'Measuring Democratic Listening: A Listening Quality Index' (2022) 75(1) *Political Research Quarterly* 175.

132 See, e.g., Moulds, '*Connected Parliaments*' (n 20).

133 Hornsey et al (n 6) 3. See also Christian Schnaudt, Caroline Hahn and Elias Heppner 'Distributive and Procedural Justice and Political Trust in Europe' (2021) 3 *Frontiers in Political Science* 642232:1–18 .

134 Hornsey et al (n 6) 4. See also Archon Fung, 'Infotopia: Unleashing the Democratic Power of Transparency' (2013) 41(2) *Politics and Society* 183.

135 Hornsey et al (n 6) 2. See also Matthew J Hornsey, 'Social Identity Theory and Self-Categorization Theory: A Historical Review' (2008) 2(1) *Social and Personality Psychology Compass* 204.

136 Gulliver, Fielding and Louis (n 8) 8.

137 Corey Byrne, 'Environmental Class Actions in Australia: A Coming Storm?' (2020) 37(2) *Environmental and Planning Law Journal* 186. See also Mark Hamilton, 'Climate Change Litigation in Australia: The Potential of Restorative Justice' (2024) 40(1) *Environmental and Planning Law Journal* 30, 37–8.

> class action allows claimants to obtain redress in cases where their individual losses may be too small by themselves for litigation to be economically viable.[138]

However, adversarial-based techniques for resolving complex policy issues are 'by no means a panacea for dealing with the incredibly complex and challenging issue of environmental protection'.[139] They are also rarely capable of generating the type of large-scale, sustainable socio-economic shifts necessary to build the strong 'civic immune system' which Hornsey et al and Archon Fung have identified as critical to developing and maintaining effective policy responses to climate change.[140] For this reason, structural and process-orientated measures are needed to: (1) slow down and deter reactionary legislative responses to protest activity in response to climate change; and (2) prompt and incentivise deliberative lawmaking techniques, such as meaningful and diverse community consultation.[141]

One structural reform that can incentivise this type of deliberative or participatory approach to lawmaking in areas involving competing public interests or rights is the adoption of human rights legislation with two characteristics. Such legislation must impose: (1) 'preventative' duties on parliaments to consider rights, such as the right to peaceful assembly or the right to a clean and healthy environment, when introducing or scrutinising proposed laws in response to civil resistance or protest relating to climate change;[142] and (2) 'positive' duties on lawmakers and public servants to seek the views of different communities before introducing new laws or policies, and to actively consider human rights when implementing laws or policies.[143] Such legislative frameworks operate in varying forms in Victoria, Queensland and the ACT,[144] with models having also been considered for implementation at the federal level[145] and in SA.[146]

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138 Byrne (n 137) 188.

139 Ibid.

140 Hornsey et al (n 6) 4. See also Fung (n 134).

141 For further discussion see Helen Fenwick, 'The Right to Protest, the Human Rights Act and the Margin of Appreciation' (1999) 62(4) *Modern Law Review* 491. For consideration of these types of structural and process orientated measures in a different context see Timon Forster and Mirko Heinzel, 'Reacting, Fast and Slow: How World Leaders Shaped Government Responses to the COVID-19 Pandemic' (2021) 28(8) *Journal of European Public Policy* 1299.

142 Social Development Committee (n 36) 125. See also Parliamentary Joint Committee on Human Rights (n 126) 231–49.

143 Social Development Committee (n 36) 126–7. See also Parliamentary Joint Committee on Human Rights (n 126) 169–81.

144 *Charter Act* (n 37); *Qld Human Rights Act* (n 38); *ACT Human Rights Act* (n 39). See also: Social Development Committee (n 36) 58; Parliamentary Joint Committee on Human Rights (n 126) 9.

145 Parliamentary Joint Committee on Human Rights (n 126) xxi.

146 Social Development Committee (n 36) 11.

It is important to note that these types of preventative and positive duties do not *prohibit* governments from enacting laws criminalising protest activity or curtailing the right to peaceful assembly. Experiences from within existing human rights jurisdictions like Queensland indicate that governments can and do pass rights-abrogating laws despite having human rights acts in place.[147] However, human rights regimes that include both preventative, scrutiny elements and enforceable positive duties do slow down the legislative process and demand that public servants and members of parliament publicly justify their legislative and policy choices having regard to human rights standards. This in turn contributes to a 'culture of justification'[148] across government that works to reward lawmakers and policymakers that *do* engage in more deliberative or participatory legislative design by protecting them from the risk of future liability for non-rights compliant actions or decisions.

The absence of either 'preventative' duties to consider human rights at the pre-enactment stage, or 'positive' studies to consider human rights when implementing laws and polices gives rise to a heightened risk of reactionary, rights-abrogating lawmaking.[149] This has been recognised by the South Australian Parliament's Social Development Committee following its 16-month Inquiry into the Potential for a Human Rights Act for South Australia. The Committee recommended that the South Australian Government consolidate the various rights and protections afforded to citizens across a wide range of existing laws into one comprehensive human rights act,[150] and 'conduct a comprehensive consultation with the South Australian community on the model of human rights act to be adopted'.[151]

Had such a human rights act been in place when South Australian legislators were contemplating the proposed amendments to s 58 of the *Summary Offences Act* in May 2023, a richer debate may have ensued. Freedom of peaceful assembly and association could have been considered alongside other important public interests such as freedom of movement, and a structured approach to developing proportionate and effective legislative amendments could have been adopted. It might have resulted, for example, in a law that specifically targeted disruptive protest activity on major roads or thoroughfares whilst also increasing the practical accessibility and scope of the provisions designed to enable community members to conduct lawful and peaceful, public assemblies. Even if it did not have any impact on the legislative design of the amendments to the *Summary Offences Act*, a human rights act would

147 See, e.g., Savannah Meacham and Laine Clark, 'Cruel, Inhuman: Queensland Government Admits Justice Laws Will Violate Human Rights', *National Indigenous Times* (online, 29 November 2024) <https://nit.com.au/29-11-2024/15149/cruel-inhuman-queensland-government-admits-justice-laws-will-violate-human-rights>.

148 Janet L Hiebert, 'Parliament and the Human Rights Act: Can the JCHR Help Facilitate a Culture of Rights?' (2006) 4(1) *International Journal of Constitutional Law* 1.

149 Julie Debeljak, Submission to Social Development Committee, Parliament of South Australia, *Inquiry into the Potential for a Human Rights Act in South Australia* (1 February 2024).

150 Social Development Committee (n 36) 11.

151 Ibid.

have given legislators — and community members — a common language and a new set of tools for navigating competing claims of rights in a consistent, systematic and transparent way.

VI Conclusion

The legislative response to climate protests in SA, exemplified by the rapid amendments to the *Summary Offences Act,* highlights the trends explored in depth by Robyn Gulliver, Kelly S Fielding and Winnifred R Louis in their study of civil resistance against climate change, and the different interests that are weighed and prioritised by governments when seeking to respond to such acts of resistance.[152] While the urgency to address disruptive protest activities is understandable, the approach taken raises significant concerns about the proportionality and fairness of the legal measures imposed. The dramatic increase in penalties and the broadening of the offence's scope risk undermining the fundamental freedoms of assembly and expression, which are cornerstones of a healthy democracy.

The concept of democratic listening offers a promising framework for navigating these complex issues. By actively engaging with diverse community perspectives and fostering inclusive dialogue, lawmakers can develop more balanced and sustainable legislative responses. This approach not only enhances the legitimacy of the laws enacted but also strengthens public trust in democratic institutions.

The introduction of a human rights act in SA could provide a structured mechanism for ensuring that legislative measures are compatible with fundamental human rights. Such a framework would facilitate a more considered and transparent lawmaking process where the rights of protesters are weighed alongside other public interests in a systematic way. Such legislative reform should also be accompanied by changes to parliamentary procedure to provide real incentives for elected members to engage with their constituents before voting to enact punitive responses to protest and to mitigate the political realities of executive dominance that can facilitate rushed law making.

As we face the challenge of developing practicable, effective responses to the complex and dynamic climate crisis it is imperative that we continue to allow members of the community to peacefully and publicly test power and register their discontent with the status quo.[153] As the UN Human Rights Committee has observed:

> peaceful assemblies can play a critical role in allowing participants to advance ideas and aspirational goals in the public domain and to establish the extent of support of or opposition to those ideas and goals. Where they are used to air grievances, peaceful assemblies may create opportunities for the inclusive, participatory and peaceful resolution of differences.[154]

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152 Gulliver, Fielding and Louis (n 8) 75–83.

153 Zick (n 9) 27.

154 *Human Rights Committee* (n 28) 1 [1].

Arpita Verma,* *Gino Dal Pont*** *and Jane Nielsen****

PERSONAL INFORMATION COLLECTION VIA VIDEO GAMES: AUSTRALIAN PRIVACY LAW IMPLICATIONS

Abstract

Video game companies collect vast amounts of personal information about gamers, including — but not limited to — age, gender, facial scans, credit card details, licence numbers and location data. There is a significant gap in research regarding the true scope of this information collection and associated privacy law implications. This is particularly evident from the Australian standpoint, with no existing studies addressing this issue. This article endeavours to fill this gap by pursuing two research aims: (1) using thematic analysis to explore the extent of personal information collected by video game companies; and (2) investigating how such collection is regulated under the *Privacy Act 1988* (Cth), and the extent to which those companies comply with that Act when collecting personal information.

The analysis reveals that the gaming industry collects the personal information of Australian gamers in a way that has the potential to negatively affect gamers. It also evinces a lack of adherence to certain requirements of Australian privacy law with respect to such collection.

I Introduction

The video game industry is one of the fastest-growing industries in the world, with over 3.4 billion users ('gamers') and USD187.7 billion in revenue earned in 2024.[1] Video game companies ('gaming companies') use personal information to develop and improve games; it represents a commercially valuable asset offering a unique opportunity to obtain detailed, timely and multifaceted insights

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1 Newzoo, *Global Games Market* (Report, August 2024) 4. See also Michiel Buijsman, 'The Global Games Market Will Generate $187.7 Billion in 2024', *Newzoo* (Web Page, 13 August 2024).

into gamer behaviour and opinions.[2] In turn, this provides a source of business intelligence and guides decision-making concerning games, including the opportunity to launch new updates and adjustments to game design based on gamers' needs, preferences, likes and dislikes.[3]

Personal information collected by gaming companies includes seemingly innocuous information actively provided by gamers,[4] such as age group and the average time gamers play a game. It extends to other more 'sensitive' personal information, such as government issued identifications (including driver's licence numbers)[5] and biometric information (for instance, facial scans,[6] and information about gamer's voice and background sounds when playing).[7] Much of this information can be classified as 'personal information' under relevant privacy laws and its unmitigated collection can encroach into gamers' private lives. In Australia, the collection of personal information is regulated by the *Privacy Act 1988* (Cth) ('*Federal Privacy Act*').

There is limited scholarship examining the actual extent of the personal information collected by gaming companies,[8] despite extensive literature on how to collect,

2 Magy Seif El-Nasr, Anders Drachen and Alessandro Canossa, *Game Analytics: Maximizing the Value of Player Data* (Springer-Verlag, 2013) 63, 153.

3 Rowan Tulloch and Craig Johnson, 'Games and Data Capture Culture: Play in the Era of Accelerated Neoliberalism' (2022) 44(5) *Media, Culture and Society* 922, 923.

4 See, e.g., 'Privacy Policy', *Rockstar Games* (Web Page, November 2024) <https://www.rockstargames.com/privacy>.

5 'Online Privacy Policy', *Blizzard Entertainment* (Web Page, 27 June 2025) <https://www.blizzard.com/en-gb/legal/a4380ee5-5c8d-4e3b-83b7-ea26d01a9918/blizzard-entertainment-online-privacy-policy> [1] ('Blizzard Entertainment Privacy Policy').

6 'Roblox Facial Animation Privacy Notice', *Roblox Support* (Web Page, 12 July 2023) <https://en.help.roblox.com/hc/en-us/articles/8064749848980-Roblox-Facial-Animation-Privacy-Notice>.

7 'Microsoft Privacy Statement', *Microsoft* (Web Page, May 2025) <https://www.microsoft.com/en-gb/privacyoobe/oobeprivacystatementwhite#mainlocation servicesmotionsensingmodule>. Microsoft collects '[y]our voice data, sometimes referred to as "voice clips", such as search queries, commands, or dictation you speak, which may include background sounds'.

8 Some seminal works in this regard include: Jacob Leon Kröger et al, 'Surveilling the Gamers: Privacy Impacts of the Video Game Industry' (2023) 44 *Entertainment Computing* 1; Joe Newman, Joseph Jerome and Christopher Hazard, 'Press Start to Track Privacy and the New Questions Posed by Modern Video Game Technology' (2014) 42 *American Intellectual Property Law Association Quarterly Journal* 527 1; N Cameron Russell, Joel R Reidenberg and Sumyung Moon, 'Privacy in Gaming' (2019) 29(1) *Fordham Intellectual Property, Media and Entertainment Law Journal* 61.

use and analyse gamer data in game development.[9] There is accordingly a notable gap in research addressing the privacy issues arising from gaming companies' data-gathering practices.[10] That this issue has received little, if any, attention from researchers in Australia justifies an analysis of these information-gathering practices, and their privacy law implications, from an Australian legal perspective.

The article is structured as follows. It begins in Part II by outlining the definition of 'personal information' under the *Federal Privacy Act* and briefly examines the prospective changes to the current definition of personal information arising from the Attorney-General's Review of the *Federal Privacy Act*. Part III presents the methodology employed to examine the personal information collected by gaming companies (the thematic analysis method). The results of this analysis, presented in Part IV, reveal a diverse array of personal information collected by gaming companies. Part V considers how gaming companies combine the information they collect, and its privacy implications. This demonstrates that the full extent of personal information collected by gaming companies goes beyond what is apparent from privacy policies, in turn suggesting that gamers are unlikely to understand the full gamut of information collected. Building upon these findings, Part VI evaluates the privacy concerns arising from the personal information being collected and examines whether the information collection aligns with the standards established by the *Federal Privacy Act*. The article concludes with further analysis of the privacy implications derived from the article's key findings and presents ideas for future work.

II Personal Information Under Australian Privacy Law

Informational privacy in Australia is protected by a combination of Commonwealth (the *Federal Privacy Act*),[11] state[12] and territory acts.[13] The organisations bound

9 See generally Yanhui Su, Per Backlund and Henrik Engström, 'Comprehensive Review and Classification of Game Analytics' (2021) 15(2) *Service Oriented Computing and Applications* 141.

10 See, e.g.: Jennifer R Whitson and Bart Simon, 'Game Studies Meets Surveillance Studies at the Edge of Digital Culture: An Introduction to a Special Issue on Surveillance, Games and Play' (2014) 12(3) *Surveillance and Society* 309; Elena Petrovskaya and David Zendle, 'Predatory Monetisation? A Categorisation of Unfair, Misleading and Aggressive Monetisation Techniques in Digital Games from the Player Perspective' (2022) 181(4) *Journal of Business Ethics* 1065.

11 *Privacy Act 1988* (Cth) ('*Federal Privacy Act*').

12 See, e.g.: *Privacy and Personal Information Protection Act 1998* (NSW); *Health Records and Information Privacy Act 2002* (NSW); *Information Privacy Act 2009* (Qld); *Privacy and Data Protection Act 2014* (Vic); *Privacy and Responsible Information Sharing Act 2024* (WA); *Personal Information Protection Act 2004* (Tas); *Information Privacy Act 2014* (ACT); *Information Act 2002* (NT). Cf South Australia does not have a dedicated privacy act, but instead relies on a Cabinet Administrative Instruction: Department of the Premier and Cabinet (SA), *Information Privacy Principles Instructions* (PC012, 4 May 2020).

13 *Information Privacy Act 2014* (ACT); *Information Act 2002* (NT).

by the *Federal Privacy Act* comprise government agencies at the Commonwealth level,[14] the Australian Capital Territory ('ACT') Government,[15] as well as organisations including trusts, body corporates or partnerships with an annual turnover exceeding AUD3 million.[16] This includes most video game companies, many of which earn more than AUD3 million and otherwise do not fall under any exclusions listed in the Act.[17] The state and territory laws regulate information privacy in respective state or territory public sector bodies.

The *Federal Privacy Act* is the primary legislative instrument regulating the protection of the collection, use and disclosure (together 'handling') of individuals' personal information in Australia.[18] The 13 Australian Privacy Principles (APPs), which form the main regulatory mechanism under the Act, prescribe requirements as to how organisations may collect, use, disclose and store 'personal' and 'sensitive' information (concepts that are explored below).[19] The APPs can broadly be divided into transparency obligations — APP 1 and APP 5 — and consent requirements — APP 3 (solicited collection), APP 4 (un-solicited collection), APP 6 (use and disclosure) and APP 7 (direct marketing). In this article, we are concerned only with the kinds of personal information collected by gaming companies. The focus is accordingly on APP 3, which governs how information can be 'solicited' by an organisation.

A *Personal Information*

The definition of 'personal information' is central to the *Federal Privacy Act* as it determines whether an entity handling personal information is subject to the various obligations set forth by the Act.[20]

14 *Federal Privacy Act* (n 11) ss 7, 7A, 8.

15 *Information Privacy Act 2014* (ACT) (n 13) s 23; Government of the Australian Capital Territory, 'Privacy', *Chief Minister, Treasury and Economic Development Directorate* (Web Page, 9 November 2020) <https://www.cmtedd.act.gov.au/legal/privacy>. Note that ACT's Information Privacy Act 2014 fully adoptes the commonwealth privacy principles.

16 *Federal Privacy Act* (n 11) ss 6, 6C, 6D.

17 The definition of organisation under the *Federal Privacy Act* is listed in s 6C and excludes organisations that are 'a small business operator, a registered political party, an agency, a State or Territory authority or a prescribed instrumentality of a State or Territory'.

18 *Federal Privacy Act* (n 11) s 2A; Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* (No 108, 30 May 2008) 162 [2.3] ('*For Your Information*').

19 *Federal Privacy Act* (n 11) sch 1.

20 Ibid s 6(1) (definition of 'personal information'); *For your Information* (n 18) 293 [6.2].

The *Federal Privacy Act* provides the following definition:

> ***Personal information*** means information or an opinion about an identified individual, or an individual who is reasonably identifiable:
> (a) whether the information or opinion is true or not; and
> (b) whether the information or opinion is recorded in a material form or not.[21]

Information is 'about' an individual when there is a link between the person and that information.[22] The Office of the Australian Information Commissioner ('OAIC') gives two examples of when this is possible:

(1) where an individual is the sole or joint subject matter of information; or (2) where information conveys something about an individual. [23]

Not every single piece of information collected and processed by an organisation will necessarily be 'about' an identified, or a reasonably identifiable, individual. Instead, it might only be about the identified or reasonably identified individual when linked or combined with other information.[24]

In this regard, the OAIC suggests that contextual factors should be used to determine whether information is about an identified, or reasonably identifiable individual, including: (1) the nature and amount of information collected by an entity; (2) the context of release (that is, who will have access to the information); and (3) other information that is available to the entity.[25]

In practice, this makes it necessary to consider the totality of information collected by gaming companies to determine the true extent of personal information collected.[26] This includes personal information collected by drawing inferences about individuals, thus creating new factual personal information about an individual's past or present life.[27] For instance, in the *7-Eleven* determination,[28] it was held that a face-print — an encrypted algorithmic representation of an individual's

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21 *Federal Privacy Act* (n 11) s 6(1) (definition of 'personal information').

22 Office of the Australian Information Commissioner, *What is Personal Information?* (Report 5 May 2017) 6 ('*What is Personal Information?*').

23 Ibid 6–7.

24 Office of the Australian Information Commissioner, *Publication of MBS/PBS Data — Commissioner Initiated Investigation Report* (Report, 23 March 2018) 4.

25 *What is Personal Information?* (n 22).

26 *Privacy Commissioner v Telstra Corporation Ltd* [2017] 249 FCR 24, 35–6 [61]–[63].

27 Office of the Australian Information Commissioner, *Guide to Data Analytics and the Australian Privacy Principles* (Report, 21 March 2018) 9 [1.5].

28 *Commissioner Initiated Investigation into 7-Eleven Stores Pty Ltd (Privacy)* [2021] AICmr 50 ('*7-Eleven*').

face, from which the age and gender of customers could be inferred[29] — is personal information.[30]

Notably, the definition of 'personal information' is intentionally broad, so as to address shifts in information-handling practices over time.[31] It also has breadth in being applicable across different contexts, sectors, activities and technologies.[32] Hence, a wide variety of information can fall under the umbrella of 'personal information', creating potential ambiguity over precisely what constitutes 'personal information' in a given context.

The scope for ambiguity intensified following the important decision in *Telstra Corporation Ltd v Privacy Commissioner*,[33] in which the issue was whether an Internet Protocol address ('IP address') is personal information. The plaintiff (Mr Grubb) desired access to certain telecommunications metadata, including his IP address, claiming that it was his personal information.[34]

The Administrative Appeals Tribunal ('AAT') found that the IP address was not personal information about Mr Grubb but information about how Telstra provided a service to him.[35] An appeal to the Full Court of the Federal Court failed.[36] While the Federal Court did not examine whether there are any circumstances in which an IP address could be personal information, the Court wrote that the facts, context and circumstances of the case must be considered in deciding whether the information is personal.[37] The lack of substantial analysis in definitely determining what is personal information has led to further uncertainty over whether technical information (such as IP addresses, location information and device identifiers) can be considered to be personal information.[38]

To assuage uncertainty, the OAIC has issued guidance that organisations can refer to in order to understand if information is personal information. The OAIC guidance does this by including examples of information that can be considered personal

29 Ibid [6].

30 Ibid [1].

31 Explanatory Memorandum, Privacy Amendment (Enhancing Privacy Protection) Bill 2012 (Cth) 53 ('Explanatory Memorandum to Privacy Bill').

32 Ibid.

33 *Telstra Corporation Ltd v Privacy Commissioner* (2015) 254 IR 83.

34 Ibid 98 [39]–[40].

35 Ibid 121 [113].

36 *Privacy Commissioner v Telstra Corporation Ltd* (n 26).

37 Ibid 36 [63].

38 Normann Witzleb and Julian Wagner, 'When is Personal Data About or Relating to an Individual a Comparison of Australian, Canadian, and EU Data Protection and Privacy Laws' (2018) 4 *Canadian Journal of Comparative and Contemporary Law* 293, 325.

information, such as name, address, date of birth, phone number, location information, IP address, facial recognition biometrics and medical records.[39]

Recently, a need to amend the definition of 'personal information' has been noted by government agencies, arguably because the current iteration under the *Federal Privacy Act* fails to adequately protect individuals' personal information in the digital age.[40] The *Privacy Act Review Report 2022* ('*PAR Report 2022*') published by the Australian Attorney-General's Department recommended an amendment to the definition of 'personal information', suggesting that the definition be modified to replace the term 'about' with the phrase 'related to'.[41] This would address some of the uncertainty regarding the scope of personal information in two key ways.

First, it would widen the scope of personal information to include technical information (such as IP addresses, location information and device identifiers), which currently may fall outside the definition of information 'about' an individual.[42] This is important because technical information can raise privacy concerns as it 'uniquely identifies' a user, a device or a set of behaviours recorded on the device.[43] Thus, technical information becomes a proxy identifier for the individual who uses the device.[44] This, in turn, facilitates gaming companies singling out individuals by distinguishing them from others; monitoring them across various services, devices and databases to create an individual profile of their interests and preferences.[45] This significantly increases the chance of an individual being reasonably identifiable.[46] The Privacy Commissioner, in the determinations of *7-Eleven*[47] and

39 'Office of the Australian Information Commissioner, 'Chapter B: Key Concepts' (Web Page, 24 March 2023) 9 [B.31] <https://www.oaic.gov.au/privacy/australian-privacy-principles/australian-privacy-principles-guidelines/chapter-b-key-concepts> ('*Chapter B: Key Concepts*').

40 Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019) 461 ('DPI Report').

41 Attorney-General's Department (Cth), *Privacy Act Review Report 2022* (Final Report, 16 February 2023) 25–7 [4.2], recommendation 4.1 ('*PAR Report 2022*').

42 Ibid 25 [4.2.1].

43 Office of the Victorian Information Commissioner, 'Biometrics and Privacy' (Report, July 2019) <https://ovic.vic.gov.au/privacy/resources-for-organisations/biometrics-and-privacy-issues-and-challenges/> 11; Christopher Parsons, 'Privacy Tech-Know Blog: Uniquely You: The Identifiers on Our Phones That Are Used to Track Us', *Office of the Privacy Commissioner of Canada* (Blog, 8 December 2016) <https://www.priv.gc.ca/en/blog/20161208/>.

44 Finn Myrstad and Ingvar Tjøstheim, *Out of Control. How Consumers Are Exploited by the Online Advertising Industry* (Final Report, Norwegian Consumer Council, 14 January 2020) 25 ('*Norwegian Consumer Council*').

45 *Commissioner Initiated Investigation into Clearview AI Inc (Privacy)* [2021] AICmr 54, 20 [96] ('*Clearview*').

46 *PAR Report 2022* (n 41) 31.

47 *7-Eleven* (n 28) 6 [28].

Clearview,[48] considered that individuals can be identifiable when they are distinguished from others in the group. It follows that technical information that permits an individual to be distinguished from others can constitute 'personal information'. Therefore, clarifying — that such technical information is 'personal information' for the purposes of privacy legislation will serve to reflect the Privacy Commissioner's practice.

Second, the proposed amendment would make explicit that inferred information (that is, new identifying information gathered by linking or combining other information together) is considered personal information.[49] While personal information is broad enough to include inferred information, given the privacy risk associated with the collection of inferred information, it is crucial for the *Federal Privacy Act* to clearly address its application to such information.

In its response to the *PAR Report 2022*, the Government agreed in principle with the need for this amendment.[50] At the time of writing, though, if and when these reforms will be implemented remains unclear. In the interim, a lack of certainty regarding the true scope of what constitutes 'personal information' remains. This may cause organisations to exercise insufficient caution when collecting personal information, possibly leading to privacy harm.

B *Sensitive Information*

A subset of personal information is 'sensitive' information, which is defined under s 6(1) of the *Federal Privacy Act* by exhaustively listing types of information that comprise sensitive information, including health information, biometric information, and genetic information that is not otherwise health information.[51] Sensitive information is accorded a higher level of privacy protection because of the likely greater harm caused by its misuse.[52] For instance, biometric information, such as facial scans of an individual, [53] can be used to commit identity theft.[54]

48 *Clearview* (n 45) 20 [96].

49 *PAR Report 2022* (n 41) 30.

50 Australian Government, *Government Response to the Privacy Act Review* (Report, 28 September 2023) 5 ('*Government Response*').

51 *Federal Privacy Act* (n 11) s 6(1) (definition of 'sensitive information').

52 Office of the Australian Information Commissioner, 'Chapter B: Key Concepts' (n 39) 29 [B.144].

53 *Clearview* (n 45).

54 Jessica Bahr, 'The "Hi Mum" Scam Cost Australians Millions. Now, It's Had an Upgrade', *SBS News* (online, 14 January 2024) <https://www.sbs.com.au/news/article/the-hi-mum-scam-cost-australians-millions-now-its-had-an-upgrade/53v2hycvi>.

III Methodology

The following Part describes how the gaming companies were selected, what documents were chosen to glean data about gaming companies' collection of personal information, and the use of thematic analysis to analyse data.

A *Game Companies Screening*

Three inclusion criteria were employed to select gaming companies for analysis:

1 *Representative Size*

The largest gaming companies, by revenue, were chosen because the gaming industry is highly oligopolistic, and larger companies earn a major portion of global gaming revenue.[55] Thus, it can be assumed that most gamers will at some point play games produced by these companies. Additionaly, these companies will not fall within the statutory AUD3 million threshold, which forms exception to small business enterprises under the Federal Privacy Act.

2 *Presence in Australia*

Since the focus of the research is Australian law, companies with no presence in Australia or that do not cater to Australian gamers were excluded from the study.

3 *Involvement in the Gaming Business, Including Involvement in the Process of Publishing Games*

Companies that are not involved in the gaming business but earn money incidentally from games were excluded.[56]

After considering this inclusion criteria, a representative sample of major players were chosen for this study — Sony, Microsoft, Nintendo, Activision Blizzard, Electronic Arts, Take-Two Interactive, WarnerMedia, Roblox, Bandai Namco Entertainment and Playtika — all of which exceed the AUD3 million revenue threshold.

B *Data Collection Techniques*

Once the companies were identified, it was necessary to gather data about their information-handling practices. Privacy policies were the main documents analysed

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55 Frédéric Le Roy, Frank Robert and Rhizlane Hamouti, 'Vertical vs Horizontal Coopetition and the Market Performance of Product Innovation: An Empirical Study of the Video Game Industry' (2022) 112 (April) *Technovation* 1, 9–11; Michiel Buijsman (n 1).

56 This will include, for example, companies like Apple and Google.

for this purpose, given that, under the *Federal Privacy Act*, these are the documents required to notify gamers about the entity's information-gathering practices.[57]

Multiple privacy policies relevant to Australian gamers were identified and examined. Locating the privacy policy of each company was not straightforward. First, companies that have a global presence, many subsidiary companies or develop multiple games raise the prospect of multiple privacy policies within one parent company. Second, while most gaming companies (8 out of 10) have privacy policies listed on their websites, not all do.[58] In some cases (such as Sony and WarnerMedia), only one such policy is listed. However, some of the games that are available to the Australian market have a discrete privacy policy for Australian gamers, such as for differing age groups, types of console or genre of game. For instance, Sony's main PlayStation privacy policy is listed on the PlayStation website. However, Sony Pictures also releases games for mobile devices (such as *My Hero Academia* and *Zombieland*), which are governed under Sony Pictures Ltd and Sony Pictures International Ltd, respectively, not Sony PlayStation. Additionally, Sony has a separate children's privacy policy. Each privacy policy differs but applies to Australian gamers. Third, gaming companies frequently update their privacy policies, making it essential to establish a final cut-off date for their collection for the current study. This cut-off date is set as 13 November 2024.

Table 1, below, details the total number of privacy policies included in this study (36), how they were located.

Table 1: Privacy Policies Relevant to the Study

Company	Number of privacy Policies Studied	How Were Privacy Policies Found?
Activision	4	Company's website
Sony	4	Company's website and by installing, opening, and downloading games
WarnerMedia	2	Received directly from WarnerMedia
Nintendo	5	Company's website and by installing, opening, and downloading games
Microsoft	2	Company's website
Electronic Arts	1	Company's website
Take-Two Interactive	2	Received directly from Take-Two Interactive
Roblox	1	Company's website
Bandai Namco Entertainment	8	Company's website and by installing, opening, and downloading games
Playtika	7	Company's website
Total	**36**	

57 *Federal Privacy Act* (n 11) sch 1 pt 1 cl 1: APP 1.

58 See Table 1.

C *Data Analysis*

Privacy policies contain detailed information on every information-handling activity of an organisation, from collection to use and disclosure of personal information. The authors needed to extract from the policies the kinds of information obtained by the companies and proffer a broad overview, necessarily by virtue of the detail between policies. The main method employed to undertake this reductive exercise was thematic analysis. Thematic analysis is particularly useful in reducing large volumes of text (such as interview transcripts) without undue cost, making it an appropriate method to analyse privacy policies.[59] Thematic analysis is a method of 'identifying and interpreting patterns of meaning across qualitative data'.[60] It can be used to identify and analyse recurring patterns (themes) from the data and to draw valid inferences from those patterns.[61] Thus, beyond reducing the text, it also aids in generating a thematic perspective of the data collected.

The analysis conducted adapted Braun and Clarke's six-step process (see Figure 1).[62]

Figure 1: Braun and Clarke's Six-Step to Thematic Analysis

Step 1: To begin the thematic analysis, all 36 privacy policies were read until sufficient familiarity with the data was obtained. While the policies were initially read with no specific focus, the authors were able to discern some initial themes. For instance, they noticed that, in general, companies collected the name, age and gender of individuals at the very least.

Step 2: The next phase required the generation of codes. Coding helps to systematically break down the data (that is, privacy policies) into meaningful chunks of information related to the research question.[63] Codes were generated manually using open coding; that meant first separating the information about the 'collection' aspect of information-handling activities from other aspects of information-handling

59 Christian Herzog, Christian Handke and Erik Hitters, 'Analyzing Talk and Text II: Thematic Analysis' in Hilde Van den Bulck et al (eds), *The Palgrave Handbook of Methods for Media Policy Research* (Springer, 2019) 385, 385–6.

60 Victoria Clarke and Virginia Braun, 'Thematic Analysis' in Alex C Michalos (ed), *Encyclopedia of Quality of Life and Well-Being Research* (Springer, 2014) 6626, 6627.

61 Moira Maguire and Brid Delahunt, 'Doing a Thematic Analysis: A Practical, Step-by-Step Guide for Learning and Teaching Scholars' (2017) 9(3) *All Ireland Journal of Higher Education* 3351, 3353.

62 Virginia Braun and Victoria Clarke, 'Using Thematic Analysis in Psychology' (2006) 3(2) *Qualitative Research In Psychology* 77, 87.

63 Ibid 87.

activities, such as use and disclosure.[64] What followed was the generation of codes using an inductive approach; that is, instead of relying on a pre-existing theory to develop codes, codes were developed from the data itself.[65] Generating codes was an iterative process; the initial codes were developed and adjusted, if necessary. Initially, the process produced close to 100 codes (see Table 2 for an example of how initial codes were developed using a small segment of data).

Steps 3–5: Codes developed were then clustered together into broader themes based on similarities. This helped to identify overarching patterns in the data. Similar to coding, creating themes was an iterative process that continued until all codes were incorporated into themes. All themes were coherent and separate from each other, and further refinement was unnecessary. A total of ten broad themes relative to categories of personal information collected by gaming companies were generated.

Table 2: Thematic Analysis: Example of How Themes Were Extracted

Extract from the privacy policy of Call of Duty League:	**Extracted code**	**Theme**	**Description of the theme**
'When you visit or use our Properties we collect, process and/or combine Information about your use of those Properties, such as *websites you visited* before and after you used a Property, *browser type and language, IP address, hardware and software information, third party account information* (for example, information associated with your Activision account), *purchase histories, and Social Media data*.'[66]	• Websites visited, • Browser type. • Browser language. • IP address. • Hardware and software information. • Third-party account information.	Technical Information	Technical information encompasses device identifiers, technical device information, and device event information.
	• Purchase histories	Transactional Information	This refers to the personal information collected from consumers' online transactions.
	• Social Media data	Social Information	Social information refers to information about how gamers interact with each other.

64 Del Siegle, 'Open, In Vivo, Axial, and Selective Coding', *University of Connecticut* (Blog Post, 19 June 2023) <https://researchbasics.education.uconn.edu/open-in-vivo-axial-and-selective-coding/>.

65 Virginia Braun and Victoria Clarke, *Thematic Analysis: A Practical Guide* (Sage, 2021).

66 The Call of Duty League, 'Privacy Policy', *The Call of Duty League, LLC* (20 December 2022) <https://callofdutyleague.com/en-us/privacy> (emphasis added) ('Call of Duty League Privacy Policy').

IV Summary of Findings: Kinds of Personal Information Collected

The 10 broad themes created as a result of thematic analysis were: (1) contact information; (2) demographic information; (3) transactional information; (4) location information; (5) technical information; (6) biometric information; (7) social information; (8) behavioural information; (9) in-game behavioural information; and (10) personal records.

Notably, not all 10 kinds of information noted above were collected by all companies, as revealed in Table 3 below. Indeed, only four of the companies collect all 10 types of personal information.

Table 3: Categories of Personal Information Collected by Gaming Companies

Companies	Contact information	Demographic information	Transactional information	Location information	Technical information	Biometric information	Social information	Behavioural information	In-game behavioural information	Personal records	Number of data types collected
Activision	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	**10**
Sony	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	**10**
WarnerMedia	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	**9**
Nintendo	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	**8**
Microsoft	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	**9**
Electronic Arts	✓	✓	✓	✓	✓	✓	✓	✓	✓	✗	**9**
Take-Two Interactive	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	**8**
Roblox	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	**10**
Bandai Namco	✓	✓	✓	✓	✓	✓	✓	✓	✓	✓	**10**
Playtika	✓	✓	✓	✓	✓	✗	✓	✓	✓	✗	**8**
Total	**10**	**10**	**10**	**10**	**10**	**7**	**10**	**10**	**10**	**4**	

The individual categories of personal information collected by gaming companies as developed using the thematic analysis are explored below.

A *Contact Information*

Contact information refers to personal information used by gaming companies to contact people, whether directly or indirectly, via the gaming context. Each of the gaming companies studied collected contact information, including name, email address, physical address, telephone number, username and gamertag (a unique gamer identifier).

B *Demographic Information*

Gaming companies collect a variety of demographic information, which can include profile information (including profile photos, likes and languages spoken), education, employment, and sensitive demographic information including race and political affiliations.[67]

C *Transactional Information*

Transactional information refers to personal information collected from consumers' online transactions. It is collected whenever gamers purchase games through gaming companies[68] and includes information such as debit/credit card details (including debit card number, security code and expiry date) and payment instrument details (such as PayPal account details).[69] This information is considered to be personal information.[70]

Transactional information can encompass purchase histories,[71] active subscriptions and missed payments.[72] Information of this nature is used to predict a gamer's revenue potential by forecasting how likely they are to buy a particular product if offered.[73] There is limited research on how transactional information gathered through online gaming is used to determine a gamer's creditworthiness in a context outside gaming, for example, where purchase history is analysed to determine a gamer's general creditworthiness. Nevertheless, one notable example is Pokémon Go, a game that allows the game developer, Niantic, to track players' locations and the distance they travel. This information is reportedly shared by Niantic with insurance companies, which in turn offer discounts or incentives to gamers who meet specific travel or movement goals while playing the games — thus implying

67 Warner Media, 'Warner Bros. Discovery Privacy Policy', *Warner Bros Discovery* (Web Page, 27 March 2024) <https://www.wbdprivacy.com/policycenter/b2c/en-us/>.

68 This might change, if the purchase is made via third party. See 'Privacy Policy', *King Inc* (Web Page, 14 September 2023) <https://www.king.com/privacyPolicy>: 'When you purchase items in our mobile apps through the App Store, on Facebook or on Google Play, we do not collect or store any payment information from you'.

69 See, e.g., Sony Interactive Entertainment Europe Limited, 'Privacy Policy', *PlayStation* (Web Page, January 2024) <https://www.playstation.com/en-au/legal/privacy-policy/> ('PlayStation').

70 *Flight Centre Travel Group* (Privacy) [2020] AICmr 57 (25 November 2020) [28] (Commissioner Falk): 'credit card details and/or passport information … constituted their personal information.'

71 See, e.g., Rockstar Games (n 4).

72 See, e.g., Warner Media (n 67).

73 See generally Paolo Burelli, 'Predicting Customer Lifetime Value in Free-to-Play Games' in Günter Wallner (ed), *Data Analytics Applications in Gaming and Entertainment* (Auerbach Publications, 2019) 79, 79.

that player is in good health.[74] Should transactional information be used or shared with insurers who then make credit-related decisions about gamers without properly informing those gamers, it would potentially violate the credit reporting provisions of the *Federal Privacy Act*.[75]

D *Location Information*

Location information refers to information about the location of a gaming device. This may be either imprecise or precise. Imprecise information includes: (1) current and recent locations;[76] (2) geolocation data inferred from IP address, and access points near the gaming device;[77] (3) information about nearby cell towers; and (4) city or postcode level information inferred from a gamer account. Precise information includes: (1) geolocation based on mobile device location;[78] and (2) location gathered using the Global Navigation Satellite System ('GNSS'), e.g., Global Positioning System ('GPS').

Location information can also be collected from third parties, such as analytics and advertising partners. It is important to gaming companies, as it allows the matching of players in a particular location to prevent 'lag' (delay) in the operation of a game. Location information is equally significant when it comes to location-based games, such as augmented reality games, which require gamers to carry a GPS-capable device near specific locations to progress in the game and earn rewards. An example is Pokémon Go, which requires gamers to visit locations to capture and train virtual creatures, called Pokémon.

Unfortunately, location information allows its collectors to infer more information about individuals, including sensitive information. For example, in the United States, a local newspaper disclosed the sexual orientation of a priest without his consent, after obtaining location information indicating he frequented gay bars.[79] In the PAR Report 2022, the Australian Attorney-General's Department recommended that precise geolocation tracking data (an individual's precise geolocation tracked over time) should be included in the category of sensitive information.[80] The

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74 Sumitomo Life, 'Sumitomo Life to Become Japan's Very First Financial Institution to Partner with "Pokémon GO"'!', *Sumitomo Life* (News Release, 22 March 2021) <https://www.sumitomolife.co.jp/english/newsrelease/pdf/nr20210322.pdf>.

75 *Federal Privacy Act* (n 11) s 6N defines credit information. It is regulated separately under Part IIIA of the Act.

76 PlayStation (n 69).

77 'Privacy and Cookie Policy', *Electronic Arts Inc* (Web Page, 23 August 2024) <https://www.ea.com/legal/privacy-and-cookie-policy>.

78 'Microsoft Privacy Statement' (n 7).

79 Michelle Boorstein, Marisa Iati and Annys Shin, 'Top US Catholic Church Official Resigns after Cellphone Data Used to Track Him on Grindr and to Gay Bars', *Washington Post* (Web Page, 20 July 2021) <https://www.washingtonpost.com/religion/2021/07/20/bishop-misconduct-resign-burrill/>.

80 *PAR Report 2022* (n 41) 45.

Australian Government has agreed in principle with this recommendation.[81] Thus, despite location information not being explicitly considered personal information under the *Federal Privacy Act*, the Australian Government has already accepted that such information should be protected as sensitive information. This applies in cases where the information collected classifies as personal information. At the time of writing, it is unclear when (or, indeed, whether) this response will be implemented.

E *Technical Information*

Technical information encompasses three key elements — device identifiers, technical device information and device event information — elaborated further in Table 4:

Table 4: Technical Information Collected by Gaming Companies

Device Identifiers
Gaming companies collect many device identifiers in respect of users, including: • International Mobile Equipment Identifiers (IMEI). • Apple Identifiers for Advertising (IDFA), Android Advertising IDs (AAIDs), Media Access Control (MAC) address and IP address.[82]
Technical Device Information
• Here the information concerns the operating systems, software installed or any associated peripherals (that is, virtual reality headsets and controllers).
Device Event Information
• Device event information includes crash reports (e.g., where gamers encounter an error playing games) and detailed information related to software or hardware used, or contents of files opened in error.

There is ambiguity surrounding whether technical information — particularly device identifiers — qualifies as personal information under the *Federal Privacy Act*.[83] This stems from the broad nature of the concept of personal information under the Act, as highlighted in Part II. However, as also noted in Part II, there is a strong possibility that technical information including IP addresses, cookie identifiers, device identifiers, location data, radio identification tags, and other such identifiers may be classified as personal information in the future.[84]

81 G*overnment Response* (n 50) 6.

82 Appcensus, *1,000 Mobile Apps in Australia: A Report for the ACCC* (Interim Report, ACCC, 24 September 2020) 9.

83 *PAR Report 2022* (n 41) 24.

84 *Government Response* (n 50) 5.

F *Biometric Information*

Biometric information is 'information about an individual's unique physiological or behavioural characteristics'.[85] Under the *Federal Privacy Act*, biometric information that is used to automatically verify or identify an individual is considered sensitive information.[86] Automatic verification occurs when an image is matched with another image in a database to verify that a person is who they claim to be.[87] Automatic identification occurs when an image is matched with all other images in the database to identify a potential match.[88]

The term 'biometric' is not further defined under the *Federal Privacy Act*. However, in the *7-Eleven* determination, it was noted that biometric information can include information about physiological features[89] (including any facial features, iris scans, fingerprints, signatures and voices) which can be used to identify an individual and behavioural attributes (such as an individual's gait or keystroke pattern).[90] If biometric information is collected but used for purposes other than identification or verification, it is classified as personal information.[91]

Gaming companies use cameras, microphones and other hardware to collect biometric information, which includes the four following elements:

1. Sensitive information is collected via facial scanning,[92] eye tracking, skin response,[93] and biometric templates, including scans of fingerprints, hands, or face geometry.[94] This information is considered sensitive information and not personal information because it is used to verify the identity of the gamer. The purpose of verification could be to: (1) confirm the age of a gamer;[95] (2) ensure

85 Sharon Givoni and Alec Christie, 'Guide to Understanding the Australian Biometric Privacy Law Landscape', *LexisNexis* (Web Page, 9 March 2023) <https://www.lexisnexis.com.au/en/insights-and-analysis/research-and-whitepapers/2023/privacy-law-bulletin-2023-special-issue>.

86 *Federal Privacy Act* (n 11) s 6 (definition of 'sensitive information').

87 'Biometrics and Privacy' (n 43).

88 *Clearview* (n 45) [123].

89 *7-Eleven* (n 28) [47].

90 Ibid.

91 *PAR Report 2022* (n 41) 127.

92 See, e.g., PlayStation (n 69).

93 Russell, Reidenberg and Moon (n 8) 61, 85.

94 See, e.g., Roblox, 'Roblox Biometric Privacy Notice', *Roblox Support* (Web Page, 29 August 2024) <https://en.help.roblox.com/hc/en-us/articles/4412863575316-Roblox-Biometric-Privacy-Notice>.

95 See, e.g., Bandai Namco, 'Privacy Policy', *Bandai Namco Entertainment America Inc.* (Web Page, 31 July 2025) <https://www.bandainamcoent.com/legal/privacy>.

that an access request under APP 12 of the *Federal Privacy Act;*[96] is made by the gamer and not an imposter;[97] or (3) confirm gamer identity in cases involving competitive gaming.[98]

2. Photographs (including profile or account photos containing facial images of a person)[99] and live camera inputs[100] which could be classified as 'personal information'. However, there is a lack of consensus over when photographs *alone* qualify as personal information. In the *7-Eleven* determination, it was noted that 'facial image alone will generally be sufficient to establish a link back to a particular individual', as facial images 'display identifying features unique to that individual".[101] In *Clearview AI Inc v Australian Information Commissioner*, however, it was noted that a 'photo will render a person reasonably identifiable if it is shown to someone who knows them but not if it is shown to someone who doesn't.[102] Nevertheless, the OAIC considers photographs alone to be personal information.[103]
3. Audio/visual information, such as voice clips or gameplay recordings (video footage of a video game as it is being played, which could include a gamer's voice and face). Here, the biometric information is used to enable gameplay and not for *identification* and so is likely to be classified as personal information, rather than sensitive information, under the *Federal Privacy Act.*
4. Information about physical movements,[104] such as steps taken,[105] skeletal tracking,[106] hand gestures and movements of facial features (e.g., closing eyes and opening mouth).[107] This information is likely to be considered 'weak biometric' information; that is, 'features that are "less unique" or "less stable", e.g. body shape, [and] behavioural patterns'.[108] As this is less likely to uniquely identify an individual, whether it is classified as personal information under Australian privacy law remains unclear. As noted, for a piece of information to

96 *Federal Privacy Act* (n 11) sch 1 pt 5 cl 1: APP 12. Australian Privacy Principle 12 entitles individuals with a right to request access to their personal information held and processed by the APP entity.

97 See, e.g., 'Microsoft Privacy Statement' (n 7).

98 See, e.g., 'Call of Duty League Privacy Policy' (n 66).

99 See, e.g., Playtika, 'Privacy Notice', *Playtika Ltd.* (Web Page, October 2024) <https://www.playtika.com/privacy-notice/> ('Playtika Privacy Notice').

100 Roblox Facial Animation Privacy Notice (n 6).

101 *7-Eleven* (n 28) [33].

102 [2023] AATA 1069 [109].

103 *What is Personal Information?* (n 22).

104 See, e.g., Roblox, 'Roblox Privacy and Cookie Policy', *Roblox Support* (Web Page, 6 November 2024) <https://en.help.roblox.com/hc/en-us/articles/115004630823-Roblox-Privacy-and-Cookie-Policy>. ('Roblox Privacy and Cookie Policy').

105 'Microsoft Privacy Statement' (n 7).

106 Ibid.

107 'Roblox Facial Animation Privacy Notice' (n 6).

108 Christiane Wendehorst and Yannic Duller, *Biometric Recognition and Behavioral Detection* (Study, No PE 696.968, 2021) 13.

be personal information, it must be *about an identified or reasonably identifiable individual*. While biometric information (such as hand gestures) is about an individual, given that it is an action taken by an individual, by itself it cannot reasonably identify an individual. But if attached to other personal information, it can help infer more information. For instance, a person's gait can help determine their gender.[109]

G *Social Information*

Social information refers to information about how gamers interact with each other.[110] It includes their movements across the user community (such as forums and websites),[111] as well as social information relating to gamers themselves (information collected over social media accounts connected to gamers' real-world identities and friend lists, including how often they use social media, such as chat).[112] Social information, such as the content of messages and posts, is likely to be considered personal information under the *Federal Privacy Act*.[113] Thus, gamers disclosing their name, political views, or sexuality in the forum or chat would be voluntarily disclosing sensitive information. Collection also occurs when gamers use their social media account to play a game. The amount of information collected in this way depends on users' privacy settings on the social media platform.[114] In general, the use of social media accounts can facilitate the collection of information that includes real name, profile picture, email address, age, gender, country,[115] birthday, likes, location, advertisements seen and content viewed.[116]

H *Behavioural Information*

Behavioural information refers to information about gamers' behaviour and characteristics. From information collected about the 10 companies studied, behavioural information collected by gaming companies can be divided into three kinds: (1) information regarding gamers' interactions with products (in this case, games); (2) purchasing behaviour (as distinct from transactional information); and

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109 Muhammad Azhar et al, 'A Gait-Based Real-Time Gender Classification System Using Whole Body Joints' (2022) 22(23) *Sensors* 9113, 9113.

110 Magy Seif El-Nasr, Anders Drachen and Alessandro Canossa (n 2) 23.

111 See, e.g., 'Privacy Policy', *Take-Two Interactive* (Web Page, 26 April 2023) <https://www.take2games.com/privacy>.

112 See, e.g., 'Privacy Policy', *Activision* (Web Page, 22 December 2022) <https://www.activision.com/au/en/legal/privacy-policy>.

113 See e.g., *Jurecek v Director, Transport Safety Victoria* [2016] VSC 285 [8]: 'chats' and 'posts' made via their personal Facebook account were considered as personal information. See also *Australian Information Commission v Facebook Inc* (2020) 144 ACSR 88, 97 [46]: where the OIAC submitted that chat and messages are personal information.

114 See, e.g., Activision (n 112).

115 King (n 68).

116 Warner Media (n 67).

(3) information about gamers' interests and likes. Table 5 provides a glimpse of behavioural information revealed by privacy policies to be collected by the gaming companies examined.

Table 5: Behavioural Information Collected by Gaming Companies

Information Regarding Gamers' Interactions with Product (Game) Features
• Content and advertisements downloaded to a gamer's device, content viewed or posted. • Advertisements interacted with. • Information related to browsing behaviour. • Information about gamers' active or inactive subscriptions, licences and other entitlements, promotions trial periods, and rewards.
Purchasing Behaviour
• Products or services considered (added to the 'basket' in-game companies digital stores) or purchased.
Information about Gamers' Interests and Favourites
• Information about certain preferences, such as sports teams, game genre interests, media content interests (such as TV, video, movies, music, textbooks, apps, and games) or the stocks gamers track. In addition, interests and likes can be inferred or derived from other information, such as ratings, reviews, or problem reports submitted to the digital store and the account associated with them.

Behavioural information is valuable not just for gaming companies but also to AdTech companies (advertisers)[117] to which information is often disclosed for 'targeted'[118] or personalised advertising,[119] that is, to better target advertisements to individuals.[120] Advertising companies use tracking technologies, such as cookies and web beacons, to aggressively collect gamers' personal information outside the gaming context (such as shopping websites[121] or social media websites)[122] and combine it with information received from gaming companies. Advertising companies accordingly have access to information about gamers outside the gaming context, meaning that the information collected can potentially be used for unanticipated purposes and so poses a higher risk of privacy harm.

117 AdTech companies include advertising agencies and networks, data brokers, data analytics companies, publishers and buyers.

118 Electronic Arts (n 77).

119 Roblox, *Roblox Privacy and Cookie Policy* (n 104).

120 Sophie C Boerman, Sanne Kruikemeier and Frederik J Zuiderveen Borgesius, 'Online Behavioral Advertising: A Literature Review and Research Agenda' (2017) 46(3) *Journal of Advertising* 363, 363–4.

121 See, e.g., Nintendo, 'Nintendo Account Privacy Policy', *Nintendo* (Web Page, July 2021) <https://accounts.nintendo.com/term/privacy_policy/AU?lang=en-GB>.

122 See, e.g., King (n 68).

I *In-Game Behavioural Information*

In-game behavioural information targets information about how gamers interact within the game, which includes tracing 'every single choice, action, and footstep'[123] taken within the game. Table 6 below provides examples of in-game behavioural information collected by the subject gaming companies.

Table 6: In-Game Information Collected by Gaming Companies

In-Game Behaviour Information
• Information about the actions gamers take within games (e.g., obstacles jumped over and types of vehicles used in-game). • Items collected, collaborations, and other in-game choices (such as the way gamers interact with certain features or pop-ups). • Any content gamers create or submit in the game or app and other gameplay information.

In-game behavioural information is a type of personal information that is particular to the video game industry. It includes information such as the gamer's progress within the game, which, while generally harmless, can raise privacy concerns when combined with other information to create new inferences about an individual. For instance, in-game behavioural data can help discern personality traits, such as leadership skills, or the fact that gamers are disloyal in real life.[124]

J *Personal Records*

This information is collected on an opt-in basis and includes 'government related identifiers' as defined by the *Federal Privacy Act*.[125] Personal records collected by gaming companies include government-issued identifications, such as an individual's driver's licence number, Medicare number and passport number,[126] presumably to establish or verify the identity of an individual.[127] However, only four of the 10 companies studied collected personal records and then only with gamers' consent.

The thematic analysis accordingly reveals that a substantial amount of gamer information is collected by gaming companies, raising potentially significant privacy concerns. This includes sensitive information, such as biometric information, personal records and transactional information. Some categories of information

123 Alex Wiltshire, 'How Developers Harvest Your Data to Make Their Games Better', *pcgamer* (Web Page, 5 October 2018) <https://www.pcgamer.com/how-developers-harvest-your-data-to-make-their-games-better/>.

124 Dragana Martinovic et al, '"You Are What You Play": Breaching Privacy and Identifying Users in Online Gaming' in *2014 Twelfth Annual International Conference on Privacy, Security and Trust* (2014) 31, 35.

125 *Federal Privacy Act* (n 11) s 6(1) (definition of 'government related identifier').

126 'Blizzard Entertainment Privacy Policy' (n 5).

127 *Federal Privacy Act* (n 11) sch 1 pt 3 cl 9.3: APP 9.3.

collected, such as precise location information and technical information, can be used to identify and track individuals, enabling gaming companies to create a gamer behaviour profile. For instance, companies use information about places gamers have visited, alongside their general interests, likes, and behaviours, to determine their political leaning.[128] Companies can then manipulate users by targeting them with specific content. For instance, gaming companies can discern which users are willing to spend money and then coerce them to spend (more) money[129] — either with offers made exclusively to them (such as rare collectible items or discounts on the next purchase),[130] or by offering items at a differing higher price (but claiming it is an exclusive low price).[131] Thus, gaming companies collect a plethora of personal information, which may be harmful to gamers if exploited.

V Combining Information and Privacy Implications

Privacy concerns go beyond the collection of vast amounts of information. Gaming companies combine the information they collect across different contexts. Some of the information they collect and combine, such as biometric data or political beliefs, is also sensitive information. This information may be seriously prejudicial to the gamer if disclosed.

The collection of information is not limited to the gaming environment. For example, as Electronic Arts ('EA') explains, referring to their tracking technology, 'these technologies can sync or connect behavior across different websites, mobile apps, and devices'.[132] Gaming companies use a plethora of such tracking technologies — such as cookies, web beacons, Application Programming Interface ('API') and Software Development Kit ('SDK') — to collect information about gamers. The information thereby collected includes specifications of the users' device (e.g., type of device, version of Android) and games (e.g., gamers' preferences, location, friends). These

128 James Ball, 'Angry Birds and "Leaky" Phone Apps Targeted by NSA and GCHQ for User Data', *The Guardian* (online, 28 January 2014) <http://www.theguardian.com/world/2014/jan/27/nsa-gchq-smartphone-app-angry-birds-personal-data>; Sam Schechner, Emily Glazer and Patience Haggin, 'Political Campaigns Know Where You've Been. They're Tracking Your Phone', *Wall Street Journal* (online, 10 October 2019) <https://www.wsj.com/articles/political-campaigns-track-cellphones-to-identify-and-target-individual-voters-11570718889>.

129 *Norwegian Consumer Council* (n 44) 20–1.

130 Daniel L King et al, 'Unfair Play? Video Games as Exploitative Monetized Services: An Examination of Game Patents from a Consumer Protection Perspective' (2019) 101(December) *Computers in Human Behavior* 131, 138.

131 Daniel L King and Paul H Delfabbro, 'Predatory Monetization Schemes in Video Games (Eg "Loot Boxes") and Internet Gaming Disorder' (2018) 113(1) *Addiction* 1967, 1968; Rafi Mohammed, 'How Retailers Use Personalized Prices to Test What You're Willing to Pay' *Harvard Business Review* (Web Page, 20 October 2017) <https://hbr.org/2017/10/how-retailers-use-personalized-prices-to-test-what-youre-willing-to-pay>.

132 Electronic Arts Inc (n 77).

technologies are also capable of sending personal information, including sensitive financial and health information, to a third party.[133]

Most of these tracking technologies have a unique identifier (such as an Ad ID) that can uniquely identify individuals and distinguish them from a group. This makes it possible to identify users, even if they are neither directly named nor identifiable.[134] In turn, this enables gaming companies to create a granular 360-degree view of gamers and then target them with advertisements and services that align with each gamer's nature.[135]

Another cause for concern is the potential for the combination and linking of information to create new personal information (inferred information).[136] Consider, say, the virtual reality ('VR') game, MetaData, collecting information on gamers as they play an escape game for 25 minutes.[137] This VR game could likely collect information related to height, age, gender, physical fitness and ethnicity.[138]

Inferences are of specific concern because video games are an extension of our physical world; that is, they are a contained environment based on the real world, where gamers' actions and behaviour can be studied.[139] This allows companies to make predictions about the behaviour of individuals in real life.[140] For instance, the choices gamers make in selecting their avatar in a game can help companies infer the gender[141] and personality of a gamer (such as how friendly they are in real

133 Sam Schechner and Mark Secada, 'You Give Apps Sensitive Personal Information. Then They Tell Facebook', *Wall Street Journal* (online, 22 February 2019) <https://www.wsj.com/articles/you-give-apps-sensitive-personal-information-then-they-tell-facebook-11550851636>.

134 *Commissioner Initiated Investigation into Australian Federal Police (AFP) (Privacy)* [2021] AICmr 74 [54]; *PAR Report 2022* (Australia) (n 41) 31: 'an individual is 'identifiable' where they are 'distinguished from all others in a group''.

135 *Norwegian Consumer Council* (n 44) 20.

136 Kröger et al (n 8) 3–6.

137 Vivek Nair et al, 'Exploring the Privacy Risks of Adversarial VR Game Design' (2023) 23(4) *Proceedings on Privacy Enhancing Technologies* 238, 238.

138 Ibid 241–3.

139 Whitson and Simon (n 10) 313.

140 See, e.g: Yannick Ferreira De Sousa and Alistair Munro, 'Truck, Barter and Exchange versus the Endowment Effect: Virtual Field Experiments in an Online Game Environment' (2012) 33(3) *Journal of Economic Psychology* 482; Zahid Halim et al, 'Profiling Players Using Real-World Datasets: Clustering the Data and Correlating the Results with the Big-Five Personality Traits' (2019) 10(4) *IEEE Transactions on Affective Computing* 568, 568.

141 Daniel Zimmermann, Anna Wehler and Kai Kaspar, 'Self-Representation through Avatars in Digital Environments' (2023) 42(25) *Current Psychology* 21775, 21775.

life).[142] Moreover, some of this information, such as gamer behaviour information (whom gamers play against or how they play),[143] is unique to games and thus not easily available through other digital mediums such as social media.

Inferences drawn can also constitute sensitive information. A gaming app may, for example, allow an inference to be drawn about a gamer's gambling problem.[144] Moreover, the information collected can be used to predict future behaviour not only of the individual whose information is collected, but also of others. For example, information including the age, location, and gameplay style of an individual over time can be analysed to determine how gamers of a similar demographic will play the game in the future.[145] Thus, the personal information collected affects not just the individual subject of the collection but others. The volume of behavioural information collected this way can be enormous, considering that an average Australian plays video games for over 90 minutes each day.[146]

It follows that the collection of information is not limited to collection practices explicitly disclosed by respective privacy policies but can encompass inferences arising from combining existing information collected outside the gaming context via third parties. Unfortunately, the true extent of information gaming companies can extract from third parties depends on preferences or an opt-out setting set by gamers with those third parties.[147] Consequently, gamers may well be unaware of the actual extent of information being collected, meaning that collection likely goes beyond what could be anticipated by gamers. For instance, Bandi Namco collects personal information from third parties about gamers including their 'preferences, characteristics, behaviour, and other information'.[148] Here it is not clear what information is collected. To illustrate, Bandai Namco collects personal information that helps determine gamers' gameplay characteristics such as how long a gamer plays or whether they are an avid player.[149] It also collects information about gamers'

142 Katrina Fong and Raymond A Mar, 'What Does My Avatar Say about Me? Inferring Personality from Avatars' (2015) 41(2) *Personality and Social Psychology Bulletin* 237, 237.

143 See, e.g., Innplay Labs, 'Privacy Notice Animals and Coins', *Innplay Labs* (Web Page, 1 November 2023) <https://www.innplaylabs.com/privacy-notice-animals-and-coins/>.

144 Imdad Ullah et al, 'Protecting Private Attributes in App Based Mobile User Profiling' [2020] *IEEE Access* 143818, 143818.

145 Rainer Mühlhoff, 'Predictive Privacy: Towards an Applied Ethics of Data Analytics' (2021) 23(3) *Ethics and Information Technology* 675, 675.

146 Jeffrey E Brand et al, *Australia Plays 2023* (Interactive Games and Entertainment Association, 2023) 5.

147 Activision, 'Privacy Policy' (n 112): 'You may be able to control how third parties collect and share your Information by changing your preferences or opting out of collection directly with those third parties.'

148 Bandai Namco Entertainment America Inc (n 95).

149 'Wooga Privacy Notice', *Wooga* (Web Page, 4 November 2024) <https://www.wooga.com/legal/en-privacy-policy>.

real-life characteristics, like their monthly spending on games.[150] Gamers would likely expect (and consider acceptable) the collection of the gameplay information, but not their purchasing habits and marriage status.[151]

VI Personal Information Collection: Legal Implications

The *Federal Privacy Act* requires an entity collecting personal information to comply with the Australian Privacy Principles ('APP') embedded in the Act. One such principle, APP 3, sets out the requirements related to the collection of personal information and sensitive information. It prescribes that personal information can only be collected if it is 'reasonably necessary' to carry out the entity's functions or activities.[152] Where possible, collection must be directly from the individual.[153] It must also be done using 'lawful and fair means'.[154] Given the importance of protecting sensitive information, the Act deals with the collection of sensitive information discretely from personal information. While the Act forbids the collection of sensitive information as a starting point, it envisages that such information may be collected if at least one of the exceptions listed in APP 3.3 applies.[155] These exceptions include where consent is obtained before the collection of sensitive information and the collection is reasonably necessary for one or more of the entity's functions or activities,[156] or where the collection is authorised by or under Australian law.[157] The ensuing sections of this paper explore the key requirements under APP 3: the need for personal information to be collected 'directly' from gamers, the use of lawful and fair means, and compliance with the 'reasonably necessary' test.

A *Directly Collected*

An analysis of the privacy policies reveals that gaming companies collect information about gamers in three ways: (1) actively from gamers; (2) passively from gamers;

150 Rafet Sifa et al, 'Predicting Purchase Decisions in Mobile Free-to-Play Games' 11(1) (2015) *Proceedings of the AAAI Conference on Artificial Intelligence and Interactive Digital Entertainment* 79, 79.

151 Amel Bourdoucen, Leysan Nurgalieva and Janne Lindqvist, 'Privacy Is the Price: Player Views and Technical Evaluation of Data Practices in Online Games' (2023) 7 (CHI PLAY) *Proceedings of the ACM on Human-Computer Interaction* 1136, 1148. Surveyed gamers considered personal information as acceptable only to the extent that it does not relate to them in the real world.

152 *Federal Privacy Act* (n 11) sch 1 pt 2 cls 3.1–3.2: APPs 3.1, 3.2.

153 Ibid sch 1 APP 3.6.

154 Ibid sch 1 APP 3.5.

155 Ibid sch 1 APP 3.3(a).

156 Ibid sch 1 APP 3.3(a)(ii).

157 Ibid sch 1 pt 1 cl 2: APP 2.2.

and (3) by inference from other sources.[158] Personal information can be actively collected by requesting gamers to provide it. This includes scenarios where gamers register accounts with the company[159] or engage in multiple social and community channels created by gaming companies to foster community building.[160]

Secondly, personal information is collected automatically, simply by gamers playing the game,[161] downloading, installing, or accessing games or gaming client software,[162] or using game services.[163] This avenue for collection might go unnoticed by gamers as there is no additional action required. The passively collected information can help track individuals over time across various websites and services,[164] positioning companies to infer more information about gamers.

Thirdly, gaming companies collect personal information by drawing inferences about individuals using additional personal information obtained from other third-party sources.[165] The sources include vendors, affiliates, advertisers, other gaming companies, and even other gamers.[166]

Thus, gaming companies collect personal information both directly from gamers and indirectly from third parties. The *Federal Privacy Act* requires that an organisation collect personal information directly from individuals unless it is 'unreasonable or impracticable' to do so.[167] The terms 'unreasonable' or 'impracticable' are not defined, nor have they been interpreted in any privacy determinations. The OAIC guidelines observe that whether direct collection of personal information is unreasonable or impracticable depends on the facts and circumstances of the case.[168]

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158 Scholars have proffered varying classifications of different types of collection. See, e.g., Simone Van der Hof, 'I Agree, or Do I: A Rights-Based Analysis of the Law on Children's Consent in the Digital World' (2016) 34(2) *Wisconsin International Law Journal* 409, 412–3, which notes three classification of data collection: data volunteered, observed data and inferred data.

159 See, e.g., Nintendo Account Privacy Policy (n 121).

160 See, e.g., King (n 68).

161 See, e.g., Take-Two Interactive Software Inc (n 111).

162 See, e.g., Microsoft, 'Data Sharing with Games and Apps', *Xbox.com* (Web Page) <https://www.xbox.com/en-AU/legal/ThirdPartyDataSharing>: 'If you want to stop sharing game or app data with a publisher, remove all its games or apps from all devices where you have them installed'.

163 Electronic Arts Inc (n 77): 'Your use of EA online services through these third parties indicates your agreement for the transfer of this information'.

164 *PAR Report 2022* (n 41) 31.

165 *DPI Report* (n 40) 479.

166 See, e.g., 'Privacy Policy', *Sony Pictures Entertainment* (Web Page, 28 June 2024) <https://www.sonypictures.com/corp/privacy.html>.

167 *Federal Privacy Act* (n 11) sch 1 pt 2 cl 6: APP 3.6(b).

168 Office of the Australian Information Commissioner, 'Chapter 3: APP 3 Collection of Solicited Personal Information', *Office of the Australian Information Commissioner* (Web Page, 22 July 2019) [3.65] <https://www.oaic.gov.au/privacy/australian-privacy-

As per those guidelines, considerations that might be relevant to this assessment are elaborated below.[169]

1 *Sensitivity of the Information Concerned*

The greater the sensitivity of the information being collected, the higher the expectation that its collection will occur directly. Most gaming companies collect sensitive information such as biometric information and credit card details from third-party sources.[170] Thus, there is a higher expectation for personal information to be gathered directly.

2 *Whether Individuals Would Reasonably Expect Their Information to be Collected Either Directly From Them or Indirectly by Other Organisations*

In most indirect collections, gamers receive pre-collection notices from companies that information about them is being indirectly collected. For instance, in its privacy notice, Rockstar Games states that it collects information about gamers from 'third parties, such as advertising networks, business partners, third party information providers, and other players'.[171] Therefore, a gamer whose personal information is collected must be considered as having been 'notified' under APP 5 of the information being directly or indirectly collected.[172] Thus, they have a reasonable expectation of the direct or indirect collection.

However, gaming companies only disclose that personal information is collected directly or indirectly and not the source of collection for *each piece of information* (for instance, age) or even *each category* of personal information (for instance, transaction information) collected. In other words, the companies do not inform gamers about what categories of personal information are collected directly as opposed to indirectly.

principles/australian-privacy-principles-guidelines/chapter-3-app-3-collection-of-solicited-personal-information> ('Chapter 3: APP 3 Collection of Solicited Personal Information').

169 Ibid [3.66].

170 See, e.g., Playtika Privacy Notice (n 99); Roblox, *Roblox Privacy and Cookie Policy* (n 104).

171 Rockstar Games (n 4).

172 APP 5 under the *Federal Privacy Act* (n 11) proffers individuals with a right to receive a notice of collection from the data collecting entity. This collection notice must inform individuals about entities information-gathering and handling activities. This includes, inter alia, the kind of information being collected, details about the entity collecting it, why it is being collected, and the consequences of the collection. Collection notices differ from privacy policies as they perform different functions and have distinct goals. However, gaming companies conflate both by providing notices of collection via their privacy policies.

Thus, while it may be clear to gamers that information is being collected indirectly, it is unclear whether they understand the full gamut of actual information being indirectly collected. This raises the question of whether gamers could be 'reasonably expected' to be informed about what information is collected about them indirectly and thus consider such collection as reasonable. For example, gaming companies like Activision Blizzard often create cosmetic banners that gamers can use to customise their characters in the game. This cosmetic banner includes a label supporting a community or cause such as the LGBTQ+ community.[173] A person using a banner might have a reasonable expectation that gaming companies will deduce that they support the LGBTQ+ community. That is, they can rightfully assume that gaming companies collect data about their sexuality by inferring it using 'banners.' However, they will likely not agree to the indirect collection by gaming companies of their sexual orientation from third parties like the gay dating app Grindr.[174]

Surprisingly, some companies like Playtika in their information disclosure to Californian residences do mention what information is directly or indirectly collected.[175] Thus, while it is presumably not onerous for companies to disclose this information, they nonetheless choose not to disclose this information without some compulsion.

3 *Whether Direct Collection Would Compromise the Intended Purpose of Collection*

The *Federal Privacy Act* aims to balance industry interests with consumer rights.[176] Therefore, when collecting personal information, it is essential to also consider whether the direct collection would hinder the organisation from performing intended functions. For example, gaming companies indirectly collect software information from gamers to ensure that they are not violating their code of conduct by cheating.

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173 Blizzard Entertainment, 'Coming Together to Celebrate Pride', *Overwatch Blizzard Entertainment* (Web Page, 30 May 2024) <https://overwatch.blizzard.com/news/24102826/coming-together-to-celebrate-pride/>.

174 Bobby Allyn, 'Study: Tinder, Grindr And Other Apps Share Sensitive Personal Data With Advertisers', *NPR* (Web Page, 14 January 2020) <https://www.npr.org/2020/01/14/796427696/study-grindr-tindr-and-other-apps-share-sensitive-personal-data-with-advertisers>; Emily Moschet, Brandon Liu, and Neha Aletty, 'Growth for Gaming: How Embracing a Player-Centric Approach Drives Success', *Braze* (Web Page, 11 March 2022) <https://www.braze.com/resources/articles/growth-for-gaming>. Grindr routinely shares information about their users including their sexual orientation with analytics companies like Braze. Braze, in turn, shares this sensitive information with gaming companies Roblox and Sony. Currently there is no explicit or implicit requirement under the *Federal Privacy Act* (n 11) to ensure that gaming companies collecting personal information indirectly from third party ensure that personal information was originally collected from the individual using only lawful and fair means. Thus, collection would be considered lawful but may not be reasonably necessary to carry out organisation's function.

175 Playtika Privacy Notice (n 99).

176 *Federal Privacy Act* (n 11) pt 1 s 2A(b).

This also involves scenarios where the collection of personal information is needed to fulfil public interests even though such collection may be disadvantageous to the individual concerned. Some examples set out in the Act include where personal information is collected for 'enforcement-related activity'[177] (such as lawful surveillance), permitted general situations (preventing a serious threat to life),[178] or permitted health situations (to provide a health service).[179] Consider, for instance, where a law enforcement officer uses a game chatbox to collect personal information of a child sexual predator to investigate or prosecute a crime.[180] Here, covert indirect collection of the preparator's personal information is necessary to identify the perpetrator without alerting them — the indirect collection is accordingly justified.

4 *Privacy Risks Associated with Obtaining the Information from an Alternative Source*

An organisation that collects excessive personal information about gamers runs the risk of creating additional personal information,[181] which may include personal information that is not reasonably necessary for it to perform its functions (thus violating APP 3 provisions). For example, information including the age, location and gameplay style of an individual over time can be analysed to determine how gamers of a similar demographic will play the game in the future. However, when combined, this information can also create a personality profile of the gamer[182] — including motivation factors such as family, power, status and saving — from which further inference can be made such as determining if a gamer has strong family bonds or is from a low socioeconomic background.

As noted in Part IV, gaming companies combine personal information and create new personal information (by drawing inferences). Unfortunately, there is limited understanding of the true extent of analytics in the gaming industry because such analysis techniques are considered proprietary.[183] For this reason, privacy policies

177 Ibid s 6(1) (definition of 'enforcement related activity').

178 Ibid s 16A.

179 Ibid s 16B.

180 Nellie Bowles and Michael H Keller, 'Video Games and Online Chats Are "Hunting Grounds" for Sexual Predators', *The New York Times* (Web Page, 7 December 2019) <https://www.nytimes.com/interactive/2019/12/07/us/video-games-child-sex-abuse.html>.

181 World Economic Forum, *Unlocking the Value of Personal Data: From Collection to Usage* (Report, World Economic Forum, 2013) 8 <https://www.weforum.org/reports/unlocking-value-personal-data-collection-usage/>.

182 Alessandro Canossa, Josep B Martinez and Julian Togelius, 'Give Me a Reason to Dig: Minecraft and Psychology of Motivation' (Conference Paper, IEEE Conference on Computational Intelligence and Games, 2013) 1.

183 Anders Drachen et al, 'A Comparison of Methods for Player Clustering via Behavioral Telemetry' (Conference Paper, International Conference on the Foundations of Digital Games, 2014) 3.

rarely mention how gamer information is used to draw inferences and so shield the full extent of inferences drawn. For instance, Blizzard states that it collects personal information to draw inferences about gamers such as 'reputation, experience, influencer type, interests'.[184] Blizzard mentions the broad categories of inferences drawn about gamers (such as influencer type) but not how the inferences are drawn or what personal information is used to draw them.

Some insights on how analytics can be used to draw inferences can be gleaned from academic research conducted using gamer information. It has been used to determine the demographic traits of gamers, such as gender,[185] education level,[186] psychologic[187] and social traits (how gamers interact with other gamers),[188] personality traits[189] and skills (including gamers' problem-solving skills[190] and learning skills).[191]

Previous survey-based research has demonstrated that most Australians are uncomfortable with companies combining personal information about them in general.[192] From this, it is reasonable to infer that most gamers will also uncomfortable with gaming companies combining their personal information. It is difficult to imagine

184 Blizzard Entertainment Privacy Policy (n 5).

185 John Murray, Edmond Chow and Christopher Connolly, 'Something in the Way We Move: Quantifying Patterns of Exploration in Virtual Spaces' (Conference Paper, International Conference on the Foundations of Digital Games, 2015) 3.

186 Carl Symborski et al, 'The Use of Social Science Methods to Predict Player Characteristics from Avatar Observations' in Muhammad Aurangzeb Ahmad et al (eds), *Predicting Real World Behaviors from Virtual World Data* (Springer International, 2014) 19.

187 Emmanuel Guardiola and Stephane Natkin, 'A Game Design Methodology for Generating a Psychological Profile of Players' in Christian Loh, Yanyan Sheng and Dirk Ifenthaler (eds), *Serious Games Analytics: Advances in Game-Based Learning* (Springer, 2015) 363, 363.

188 Maude Bonenfant, Patrick Deslauriers and Issam Heddad, 'Methodological and Epistemological Reflections on the Use of Game Analytics toward Understanding the Social Relationships of a Video Game Community' in Günter Wallner (ed), *Data Analytics Applications in Gaming and Entertainment* (CRC Press, 2019) 183, 188–91.

189 Halim et al (n 140) 568, 568.

190 Valerie Shute, Gregory Moore and Lubin Wang, 'Measuring Problem Solving Skills in Plants vs Zombies 2' (Conference Paper, International Conference on Educational Data Mining, 2015) 428, 428.

191 Wim Westera, Rob Nadolski and Hans Hummel, 'Serious Gaming Analytics: What Students Log Files Tell Us about Gaming and Learning' (2014) 1(2) *International Journal of Serious Games* 35, 35.

192 Lonergan Research, *Australian Community Attitudes to Privacy Survey 2020* (Office of the Australian Information Commissioner, September 2020) 111 <https://www.oaic.gov.au/engage-with-us/research/australian-community-attitudes-to-privacy-survey-2020-landing-page/2020-australian-community-attitudes-to-privacy-survey/>: 53% of respondents reported being uncomfortable with a business combining data about them.

gamers would agree to gaming companies combining their information in the manner suggested above, especially when the information from the gaming context is combined with real-world information about them. Consider, for instance, a third-party advertising company Red Shell whose technologies were used by gaming companies to advertise their products and services. For this advertising purpose, gaming companies shared gamers' personal information with Red Shell, which then used this personal information (including user ID, IP address, and browser details) to track gamers *outside* the gaming context and thus collect more personal information, without obtaining gamers' prior consent.[193] Red Shell thus had access to gamers' combined personal information, both within and outside the gaming context, which it proceeded to share with other third-party advertisers outside the gaming context. This allowed third-party advertisers to target gamers with personalised advertisements based on their interests within the game.[194] Such collection, use and disclosure of gamers' personal information by Red Shell without gamers' consent, once revealed, was vehemently protested by gamers. Curiously enough, gaming companies considered the use of Red Shell to be unproblematic until gamers opposed it as a violation of their privacy.[195] Thus, gaming companies themselves inadvertently breached privacy obligations by not understanding the full implications of information collection.

Additionally, as personal information is combined with other information, companies can use this information for other purposes mentioned in their privacy policies, including commercial purposes. This too raises the question of whether gamers would 'reasonably expect' the kinds of inferences that will be drawn about them and how such information will be used. In turn, this calls into question the legitimacy of such information collection.

5 *The Time and Cost Involved in the Collection of Personal Information*

The time and cost required to collect personal information directly must be excessive and not merely 'inconvenient, time-consuming or impose some cost'.[196] Some personal information collected from third parties (say, other gamers) would be impossible to collect directly from gamers. Consider a scenario where a third-party

193 Owen S Good, 'Marketing "Spyware" Caught in PC Games but Makers Reject That Label', *Polygon* (Web Page, 20 June 2018) <https://www.polygon.com/2018/6/20/17485762/red-shell-spyware-pc-games-controversy-steam>. See also Smith, 'Gamers: Is Red Shell 'Spyware' Being Used in the Games You Play?' *CSO* (Web Page, 17 June 2018) <https://www.csoonline.com/article/565668/gamers-is-red-shell-spyware-being-used-in-the-games-you-play.html>.

194 Ibid.

195 Andy Chalk, 'Red Shell Analytics Software Causes Privacy Uproar, Over a Dozen Developers Vow to Drop It (Updated)', *PC Gamer* (Web Page, 19 June 2018) <https://www.pcgamer.com/red-shell-analytics-software-causes-privacy-uproar-over-a-dozen-developers-vow-to-drop-it/>.

196 Office of the Australian Information Commissioner, 'Chapter 3: APP 3 Collection of Solicited Personal Information' (n 168) [3.65].

game distribution platform, like Steam, provides gaming companies with information regarding the amount of time gamers spend playing games of a particular genre through the Steam platform. Gaming companies do not have access to this information by themselves but might need the information to determine how best to advertise games. That is, if a gamer has spent more time playing action games than strategy games, it is assumed that they like action games and so are more likely to buy action games.

Consequently, one could posit that — despite the considerable time and cost involved in directly collecting personal information — indirect collection of personal information by gaming companies may be unreasonable in view of the sensitivity of the information gathered, gaming companies' lack of notification to gamers about the extent of indirect data collection, and the privacy risks involved in gathering information from alternate sources. Accordingly, it may violate APP 3.6, which mandates the direct collection of personal information.

(a) Lawful and Fair Means

The term 'lawful' is not defined under the *Federal Privacy Act*. The OAIC gives examples of unlawful collection that may occur by means such as hacking or doing anything that can be construed as a civil wrong.[197] 'Fair means' implies that the collection of information is not achieved via intimidation, deception or unreasonably intrusive means.[198] For instance, personal information should not be collected covertly using phone tapping.[199] The gaming companies studied in this paper have not, to the best of the authors' knowledge, directly collected personal information using any unlawful or unfair means.

(b) Legitimate Functions or Activity

The functions and activities of an organisation can include any current and proposed function or activity.[200] It can also encompass any other support activity that is necessary to perform an organisation's function. For instance, if a purchase is made via the company Take-Two Interactive directly, Take-Two Interactive indicates that it will collect the shipping address (such as name and address) along with payment details to ensure the product is delivered to the gamer.[201]

197 Ibid [3.61].

198 Explanatory Memorandum to Privacy Bill (n 31) 77.

199 Office of the Australian Information Commissioner, 'Chapter 3: APP 3 Collection of Solicited Personal Information' (n 168) [3.63].

200 Ibid [3.13].

201 Take-Two Interactive Software Inc (n 111).

Generally, an organisation's function or activity is described in its website, corporate brochures and/or annual report.[202] An organisation can perform any function or activity that is lawful.[203] In other words, companies can declare that they perform any function or activity and, so long as it is not illegal, it will be deemed legitimate. This allows gaming companies to self-determine what their functions or activities are.

Analysis of all 37 privacy policies determines that companies have seven broad purposes for which they use gamers' personal information: (1) personalisation; (2) service improvement and analytics; (3) service functionality and security; (4) marketing and advertising; (5) fair gaming; (6) legal compliance; and (7) direct marketing.

While the purpose of the information collection listed above seems *prima facie* unproblematic, in practice it is not so innocuous. For example, Rockstar games, which collects personal information and makes inferences to 'help create a personalized profile so [they] can identify goods and services that may be of interest'.[204] Here, it is unclear what kind of profile is created and how gaming services will be personalised. This practice allows gaming companies, such as Rockstar, to make an inference about gamers' likes and interests such as their favourite football team to suggest places where gamers could buy football jerseys.[205] Rockstar can also broadly interpret the privacy policy and make an inference that the gamer is frequently disloyal[206] and likely to cheat on their partner,[207] and suggest sites enabling extramarital affairs like Ashley Madison. This is intimate personal information that could negatively impact gamers if further shared.

Thus, the ambiguous language used by gaming companies raises doubt over what personal information is being collected and whether such collection could qualify as 'reasonably necessary' (that is, a reasonable person would agree if such collection were necessary) and thus legitimate (examined further below in the context of fair gaming).

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202 Office of the Australian Information Commissioner, 'Chapter 3: APP 3 Collection of Solicited Personal Information' (n 168) [3.14].

203 Ibid [3.15].

204 Rockstar Games (n 4).

205 Eli Hodapp, '"We Own You": Confessions of an Anonymous Free to Play Producer — TouchArcade' (Web Page, 16 September 2015) <https://toucharcade.com/2015/09/16/we-own-you-confessions-of-a-free-to-play-producer/>.

206 Dragana Martinovic et al, '"You Are What You Play": Breaching Privacy and Identifying Users in Online Gaming' in Ali Miri et al (eds), *2014 Twelfth Annual Conference on Privacy, Security and Trust* (Institute of Electrical and Electronics Engineers, 2014) 31, 31.

207 Patrick Stafford, 'The dangers of in-game data collection', *Polygon* (Webpage, 9 May, 2019) <https://www.polygon.com/features/2019/5/9/18522937/video-game-privacy-player-data-collection/>.

(c) Reasonably Necessary

The term 'reasonable' is not defined by the *Federal Privacy Act* and so arguably bears its ordinary meaning.[208] The term 'necessary' does not mean that collection is 'essential' or 'indispensable'; rather, it must be 'proportional', that is, 'reasonably appropriate and adapted'.[209] It requires that collection, uses and even disclosure be not 'merely helpful, desirable or convenient'.[210] The OAIC considers the collection of information for any undefined future use as an unnecessary collection.[211]

What is 'reasonably necessary' invites an objective test that demands consideration from the perspective of a reasonable person, not just that of the APP entity collecting and handling personal information.[212] It requires that a reasonable person, once properly informed of how an APP entity would collect and handle personal information, would agree that its collection and handling is necessary.[213] This test 'must be applied in a practical sense'.[214] The question to be determined is whether a function cannot be effectively performed without collecting personal information[215] and whether there are no reasonable alternatives available (such as public information) that can be used to perform the activity or function.[216] Thus, the 'reasonably necessary test' is concerned with minimising the collection of personal information.

As evidenced by Table 3 and summarised in Part V, gaming companies collect extensive personal information on gamers. The quantity of personal information collected appears to exceed what is reasonably required, potentially infringing APP 3. Companies seek to justify collection as necessary to perform their functions. Consider, for instance, the following provision in Activision's privacy policy:

> To provide a fair gaming experience … Activision may monitor and/or record your gameplay and communications (including without limitation chat text or voice communications) and activities on your device including information about the programs running alongside the game.[217]

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208 Office of the Australian Information Commissioner, 'Chapter B: Key Concepts' (n 39) [B.108].

209 *Mulholland v Australian Electoral Commissioner* (2004) 220 CLR 181, 200–1 [39] (Gleeson CJ).

210 *7- Eleven* (n 28) [58].

211 Office of the Australian Information Commissioner, 'Chapter 3: APP 3 Collection of Solicited Personal Information' (n 168) [3.21].

212 Explanatory Memorandum to Privacy Bill (n 31) 53.

213 Ibid.

214 Office of the Australian Information Commissioner, 'Chapter B: Key Concepts' (n 39) [B.118].

215 Ibid.

216 Ibid.

217 Activision (n 112).

In so doing, Activision is collecting personal information and sensitive information.[218] Gamers would agree that the collection of some personal information to prevent cheating is necessary, as cheating is counterproductive to gaming.[219] However, what must also be considered is the *extent* of information being collected to prevent cheating. For instance, Activision's anti-cheating technology (Ricochet) claims it 'monitor[s] analytics to identify cheating'.[220] Here, it is not clear how Activision monitors players. Does it embed artificial intelligence into the chat box that scans for keywords and collects personal information only when certain keywords associated with cheating are detected? If so, would this be a 'reasonably necessary' collection? However, if Activision monitors and records anything said and done using chat and voice communications at any time, the collection is excessive — especially considering that Ricochet has access to virtually all programs running on a gamer's personal computer,[221] which leaves gamers particularly vulnerable to privacy invasion in case of any security breach.[222]

From the language Activision has chosen (that is, 'monitor and/or record'), it seems that the company may collect and store all the chat and video communications as personal information. The extent of information it collects thus ostensibly goes beyond what is necessary to effectively perform the company's function. Activision, it seems, seeks refuge in gamers' consent as a basis for its collection by mentioning in its Terms of Use that gamers' 'express consent' to such monitoring and recording is 'irrevocable'.[223] Notably, under the *Federal Privacy Act*, consent is not an exception to the 'reasonably necessary' requirement. This appears from the terms of APP 3 itself, which provides no consent exception. Additionally, gaming companies collecting sensitive information must obtain the consent of gamers *in addition to* ensuring that the collection of information is 'reasonably necessary'.[224] Therefore, while the collection of personal information is necessary to determine

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218 This information is also sensitive information as voice print is used to verify the identity of gamer.

219 Irdeto, *Irdeto Global Gaming Survey: The Last Checkpoint for Cheating* (Report, 2018) 3: '77% of online gamers would be likely to stop playing a multiplayer game online if they thought other players were cheating to gain an unfair advantage'.

220 Activision, 'Ricochet Anti-Cheat: Call of Duty's Anti-Cheat Initiative', *Activision Support* (Web Page, 24 October 2024) <https://support.activision.com/articles/ricochet-overview>.

221 Serif Pilipovic, 'What Kernel-Level Anti-Cheat is and Why You Should Care', *LEVVVEL* (Web Page, 24 March 2023) <https://levvvel.com/what-is-kernel-level-anti-cheat-software/>.

222 See, e.g., Sarah Fielding, 'Hackers Gave Pro Players Cheats During EA's North American Finals of Apex Legends', *Engadget* (Web Page, 18 March 2024) <https://www.engadget.com/hackers-gave-pro-players-cheats-during-eas-north-american-finals-of-apex-legends-122102739.html>.

223 Activision, 'Terms of Use', *Activision* (Web Page, 26 September 2024) <https://www.activision.com/au/en/legal/terms-of-use>.

224 *Federal Privacy Act* (n 11) sch 1 pt 1 cl 3: APP 3.3.

whether a gamer is cheating, the full extent of information collected by Activision is potentially beyond what is necessary to perform this function.

Regrettably, gaming companies rarely explain what information is collected and for what purpose. Rather, as noted in Part VI (c), these companies list the kinds of personal information they collect and the purposes for which they use personal information. This obscurity makes it difficult to conclusively determine whether the collection of each piece of personal information (such as device information) is reasonably necessary for the entity to fulfil its functions. Nonetheless, considering the amount of information collected by gaming companies — which, when combined, can reveal unexpected correlations that can lead to the creation of more sensitive information — and the fact that some information may be excessive as noted above, such collection may not reasonably be required. For instance, Warner Bros collects and shares information from games that include address, phone number, interests, political and religious beliefs and ethnicity.[225] While some of the information collected (like movie interests) might aid the personalisation of content to media streaming companies, it does not appear relevant for a gaming company concerned with making games.[226] In a similar vein, collecting information about gamers' political leanings is not 'reasonably necessary' to make a better game. As the Cambridge Analytica scandal proves, there is significant harm in gaming companies like Activision collecting political information as it may be used to influence, for example, election outcomes.[227]

(d) Collection of Sensitive Information and Consent

APP 3 requires that APP entities (here, video gaming companies) obtain consent from gamers if they are collecting sensitive information[228] or are using personal information for purposes other than one reasonably expected.[229] An example of unexpected use would include a gaming company claiming to collect gamers' personal information for game personalisation when, in reality, the company uses it for personalisation beyond the gaming context.

In terms of consent for collection, it is necessary to determine whether companies are collecting only personal information or also sensitive information. Of the 10 companies examined, eight collect sensitive personal information.[230] The two exceptions are Nintendo and Playtika. Hence, only Nintendo and Playtika need not obtain the consent of gamers before collecting their personal information. However, it must be noted that Nintendo does not deny that it *can* collect sensitive information;

225 Warner Media (n 67).

226 See, e.g., 'Microsoft Privacy Statement' (n 7).

227 Ball (n 128). Activision's game Candy Crush was used to collect data to allow advertising companies to target voters believed to be Donald Trump supporters with advertisements.

228 *Federal Privacy Act* (n 11) sch 1 pt 1 cl 3: APP 3.3(a).

229 Ibid sch 1 pt 3 cl 1: APP 6.1(a).

230 See Table 3.

it claims that 'normally, Nintendo does not collect Sensitive Information'.[231] Due to this ambiguous wording, no definitive conclusions can be drawn about Nintendo's collection of sensitive information. In the case of Playtika, there is a possibility that the personal information it collects and shares can be combined to create sensitive information. Nevertheless, in the case of both Nintendo and Playtika, assuming that they only use personal information for the purpose notified and not for any other purpose, consent before the collection of personal information need not be obtained. For the other eight companies, however, consent for the collection of personal information is required. All 10 gaming companies analysed collected consent from gamers using privacy policies as a consent-collecting vehicle.

Thus, as far as collection is concerned, the gaming companies examined in this research do not fulfil fundamental requirements under the APP 3 of the *Federal Privacy Act* relating to the collection of personal information, by: (1) failing to properly inform gamers about information indirectly collected in a way that gamers would reasonably expect such collection; and (2) collecting and combining excessive personal gamer information in a manner that raises doubt about whether its collection is reasonable or even necessary to perform functions associated with the companies' game offerings.

VII Conclusion

This paper details the richness of information collected by the gaming companies studied. It establishes that the true extent of personal information collected by gaming companies requires consideration of its totality. Accordingly, thematic analysis was used to review the privacy policies of the gaming companies to discern what kinds of personal information were collected, the findings from which were grouped according to 10 different themes. The collection of information was not limited to the collection practices explicitly disclosed by the respective privacy policies but also encompassed inferences arising from combining existing information.

In fact, the personal information gathered by gaming companies is often linked to gamers' internet behaviour (such as shopping habits and websites browsed). As a result, it is possible to collate information obtained through engagement in the gaming environment with intimate details about gamers that are not conventionally obtainable, such as a person's decision-making skills combined with their browsing habits. Thus, video games have become a new hub for gathering information about gamers, by offering new opportunities and forms of information to both the gaming companies studied and the digital marketplace in general. This also highlights how the collection of personal information might go beyond what may be strictly necessary to optimise the gamer experience, such as the gamer's gambling habit or marital status. Such excessive collection is not only a security risk but poses privacy risks to gamers.

231 Nintendo (n 121).

The video game industry is expanding. Parallel thereto is an increasing trajectory of companies collecting gamers' personal information. This information is used to boost in-game purchases or in-game advertisements to encourage spending by gamers and generate revenue.[232] Concurrently, personal information helps to anticipate gamers' needs and streamlines game production. For instance, it allows companies to allocate resources to more popular and profitable features of a game. Thus, personal information is not just a gold nugget, but a gold mine.

Given these findings, the next fundamental issue for consideration is whether the *use* and *disclosure* of this information is privacy law compliant. This requires consideration of how gaming companies inform gamers about their information-handling activities and grant control to gamers over their personal information, against the framework for privacy protection under the *Federal Privacy Act*. To this end, further investigation into the gaming industry's compliance with relevant openness and notification requirements under the *Federal Privacy Act* is necessary.

232 See generally: Erica L Neely, 'Come for the Game, Stay for the Cash Grab: The Ethics of Loot Boxes, Microtransactions, and Freemium Games' (2021) 16(2) *Games and Culture* 228, 228; Matti Mäntymäki, Sami Hyrynsalmi and Antti Koskenvoima, 'How Do Small and Medium-Sized Game Companies Use Analytics? An Attention-Based View of Game Analytics' (2019) 22(5) *Information Systems Frontiers* 1163, 1163.

Anusha Kenny and Natalia Antolak-Saper***

THE ROLE OF TRAUMA AS A MITIGATING FACTOR IN THE SENTENCING OF OFFENDERS: THE VICTORIAN EXPERIENCE

Abstract

Within the criminal justice system, research indicates that a significant majority of offenders — over 90% — have endured some form of trauma. This article critically examines how trauma is considered as a mitigating factor in the sentencing process within the State of Victoria. While Victorian sentencing principles recognise the relevance of an offender's personal circumstances, there remains a lack of clarity regarding which principles are most applicable when assessing the impact of trauma. Further, the process of weighing trauma in accordance with the doctrine of instinctive synthesis poses substantial challenges for sentencing judges. This article examines the intersection of trauma and sentencing, proposing a more nuanced and principled approach that integrates contemporary understandings of trauma into legal decision-making. By advancing a framework for consistent and fair consideration of trauma, the criminal justice system can enhance its commitment to justice and rehabilitation, ultimately fostering more equitable sentencing outcomes.

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I Introduction

Trauma has been described as 'pain, horror and fear living inside people'.[1] It is a pervasive experience, with research indicating that over 90% of imprisoned offenders have encountered some form of trauma.[2] Yet despite its prevalence, there remains considerable uncertainty about how trauma should be understood and applied within the legal framework of sentencing.

For the purposes of this article, the term 'trauma' is not defined simply as the experience of adverse life events such as poverty, neglect, or exposure to violence, but rather as the enduring psychological impact such experiences can produce. These impacts may include impairments in impulse control, affect regulation,[3] decision-making capacity, and moral reasoning, each of which can diminish the offender's moral culpability. Mitigation, therefore, is not justified by adversity in the abstract, but by evidence of its effect on the offender's psychological functioning and capacity to comply with the law. This interpretive framework aligns with emerging trauma-informed jurisprudence, which places emphasis on demonstrable harm over categorical disadvantage.

Using the State of Victoria as an example, this article critically examines the legal implications of recognising trauma as a mitigating factor. While the existing sentencing framework acknowledges the relevance of an offender's personal circumstances,[4] there remains considerable ambiguity as to which sentencing principles

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1 Interview with Bessel van der Kolk (Rich Simon, Psychotherapy Networker, 12 August 2014) <https://www.psychotherapynetworker.org/article/video-when-it-trauma-bessel-van-der-kolk-explains/?srsltid=AfmBOopxQZlIvO9-ElbTbvDtNKd-_aQyx1YIDaN5atT3m8yIz3yWjOsW> ('Interview with Bessel van der Kolk'). Bessel van der Kolk is a leading psychiatrist and internationally recognised expert in the field of trauma research. He is the founder and medical director of the Trauma Research Foundation and was formerly a professor of psychiatry at Boston University School of Medicine. With over four decades of clinical and research experience, van der Kolk has significantly advanced the understanding of how trauma affects the brain, body, and behaviour. His seminal work, *The Body Keeps the Score: Brain, Mind, and Body in the Healing of Trauma* (Viking Penguin, 2014) ('*The Body Keeps the Score*'), is widely regarded as one of the most influential texts on trauma and is frequently cited across both clinical and legal contexts for its insights into the long-term impacts of traumatic experiences.

2 Victoria Jackson et al, 'Trauma-Informed Sentencing of Serious Violent Offenders: An Exploration of Judicial Dispositions with a Gendered Perspective' (2021) 28(5) *Psychiatry, Psychology and Law* 748, 748.

3 'Affect regulation' refers to the processes by which individuals monitor, evaluate, and modify their emotional states to achieve adaptive functioning or meet situational demands. See, e.g., James J Gross (ed), *Handbook of Emotion Regulation* (The Guilford Press, 2nd ed, 2014).

4 *Sentencing Act 1991* (Vic) s 5(1)(a) ('*Sentencing Act*'); *R v McKee* (2003) 138 A Crim R 88, 92 [10] (Buchanan JA), 94 [21] (Vincent JA) ('*McKee*'). See also Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 310.

are most applicable in assessing the impact of trauma, and how much weight should be assigned to the impact of trauma under the doctrine of instinctive synthesis.[5] Clarifying these doctrinal uncertainties is essential, as a trauma-informed approach to sentencing — particularly one that addresses the criminogenic risks associated with unresolved trauma — has the potential to reduce individual recidivism and disrupt cycles of intergenerational criminality.[6]

While Victoria's approach to trauma in sentencing is not unique, its approach is marked by a more structured articulation of principles and openness to complex psychological evidence. However, the intersection of trauma and sentencing is a live and evolving issue across all jurisdictions. For example, in New South Wales, the *Bugmy Bar Book* serves as a comprehensive and practical resource for courts, legal practitioners, and support services in considering trauma-related factors in sentencing, particularly for Aboriginal and Torres Strait Islander peoples.[7] The Northern Territory and Western Australia have also seen judicial recognition of trauma as a factor relevant to moral culpability and just punishment. For example, in *Joran v The King*,[8] the Northern Territory Court of Criminal Appeal acknowledged the significance of childhood deprivation and a psychiatric diagnosis of Complex Post-Traumatic Stress Disorder ('C-PTSD') in the assessment of moral culpability.[9] In *Kelly v Western Australia,*[10] the Western Australian Court of Appeal found that a history of profound childhood deprivation and complex trauma could diminish culpability.[11] While jurisdictional nuance can exist in evidentiary standards and the prominence of trauma-informed resources, these developments collectively underscore a national shift toward recognising the pervasive role of trauma in shaping offending behaviour and sentencing outcomes. The insights offered in this article therefore have broader relevance.

Drawing on an expanding body of research on trauma, particularly its causes and effects, this article examines how such insights can meaningfully inform sentencing practices. It places particular emphasis on cases involving survivors of Australia's Stolen Generations and their descendants, highlighting how these experiences of trauma are considered — or overlooked — in judicial decision-making.

Part II of this article provides a focused definition of trauma in the legal context and explores various forms of trauma, such as intergenerational trauma and systemic

5 For further discussion on instinctive synthesis, see *Markarian v The Queen* (2005) 228 CLR 357, 378 [51] (McHugh J) ('*Markarian*').

6 Katherine J McLachlan, *Trauma-Informed Criminal Justice: Towards a More Compassionate Criminal Justice System* (Springer, 2024) 171.

7 See 'Bugmy Bar Book', *Bugmy Bar Book* (Web Page, 2025) <https://bugmybarbook.org.au> ('*Bugmy Bar Book*').

8 [2024] NTCCA 1.

9 Ibid [69]–[70] (Barr J).

10 [2024] WASCA 116.

11 Ibid [367] (Mazza and Hall JJA)

discrimination, which have significant legal ramifications. It discusses the complex psychological and physiological effects of trauma that may impact an offender's behaviour and culpability. Part III delves into Victorian sentencing principles that allow for the consideration of trauma, examining key case studies involving offenders of Aboriginal heritage or those with a history of childhood trauma. The analysis in Part IV explores justifications for mitigating sentences based on trauma, particularly in terms of reducing moral culpability. It also addresses critical challenges in this area, such as the potential for inconsistency, personal bias, and the moral dilemma faced by judges in assessing trauma.

While this article emphasises trauma as a potential mitigating factor, it is recognised that trauma is not inherently or exclusively mitigating. The psychological and behavioural effects of trauma may, in some cases, contribute to risk factors that complicate rehabilitation or heighten community protection concerns. Where trauma manifests in persistent antisocial behaviour, impaired emotional regulation, or diminished responsiveness to intervention, it may assume an aggravating or ambiguous role in sentencing. This does not detract from the central argument advanced here, but rather supports the need for a nuanced, evidence-based assessment of its relevance on a case-by-case basis.

This article therefore advocates for a more structured and principled approach to the consideration of trauma in sentencing, emphasising the need for clear judicial guidance and consistent application. Central to this framework is the recommendation for enhanced judicial education, ensuring that judges are equipped with the knowledge and tools necessary to understand the complexities of trauma and to apply this understanding effectively and fairly in sentencing decisions.[12]

II What is Trauma?

A *Broad Definition*

The concept of trauma has evolved beyond its original association with physical injury to encompass various non-physical experiences that have significant psychological and emotional effects.[13] A term that is inherently difficult to define, trauma is

12 A number of alternative mechanisms can also support trauma-informed and culturally responsive justice practices, including truth-telling processes, formal apologies, and Aboriginal Community Justice Reports. See: Thalia Anthony and Larissa Behrendt, *Aboriginal Community Justice Reports Program: Preliminary Findings* (Report, November 2023); Andrew Day and Katherine McLachlan, *A Trauma-Informed Approach to Supporting New Professionals in the Criminal Justice System: A Literature Review* (Report, July 2024).

13 Lucy Bond and Stef Craps, *Trauma* (Routledge, 2020) 5.

> slippery: blurring the boundaries between mind and body, memory and forgetting, speech and silence. It traverses the internal and the external, the private and the public, the individual and the collective. Trauma is dynamic: its parameters are endlessly shifting as it moves across disciplines and institutions, ages and cultures. Trauma is contested: its rhetoric, its origins, its symptoms, and its treatment have been subject to more than 150 years of controversy and debate.[14]

Trauma has been described as 'a wound lived out day-to-day',[15] and an experience that continues to trouble the present. These definitions indicate that although trauma is a broad concept, it refers to significant negative experiences and their sequelae. This article will use the term 'trauma' as shorthand for a range of adverse experiences, whether stemming from a singular event, or deriving from cumulative negative experiences that, over time, can have a corrosive and traumatic effect on individuals.[16]

In the legal context, trauma is relevant when it influences behaviour, particularly in criminal offending. In sentencing remarks, judges may adopt other phrases to describe these experiences, including 'deprived background',[17] 'traumatic background',[18] 'social deprivation',[19] and 'adverse childhood experiences'.[20] Alternatively, particular sources of trauma, such as the experience of abuse or other experiences of victimisation, may be expressly referred to.[21] This article focuses on how these experiences, whether acute (like direct abuse) or insidious (such as long-term discrimination or systemic inequality), affect an offender's behaviour and decision-making.[22] An understanding of these concepts can clarify how trauma may be considered a mitigating factor in sentencing. For this reason, the next section discusses the sources of trauma, its effect and impact.

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14 Ibid.

15 Interview with Bessel van der Kolk (n 1).

16 This use of the term is consistent with its contemporary meaning, as evidenced by: *Macquarie Dictionary* (online at 2 August 2025) 'trauma'; Bond and Craps (n 13) 5; Babette Rothschild, *The Body Remembers: The Psychophysiology of Trauma and Trauma Treatment* (Norton Professional Books, 2000) 5.

17 See, e.g.: *Bugmy v The Queen* (2013) 249 CLR 571, 583 [5] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Bugmy*'); *Honeysett v The Queen* (2018) 56 VR 375, 383 [35] (Priest, Beach and Hargrave JJA) ('*Honeysett*').

18 See, e.g., *Ryder v The Queen* (2016) 256 A Crim R 115, 121 [9] (Whelan JA and Cavanough AJA).

19 See, e.g.: *R v Wordie* [2003] VSCA 107, [27] (Cummins AJA); *DPP (Vic) v Perry* (2016) 50 VR 686, 721 [136] (Maxwell ACJ, Redlich and Whelan JJA).

20 See, e.g., *Cross v The Queen* [2019] VSCA 310, [42] (Priest and Weinberg JJA).

21 See, e.g., *R v AWF* (2000) 2 VR 1, 8–9 [28] (Chernov JA) ('*AWF*').

22 Kevin L Nadal, *Microaggressions and Traumatic Stress: Theory, Research, and Clinical Treatment* (American Psychological Association, 2018) 39–47.

B *Sources of Trauma*

1 *Traumatic Events*

There is an infinite range of experiences that could have a traumatic effect on a given individual. Generally, trauma is caused by an experience that an individual is exposed to, either in childhood or adulthood. Traumatic events are characterised by 'a sense of horror, helplessness, serious injury, or the threat of serious injury or death'.[23] They can be caused by intentional or unintentional acts of individuals (sometimes referred to as 'interpersonal'[24] or 'complex trauma'),[25] or by external events or circumstances, such as war, natural disasters, or accidents. An individual does not need to be directly exposed to the traumatic event for it to have had a traumatic effect. Indirect exposure — such as being a witness to a traumatic event or having a close family member directly involved in a traumatic event — may have a traumatic effect on an individual.[26]

Traumatic experiences during childhood can have particularly pernicious effects on individuals' long-term wellbeing.[27] Trauma rewires the developmental brain 'from a "learning" brain to a "survival" brain'.[28] Adverse childhood experiences such as the experience of physical, sexual or emotional abuse during childhood can have a considerable ongoing effect on an individual's life trajectory. This can include

23 Centers for Disease Control and Prevention, *Helping Patients Cope with a Traumatic Event* (Factsheet, 15 October 2021). See also American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 5th ed, 2022).

24 Melissa J Hagan, Annmarie C Hulette and Alicia F Lieberman 'Symptoms of Dissociation in a High-Risk Sample of Young Children Exposed to Interpersonal Trauma: Prevalence, Correlates, and Contributors' (2015) 28(3) *Journal of Traumatic Stress* 258, 258.

25 Rachel Wamser-Nanney and Brian R Vandenberg, 'Empirical Support for the Definition of a Complex Trauma Event in Children and Adolescents' (2013) 26(6) *Journal of Traumatic Stress* 671, 671.

26 Centers for Disease Control and Prevention (n 23).

27 See Divna Haslam et al, *The Prevalence and Impact of Child Maltreatment in Australia: Findings from the Australian Child Maltreatment Study* (Report, 2023). For a longitudinal study of the effects of a specific childhood trauma on health, see Australian Institute of Health and Welfare, *Aboriginal and Torres Strait Islander Stolen Generations Aged 50 and Over: Updated Analyses for 2018–19* (Report, 2021).

28 Cathy Kezelman et al, *The Cost of Unresolved Childhood Trauma and Abuse in Adults in Australia* (Report, 2015) 14.

an increased likelihood of future contact with the criminal justice system,[29] the development of mental illness,[30] and decreased life expectancy.[31]

If trauma is not addressed or treated, it can result in 'interrupted neurological, social and emotional development'.[32] Unresolved trauma can also contribute to mal-adaptive coping mechanisms and can be exacerbated by traumatic experiences in adulthood.[33] Experiences of trauma can be compounded by the impact of specific trauma such as intergenerational trauma or discrimination.

2 *Contested Forms of Trauma: Intergenerational Trauma*

'Intergenerational trauma' generally refers to the ways in which trauma experienced in one generation affects the health and wellbeing of their descendants.[34] At the core of intergenerational or historical trauma is the reverberation of victimisation, where the effects of personal trauma extend beyond the primary victim and have profound effects on the lives of those connected to the primary victim, most notably their spouses and offspring.[35]

There is extensive literature documenting the intergenerational effects of traumatic experiences in various populations, including the offspring of survivors of sexual

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29 Catia Malvaso et al, *Adverse Childhood Experiences and Trauma among Young People in the Youth Justice System* (Report No 651, June 2022); Nina Papalia et al, 'Child Sexual Abuse and Criminal Offending: Gender-Specific Effects and the Role of Abuse Characteristics and Other Adverse Outcomes' (2018) 23(4) *Child Maltreatment* 399, 411.

30 Elizabeth Oddone, Mark L Genuis and Claudio Violato, 'A Meta-Analysis of the Published Research on the Effects of Child Sexual Abuse' (2001) 135(1) *The Journal of Psychology* 17, 19–21.

31 Judy Cashmore and Rita Shackel, *The Long-Term Effects of Child Sexual Abuse* (Child Family Community Australia Paper No 11, 2013).

32 Katherine J McLachlan, 'Using a Trauma-Informed Practice Framework to Examine How South Australian Judges Respond to Trauma in the Lives of Aboriginal Defendants' (2022) 11(2) *Journal of Qualitative Criminal Justice and Criminology* 181, 183.

33 Marylene Cloitre et al, 'A Developmental Approach to Complex PTSD: Childhood and Adult Cumulative Trauma as Predictors of Symptom Complexity' (2009) 22(5) *Journal of Traumatic Stress* 399, 405–6.

34 Cindy C Sangalang and Cindy Vang, 'Intergenerational Trauma in Refugee Families: A Systematic Review' (2017) 19(3) *Journal of Immigrant and Minority Health* 745, 745; Rachel Dekel and Hadass Goldblatt, 'Is There Intergenerational Transmission of Trauma? The Case of Combat Veterans' Children' (2008) 78(3) *American Journal of Orthopsychiatry* 281, 281.

35 Patrick J Morrissette and Michelle Naden, 'An Interactional View of Traumatic Stress among First Nations Counselors' (1998) 9(3) *Journal of Family Psychotherapy* 43, 45.

abuse, armed conflict, genocide, and displacement from one's homeland.[36] There has been close attention paid to the traumatic effects of the Holocaust on survivors and their descendants. It has been shown that the negative effects of intergenerational trauma can include a range of psychiatric symptoms, as well as greater vulnerability to stress.[37]

The mode of transmission of trauma between generations has been theorised to be interpersonal (such as through the communication style of the parents, the parent-child attachment style, family communication, the effect of parents' silence on their children, parental overprotection, or child maltreatment),[38] or otherwise biological or epigenetic.[39] Transmission of this trauma is unintentional.[40]

The ongoing effects of colonisation, current and past government policies, and systemic racism are linked to the intergenerational trauma experienced by, for example, Indigenous peoples in Australia and other jurisdictions.[41] In Australia, the question of intergenerational trauma generally arises in the context of sentencing Indigenous persons, but is rarely explicitly addressed.[42] It is notable that there are

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36 See, e.g.: Brent Bezo and Stefania Maggi, 'Living in "Survival Mode": Intergenerational Transmission of Trauma from the Holodomor Genocide of 1932–1933 in Ukraine' [2015] (134) *Social Science and Medicine* 87, 87; Luciana Lorens Braga, Marcelo Feijó Mello and José Paulo Fiks, 'Transgenerational Transmission of Trauma and Resilience: A Qualitative Study with Brazilian Offspring of Holocaust Survivors' (2012) 12(1) *BMC Psychiatry* 134, 134; Rachel Lev-Wiesel, 'Intergenerational Transmission of Trauma across Three Generations: A Preliminary Study' (2007) 6(1) *Qualitative Social Work* 75, 75.

37 Rachel Yehuda et al, 'Influences of Maternal and Paternal PTSD on Epigenetic Regulation of the Glucocorticoid Receptor Gene in Holocaust Survivor Offspring' (2014) 171(8) *American Journal of Psychiatry* 872, 876.

38 Sophie Isobel et al, 'Preventing Intergenerational Trauma Transmission: A Critical Interpretive Synthesis' (2018) 28(7–8) *Journal of Clinical Nursing* 1100, 1101.

39 See, e.g., Natan P F Kellermann, 'Epigenetic Transmission of Holocaust Trauma: Can Nightmares Be Inherited?' (2013) 50(1) *Israel Journal of Psychiatry and Related Sciences* 33, 34.

40 Linda O'Neill et al, 'Hidden Burdens: A Review of Intergenerational, Historical and Complex Trauma, Implications for Indigenous Families' (2018) 11(2) *Journal of Child and Adolescent Trauma* 173, 173.

41 Leilani Darwin et al, *Intergenerational Trauma and Mental Health* (Report, Australian Institute of Health and Welfare, 26 May 2023); Nola Purdie, Pat Dudgeon and Roz Walker (eds), *Working Together: Aboriginal and Torres Strait Islander Mental Health and Wellbeing Principles and Practice* (Commonwealth of Australia, 1st ed, 2010); Karen Menzies, 'Understanding the Australian Aboriginal Experience of Collective, Historical and Intergenerational Trauma' (2019) 62(3) *International Social Work* 1522.

42 Few cases explicitly reference 'intergenerational trauma', but key cases considering the legacies of colonisation and sentencing are: *Bugmy* (n 17); *Munda v Western Australia* (2013) 249 CLR 600 ('*Munda*'); *DPP (Vic) v Poole (a pseudonym)* [2020] VCC 340 ('*Poole*'); *DPP (Vic) v Lindsay* [2021] VCC 636. Judge Johns has repeatedly acknowledged the role of trauma in shaping offending behaviour in his Honour's sentencing

far fewer references to intergenerational trauma in sentencing remarks in Australia than there are references to more widely acknowledged forms of trauma, such as child sexual abuse. This is unlikely to be due to fewer offenders carrying intergenerational trauma than other forms of trauma,[43] but is more likely to be explained by other barriers to raising this issue before the courts, such as the difficulty of adducing evidence of this form of trauma.[44]

Intergenerational trauma is somewhat contested in the courts, as it is difficult to provide concrete evidence of its effects in the same ways that it is possible to link an offender's primary experience of trauma to their offending behaviour. Identifying the presence of intergenerational trauma is a complex exercise that generally requires specialist investigation and expert evidence. For example, adducing evidence about an offender's connection to the Stolen Generations requires careful, culturally sensitive conversations and rapport building with the offender. Further, such an investigation needs to explore the ways in which this trauma has affected the life of the individual.[45]

3 *Contested Forms of Trauma: Discrimination*

There is emerging evidence that more insidious forms of trauma, such as ongoing exposure to social inequality,[46] racism,[47] or everyday sexism,[48] can also have adverse effects on mental health and can lead to Post-Traumatic Stress Disorder ('PTSD') symptoms. In addition, negative events or interactions that are perceived

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remarks in the Koori Court Division of the County Court of Victoria. See, e.g.: *DPP (Vic) v Thorpe-Young* [2023] VCC 2473; *Poole* (n 42); *DPP v Atkinson* [2024] VCC 738. There has also been at least one case in Victoria involving the sentencing of a child survivor of the holocaust: see the case of 'E' in Vicki Gordon, *The Experience of Being a Hidden Child Survivor of the Holocaust* (PhD thesis, Melbourne University, 2002) 278–9.

43 Sue Gerhardt, *Why Love Matters: How Affection Shapes a Baby's Brain* (Routledge, 2nd ed, 2015) 209.

44 *Bugmy* (n 17). See also: *Honeysett* (n 17); Maria Tumarkin, *Axiomatic* (Brow Books, 2018) 41–58.

45 See also: Carolyn Holdom, 'Sentencing Aboriginal Offenders in Queensland: Toward Recognising Disadvantage and the Intergenerational Impacts of Colonisation during the Sentencing Process' (2015) 15(2) *Queensland University of Technology Law Review* 50, 70; Alister McKeich, 'The Inequality of Incarceration: Addressing the Impacts of Colonisation through the Judiciary (Australia v Canada)' (Essay, Melbourne University, 2018).

46 See, e.g., Roman Pabayo et al, 'Income Inequality among American States and the Conditional Risk of Post-Traumatic Stress Disorder' (2017) 52(9) *Social Psychiatry and Psychiatric Epidemiology* 1195, 1195.

47 See, e.g., Monnica T Williams et al, 'Assessing Racial Trauma within a DSM–5 Framework: The UConn Racial/Ethnic Stress & Trauma Survey' (2018) 3(4) *Practice Innovations* 242.

48 See, e.g., Susan H Berg, 'Everyday Sexism and Posttraumatic Stress Disorder in Women: A Correlational Study' (2006) 12(10) *Violence Against Women* 970.

as discriminatory that might not in and of themselves constitute a traumatic event may, in cumulation, result in outcomes that mirror those of trauma.[49] Although the relationship between collective trauma, discrimination, and psychological distress is complex, for the purpose of this article, it is sufficient to say that for some individuals, the experience of discrimination stressors can compound or precipitate psychological distress.[50] These experiences can be referred to as 'microaggressions', and can be particularly difficult to identify, due to the subtle and imperceptible nature of their existence.[51] For those who do not experience discrimination, it may be difficult to believe that the discrimination exists, and that it can have such pernicious effects.

C *Effects of Trauma and its Legal Implications*

The effects of trauma can be as varied as the sources of trauma. Traumatic experiences can elicit a range of cognitive, emotional, physical, and behavioural responses from individuals. Common immediate responses include shock, numbness, dissociation, nausea, memory loss, and withdrawal. These effects, and others, can persist beyond the immediate or short-term experience of the trauma. Contemporary trauma research increasingly recognises that individuals may encode, process, and recall traumatic events in varied and often non-linear ways. Rather than a uniform 'repression' of trauma, empirical studies indicate a spectrum of cognitive and emotional responses. According to Judith Herman, traumatic memories are often stored in sensory and emotional fragments rather than coherent narratives.[52] Similarly, Bessel van der Kolk observes that trauma may alter the functioning of brain regions responsible for memory integration, resulting in partial, distorted, or delayed recollection.[53] While some individuals may suppress or avoid traumatic memories, this is neither inevitable nor universal. Therefore, when trauma is raised in sentencing, its psychological impact should be assessed through a case-specific, evidence-based approach informed by contemporary clinical insights.

Longer-term effects of trauma can vary greatly between individuals. Longer-term issues that have been linked to trauma include poor concentration, unwanted memories, depression, volatile emotions, hyperarousal, gastrointestinal problems, and increased substance use or abuse.[54] Notably, intentional acts by other human beings that threaten the life or bodily integrity of children, or their primary support

49 Kimberly Matheson et al, 'Traumatic Experiences, Perceived Discrimination, and Psychological Distress among Members of Various Socially Marginalized Groups' [2019] (10) *Frontiers in Psychology* 1, 1, 14.

50 Ibid 14.

51 Derald Wing Sue, *Microaggressions in Everyday Life: Race, Gender, and Sexual Orientation* (John Wiley and Sons, 2010) 14–15.

52 See Judith L Herman, *Trauma and Recovery* (Basic Books, 1992).

53 See *The Body Keeps the Score* (n 1).

54 Bessel A van der Kolk, 'The Body Keeps the Score: Memory and the Evolving Psychobiology of Posttraumatic Stress' (1994) 1(5) *Harvard Review of Psychiatry* 253.

systems and caregivers, have particularly severe and wide-ranging adverse effects on children's psychosocial functioning and neurodevelopment.[55]

No two individuals will have the exact same response to a traumatic event, due to a range of variable factors. Studies on the longitudinal outcomes for people who have shared exposure to traumatic events, such as research on survivors of the Holocaust, have shown that there are a range of variables that may influence why some individuals are more resilient than others.[56] These include: (1) neurobiological factors (such as stress regulation and genetic predisposition); (2) secure attachment in early childhood; (3) the presence of supportive social networks; (4) access to stable environments; (5) cognitive and emotional skills (such as self-regulation, optimism, and problem-solving); and (6) cultural identity or community belonging, particularly for Indigenous and minority populations.[57]

Trauma research suggests that for those who experience ongoing effects of trauma, there are a few commonalities in the manifestation of these effects. A feeling of a fundamental lack of safety is pervasive and common to many trauma survivors.[58] Survivors may experience trauma so overwhelming that the human capacity to 'perceive, register, know, transmit, record and remember'[59] is impaired, triggering an archaic 'survival brain' response based on ancient emotions involved with real and perceived threat.[60] This can also be described as the fight, flight or freeze response, which can be triggered in seemingly unrelated situations. Therefore, a traumatised person may react with anger or violence to situations or people that

55 Wendy D'Andrea et al, 'Understanding Interpersonal Trauma in Children: Why We Need a Developmentally Appropriate Trauma Diagnosis' (2012) 82(2) *American Journal of Orthopsychiatry* 187, 194–5; Joseph Spinazzola et al, 'When Nowhere Is Safe: Interpersonal Trauma and Attachment Adversity as Antecedents of Posttraumatic Stress Disorder and Developmental Trauma Disorder' (2018) 31(5) *Journal of Traumatic Stress* 631, 634–40.

56 See, e.g., Rachel Lev-Wiesel and Marianne Amir, 'Posttraumatic Stress Disorder Symptoms, Psychological Distress, Personal Resources, and Quality of Life in Four Groups of Holocaust Child Survivors' (2000) 39(4) *Family Process* 445, 447–9.

57 See, e.g.: Michael Ungar, 'The Social Ecology of Resilience: Addressing Contextual and Cultural Ambiguity of a Nascent Construct' (2011) 81(1) *American Journal of Orthopsychiatry* 1; Suniya S Luthar, Dante Cicchetti and Bronwyn Becker, 'The Construct of Resilience: A Critical Evaluation and Guidelines for Future Work' (2000) 71(3) *Child Development* 543.

58 *The Body Keeps the Score* (n 1) 66–8.

59 Dori Laub, 'Testimonies in the Treatment of Genocidal Trauma' (2002) 4(1) *Journal of Applied Psychoanalytic Studies* 63, 64. See also Dori Laub and Susanna Lee, 'Thanatos and Massive Psychic Trauma: The Impact of Death Instinct on Knowing, Remembering, and Forgetting' (2003) 51(2) *Journal of the American Psychoanalytic Association* 433, 434.

60 Allan N Schore, 'Relational Trauma and the Developing Right Brain: An Interface of Psychoanalytic Self Psychology and Neuroscience' (2009) 1159(1) *Annals of the New York Academy of Sciences* 189, 198.

may not be objectively threatening.[61] In the key cases concerning trauma, there are several offence circumstances that suggest that this may have been in play.[62] Unsurprisingly, many of the most prevalent ongoing effects of trauma are likely to create a propensity towards behaviours that may lead some survivors into contact with the criminal law.[63]

1 *Narrative Incoherence*

A traumatised person can experience a collapsing of past and present.[64] Such a person may have difficulties in conducting narrative interviews as a means of researching the effects of trauma.[65] This is due to a 'crisis of testimony', which can occur when the interviewer and the interviewee do not have shared experiences,[66] or where the speaker describes 'extraordinary testimony' that is beyond the scope of what the listener has thus far known to be true.[67]

In the context of the criminal law, the difficulty faced by traumatised individuals in conveying their experiences through language can prevent their full participation in their sentencing hearing. In addition to the crisis of testimony, the failure of the courts to listen not only to the content provided, but to the silences in testimony, can lead to an unbridgeable distance between the sentenced and sentencer.

2 *Clinical Diagnoses: PTSD*

The effects of trauma may lead an individual to develop symptoms that fit the diagnostic criteria for PTSD or another psychiatric condition with overlapping

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61 *The Body Keeps the Score* (n 1) 66–8.

62 For example, the case of *R v Fuller-Cust* (2002) 6 VR 496 contains reference to prior offending triggered by inappropriate comments from a social worker to the offender: at 501 [11] (Batt JA). See also: *Bugmy* (n 17); *Munda* (n 42).

63 Child abuse and neglect, poverty, sexual molestation, and witnessing violence are, among others, the most common risk factors for post-traumatic reactions, aggression, and antisocial behaviour: Vittoria Ardino, 'Offending Behaviour: The Role of Trauma and PTSD' (2012) 3(1) *European Journal of Psychotraumatology* 1, 1.

64 *The Body Keeps the Score* (n 1) 15–16.

65 Ibid.

66 The notion of a 'crisis of testimony' was raised in Shoshana Felman and Dori Laub, *Testimony: Crises of Witnessing in Literature, Psychoanalysis, and History* (Routledge, 1992). A German researcher also raised the notion of a 'crisis of testimony' in relation to narrative interviews between a non-Jewish sociologist and Jewish victims of the Shoah (Holocaust): Birgit Schreiber, 'Jewish Hidden Children in Germany: Qualitative Analysis of Narrated Lifestories' (Paper presented at the 25th Silver Jubilee Annual Scientific Meeting of the International Society of Political Psychology, Berlin, 16–19 July 2002).

67 This notion is often applied to testimony of the Holocaust: Jonas Ahlskog, 'The Crisis of Testimony in Historiography' (2018) 12(1) *Journal of the Philosophy of History* 48, 48–50.

features, such as depression. PTSD was recognised for the first time in the third edition of the *Diagnostic and Statistical Manual of Mental Disorders*,[68] largely due to research conducted on the effects of the Vietnam War on soldiers. The American Psychiatric Association's classification of PTSD gave medical legitimacy to trauma patients, raising the public profile of the pathology,[69] and leading to funding of research on the condition.[70]

There is considerable ongoing debate over the conceptualisation of trauma responses as PTSD. There are various other proposed diagnoses, such as C-PTSD, and a developmental trauma diagnosis for children who have experienced trauma.[71] While psychiatric diagnoses such as PTSD have gained recognition, the broader conceptualisation of trauma remains contested.[72] The criminal law must be responsive to these evolving understandings to ensure that trauma is consistently and fairly considered as a mitigating factor.

3 *Ongoing Stressors, Trauma and Effects on Physical Health*

There is strong evidence that trauma can have detrimental effects on an individual's physical health.[73] In addition, as noted above, childhood trauma (or adverse childhood experiences) has been linked to a range of adverse health outcomes, including higher rates of chronic disease and lowered life expectancy. Research on members of the Stolen Generations has found increased rates of adverse health outcomes.[74]

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68 *The Body Keeps the Score* (n 1) 29, citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Association Publishing, 3rd ed, 1980).

69 Bond and Craps (n 13) 7.

70 *The Body Keeps the Score* (n 1) 19.

71 Complex Post-Traumatic Stress Disorder ('C-PTSD') is formally recognised in the World Health Organization's ICD-11 as a distinct diagnostic entity. It is characterised by the core symptoms of PTSD, along with persistent disturbances in self-organisation, including affect dysregulation, negative self-concept, and relational difficulties. See: World Health Organization, *International Classification of Diseases: 11th Revision (ICD-11)* <https://icd.who.int/browse/2025-01/mms/en#585833559>; Bessel A van der Kolk and Lisa M Najavits, 'Interview: What Is PTSD Really? Surprises, Twists of History, and the Politics of Diagnosis and Treatment' (2013) 69(5) *Journal of Clinical Psychology* 516, 518.

72 World Health Organization, *International Classification of Diseases: 11th Revision (ICD-11)* <https://icd.who.int/browse/2025-01/mms/en#585833559>; Anushka Pai, Alina M Suris and Carol S North, 'Posttraumatic Stress Disorder in the DSM-5: Controversy, Change, and Conceptual Considerations' (2017) 7(1) *Behavioural Sciences* 1, 1, 5.

73 *The Body Keeps the Score* (n 1) 266–7; James W Hopper et al, 'Preliminary Evidence of Parasympathetic Influence on Basal Heart Rate in Posttraumatic Stress Disorder' (2006) 60(1) *Journal of Psychosomatic Research* 83, 88–9; Arieh Y Shalev et al, 'Auditory Startle Response in Trauma Survivors with Posttraumatic Stress Disorder: A Prospective Study' (2000) 157(2) *American Journal of Psychiatry* 255, 255.

74 Australian Institute of Health and Welfare (n 27) iv–v.

Research on African American populations has found adverse health outcomes when compared with white Americans, even when controlling for the health effects of socio-economic status.[75] The effect on the bodies of marginalised people who are exposed to constant large and small stressors, including racism and microaggressions, has been described as 'weathering'.[76] Trauma can have lasting effects on an individual's physical health, which may indirectly affect behaviour and sentencing considerations. Understanding these impacts is crucial for judges when assessing the broader context of an offender's life and the appropriate weight to give to trauma in sentencing.

III The Relevance of Trauma to Sentencing

A *A Legislative Framework*

In all Australian jurisdictions, sentencing is guided by principles drawn from statute and case law.[77] In Victoria, the *Sentencing Act 1991* (Vic) ('*Sentencing Act*') provides the statutory framework for sentencing. Part 2 of the *Sentencing Act* outlines the governing principles of sentencing in Victoria, restating principles established at common law. Section 5(2) states that in sentencing an offender, a court *must* have regard to a range of factors, including but not limited to:

- the maximum penalty prescribed for the offence;[78]
- current sentencing practices;[79]
- the nature and gravity of the offence;[80]
- the offender's culpability and degree of responsibility for the offence;[81]
- the impact of the offence on any victim of the offence;[82]
- the offender's previous character;[83] and
- the presence of any aggravating or mitigating factor concerning the offender or of any other relevant circumstances.[84]

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75 See, e.g., National Academies of Sciences, Engineering and Medicine, *Communities in Action: Pathways to Health Equity* (National Academies Press, 2017) 33–7.

76 Arline T Geronimus et al, '"Weathering" and Age Patterns of Allostatic Load Scores among Blacks and Whites in the United States' (2006) 96(5) *American Journal of Public Health* 826, 826; Patia Braithwaite, 'Biological Weathering and Its Deadly Effect on Black Mothers', *Self* (Web Page, 30 September 2019) <https://www.self.com/story/weathering-and-its-deadly-effect-on-black-mothers>.

77 Sentencing Advisory Council, *Sentencing Guidance in Victoria* (Report, June 2016) 10 [2.2].

78 *Sentencing Act* (n 4) s 5(2)(a).

79 Ibid s 5(2)(b).

80 Ibid s 5(2)(c).

81 Ibid s 5(2)(d).

82 Ibid s 5(2)(daa).

83 Ibid s 5(2)(f).

84 Ibid s 5(2)(g).

This broad statutory mandate allows for the personal circumstances of the offender, such as prior experiences of trauma, to be presented as relevant evidence by both the prosecution and the defence.

An offender's prior history of trauma will be of greater relevance if it can be established that there is a nexus between the trauma and the relevant offending.[85] That is to say, if the trauma had a 'causal relationship' with the offending,[86] it will be of particular relevance to sentencing.

This section examines in detail those Victorian sentencing principles that facilitate the consideration of trauma. It draws on several case studies of sources of trauma, with a particular focus on the sentencing of offenders who have suffered childhood neglect and/or are of Aboriginal heritage. Here, justifications for mitigating an offender's sentence because of their experience of trauma are examined with a specific focus on how trauma reduces an offender's moral culpability demonstrating the need for a principled approach to integrating trauma into sentencing.

B *The Relevance of Trauma to Sentencing*

1 *Key Principles*

In Victoria, the court must apply an 'instinctive synthesis' in arriving at sentence. The methodology of 'instinctive synthesis' was described in *Markarian v The Queen* in the following way:

> [T]he method of sentencing by which the judge identifies all the factors that are relevant to the sentence, discusses their significance and then makes a value judgment as to what is the appropriate sentence given all the factors of the case. Only at the end of the process does the judge determine the sentence.[87]

It is accepted that the individual circumstances of an offender are always relevant to sentencing.[88] The consideration of an offender's background, including trauma, is always relevant as it may provide critical context for the offending and affect the determination of appropriate sentencing measures.[89]

Where there is evidence of a traumatic event or events in an offender's past, the relevance of this evidence will depend on the circumstances of each case.[90] Nevertheless, the key principles guiding the sentencing synthesis were distilled in

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85 *DPP (Vic) v Terrick* (2009) 24 VR 457, 468 [46] (Maxwell P, Redlich JA and Robson AJA) ('*Terrick*').

86 *DPP (Vic) v Green* [2020] VSCA 23, 31 [96] (Maxwell P, Priest and Kaye JJA).

87 *Markarian* (n 5) 378 [51] (McHugh J).

88 *Sentencing Act* (n 4) s 5(1)(a); *McKee* (n 4) 92, 94.

89 *Terrick* (n 85) 469 [47].

90 Ibid 468 [46].

the 2009 Victorian Court of Appeal case of *DPP (Vic) v Terrick* ('*Terrick*').[91] In *Terrick*, the Victorian Director of Public Prosecutions appealed against sentences imposed on three co-offenders who were involved in an unprovoked and random attack that resulted in catastrophic injuries to the victim.[92] The appeal was made on the basis of manifest inadequacy. A question of principle for the Court was the extent to which an offender's disadvantaged background will mitigate their offending.[93] In making its finding, the Court outlined key propositions, emphasising that while the same sentencing principles apply to all offenders regardless of race, a different outcome may be warranted if evidence shows that trauma, particularly related to Aboriginality, had a specific impact on the offender's behaviour.[94]

The second principle discussed in *Terrick* emphasised that an offender's background is 'explanatory' rather than excusatory.[95] Evidence of an offender's background can provide an explanation of the context and antecedents to the offending. This is because social, environmental and cultural factors might, as noted in *Terrick*, 'identify influences which had contributed to the commission of the offence; or reveal circumstances relevant to the nature of the sentence which should be imposed'.[96] This statement should not be taken to mean, however, that background circumstances of trauma can never play a mitigatory role in the sentencing process. Clearly, background circumstances of trauma can be relevant in a range of ways that serve to temper the sentence imposed on an offender. This may occur through the enlivening of the *R v Verdins* ('*Verdins*') principles (where there is a diagnosed mental condition),[97] through evidence that suggests reduced moral culpability of the offender,[98] or through the application of mercy by the sentencing court.

In *Terrick*, the Court held that an 'offender's background may explain the offending conduct, though whether it provides an excuse is a separate question'.[99] However, in many cases, the idea of a 'separate question' as to whether an offender's traumatic background could be 'excusatory' has been precluded.[100] Further, the notion that trauma is explanatory, not excusatory can be misleading,[101] as it gives the impression that evidence of trauma can never be more than 'explanatory', and that

91 Ibid.

92 Ibid 459 [2].

93 Ibid 459 [3].

94 Ibid 469 [47]–[50].

95 Ibid 468 [46].

96 Ibid 470 [51]. See also *R v Wright* [1998] VSCA 84, [5] (Maxwell P, Kaye, Niall, Forrest and Emerton JJA).

97 (2007) 16 VR 269, 276 [32] (Maxwell P, Buchanan and Vincent JJA) ('*Verdins*').

98 *DPP (Vic) v Herrmann* (2021) 290 A Crim R 110, 123–4 [58]–[77] ('*Herrmann*').

99 *Terrick* (n 85) 469 [47].

100 See, e.g., *AWF* (n 21).

101 Ibid 4 [5], 10 [33]–[34].

there is little overlap between the legal categories of 'explanation' and 'excuse'.[102] However, this article contends that such an interpretation is overly simplistic and fails to engage with the complex legal, philosophical, and moral issues raised by evidence of trauma. The criminal law fundamentally holds individuals accountable as rational agents, but trauma complicates this assumption by showing how past adverse experiences can limit free agency.

C *Trauma and the Purposes of Sentencing*

The current purposes of sentencing in Victoria are just punishment, deterrence (both specific and general), rehabilitation, denunciation, and community protection.[103] The High Court of Australia described the purposes of sentencing and their application in the following way:

> [P]rotection of society, deterrence of the offender and of others who might be tempted to offend, retribution and reform. The purposes overlap and none of them can be considered in isolation from the others when determining what is an appropriate sentence in a particular case. They are guideposts to the appropriate sentence but sometimes they point in different directions.[104]

When sentencing offenders with a history of trauma, it is important to recognise the distinct challenges and limitations that trauma imposes on the various sentencing purposes. While trauma may necessitate adjustments to how certain purposes are applied — such as rehabilitation, denunciation, community protection, and just punishment — the purpose of deterrence is uniquely compromised when applied to trauma-affected individuals.

Rehabilitation remains a viable and necessary goal in sentencing offenders with trauma. The rehabilitative approach seeks to address the underlying causes of criminal behaviour (including unresolved trauma) and offers therapeutic interventions aimed at reintegrating offenders into society. Research indicates that trauma-informed rehabilitative programs can significantly reduce the likelihood of reoffending by helping offenders develop healthier coping mechanisms and address the root psychological issues that contributed to their criminal conduct.[105]

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102 There is a well-established body of literature that explores the distinction between justifications and excuses or broader explanatory accounts of offending: see, e.g., Kent Greenawalt, 'Distinguishing Justifications from Excuses' (1986) 49(3) *Law and Contemporary Problems* 89.

103 *Sentencing Act* (n 4) ss 5(1)(a)–(e).

104 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (Mason CJ, Brennan, Dawson and Toohey JJ) ('*Veen*').

105 Trauma-informed rehabilitative programs within the criminal justice system are distinguished by their explicit recognition of the role that trauma plays in shaping behaviour, psychological functioning, and treatment engagement. These programs are guided by principles developed by the Substance Abuse and Mental Health Services Administration, including safety, trustworthiness, choice, collaboration,

Similarly, the principle of denunciation can still be applied effectively in cases involving trauma-affected offenders. Denunciation serves the societal function of expressing moral condemnation of criminal behaviour, signalling to both the offender and the public that such conduct is unacceptable. Even when trauma is present, the court can emphasise the seriousness of the offence and the harm caused to the victim and society, without necessarily overlooking the influence of trauma on the offender's actions. In this way, the court maintains the public's confidence in the justice system by upholding shared moral standards.

The need to protect the community also remains a crucial sentencing purpose, even when the offender has experienced trauma. Protecting society from individuals who pose a risk of harm is a fundamental role of the criminal justice system, and this principle does not lose relevance in cases of trauma. Sentencing may still involve incapacitation — through imprisonment or other measures — to safeguard the public, especially if the offender's trauma-related behaviour presents a persistent risk of harm. Importantly, though, a trauma-informed approach should be adopted alongside this principle, ensuring that the offender's psychological needs are addressed, which can ultimately contribute to long-term community protection through reduced recidivism.

Further, just punishment can still be applied to individuals with trauma, ensuring that the sentence reflects the gravity of the offence while considering the offender's culpability. The principle of proportionality allows the court to balance the seriousness of the crime with the offender's personal circumstances, including the impact of trauma.[106] This ensures that the punishment is fair, without disproportionately penalising the offender for actions that may have been influenced by their traumatic experiences.

However, the principle of deterrence stands apart as the most difficult to reconcile with trauma. Deterrence assumes that individuals make rational decisions to commit or refrain from criminal behaviour based on their assessment of the likely consequences. Yet, trauma — particularly when unresolved — impairs cognitive functioning and decision-making processes, often rendering the threat of punishment ineffective as a deterrent.[107] Trauma-affected individuals may act impulsively or out of survival instincts, without fully considering the legal consequences of their actions. In such cases, the deterrent effect of punishment is significantly weakened, if not entirely nullified, as these individuals do not respond to punishment in the

and empowerment. Importantly, empirical research confirms that trauma-informed practices are more than theoretical ideals — they produce measurable benefits: Jill S Levenson, David S Prescott and Gwenda M Willis, 'Trauma-Informed Treatment Practices in Criminal Justice Settings' in Elizabeth Jeglic and Cynthia Calkins (eds), *Handbook of Issues in Criminal Justice Reform in the United States* (Springer Nature, 2022) 483, 491–5.

106 *Hoare v The Queen* (1989) 167 CLR 348, 354.

107 Russell A Barkley, *Attention-Deficit Hyperactivity Disorder: A Handbook for Diagnosis and Treatment* (The Guilford Press, 4th ed, 2014) 220–8.

same way that a person without trauma might. Further, the application of deterrence often leads to harsher sentences, particularly when general deterrence is emphasised.[108] When applied to trauma-affected individuals, this approach overlooks the root causes of the person's offending behaviour and prioritises punitive measures over rehabilitative or restorative ones. Therefore, while other sentencing purposes can be adapted or maintained in cases involving trauma, deterrence remains fundamentally undermined by the very nature of trauma's effects on the human mind. For this reason, the next section considers the application of deterrence to trauma-affected offenders, illustrating unjust outcomes, particularly in matters where moral culpability is to be diminished. Further, the reliance on deterrence in sentencing trauma-affected offenders often leads to inconsistent and arbitrary outcomes. Judges are tasked with balancing sentencing principles without clear guidelines on how to weigh trauma as a mitigating factor. This lack of consistency undermines the integrity of the sentencing process and erodes public confidence in the legal system.

1 *Deterrence*

Deterrence is one of the primary purposes of sentencing, particularly in systems that focus on punishment and prevention of future crimes. The purpose of deterrence assumes that the imposition of penalties will discourage not only the convicted individual from reoffending (specific deterrence), but also the broader community from committing similar offences (general deterrence). However, the effectiveness of deterrence relies on the assumption that potential offenders weigh the consequences of their actions before committing a crime.

In practice, this assumption does not hold true for trauma survivors. As discussed above, the psychological effects of trauma can undermine an individual's capacity for rational thought and their ability to foresee or understand the consequences of their actions. For instance, individuals with trauma-related conditions, such as PTSD, may exhibit impulsive or aggressive behaviours as coping mechanisms, behaviours that are not easily dissuaded by the threat of punishment.

Where an offender is shown to be suffering from a mental disorder, abnormality, or impairment of mental functioning arising from trauma, the *Verdins* principles may guide the court's consideration of how that condition should be taken into account in sentencing. In *Verdins*, the Victorian Court of Appeal outlined six general principles relating to how an offender's mental illness may be relevant to the sentencing exercise. In relation to deterrence, the Court held that whether general and/or specific deterrence should be 'moderated or eliminated', depends on 'the nature and severity of the symptoms exhibited by the offender, and the effect of the condition on the mental capacity of the offender, whether at the time of the offending or at the date of sentence or both'.[109] However, the application of the *Verdins* principles is dependent on whether the offender has a 'mental disorder

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108 Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 11th ed, 2025) 234.

109 *Verdins* (n 97) 276 [32].

or abnormality or an impairment of mental function'.[110] For example, in *R v AWF* ('*AWF*'), Ormiston JA stated that

> [i]f there is evidence to link [traumatic background circumstances] to a condition or state of mind which is a proper basis for viewing the criminality of the offender as less serious or for saying that specific or general deterrence (or both) should have a smaller part to play in the sentencing process, then that condition will have a greater relevance and significance.[111]

This requirement for a link between the trauma and an offender's mental health may be appropriate for some forms of manifestations of trauma, but will exclude those offenders who are suffering from a trauma that simply does not manifest itself in a mental impairment.

Outside of the *AWF* decision, there is less explicit guidance provided to courts on the relationship between trauma and deterrence. In several cases, there is an acknowledgement that the 'broader context' of the offender and the offending (which could include the experience of trauma) may be relevant to the assessment of just punishment, and to deterrence.[112]

It is important to note that Indigeneity, in itself, is not indicative of trauma, and courts should avoid assumptions that equate cultural identity with psychological harm. Rather, where trauma is raised as a relevant consideration in sentencing, it must be substantiated on the facts of the individual case, consistent with the High Court's reasoning in *Bugmy v The Queen* ('*Bugmy*').[113] While many Aboriginal and Torres Strait Islander individuals have been disproportionately affected by the intergenerational consequences of colonisation, systemic discrimination, and institutionalisation, these factors must be judicially assessed in light of individualised evidence rather than assumed based on identity alone.

Nevertheless, there has been ongoing inconsistency in judicial approaches to the question of whether, and to what extent, Indigeneity may serve as an indication of trauma, and how such considerations should inform mitigation. In some cases, the impact of historical and intergenerational disadvantage has been treated as reducing moral culpability.[114] In others, it has been seen as relevant to the reduced efficacy or fairness of specific deterrence.[115] This inconsistency underscores the need for a principled and evidence-based sentencing framework, one that neither essentialises

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110 Jamie Walvisch et al, 'Whydunnit? Causal Explanations in Sentencing Offenders with Mental Health Problems' in Kay Wilson et al (eds), *The Future of Mental Health, Disability and Criminal Law* (Routledge, 2024) 161, 164; *Verdins* (n 97) 271 [5].

111 *AWF* (n 21) 4 [6] (Ormiston JA).

112 See, e.g., *Neal v The Queen* (1982) 149 CLR 305, 324–6 (Brennan J). See also *R v Fernando* (1992) 76 A Crim R 58; *Herrmann* (n 98).

113 *Bugmy* (n 17).

114 See, e.g., *DPP (Vic) v Todd* [2019] VSC 585, 25 [82]–[83] ('*Todd*') (Kaye JA).

115 See, e.g., *Bugmy* (n 17) 595 [44]–[45].

cultural identity nor disregards the well-documented structural conditions that may shape offending behaviour among Indigenous peoples.

The inconsistency in how courts address the relationship between trauma and deterrence underscores the need for clear judicial guidance. This article suggests that background trauma — especially when it results from systemic policy failures such as institutional abuse or colonial impacts — should significantly diminish the application of general deterrence. An offender who has had a traumatic background is not a good vehicle for general deterrence. Further, not all trauma manifests as a diagnosable mental condition, raising questions about how trauma should be evaluated when it does not fit neatly into existing legal categories. The current lack of clarity and consistency in addressing trauma as a mitigating factor points to a broader need for reform in the criminal justice system. To facilitate this process, the next Part considers the justifications for trauma mitigating an offender's sentence by focusing on the relationship between trauma and moral culpability and the application of the residual sentencing principle of mercy.

IV Justification for Mitigation

A *What is Mitigation?*

Sentencing is not merely an exercise in proportioning punishment to crime, but a nuanced and context-sensitive process wherein judicial discretion must be guided by both principle and the particularities of individual cases. Mitigating and aggravating factors function as judicial tools that permit a calibrated response to the moral and social dimensions of offending, anchored within a principled framework of sentencing jurisprudence.

Mitigating factors serve to attenuate the perceived culpability of the offender or otherwise justify a reduction in the severity of the sentence. A range of factors can be considered as mitigating, including: (1) an early plea of guilty; (2) demonstrable remorse or cooperation with authorities; (3) the presence of mental illness or intellectual impairment; (4) absence of prior convictions; and (5) circumstances of provocation or duress, which may constrain the offender's autonomous decision-making.[116] Importantly, mitigation is not about excusing criminal conduct, but about embedding it within a broader framework of human and legal context that can appropriately inform sentencing outcomes.[117] Mitigation is a right owed to the offender, provided that there is a basis for grounds of mitigation.[118]

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116 See, e.g.: Freiberg (n 4) ch 5; Jessica Jacobson and Mike Hough, 'Personal Mitigation: An Empirical Analysis in England and Wales' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 146, 149–55.

117 Andrew Ashworth, 'Re-Evaluating the Justifications for Aggravation and Mitigation in Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 22, 27.

118 *R v Storey* (1996) 89 A Crim R 519, 531–2 (Winneke P, Brooking, Hayne JJA and Southwell AJA); Richard Fox, 'The Burden of Proof at Sentencing: Storey's Case' (1998) 24(1) *Monash University Law Review* 194, 200.

Conversely, aggravating factors function to elevate the perceived gravity of the offence or amplify the offender's moral culpability.[119] These factors may include evidence of premeditation, the use of weapons or violence, the victim's vulnerability, a pattern of repeat offending, or offences motivated by prejudice, such as hate crimes.[120] Proportionality is central in this evaluative process, as it cautions against 'double-counting', that is, giving undue weight to elements already encapsulated within the statutory definition of the offence.[121]

There are procedural and normative foundations that underpin the application of these principles. Sentencing must be grounded in fairness and transparency, ensuring that judicial reasoning is principled, intelligible, and subject to public scrutiny.[122] The tension between judicial discretion and sentencing consistency is a recurrent theme. While individualised justice remains a key aim, unfettered discretion risks undermining uniformity and equality before the law. Enhancing public confidence in sentencing practices is therefore closely linked to the transparent and principled application of both mitigating and aggravating considerations. Ultimately, the concepts of mitigation and aggravation are not rigid formulas, but rather, dynamic principles that must be interpreted through the lenses of just deserts theory and consequentialist reasoning. These principles enable courts to reflect compassion, address social and systemic disadvantage, promote rehabilitation, and advance deterrent objectives, each within the bounds of a culturally and institutionally contingent legal environment.

The relationship between trauma and sentencing raises fundamental questions about the justification for mitigation based on an offender's prior experiences. Some sources of mitigation, such as an offender's mental illness, are generally mitigating because they indicate that the offender's moral culpability for the commission of the crime is reduced by enlivening the *Verdins* principle.[123] However, this simplistic link between trauma and moral culpability overlooks the complexities of assigning blame and responsibility in criminal law. It raises the issue of whether trauma should always diminish culpability or whether, in some cases, it could exacerbate the need for punishment. This Part explores the problematic nature of relying on trauma as a mitigating factor and the challenges for judges who must navigate these moral and legal complexities.

B *Reduction of Moral Culpability*

The term 'moral culpability' is frequently invoked in sentencing discourse, yet often without a thorough or consistent explanation in judicial reasoning. It is a

119 Julian Roberts, 'Punishing, More or Less: Exploring Aggravation and Mitigation at Sentencing' in Julian Roberts (ed), *Mitigation and Aggravation at Sentencing* (Cambridge University Press, 2011) 1, 1–5.

120 Ibid. See also Freiberg (n 4) ch 5.

121 Roberts (n 119) 6.

122 Ibid 13–15.

123 *Verdins* (n 97) 276 [32].

concept that bridges legal and ethical domains, and understanding its meaning is essential for evaluating how mitigation is applied in sentencing. Moral culpability can be understood as referring to the degree of blameworthiness attributable to an offender, not merely in legal terms, but in light of broader moral, psychological, and social considerations. As Niki Kiepek argues in her analysis of Canadian judicial decisions, moral culpability reflects an awareness that individuals do not always exercise free will in an unencumbered fashion; rather, their choices may be constrained by systemic barriers, social deprivation, and lived trauma.[124]

In sentencing, moral culpability occupies a central position in just deserts theory, where punishment is proportionate to the personal blameworthiness of the offender.[125] Here, 'moral' entails a normative judgement about the offender's state of mind, intentions, and capacity to act otherwise. It implies a qualitative evaluation of character, decision-making autonomy, and the extent to which external influences have compromised the individual's volitional control.

However, courts often fail to delineate how moral culpability differs from or overlaps with *legal culpability*, which is more narrowly concerned with objective elements of an offence, such as actus reus and mens rea.[126] This conceptual ambiguity can lead to inconsistent applications of mitigation where moral blameworthiness is either under-emphasised or inadequately supported by evidence. This difficulty in defining and applying the concept of moral culpability becomes particularly salient in cases where courts are asked to consider the impact of an offender's traumatic background on their degree of blameworthiness.

In a number of sentencing decisions, the courts acknowledge that an offender's experience of trauma can lessen their moral culpability.[127] In *Bugmy*, for example, the High Court described the manner in which the evidence of a traumatic background presented in that case was relevant to the assessment of the offender's moral culpability:

> The circumstance that an offender has been raised in a community surrounded by alcohol abuse and violence may mitigate the sentence because his or her moral culpability is likely to be less than the culpability of an offender whose formative years have not been marred in that way.[128]

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124 Niki Kiepek, 'Discursively Embedded Institutionalized Stigma in Canadian Judicial Decisions' (2025) 52(1) *Contemporary Drug Problems* 82, 93, 96.

125 Erin I Kelly, *The Limits of Blame: Rethinking Punishment and Responsibility* (Harvard University Press, 2018) chs 2, 3.

126 Andrew Ashworth, 'Legal and Moral Responsibility' (2009) 4(6) *Philosophy Compass* 978, 978–80.

127 *Bugmy* (n 17) 595 [44]; *Veen* (n 104) 493–4.

128 *Bugmy* (n 17) 594 [40]. This was described by the Victorian Court of Appeal in *Herrmann* (n 98) as the more 'general' expression of sentencing principle: at 118 [36].

This is because, the Court reasoned:

> The experience of growing up in an environment surrounded by alcohol abuse and violence may leave its mark on a person throughout life. Among other things, a background of that kind may compromise the person's capacity to mature and to learn from experience. It is a feature of the person's make-up and remains relevant to the determination of the appropriate sentence, notwithstanding that the person has a long history of offending.[129]

The High Court found that the effects of profound childhood deprivation do not diminish with time, and that an offender does not exhaust their right to refer to this traumatic background; 'full weight' must be given to this background each time an offender comes before the court for sentencing.[130] Nevertheless, the Court noted that this does not mean that an offender's deprived background has 'the same (mitigatory) relevance for all of the purposes of punishment':

> Giving weight to the conflicting purposes of punishment is what makes the exercise of the discretion so difficult. An offender's childhood exposure to extreme violence and alcohol abuse may explain the offender's recourse to violence when frustrated such that the offender's moral culpability for the inability to control that impulse may be substantially reduced. However, the inability to control the violent response to frustration may increase the importance of protecting the community from the offender.[131]

However, this reasoning presents significant challenges. It risks overgeneralising trauma's impact, thereby potentially normalising a reduction in culpability without adequately considering the nuances of each case. Moreover, while the Court in *Bugmy* suggested that trauma should be given 'full weight' at each sentencing instance, it simultaneously cautioned that not all forms of trauma hold equal relevance for every sentencing purpose.[132] This contradictory stance highlights a fundamental tension: how can trauma simultaneously mitigate culpability, yet not universally diminish the need for punishment? This leaves sentencing judges with a broad discretion that may result in inconsistent sentencing outcomes.[133] Focusing on whether the connection between trauma and offending is sufficient to reduce culpability, rather than establishing a direct causal link, also presents risks. It invites subjective interpretation, potentially leading to arbitrary decisions also undermining the principle of consistency in sentencing.[134]

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129 *Bugmy* (n 17) 594–5 [43].

130 Ibid 595 [44].

131 Ibid. This was described by the Victorian Court of Appeal in *Herrmann* (n 98) as the more 'specific' expression of sentencing principle: at 118–9 [36]–[37].

132 *Bugmy* (n 17) 595 [44].

133 Walvisch et al (n 110) 169.

134 Ibid 172.

1 *Circumstances 'Not of His Making'*

The clearest articulation of why trauma mitigates sentencing is found in the Victorian Court of Appeal case of *DPP v Herrmann* ('*Herrmann*').[135] This case concerned the sentencing of an offender for the rape and murder of a woman in Melbourne in 2019. The matter came before the Court of Appeal due to the Victorian Director of Public Prosecution's appeal on the basis of manifest inadequacy. A full bench of the Court of Appeal considered the relationship between the offender's profound childhood deprivation and trauma, and the assessment of their moral culpability. In their decision, the Court of Appeal clarified the task of assessment of moral culpability, stating that [i]n assessing an offender's "moral culpability", the sentencing court is making a moral judgment on behalf of the community about the degree of blameworthiness to be attached to the offender for the offending conduct.[136]

In the Court's view, determining the degree of Mr Herrmann's 'blameworthiness' required a consideration of those factors that affected him, and which were connected to the commission of the two offences.[137] The Court of Appeal was assisted by detailed and considered expert evidence on the nature and causes of Mr Herrmann's mental condition. This expert evidence was heavily informed by case notes from the Victorian Aboriginal Child Care Agency.

Underpinning the Court's justification for mitigation was the notion that Herrmann was not the author of the circumstances that led to his development into someone capable of committing the unfathomable crime to which he pleaded. Crucially, the Court stated:

> Determining how harshly a particular offender is to be judged — and punished — often requires a close examination of the personal circumstances and background of the offender and an exploration of factors which may explain the offending conduct. *To the extent that offending conduct can be seen to reflect the operation of factors which are beyond the offender's control, the harshness of the moral judgment is likely to be moderated*.[138]

In concluding, the Court held:

> It must never be forgotten that the factors which explained this offending — [the offender's] profoundly damaged personality and the associated personality disorder — were not of his making. That is precisely why the judge was right to regard his moral culpability as reduced.[139]

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135 *Herrmann* (n 98).

136 Ibid 114 [14].

137 Ibid 114 [11].

138 Ibid 114 [14] (emphasis added).

139 Ibid 135 [113].

This statement discloses the underlying reasoning for mitigating a sentence on the basis of an offender's experience of trauma or deprivation. Mitigation is justified, as the trauma experienced by an offender was beyond their control, and therefore the effect it has had on them has also, to some degree, been beyond their control. This was not clearly stated in *Bugmy*, and it seems that courts either treat this matter as being too obvious to require articulation, or otherwise somewhat controversial and therefore better not to identify explicitly. The potential controversy behind this use of mitigation is that it runs counter to fundamental assumptions of the criminal law regarding the moral and legal responsibility of rational agents for their actions. Further, the Court's reliance on expert evidence in the decision of *Herrmann* underscores a critical limitation, which is that legal standards can vary widely depending on the availability and presentation of expert testimony.

2 *Lack of Instruction*

The theme of a 'lack of instruction' also emerges as an implicit basis for mitigation in a number of cases. Fundamental to this basis for mitigation are some commonly held beliefs about childhood development, including the fact that one's experience during childhood is relevant to the development of adult faculties, such as empathy.[140] Research has established that children who are emotionally secure and well-regulated rarely become antisocial individuals in the future.[141] Conversely, research has also shown that a child's social environment has a huge effect on the development of the prefrontal cortex, and therefore empathy and impulse control.[142]

Within this broad basis for mitigation, there are two strands of reasoning. The first rests on the notion that early developmental trauma or adverse experiences compromise an individual's ability to develop healthy coping mechanisms.[143] While there is rarely explicit reference to neurological development in the cases, there is acknowledgement of the fact that exposure to trauma can 'compromise the person's capacity to mature'.[144] This statement suggests that a person's ability to learn and grow is compromised by their exposure to trauma, such that even if they do have positive experiences or positive instruction after a traumatic event or experience, their capacity to integrate learnings and mature is reduced by their traumatic background. This could be described as the 'compromised functioning' basis of mitigation due to trauma.

This is a subtly different point from the second strand of reasoning, under the theme of a 'lack of instruction'. This second strand is justified by the fact that a lack of instruction renders someone less equipped to deal with adult life, and therefore

140 See, e.g.: *Bugmy* (n 17) 585 [44] (Bell and Gageler JJ); *Herrmann* (n 98).

141 See, e.g., Christiane Otto et al, 'Risk and Resource Factors of Antisocial Behaviour in Children and Adolescents: Results of the Longitudinal BELLA Study' (2021) 15(1) *Child and Adolescent Psychiatry and Mental Health* 1.

142 Adrian Raine, *The Anatomy of Violence* (Allen Lane, 2013) 260.

143 *Bugmy* (n 17) 594–5 [43].

144 Ibid.

their sentence should be mitigated because of the poor care that they received in the past.[145] Under this reasoning, there is less emphasis on the notion of compromised mental functioning, and instead a simple statement of the fact that adverse childhood experiences, and a lack of basic care and parental stability, place an individual at a disadvantage in comparison to others who have had a stable early life. The decision of *DPP (Vic) v Todd* ('*Todd*') illustrates this notion.[146] The Court noted that Todd, who was 19 at the time of his offending,[147] had grown up in a home described as an 'environment of rotting refuse, vermin and complete squalor'.[148] Similarly, his relationships were described as mirroring the decay of the physical environment.[149] This was relevant to the assessment of Todd's moral culpability on the basis that Todd was not to be sentenced as a person who has had a 'normal, stable and regular home environment'.[150]

While *Todd* is an example where the Court recognised the relevance of an offender's traumatic background, it is important to acknowledge that Todd received a life sentence with a non-parole period of 35 years.[151] The reduction in the non-parole period was primarily attributed to his guilty plea rather than any explicit judicial finding that his moral culpability was substantially reduced.[152] This outcome illustrates a critical point: recognition of trauma or adverse background does not necessarily lead to a significantly reduced sentence, particularly where the offence is of exceptional gravity. Rather, the seriousness of the offence remains a dominant factor in sentencing. This reinforces the broader argument that while trauma may inform the assessment of moral culpability, its practical influence on sentence length can be constrained by the weight given to other considerations, such as public protection, deterrence, and the objective seriousness of the offence.

Further, while the idea that childhood deprivation impairs psychosocial development has intuitive appeal, it lacks a clear legal standard for application. Rather it rests on the views of the individual sentencing judge.[153] If a sentencing judge believes that lack of instruction is a relevant basis for mitigation, this will receive greater attention. This also raises broader social policy questions about the role of the criminal justice system in addressing systemic inequities, which are not always aligned with the goals of punishment and deterrence. There ought to be more explicit acknowledgment that lack of care, neglect, and inadequate instruction has a negative effect on an individual's ability to develop prosocial skills, placing them at a significant disadvantage, even when no neurological impairment is present.

145 See *Todd* (n 114).

146 Ibid.

147 Ibid 2 [6], 9–10 [35].

148 Ibid 25 [82].

149 Ibid.

150 Ibid 25 [83].

151 Ibid 38 [125].

152 Ibid 34 [113], 38 [125].

153 *Bugmy* (n 17) 591–2 [34].

C *Sentencing Judges as Moral Arbiters*

The consideration of trauma, and its relationship with the offender's moral culpability, prima facie requires the sentencing judge to perform the role of a moral arbiter.[154] Here, the central question for the sentencing judge is 'the extent of "moral blameworthiness" which should properly attach to the offending conduct'.[155] That sentencing judges have the capacity, or at least may develop the capacity, to be moral reasoners has been discussed by both judges and philosophers alike. For example, Lord Goff suggested extracurially that inherent to a sentencing judge's function is 'searching for principles (often only of limited application) which accord with a professionally developed sense of justice and an (to that extent) intuitive sense of a just result'.[156] John Tasioulas also suggests that 'the relative political insularity of judges and the piecemeal and discursive nature of their decisions mark them out as well suited to perform certain vital social tasks through ethical reasoning'.[157] Finally, Irit Samet suggests that there are attributes of the judiciary that are borne out of their professional experience which increases their ability to

> get the answers to moral questions right. First, the procedure and etiquette of adjudication create a working environment in which risk factors, such as bias, are constantly controlled for ... Second, on the bench, judges become habituated to listening to both sides before making up their mind, gain proficiency at sifting truth from falsehood, and get accustomed to exercising a detached judgement. These executive virtues and skills are necessary in a good judge, but they also make it easier for them to excel as moral reasoners. The court room is thus a highly nurturing environment for straight thinking over problems in morality.[158]

However, relying on judges to act as moral arbiters in assessing trauma's impact on sentencing presents a number of challenges. First, the subjective nature of moral reasoning risks undermining consistency, a cornerstone of equitable sentencing.[159]

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154 Chris Maxwell, 'Equity and Good Conscience: The Judge as Moral Arbiter and the Regulation of Modern Commerce' (Speech, Victoria Law Foundation Oration, 14 August 2019) 8.

155 Ibid.

156 Lord Goff, 'The Future of the Law of Restitution' (1989) 12(1) *Sydney Law Review* 1, 2–3.

157 John Tasioulas, 'Legal Relevance of Ethical Objectivity' (2002) 47(1) *American Journal of Jurisprudence* 211, 233; Maxwell (n 154) 9.

158 Irit Samet, *Equity: Conscience Goes to Market* (Oxford, 2018) 206–7.

159 Lyndon Harris, *Achieving Consistency in Sentencing* (Oxford University Press, 2022) ch 2. Although the High Court in *DPP (Vic) v Dalgliesh (pseudonym)* (2017) 262 CLR 428 ('*Dalgliesh*') appeared to recalibrate the weight given to consistency in sentencing by emphasising that courts must be consistently right rather than rightly consistent, this should not be understood as diminishing the broader normative role of consistency as a cornerstone of equitable sentencing. Rather, the judgment affirms that consistency should not be pursued at the expense of accuracy or justice in individual cases. In this context, subjective factors such as moral culpability may justifiably lead

Despite some judges being capable of ethical reasoning, this approach transfers substantial interpretive power to individual judges, which can result in divergent outcomes for similar cases. Like cases may attract different sentencing outcomes based simply on the personal views of the sentencing judge. Further, the expectation that judges will apply their personal moral values when considering trauma detracts from the principle of interpreting and applying the law in a consistent manner. This variability challenges the fairness and predictability of the sentencing system and raises questions about the appropriateness of such broad judicial discretion.

While trauma should not be seen as an automatic or universally determinative basis for sentence reduction, there is a strong normative argument for its formal recognition within a structured and principled sentencing framework.[160] The introduction of a legislative provision that identifies trauma as a mitigating factor would serve an important symbolic and doctrinal function, signalling the relevance of psychosocial adversity in shaping culpability, and encouraging courts to engage more systematically with such evidence. However, it must also be acknowledged that the mere codification of trauma as a mitigating consideration may not, in itself, yield substantive change in sentencing outcomes. In jurisdictions where intuitive synthesis remains the dominant methodology and guideline judgments have been rejected in favour of flexible, individualised discretion,[161] the weight afforded to listed mitigating factors remains largely at the discretion of the sentencing judge.

In light of these institutional constraints, a more pragmatic and potentially effective approach lies in the development and promotion of structured judicial resources, such as bench books. Notably, the *Bugmy Bar Book*, developed in New South Wales, provides detailed, evidence-based material on the relevance of trauma to criminal behaviour and its implications for sentencing.[162] Such tools do not seek to constrain judicial discretion but rather inform it, offering a principled foundation upon which courts can better understand and assess the impact of trauma on moral culpability. By embedding trauma-informed reasoning into judicial practice without imposing rigid constraints, these aids strike a balance between individualised justice and systemic coherence, thereby enhancing both the legitimacy and transparency of sentencing decisions.

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to differentiated outcomes, but they must be assessed through a principled methodology to ensure that disparity does not devolve into arbitrariness. Thus, while moral reasoning introduces an element of subjectivity, it need not undermine consistency, so long as judicial discretion is exercised within an articulated framework of relevant sentencing principles. Cf *Wong v The Queen* (2001) 207 CLR 584.

160 See, e.g., Mirko Bagaric, Gabrielle Wolf and Peter Isham, 'Trauma and Sentencing: The Case for Mitigating Penalty for Childhood Physical and Sexual Abuse' (2019) 30(1) *Stanford Law and Policy Review* 1, 38.

161 *Dalgliesh* (n 159) 450 [69]–[70] (Kiefel CJ, Bell and Keane JJ).

162 *Bugmy Bar Book* (n 7).

D *Mercy*

An often underdiscussed avenue for the consideration of an offender's traumatic background in sentencing is the residual principle of mercy. Mercy is a useful concept, as it can be enlivened when other avenues for use of the trauma in the sentencing process are closed. For example, in the absence of a clear nexus between the offending and the background of trauma, there may still be scope for courts to consider the evidence of an offender's experience of trauma in the sentencing process.[163] Mercy plays a greater role in the sentencing of persons who have experienced trauma than has been acknowledged in the cases or literature to date. Before considering the application of the principle of mercy to experiences of trauma, it is necessary first to articulate the meaning of 'mercy' within the Victorian sentencing framework.

1 *What is Mercy?*

If the law of sentencing allows for all mitigating factors to be taken into account, why should a sentencer, having accommodated all such matters, deliberately order less than what is called for by the criminal law? Mercy, a kind of sublime sentencing factor, generally arises in cases with unique, compelling and tragic circumstances.[164] The role of mercy, its definition, and how it differs from other concepts such as mitigation, is difficult to articulate. As has been stated by the Victorian Court of Appeal in *R v Miceli*, 'an element of mercy has always been regarded, and properly regarded, as running hand in hand with the sentencing discretion'.[165]

The preferred approach to mercy, according to Charles JA, was that stated in *R v Kane:*

> [J]ustice and humanity walk together. Cases frequently occur where a court is justified in adopting a course which may bear less heavily upon an accused than if he were to receive what is rather harshly expressed as being his just deserts. But mercy must be exercised upon considerations which are supported by the evidence and which make an appeal not only to sympathy but also to well-balanced judgment. If a court permits sympathy to preclude it from attaching due weight to the other recognized elements of punishment, it has failed to discharge its duty.[166]

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163 See, e.g., *Guode v The Queen* [2020] VSCA 257, [42] (Ferguson CJ, Priest and Beach JJA) ('*Guode*').

164 *Markovic v The Queen* (2010) 30 VR 589, 592 [7] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA).

165 [1998] 4 VR 588, 592 (Tadgell JA).

166 *R v Kane* [1974] VR 759, 766.

2 *Mercy and an Offender's Background Trauma: The Guode Cases*

There has been limited consideration of the interrelationship between hardship, mitigation, and mercy.[167] The case of *Guode v The Queen*[168] provides an impactful illustration of the way in which evidence of trauma can be relevant for the purpose of sentencing.

Ms Guode was sentenced for the murder, attempted murder and infanticide of four of her children. In 2015, Ms Guode deliberately drove her car into Lake Gladman in Wyndham Vale, Victoria with four of her seven children in the car.[169] The children in the car were between 16 months and five years of age. Prior to this event, Ms Guode had been observed to be 'huddled over the steering wheel with her face in her hands', while one of her children was hanging off the front seat and another was 'hysterical' in the car.[170] While the legal significance of this case primarily relates to the question of the relevance of a charge of infanticide to charges of murder when sentenced concurrently, this case is also notable for the levels of trauma that the offender had experienced. Justices Gordon and Edelman summarised the experiences of Ms Guode in their dissent:

> Ms Guode had arrived in Australia in 2005 as a refugee on a Global Special Humanitarian visa after having been raised in South Sudan during the civil war. She had witnessed her husband's murder [during a Janjaweed militia raid on her village]. She had been raped to the point of unconsciousness and had been wounded with a knife. She had escaped by walking for 18 days to Uganda with her three young children. After arriving in Australia, she had four further children as a result of a relationship which saw her ostracised from her community.[171]

In addition, Ms Guode had suffered a post-partum haemorrhage requiring a blood transfusion in giving birth to her youngest son, Bol, which occurred just over a year before the offending.[172] The gravity of the horror of Ms Guode's experiences cannot be conveyed within the clinical language of sentencing remarks.

In this case, there was no link established between the trauma and Ms Guode's mental impairment, aside from a diagnosis of mild PTSD. The medical expert opined that Ms Guode's PTSD 'overlap[ped] with other features of mood disorder', including her diagnosed 'major depressive disorder, [which was] mild-moderate in

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167 See, e.g., Natalia Antolak-Saper, 'The Role of Mercy and Sentencing for Infanticide: The Tragic Case of *R v Guode*' (2023) 35(1) *Current Issues in Criminal Justice* 65, 67–70.

168 *Guode* (n 163); *R v Guode* (2020) 267 CLR 141 ('*Guode* (HCA)').

169 *Guode* (n 163) 2–3 [7].

170 *Guode* (HCA) (n 168) 158 [33] (Gordon and Edelman JJ).

171 Ibid 158–9 [35].

172 Ibid 163 [49].

severity, with somatic syndrome'.[173] Trauma in this instance could not invoke the application of the *Verdins* principles, as it did not satisfy the necessary threshold.

On 30 May 2017, Lasry J sentenced Ms Guode to 26 years and six months in jail, with a non-parole period of 20 years.[174] On 30 September 2020, the Court of Appeal reduced her sentence to 18 years with a non-parole period of 14 years, after finding that the original sentence was manifestly excessive.[175] At first instance and in the Victorian Court of Appeal, the Courts did not explicitly state that the compounding relationship of Ms Guode's traumas were relevant to the Courts' assessment of her moral culpability.[176]

Once the matter returned before the Court of Appeal for resentencing following an appeal to the High Court, it was clear that mercy emerged as a key factor in sentencing Ms Guode.[177] The Court of Appeal noted that whilst the sentencing judge had observed that the principles of mercy were significant in sentencing the appellant,[178] the sentences imposed at first instance did not adequately reflect this. The Court of Appeal, composed of Ferguson CJ, Priest and Beach JJA, highlighted Ms Guode's experience of extreme disadvantage and hardship as the crucial factors that raised the need for mercy, and repeated statements made in the 2018 Court of Appeal decision:

> It should not be thought that, in reaching [the conclusions we have reached], we have lost sight of the fact that three vulnerable children lost their lives (and that a fourth nearly did). Adjectives such as 'tragic' are inadequate to convey the depth of emotional response provoked by the destruction of such innocent lives. Each of the applicant's children had a right to expect that she would protect them and keep them safe from harm. The applicant fatefully and irredeemably, however, breached their trust. But it must also be remembered that, when she did so, her capacity to make calm and rational decisions was severely compromised by a mental condition which was not of her own making. Her situation is pitiable. And although the Court must avoid being weakly merciful, principle nonetheless demands that the punishment inflicted upon the applicant must be mitigated by, and justly reflect, her diminished moral culpability.[179]

We see here that the Court used mercy as a residual category to justify tempering the sentence beyond the bounds of ordinary mitigation. Here, the Court also linked the concepts of trauma, mercy and diminished moral culpability, noting the effect of trauma on Ms Guode and her ability to make decisions. The Court also acknowledged

173 *Guode* (n 163) [10]–[11].

174 *R v Guode* [2017] VSC 285 ('*Guode* (VSC)').

175 *Guode* (n 163) [51].

176 *Guode* (VSC) (n 174); *Guode v The Queen* [2018] VSCA 205 ('*Guode* (VSCA 2018)').

177 *Guode* (n 163) [45]–[50].

178 *Guode* (VSCA 2018) (n 176) [52], [72].

179 *Guode* (n 163) [47], quoting ibid [74].

that the trauma Ms Guode had experienced was linked to her diagnosed mental conditions, and that her circumstances were not of her own making.

In this way, the role of mercy overlaps with the other justifications for mitigation discussed above. First, the fact that many aspects of Ms Guode's previous traumas had not been of her own making, and, secondly, that the level of stress Ms Guode had experienced would be too much for many people to bear.[180] This overlap between mercy and other categories of mitigation makes it difficult to take a principled approach to treatment of an offender's experiences of trauma.

This case also provides a stark example of the way in which traumatised offenders are required to relate events and experiences that may be beyond articulation, in the sense that acute trauma can lead to a collapsing of narrative coherence and sense-making.[181] This may drive the consequential amorphousness of the legal principles relevant to treatment of these offences.

An interesting question remains as to the link between evidence of a prior experience of trauma, the commission of the offence,[182] and the prerogative of mercy. Where there is no expert evidence of a link or nexus between the offender's trauma and the offending, is it possible that the evidence of trauma can nevertheless be relevant — perhaps even to the same extent as it would have been had there been evidence of a link — through the enlivening of the court's prerogative of mercy? There is scant discussion of this particular question.[183] It does seem, however, that mercy can be used as an alternative route to acknowledging trauma in sentencing, particularly in the absence of evidence of a strong nexus, or where the evidence of trauma requires greater recognition than that allowed for by the key cases, such as *AWF* and *Terrick*.[184]

V Conclusion

The relationship between trauma and sentencing is complex and multifaceted. Within the context of the criminal justice system, the recognition of trauma's pervasive impact is an imperative step towards achieving a more just and compassionate approach to sentencing. As this article has explored, the acknowledgment of an offender's past experiences of trauma is not merely an abstract consideration. This article has illuminated the profound implications on both mental and physical health as well as its impact on an offender's moral culpability.

180 Antolak-Saper (n 167) 70–3.

181 *The Body Keeps the Score* (n 1) 15–17.

182 *AWF* (n 21) 4 [6].

183 See, e.g., *Hill v The Queen* [2020] VSCA 220, [46] (Maxwell P and Niall JA).

184 The principles outlined in *AWF* (n 21) do not seem particularly useful when considering Guode's case. It is for this reason that mercy was employed as a residual category of mitigation to provide proper acknowledgement of Ms Guode's prior trauma and unique circumstances: *Guode* (n 163) [46].

As research develops on intergenerational trauma and the effects of systemic racism and other forms of discrimination, the policies and legal principles applied within criminal sentencing courts need to develop to acknowledge the ways that these forces act upon individuals' lives. Developments in neuroscientific research and a growing understanding of the physical and biological effects of trauma also require careful attention from criminal practitioners, judicial officers and policy makers. It is clear, however, that an offender's prior traumatic experiences ought to be expressly provided for in the sentencing framework as a mitigating factor. Using case studies of the Stolen Generations and survivors of intergenerational trauma, we have seen how the judicial system in Victoria grapples with the intricate intersections of history, culture, and trauma in sentencing decisions.

Considering trauma as a mitigating factor while navigating the pitfalls of subjectivity and personal bias underscores the complexity of this endeavour. For this reason, it is suggested that trauma should be formally recognised within sentencing frameworks as a mitigating factor. Judicial guidelines should provide clear criteria for how trauma — particularly intergenerational trauma, systemic racism, and experiences of discrimination — may reduce an offender's culpability. This could be achieved through legislative reform or detailed judicial bench books that outline trauma's influence on offending behaviour. Courts should adopt trauma-informed sentencing principles that balance the goals of rehabilitation, deterrence, and community protection with a compassionate understanding of the offender's circumstances. These principles should encourage alternatives to incarceration where appropriate, focusing on rehabilitation and restorative justice practices.

Sentencing courts should have access to expert trauma assessments.[185] These assessments should include detailed examinations of how trauma has influenced the offender's behaviour and mental health. Training for legal professional and judicial officers on understanding and interpreting these assessments should be mandated. Ongoing judicial education programs must be developed to equip judges with the tools to assess trauma's relevance in sentencing. This should include training on the neurobiological effects of trauma, intergenerational trauma, and its specific impacts on Indigenous populations and marginalised groups. Education on avoiding unconscious bias when evaluating trauma in sentencing is essential to prevent subjective discrepancies.

In acknowledging the significance of trauma in sentencing, embracing education, and fostering dialogue, the criminal justice system can take strides toward a more equitable and humane approach that respects the depth of each individual's lived experience.

185 See, e.g.: Anthony and Behrendt (n 12); Day and McLachlan (n 12).

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A MODEL FOR THE EARLY COMPASSIONATE RELEASE OF PRISONERS IN AUSTRALIA

Abstract

For many reasons, prisoners' personal circumstances may change during their custodial terms. Their experiences in prison, such as their participation in a rehabilitation program, might have profoundly positive and life-changing effects on them. Yet other circumstances may arise that make their prison terms considerably more onerous than sentencing courts contemplated they would endure. For instance, they might develop a serious illness in prison, or a close relative could require their care. Notwithstanding these possibilities, there are few avenues for incarcerated people in Australia to be able to secure early release from prison for compassionate reasons. To address this shortcoming, this article recommends law reforms that adopt aspects of the early compassionate prisoner release model that operates in the United States of America's federal jurisdiction, and expand the 'release on licence' process available to some prisoners in Australia's federal jurisdiction. The article argues that established sentencing considerations in Australian law could provide justifications for early compassionate release from prison, and proposes grounds on which prisoners should be able to apply for early release.

I Introduction

The United States of America ('US') is one of the most punitive nations on Earth: it imprisons more people per capita than most other countries.[1] Although the number of inmates in Australia is high (214 persons per 100,000

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1 See, e.g.: 'Highest to Lowest — Prison Population Rate', *Word Prison Brief* (Web Page) <https://www.prisonstudies.org/highest-to-lowest/prison_population_rate?field_region_taxonomy_tid=All>; 'Countries with the Largest Number of Prisoners per 100,000 of the National Population, as of February 2025', *Statista* (Web Page) <https://www.statista.com/statistics/262962/countries-with-the-most-prisoners-per-100-000-inhabitants/>. See also Part II of this article.

adult population),[2] it is less than three times the rate in the US.[3] Ironically, however, the federal jurisdiction of the US has a clear process for prisoners to apply for early compassionate release and recent amendments to the process have increased the likelihood of prisoners' applications being granted. By contrast, it is difficult and extremely rare for prisoners in Australia to obtain early release on compassionate grounds.

In sentencing someone to a prison term, a court intends to punish them. Nevertheless, during a custodial sentence, and especially a long one, a prisoner's personal circumstances may change in unforeseen ways and increase the burdens they experience, beyond the hardship that the sentencing court contemplated they would endure. Examples of such a turn of events are where a prisoner develops a serious illness or a close family member requires their care.[4] A prisoner with poor health may suffer greatly due to barriers to receiving high quality healthcare in Australian prisons, which numerous official investigations have documented.[5]

Yet, in Australia, there is no systematic manner for taking into account in the sentencing determination the potential for a prisoner's changed personal circumstances to make a custodial term more onerous for them. Once a defendant has been sentenced, they are generally required to serve the minimum prison term to which they were sentenced, irrespective of any developments that inflict unexpected additional burdens on the prisoner and/or their dependants. The length of a custodial term could potentially be reduced in light of a prisoner's substantially changed personal circumstances through a successful appeal of their sentence. However, it is procedurally and substantively complex for a prisoner to mount an appeal of their sentence.[6] In order to persuade a court to reduce their sentence on the basis of their changed circumstances, the prisoner needs to provide fresh evidence and, even if this test is satisfied, courts tend to be reluctant to reduce the original penalty.[7] A prisoner can petition the executive to exercise the royal prerogative of mercy, but offenders rarely receive a pardon or remission of their sentence under this process.[8]

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2 Australian Bureau of Statistics, *Corrective Services, Australia, March Quarter 2025*, (Catalogue No 4512.0, 12 June 2025).

3 The incarceration rate in the United States is 700 per 100,000 adults: Emily D Buehler and Rich Kluckow, *Correctional Populations in the United States, 2022 — Statistical Tables* (Report, 30 May 2024) 1.

4 See, e.g., United States Sentencing Commission, *Guidelines Manual* §3E1.1 (Manual, November 2023) §1B1.13 ('*Federal Sentencing Guidelines*').

5 See Part IV(C) of this article.

6 See, e.g., Sentencing Advisory Council, *Sentence Appeals in Victoria* (Summary Paper, August 2012) 2, 4.

7 Mirko Bagaric, Theo Alexander and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 11th ed, 2025) 178–83.

8 In New South Wales, for example, 18 petitions for the exercise of the royal prerogative of mercy and applications were made under s 76 of the *Crimes (Appeal and Review) Act 2001* (NSW) in the last two completed calendar years. However, only three of them were granted: two on the basis of 'genetics evidence' (not

It is possible for a prisoner who is convicted of a federal offence in Australia to apply for 'release on licence' on the basis of 'exceptional circumstances'.[9] Nevertheless, these licences will only be granted in a limited range of very extreme cases,[10] and no such licences are available to people convicted of crimes in other Australian jurisdictions. Further, only approximately 3% of Australia's prisoners are incarcerated under the federal criminal justice regime.[11]

By contrast, the federal jurisdiction of the US has long had a process for facilitating the early release of prisoners for compassionate reasons. In the past, this was sparingly used due to strict procedural and substantive constraints on its availability. However, the scope of the early compassionate release provision has recently been expanded, resulting in the early release of thousands of prisoners.[12] This article argues that the Australian criminal justice system should adopt aspects of the early compassionate release provision that is available to prisoners in the US federal jurisdiction. Further, these could be incorporated into a process for the release of prisoners on licence for compassionate reasons in all Australian jurisdictions. We argue that this approach is consistent with the existing sentencing considerations of proportionality and mercy, and would not undermine the sentencing objective of community protection.

Part II provides an overview of the sentencing system and approach to early release of prisoners on compassionate grounds in the US federal jurisdiction. This is followed in Part III by a discussion of the limited prospects of early compassionate release from prison for prisoners in Australia at present. Part IV outlines the article's proposal to expand the current licence process available in Australia's federal jurisdiction and extend it to other Australian jurisdictions. It discusses established sentencing considerations in Australian law that could be invoked to justify early compassionate release of prisoners and, drawing particularly on the law in

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on the basis of the prisoner's changed circumstances) and for the other matter, the ground on which review was sought was unpublished: 'Release of Information: Policy for the Release of Information Relating to the Royal Prerogative of Mercy and Reviews of Conviction or Sentence Under the *Crimes (Appeal and Review) Act 2001*', *New South Wales Government* (Web Page) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/release-of-information.html> ('Release of Information'). See also Dianne Heriot, 'Justice Beyond Law: Clemency and the Royal Prerogative of Mercy', *Parliament of Australia* (Blog, 19 September 2012) <https://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1925114/upload_binary/1925114.pdf;fileType=application%2Fpdf#search=%22library/prspub/1925114%22>.

9 *Crimes Act 1914* (Cth) s 19AP ('*Crimes Act*').

10 'Application for Early Release on Licence', *Attorney-General's Department* (Application Form) <https://www.ag.gov.au/sites/default/files/2020-03/Earlyreleaseonlicence-applicationformandgeneralinformation.pdf> ('Application').

11 Only 1,324 of the 44,403 people currently incarcerated in Australia have been sentenced under the federal regime: Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 19 December 2024).

12 See Part II of this article.

the US federal jurisdiction, proposes compassionate grounds on which prisoners could apply for early release from prison in Australia. Part V summarises these arguments.

II Laws Regarding Early Compassionate Release of Prisoners in the United States of America's Federal Jurisdiction

The US is renowned for its harsh sentencing laws and practices,[13] which appear to reflect little compassion for those who offend. As noted above,[14] it has a very high imprisonment rate per capita, compared to other countries in the Organisation for Economic Co-operation and Development. The number of prisoners in US prisons peaked at 2,293,157 in 2007,[15] following a continual increase in prisoner numbers in the preceding four decades. Prisoner numbers then gradually dropped for well over a decade until 2020, by which time they had reduced to their lowest level since 1995–1996.[16] Nevertheless, the most recent official data, released in May 2024, suggests that this downward trend may have ended: by the end of 2021, there was a total of 1,827,600 people in US prisons and jails, compared with 1,776,000 prisoners a year earlier.[17] The incarceration rate in the US in 2022 was 700 per 100,000 adult residents,[18] which is approximately three times higher than prisoner numbers in Australia.[19]

13 Michael Tonry, 'Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration' (2014) 13(4) *Criminology and Public Policy* 503, 506.

14 See Part I of this article.

15 Heather C West, 'Prisoners in 2007' (Bulletin, 2 December 2009) 6 <https://bjs.ojp.gov/content/pub/pdf/p07.pdf>.

16 E Ann Carson, 'Prisoners in 2018' (Bulletin, April 2020) <https://www.bjs.gov/content/pub/pdf/p18.pdf>. See also John Gramlich, 'Black Imprisonment Rate in the U.S. Has Fallen by a Third Since 2006', *Pew Research Center* (Web Page, 6 May 2020) <https://www.pewresearch.org/fact-tank/2020/05/06/share-of-black-white-hispanic-americans-in-prison-2018-vs-2006/>.

17 Buehler and Kluckow (n 3) 4. In the United States, incarcerated offenders are held in two forms of detention: prisons and jails. Prisons are institutions run by states or the federal government, which hold offenders with sentences that are typically longer than one year in duration, and include public and private prisons, boot camps and treatment centers. Jails are confinement facilities, which are operated by a sheriff, police chief, or city or county administrator, and generally hold offenders who are sentenced to a prison term of one year or less. The data in this article relates to inmates held in both prisons and jails.

18 Ibid 1.

19 Australian Bureau of Statistics (n 2). In the last quarter of 2025, there were 46,081 persons in custody in Australia, which equates to 214 persons per 100,000 adult population.

Despite the severity of the US's sentencing system, its federal jurisdiction, which has the highest number of prisoners, also has a provision for the early release of prisoners on compassionate grounds, which offers a useful paradigm for Australia. Hundreds of thousands of people are sentenced annually in the US federal jurisdiction, and its prison population is one of the largest in the world.[20] Yet its process for the early compassionate release of prisoners has resulted in the release of thousands of prisoners over the past six years.[21] The following brief discussion of the sentencing system in the US provides some context for these laws.

As is the case in Australia, each state in the US and the federal jurisdiction has its own sentencing system. There are, nonetheless, similarities between sentencing laws throughout the US, most of which have become harsher in the past few decades, leading to increases in the prison population.[22] A principal commonality between the jurisdictions is their prescriptive sentencing laws, which were introduced in the 1980s — influenced by a 'tough-on-crime' political agenda — and significantly constrained sentencing courts' discretion.[23] At least 18 states in the US (and the federal jurisdiction) now have sentencing guidelines, which implement determinate sentencing.[24] They set out prescribed penalties based upon the offence and the offender's characteristics.[25] The extent of courts' discretion to diverge from imposing those terms differs between jurisdictions.[26]

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20 In January 2023, more than 150,000 people were incarcerated in federal prisons in the United States: 'Federal Offenders in Prison', *United States Sentencing Commission* (Web Page, 29 March 2025) <https://www.ussc.gov/research/quick-facts/federal-offenders-prison#:~:text=As%20of%20January%202023%2C%20there,%5B2%5D%2C%5B3%5D>.

21 See Jessie Brenner and Stephanie Wylie, 'Analyzing the First Step Act's Impact on Criminal Justice', *Brennan Centre for Justice* (Web Page, 20 August 2024) <https://www.brennancenter.org/our-work/analysis-opinion/analyzing-first-step-acts-impact-criminal-justice>.

22 Tonry (n 13) 506, 509–10.

23 National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, ed Steve Redburn, Bruce Western and Jeremy Travis (National Academies Press, 2014) 3; Michael Tonry, 'Remodeling American Sentencing: A Ten-Step Blueprint for Moving Past Mass Incarceration' (2014) 13(4) *Criminology and Public Policy* 503, 514.

24 The following US jurisdictions, in addition to the federal jurisdiction, have sentencing guidelines: Alabama; Arkansas; Delaware; District of Columbia; Florida; Kansas; Maryland; Massachusetts; Michigan; Minnesota; North Carolina; Ohio; Oregon; Pennsylvania; Tennessee; Utah; Virginia; and Washington: 'Sentencing Guidelines Resource Center: In-Depth Jurisdiction Profiles', *Robina Institute of Criminal Law and Criminal Justice* (Web Page) <https://robinainstitute.umn.edu/publications/sentencing-guidelines-resource-center-depth-jurisdiction-profiles>.

25 'What Are Sentencing Guidelines', *Robina Institute of Criminal Law and Criminal Justice* (Web Page, 21 March 2018) <https://robinainstitute.umn.edu/articles/what-are-sentencing-guidelines>.

26 Ibid.

In the US federal jurisdiction[27] there was a sharp shift from a system in which sentencing judges were 'guided only by broad sentence ranges provided by federal criminal statutes' to one in which it was intended that they would adhere to 'mandatory guidelines'.[28] The US Sentencing Commission developed the *United States Sentencing Commission Guidelines Manual* (2023) ('*Federal Sentencing Guidelines*'). Despite the original intention behind the introduction of the *Federal Sentencing Guidelines*, in the 2005 case of *United States v Booker,*[29] the US Supreme Court held that it is not mandatory for courts to apply them.[30] The *Federal Sentencing Guidelines* have influenced many of the states' sentencing laws in the US,[31] and provide a model for the early release of prisoners on compassionate grounds that could be applied in Australia. Importantly, Australian sentencing laws share the stated objectives of the *Federal Sentencing Guidelines*; both focus on imposing sentences that will deter, incapacitate, punish and rehabilitate offenders.[32]

Laws regarding the early compassionate release of prisoners in the US federal jurisdiction derive from legislation as well as the *Federal Sentencing Guidelines*. The United States Code ('USC') codifies the law of the US. 18 USC *§* 3582(c)(1)(A) permits the 'modification of an imposed term of imprisonment' in response to what is commonly described as a 'compassionate release' motion.[33] It states that a court

> may reduce the term of imprisonment … after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that —
> (i) extraordinary and compelling reasons warrant such a reduction; or
> (ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c) [which prescribes mandatory life prison sentences for 'certain violent felons'] for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);
> and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.[34]

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27 Most federal criminal offences are set out in 18 USC.

28 William W Berry III, 'Discretion without Guidance: The Need to Give Meaning to Section 3553 after Booker and Its Progeny' (2008) 40(3) *Connecticut Law Review* 631, 633.

29 543 US 220 (2005).

30 Ibid 264–6.

31 Mirko Bagaric, 'Sentencing Developments in the United States in 2023: The Start of Reversing the War on Drugs?' (2023) 46(5) *Criminal Law Journal* 283.

32 *Federal Sentencing Guidelines* (n 4) 2; Bagaric, Alexander and Edney (n 7) 222.

33 United States Sentencing Commission, 'Compassionate Release Data Reports' (Report, 12 March 2025) <https://www.ussc.gov/research/data-reports/compassionate-release-data-reports>; 18 USC § 3582(c)(1)(A) (2018).

34 18 USC § 3582(c)(1)(A) (2018).

'Factors' that a court may need to consider in determining a compassionate release motion, listed in 18 USC § 3553(a), include the following, and the provision states that 'The Court shall impose a sentence sufficient, but not greater than necessary, to comply with' these 'purposes':

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed —
> (a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (b) to afford adequate deterrence to criminal conduct;
> (c) to protect the public from further crimes of the defendant; and
> (d) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

The US Sentencing Commission has included in the *Federal Sentencing Guidelines* a policy statement titled, 'Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)'.[35] It adds to the provision for a compassionate release motion in the USC by confirming that the defendant's risk to the public is a separate consideration that the court must take into account if it is contemplating that 'extraordinary and compelling reasons' may 'warrant' a reduction in the prisoner's sentence (that is, not only where the motion is based on the facts that the defendant is 70 years old and has served at least 30 years in prison).

Courts have been able to reduce a sentence in response to a compassionate release motion for several decades, but until recently such motions were rarely made.[36] The main reason for this was that prisoners could not make a compassionate release motion themselves; rather, they needed to petition the Director of the Bureau of Prisons ('BOP') to make a motion to a district court on their behalf, and the BOP did not frequently exercise its discretion in this respect.[37] However, in December 2018, Congress passed the *Formerly Incarcerated Re-enter Society Transformed Safely Transitioning Every Person Act* ('*First Step Act*'), which led to major reforms to the laws regarding compassionate release from prison — as well as to other aspects of federal criminal law — in an attempt to reduce recidivism and lengthy prison terms.[38]

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35 *Federal Sentencing Guidelines* (n 4) §1B1.13.

36 Meredith Esser, 'Extraordinary Punishment: Conditions of Confinement and Compassionate Release' (2023) 92(4) *Fordham Law Review* 1369, 1387–8.

37 Ibid 1388–9.

38 Ibid; The Sentencing Project, 'The First Step: Ending Mass Incarceration in Federal Prisons' (Report, August 2023) 1–2 <https://www.sentencingproject.org/app/uploads/2023/08/First-Step-Act-2023.pdf>.

The *First Step Act* amended 18 USC *§* 3582(c)(1)(A), so that it now provides that a court can reduce a defendant's term of imprisonment either on the motion of the BOP or the prisoner

> if the prisoner has fully exhausted all administrative rights to appeal a failure by BOP to bring a motion on the prisoner's behalf or upon the lapse of 30 days from the receipt of such a request by the warden of the prisoner's facility, whichever is earlier.[39]

Therefore, a prisoner can make a compassionate release motion directly to a court, where the BOP opposes or neglects to respond to their request for the BOP to bring a motion for their early release.[40] This change to the compassionate release provision considerably increased its use. From 2013 to 2017, the BOP received 5,400 requests for compassionate release, but approved fewer than 350 of them (6% of the applications were granted).[41] By contrast, after the passage of the *First Step Act* and at the height of the COVID-19 pandemic, 2,611 and 1,399 federal prisoners were granted early release in 2020 and 2021 respectively (27% and 12% of applications were granted in those years).[42] Since the pandemic has no longer been considered a public health emergency, the number of compassionate release applications that have been made and approved has diminished, but it remains considerably higher than in the past.[43]

The rate of approval of applications for early compassionate release will likely increase further in the near future as a result of additional amendments that the US Sentencing Commission made recently to its policy statement, 'Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A)'. In 2023, the US Sentencing Commission expanded the list in its policy statement of 'circumstances' in which 'extraordinary and compelling reasons' for reducing a prison sentence might exist.[44] Its stated rationale for doing so was 'to reflect the reasons relied upon by many courts after passage of the *First Step Act* in the absence of a binding policy statement', including 'the medical circumstances … that were most often cited by courts in granting sentence reduction motions'.[45] Notable among the circumstances included in the expanded list are the following.

The list refers to a range of 'medical circumstances' of a defendant that might warrant early release. This includes the defendant: (1) 'suffering' from a 'terminal illness';

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39 Congressional Research Service, 'The First Step Act of 2018: An Overview' (Report, 4 March 2019) 18 <https://sgp.fas.org/crs/misc/R45558.pdf>.

40 Esser (n 36) 1389.

41 The Sentencing Project (n 38) 3.

42 Ibid.

43 Ibid.

44 Esser (n 36) 1376.

45 United States Sentencing Commission, 'Amendment #814: Reduction in Sentence Pursuant to Section 3582(c)(1)(A)', *United States Sentencing Commission* (Amendment, 1 November 2023) 1 — 3 <https://www.rid.uscourts.gov/sites/rid/files/historical/documents/USSC%202023%20Amendments%20in%20Brief.pdf>.

(2) 'suffering from a serious physical or mental condition', 'serious functional or cognitive impairment' or 'deteriorating physical or mental health because of the aging progress', from which they are 'not expected to recover' and that 'substantially diminishes' their capacity to 'provide self-care within' prison; (3) being incarcerated in a facility 'affected or at imminent risk of being affected by … an ongoing outbreak of an infectious disease' and their consequent 'increased risk of suffering severe medical complications or death', which 'cannot be adequately mitigated in a timely manner'; and/or (4) suffering from 'a medical condition that requires long-term or specialized medical care that is not being provided and without which the defendant is at risk of serious deterioration in health or death'.[46] This latter circumstance could apply to situations where the BOP neglects to treat or disregards a prisoner's serious medical condition.[47]

Other circumstances in which 'extraordinary and compelling reasons' for reducing a prison sentence might exist, which were added to the policy statement, were: (1) the defendant's age (at least 65 years old) and their experience of 'serious deterioration in physical or mental health because of the aging process';[48] and (2) their experience of sexual or physical abuse during custody 'committed by, or at the direction of… any … individual who had custody or control over the defendant'.[49] In addition, the policy statement now lists the defendant's 'family circumstances', which are specified to include: 'death or incapacitation of the caregiver of the defendant's … child'; 'incapacitation' of the defendant's spouse, registered partner or parent, 'when the defendant would be the only available caregiver' for them; and similar circumstances 'involving any other immediate family member' — such as 'a grandchild, grandparent, or sibling of the defendant' — or 'an individual whose relationship with the defendant is similar in kind to that of an immediate family member', 'when the defendant would be the only available caregiver' for them.[50]

Although a prisoner's rehabilitation alone cannot constitute an 'extraordinary and compelling reason' for early release, the policy statement confirms that a court can consider it 'in combination with other circumstances in determining whether and to what extent a reduction in the defendant's term of imprisonment is warranted'.[51] The policy statement now permits a defendant to present in support of an application for early compassionate release 'any other circumstance or combination of circumstances that, when considered by themselves or together with any of the reasons' it lists 'are similar in gravity' to them.[52] As Meredith Esser observes, this 'catch-all provision could potentially open the door to other conditions-based arguments such as being held in particularly restrictive conditions … or other kinds

46 *Federal Sentencing Guidelines* (n 4) §1B1.13(b)(1).

47 Esser (n 36) 27.

48 *Federal Sentencing Guidelines* (n 4) §1B1.13(b)(2).

49 Ibid §1B1.13(b)(4).

50 Ibid §1B1.13(b)(3)(A)–(D).

51 Ibid §1B1.13(d).

52 Ibid §1B1.13(b)(5).

of severe harms experienced in prison'.[53] The policy statement emphasises, too, that 'an extraordinary and compelling reason need not have been unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment'.[54] The United States Sentencing Commission 'encourages the court', 'before granting a motion' to modify a prison term, 'to make its best effort to ensure that any victim of the offense' is 'notified' and 'provided … with an opportunity to be reasonably heard'.[55]

The United States Sentencing Commission regularly releases data on the outcomes of prisoners' early compassionate release applications. Its reports are illuminating because they provide details of the nature of the applications that have been made and the circumstances in which early release has been granted or refused. The most recent report, dated April 2025, is for the period 1 October 2024 to 31 March 2025.[56] In that period, 1,375 applications were made, of which 209 (approximately 15%) were approved.[57] Most of the applications that were approved related to sentences of imprisonment of 20 years or more (51.5%) or terms of 10–20 years (25.7%), while only a small portion related to sentences of less than one year (0.5%).[58] The main offences of prisoners whose early release applications were granted were: drug trafficking (45.4%); robbery (15.9%); fraud/theft (6.8%); and murder (6.3)%.[59]

The main reasons provided by the courts for granting a reduction in the custodial sentence include: (1) the prisoner's rehabilitation (54 instances); (2) a serious physical or medical condition of the prisoner (40 instances); (3) the prisoner's terminal illness (18 instances); (4) the BOP's failure to provide treatment (5 instances); and (5) the prisoner's age of 65, deteriorating health and completion of 10 years of their prison sentence (7 instances).[60] In some cases, courts gave more than one reason for granting motions and, in total, 318 reasons were provided.[61]

53 Esser (n 36) 1391.

54 *Federal Sentencing Guidelines* (n 4) §1B1.13(e).

55 Ibid §1B1.13, 'Application Notes'.

56 United States Sentencing Commission, 'Compassionate Release Data Report' (Report, April 2025) <https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/compassionate-release/FY25Q2-Compassionate-Release.pdf>.

57 Ibid table 4.

58 Ibid figure 2.

59 Ibid table 8.

60 Ibid table 10.

61 Ibid.

III Current Laws regarding Early Compassionate Release for Prisoners in Australia

A *Overview of Current Early Release Options*

As explained below,[62] at present, there are limited opportunities for prison sentences to be reduced for compassionate reasons in Australia. A prisoner could appeal their sentence on the basis of their changed personal circumstances, but they must produce fresh evidence.[63] Courts have imposed tight constraints on the situations in which they can reduce a custodial term on this basis following sentencing, and such appeals have infrequently succeeded.[64] Moreover, Australian courts have not developed any coherent, transparent rules (as opposed to discretionary principles)[65] for determining an appeal of a prison sentence on compassionate grounds.

In most Australian jurisdictions, offenders can apply for a leave of absence from prison for compassionate reasons, such as to attend a funeral, but if granted, that leave will be brief and temporary.[66] Further, in some jurisdictions, a prisoner can be released for compassionate reasons up to a few weeks before their sentence is due to expire.[67] In addition, offenders can make a petition for the executive to exercise the royal prerogative of mercy, which could result in them being pardoned or their sentence being remitted. Nevertheless, such petitions are rarely granted and the

62 See Parts 3(B)–(E) of this article.

63 See Bagaric, Alexander and Edney (n 7) 175–6; *R v Nguyen* [2006] VSCA 184, [36] (Redlich JA) ('*Nguyen*').

64 Bagaric, Alexander and Edney (n 7) 175–6; *Nguyen* (n 63) [36] (Redlich JA); *Lissock v The Queen* [2019] NSWCCA 282 ('*Lissock*').

65 For a discussion of the distinction between rules and principles, see Ronald Dworkin, *Taking Rights Seriously* (Duckworth Books, rev ed, 1978) 22–8, 76–7.

66 *Corrections Act 1997* (Tas) s 42(1); *Correctional Services Act 2014* (NT) ss 109, 118; *Corrective Services Act 2006* (Qld) s 73; *Correctional Services Act 1982* (SA) s 27(1)(d); 'Release Conditions', *Government of South Australia* (Web Page) <https://www.corrections.sa.gov.au/prison/release-from-prison/release-conditions#:~:text=Every%20prisoner%20can%20apply%20for,will%20aid%20the%20prisoner's%20rehabilitation>; New South Wales Government, 'Custodial Operations Policy and Procedures: Application for Compassionate Leave' (Policy) <https://correctiveservices.dcj.nsw.gov.au/documents/copp/09-processing-inmate-requests-applications-and-complaints/09.03-application-for-compassionate-leave.pdf>.

67 In Western Australia, prisoners can be released up to 30 days before their sentence is due to expire: *Prisons Act 1981* (WA) ss 31(1)–(2); Government of Western Australia, 'Commissioner's Operating Policy and Procedure' (Report) 15 <https://www.wa.gov.au/media/34045/download?inline>. In the Australian Capital Territory, the director-general can direct the release of an offender from prison for compassionate reasons, depending on the length of their sentence, one to two weeks before their scheduled release date: *Crimes (Sentence Administration) Act 2005* (ACT) s 31. In the Northern Territory, prisoners can be released up to seven days before their scheduled release date: *Correctional Services Act 2014* (NT) s 62.

circumstances in which the prerogative is exercised are not clearly disclosed.[68] All Australian jurisdictions have adopted a 'truth in sentencing' approach, and hence most remission schemes that previously provided an opportunity for early release from prison have been abolished.[69] In some jurisdictions, such schemes were abolished following the exposure of misuse of discretion and corrupt practices, such as acceptance of bribes in exchange for early release of prisoners.[70]

The federal jurisdiction has a process outlined in legislation, whereby prisoners who have been convicted of a Commonwealth offence can apply for a 'licence' to be released from custody on compassionate grounds (as well as where other 'exceptional circumstances' exist, including a prisoner's 'extensive cooperation … with law enforcement agencies', before or after sentencing).[71] However, applications for licences are unlikely to be granted in circumstances beyond very extreme cases.[72] For the duration of their licence, an offender will not have total freedom. It is perhaps unsurprising that there is no equivalent mechanism to this licence in other Australian jurisdictions. As discussed below,[73] most Australian governments were reluctant even to permit the early release of certain prisoners at the height of

68 See: New South Wales Government, 'Release of Information' (n 8); David Caruso and Nicholas Crawford, 'The Executive Institution of Mercy in Australia: The Case and Model for Reform' (2014) 37(1) *University of New South Wales Law Journal* 312, 323. Nevertheless, for a discussion of the advantages of preserving the royal prerogative of mercy, see Catherine Dale Greentree, 'Retaining the Royal Prerogative of Mercy in New South Wales' (2019) 42(4) *University of New South Wales Law Journal* 1328.

69 For an overview of these historical schemes, see: Janet Chan, 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release' (1991) 13(2) *University of New South Wales Law Journal* 393; Neil Morgan, 'Now You See It, Now You Don't: Truth and Justice Under the New Sentencing Laws' (2000) 29(2) *University of Western Australia Law Review* 251. In Tasmania, a prisoner's sentence can be remitted, but only by up to three months: *Corrections Act 1997* (Tas) s 86; *Corrections Regulations 2018* (Tas) s 25.

70 For example, Rex Jackson, the New South Wales Corrective Services Minister, established a scheme for early release of prisoners and was later convicted for accepting bribes to release particular inmates: David Marr, 'Time Runs Out for Disgraced Prisons Minister', *Sydney Morning Herald* (online, 2 January 2012) <https://www.smh.com.au/national/nsw/time-runs-out-for-disgraced-prisons-minister-20120101-1ph9s.html>; Janet Chan, *Doing Less Time: Penal Reform in Crisis* (Institute of Criminology Sydney University Law School, 1992) 118–37. We thank the anonymous referee for this point.

71 'Early Release of Federal Prisoners', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/crime/federal-offenders/early-release-federal-prisoners> ('Early Release'); *Crimes Act* (n 9) s 19AP(4A).

72 The Attorney-General's Department does not appear to have released any data on the number of applications for early release on licence that have been granted.

73 See Part 3(E) of this article.

the COVID-19 pandemic when the risk of transmission of the virus in the close confines of prisons was great.[74]

B *Appeal of Sentence*

When a court sentences a person to a term of imprisonment, they will serve the minimum term of the sentence that the court has stipulated unless they successfully appeal the sentence. Thus, a prisoner could seek to be released early from a custodial term on compassionate grounds by appealing their original sentence. An appeal of a prison sentence can be made on the basis of new circumstances that have occurred since the sentence was imposed, but the defendant must produce 'fresh evidence'.[75] In the interests of the finality of court proceedings, courts have narrowly defined what constitutes fresh evidence.[76] Further, they have clarified that fresh evidence principally refers to evidence that raises questions about whether there was a wrongful conviction or a miscarriage of justice, rather than whether prisoners' personal circumstances have changed since sentencing so as to justify early release on compassionate grounds.[77] Such appeals often fail due to the high bar that must be overcome to establish that evidence is fresh and the limitations imposed by the courts on allowing appeals based on compassionate reasons.[78]

In *R v Davidson*,[79] the Victorian Court of Appeal quoted the following statement of Redlich JA in *R v Nguyen*[80] of the 'principles' that apply to the admission of fresh evidence in an appeal of a sentence:

> (i) the new evidence must relate to events which have occurred since the sentence was imposed;
> (ii) the evidence must demonstrate the true significance of facts in existence at the time of the sentence;
> (iii) the evidence will not be admitted if it relates only to events which have occurred after sentence and which show that the sentence has turned out to be excessive;
> (iv) the new evidence may be admissible even though the applicant did not refer to the pre-existing state of affairs in the course of the plea;

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74 See Brendon Murphy, John Anderson and Mirko Bagaric, 'The Curious Role of COVID-19 in Sentencing: The Relevance and Mitigating Weight of Ill Health and Harsh Prison Conditions' (2021) 47(3) *Monash University Law Review* 25, 45–7.

75 Bagaric, Alexander and Edney (n 7) 175–7; *Nguyen* (n 63) [36].

76 See, e.g., *R v Hughes* [2004] 1 Qd R 541, 543 [40] (McPherson JA), 545 [40] (McMurdo J).

77 Bagaric, Alexander and Edney (n 7) 177; *Nguyen* (n 63) [36].

78 It appears that data on the number of successful appeals of original sentences on compassionate grounds in Australia is unavailable.

79 [2008] VSCA 188 ('*Davidson*').

80 *Nguyen* (n 63) [36].

> (v) upon the admission of the new evidence, it is unnecessary to determine whether the original sentence was vitiated by error, or whether it was manifestly excessive; and
> (vi) the question is whether, on all of the material now before the Court, any different sentence should be substituted to avoid a miscarriage of justice.[81]

In *Lissock v The Queen* ('*Lissock*'), the New South Wales Court of Criminal Appeal referred to other cases that have confirmed when courts will receive fresh evidence on appeal and when that evidence can lead them to reduce a prison sentence on compassionate grounds.[82] The Court noted:

> In exceptional circumstances, where at the time of sentencing the offender had an existing medical condition, and subsequently fresh evidence comes to light indicating that the condition has worsened during incarceration, this Court will receive such fresh evidence.[83]

The Court in *Lissock* quoted the judgment in *Khory v The Queen*[84] that, in deciding whether it should 'intervene' on the basis of this 'fresh evidence', a court must consider 'whether the applicant's period of incarceration would be more onerous than it was considered to be when he was sentenced and, if so, whether any reduction in his sentence or, at least the non-parole period, is justified'.[85] In addition, the Court in *Lissock* noted that the case of *Iglesias v The Queen* confirmed that 'this question "requires consideration of his [or her] physical condition, the availability of medical facilities and whether he [or she] can be adequately treated within the prison system"'.[86]

Also in *Lissock*, the Court referred to several cases in which offenders' appeals of their sentences did not succeed, despite their production of seemingly compelling fresh evidence that could substantiate their applications on compassionate grounds.[87] One of those cases was *R v Jones*,[88] where the applicant only learned that he was

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81 *Davidson* (n 79) 196, [40] (Nettle JA, Weinberg JA agreeing at [47], Mandie AJA agreeing at [48]), quoting *Nguyen* (n 63) [36] (Redlich JA).

82 *Lissock* (n 64) [98]–[100] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]).

83 Ibid [98] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Iglesias v The Queen* [2006] NSWCCA 261, [10] ('*Iglesias*').

84 [2014] NSWCCA 272 ('*Khoury*').

85 *Lissock* (n 64) [99] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), quoting *Khoury* (n 84) [25].

86 *Lissock* (n 64) [100] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), quoting *Iglesias* (n 83) [13].

87 *Lissock* (n 64) [101] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]).

88 (1993) 70 A Crim R 449 ('*Jones*').

HIV-positive after sentencing.[89] The Court also referred to *R v Jacobs*,[90] where the applicant required medical treatment for an injury he sustained in a car accident prior to sentencing, and provided fresh evidence on appeal that indicated he was unable to access treatment in prison that the sentencing judge had believed would be available; the treatment he had undergone in prison was unhelpful; and 'surgical amputation was the only alternative' in prison, but 'there was another surgical procedure in the private health system that offered good prospects of alleviating [his] condition'.[91] The abovementioned cases can, nonetheless, be contrasted with *Fedele v The Queen*,[92] where a sentence was reduced on the basis that the defendant had undiagnosed early onset dementia at the time of sentence.[93]

Thus, while it is theoretically possible for prisoners in Australia to be granted early release for compassionate reasons through an appeal of their sentence, such appeals are unlikely to succeed, and courts lack coherent, transparent rules to guide their decisions regarding these applications.

C *Royal Prerogative of Mercy*

The royal prerogative of mercy is another means by which prisoners can potentially obtain early release from prison in Australia on compassionate grounds, but it is seldom utilised.[94] The Governor-General and Governors in each Australian state and territory have discretionary power at common law to grant a pardon to, or remit the sentence of, an offender in response to their petition and on the advice of the executive government.[95] The prerogative is usually only exercised in the federal jurisdiction through the grant of a pardon if the Attorney-General recommends that the Governor-General do so on the basis that the offender is 'morally and technically innocent' of the crime in relation to which they are seeking to be pardoned.[96] In other jurisdictions, it seems that the prerogative can be exercised in 'rare and

89 *Lissock* (n 64) [102] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Jones* (n 88).

90 [2001] NSWCCA 212 ('*Jacobs*').

91 *Lissock* (n 64) [103]–[105] (Button J, Payne JA agreeing at [1], Davies J agreeing at [3]), citing *Jacobs* (n 90).

92 [2017] VSCA 363.

93 See also *Brierley v The Queen* [2022] NSWCCA 26 ('*Brierley*').

94 Heriot (n 8). For instance, between 1990 and 2012, the Governor-General only granted four pardons and a few full and partial remissions of fines. It appears that some data regarding the outcomes of petitions for the exercise of the royal prerogative of mercy may not be publicly available: see David Hamer, Gary Edmond and Megan McElhone, 'Submission: Review into Royal Prerogative of Mercy', *University of Sydney* (Submission, 9 February 2018).

95 Heriot (n 8); Caruso and Crawford (n 68) 313.

96 Heriot (n 8); 'Appeals', *Attorney-General's Department* (Web Page) <https://www.ag.gov.au/crime/federal-offenders/appeals>.

exceptional circumstances', including on 'compassionate grounds', such as 'medical issues', that have arisen for the offender since they were sentenced.[97]

The royal prerogative of mercy cannot, however, be relied upon to formulate a principled, systematic process for facilitating the early release of prisoners for compassionate reasons.[98] It is vague: legislatures have not provided guidance to the executive regarding the exercise of its discretion.[99] The prerogative has been criticised for contravening the separation of powers doctrine, as it permits the executive to exercise judicial power.[100] In addition, the courts probably have no power to review the executive government's exercise of the prerogative.[101] As a consequence, courts have not formulated clear principles for the exercise of the prerogative.[102] Given that it allows the executive to substitute the court's decision with its own, the royal prerogative of mercy is generally only exercised if the offender cannot obtain redress through any other channel.[103]

Legislative schemes 'operate alongside' the prerogative and empower Attorneys-General to refer a petitioned matter to a court either for its opinion on a question relating to it or as an appeal for review.[104] The decision not to refer a case can be subject to judicial review.[105] However, the court does not conduct an inquiry so

97 See, e.g., 'Royal Prerogative of Mercy', *NSW Government* (Web Page, October 2022) <https://dcj.nsw.gov.au/legal-and-justice/laws-and-legislation/royal-prerogative-of-mercy-and-reviews-of-convictions-sentences/royal-prerogative-of-mercy.html>. The prerogative may also be granted for expedient reasons, such as to negotiate with hostage abductors: Richard G Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25(1) *Monash University Law Review* 1, 21 ('The Place of Mercy in Sentencing').

98 For a different perspective, see Julian R Murphy et al, 'An Ancient Remedy for Modern Ills: The Prerogative of Mercy and Mandatory Sentencing' (2020) 46(3) *Monash University Law Review* 252. Those authors argue that the Royal Prerogative of Mercy should be used more expansively to 'respond to the injustices and anomalies produced by mandatory sentencing regimes in Australia': at 254.

99 Law Council of Australia, 'Policy Statement on a Commonwealth Criminal Cases Review Commission' (Report, 21 April 2012) <https://lawcouncil.au/publicassets/0e6c7bd7-e1d6-e611-80d2-005056be66b1/120421-Policy-Statement-Commonwealth-Criminal-Cases-Review-Comission.pdf> ('Policy').

100 Caruso and Crawford (n 68) 313.

101 Heriot (n 8); Fox, 'The Place of Mercy in Sentencing' (n 97) 22.

102 Fox, 'The Place of Mercy in Sentencing' (n 97) 22.

103 Heriot (n 8).

104 See, e.g.: *Criminal Code Act 1889* (Qld) s 672A; *Crimes (Appeal and Review) Act 2001* (NSW) ss 77(1)(b)–(c); *Criminal Procedure Act 1921* (SA) s 173(1); *Criminal Code Act 1924* (Tas) s 419. See also: Heriot (n 8); Law Council of Australia, 'Policy' (n 95); Caruso and Crawford (n 68) 313.

105 See *Martens v Commonwealth of Australia* [2009] FCA 207, [19]–[25] (Logan J); Heriot (n 8).

the offender must compile relevant evidence.[106] This process, too, potentially contravenes the separation of powers doctrine, including because it may involve the judiciary providing advice to the executive.[107]

D *Licence in the Federal Jurisdiction*

The federal jurisdiction is the only Australian jurisdiction that has a clear statutory process for prisoners to apply for early compassionate release from prison potentially longer than a few weeks before their scheduled release date, though the availability of this option has been tightly circumscribed. The Commonwealth Attorney-General or their delegate is empowered by the *Crimes Act 1914* (Cth) ('*Crimes Act*') to grant a 'licence' for a prisoner who has been convicted of a crime under Commonwealth legislation 'to be released from prison' on the basis of the existence of 'exceptional circumstances'.[108] Licences have been granted under this provision only in a small number of cases.[109] It has been clarified that a court is not empowered to grant such a licence.[110] However, it seems that judicial review of a decision not to grant a licence would be available.[111]

The Attorney-General has confirmed that '[r]elease on licence on compassionate grounds is only justified in extreme circumstances'.[112] The matters that the Attorney-General can consider in deciding whether 'he or she is satisfied that exceptional circumstances exist which justify the grant of the licence' are not restricted, but the *Crimes Act* provides that they 'may have regard to … any serious medical condition the person has that cannot adequately be treated or managed within the prison system'.[113] The Attorney-General's Department advises:

> In previous cases where a person has been granted early release on licence based on medical grounds, their medical condition has been deemed as terminal and they were

106 Law Council of Australia, 'Policy' (n 99).

107 Caruso and Crawford (n 68) 313–14.

108 *Crimes Act* (n 9) ss 19AP(1), (3)(b).

109 See, e.g.: *Jasmin v The Queen* (2017) 51 WAR 505; *Yasmin v Attorney-General of the Commonwealth of Australia* (2015) 236 FCR 169; *Ng v Attorney-General* [2017] FCA 1392 ('*Ng*'). Attorney-General Roxon relied on this provision to release 15 Indonesian minors who had been imprisoned for people smuggling: Heriot (n 8).

110 See *Wharton v The Queen* [2016] WASCA 21, [13] (Mazza JA).

111 In *Ng* (n 109), the Federal Court of Australia heard (but did not grant) an application for review of the decision of a delegate of the Attorney-General not to make an order under s 19APA(1)(d) of the *Crimes Act* (n 9) amending the terms of a release on licence that had been granted.

112 Attorney-General's Department, 'Early Release' (n 71).

113 *Crimes Act* (n 9) ss 19AP(4), (4A)(c). Sections 19AP(4A)(a)–(b) state that the Attorney-General also 'may have regard' to 'any extensive cooperation by the person with law enforcement agencies before sentencing that the sentencing court did not take into account' or 'any extensive cooperation by the person with law enforcement agencies after sentencing'.

> not able to be managed by the prison system. In these cases the person was released from prison, but was moved to a high care facility for treatment.[114]

The Attorney-General's Department contemplates that a prisoner could also apply for early release 'based on a family member suffering a serious medical condition', but notes (as indicated in the Explanatory Memorandum to the legislation) that '[g]enerally, family hardship (unless of an extreme kind) does not constitute exceptional circumstances'.[115]

There is little case law interpreting this provision for a prisoner to be released early from prison on a licence due to exceptional circumstances. Such guidance would be extremely helpful given the lack of a detailed statutory explanation of how the Attorney-General or their delegate should determine whether circumstances are sufficiently 'exceptional' to warrant granting a release on licence. As Greenwood J observed in *Hasim v Attorney General of the Commonwealth* ('*Hasim*')[116]

> the statute tells the decision-maker the *criterion* to be considered, that is "exceptional circumstances" … [but] does not identify the *factors* upon which the decision-maker might, or might not, be satisfied of that criterion or, in consequence, the weight to be attributed to any factor falling within the criterion since no factors relevant to the criterion are identified expressly by the Act. The criterion *itself* is identified but not the *informing features* of that criterion.[117]

An offender's release from prison on a licence does not give them complete freedom initially and the release may only be temporary. Where a prisoner in the Australian federal jurisdiction has a licence, 'the person is taken to be still under sentence'.[118] Further, licences are 'subject to the condition that the offender must, during the licence period, be of good behaviour and not violate any law' and any other conditions the Attorney-General specifies.[119] The Attorney-General can revoke a licence, for instance, if the offender breaches a condition that they imposed on the licence.[120] The *Crimes Act* states that licences for prisoners with a life sentence 'must specify the day on which the licence period ends',[121] and in the case of prisoners with shorter custodial sentences, generally their licence will end on the final day of

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114 Attorney-General's Department, 'Application' (n 10) 3.

115 Ibid; Attorney-General's Department, 'Early Release' (n 67).

116 (2013) 218 FCR 25 ('*Hasim*').

117 Ibid 36 [49] (emphasis in original). The phrase 'exceptional circumstances' has no fixed meaning and is context sensitive. In criminal law cases, the High Court has refused to define the parameters of this phrase (see, e.g.: *R v Hatahet* (2024) 418 ALR 520; *Hurt v The King* (2024) 418 ALR 63; *HT v The Queen* (2019) 269 CLR 403), other than to observe that it denotes a high threshold, requiring conditions that are unusual, uncommon, or out of the ordinary in the relevant legal context (*United Mexican States v Cabal* (2001) 209 CLR 165).

118 *Crimes Act* (n 9) s 19APB(1)(a).

119 Ibid ss 19AP(7)(a), (c).

120 Ibid s 19AU.

121 Ibid s 19AP(6)(a).

their sentence.[122] An offender can be released from prison permanently if no reason arises for their return to prison during the stipulated licence period.[123]

E *Response to the COVID-19 Pandemic*

There were calls for some prisoners to be released early from their custodial sentences during the COVID-19 pandemic due to the increased risks of them contracting the virus in prison, and developing a serious illness or dying from it, as well as new limits placed on incarcerated people's movement at this time.[124] Yet many Australian governments were resistant to these entreaties.[125] In Victoria, however, prisoners' sentences were modestly reduced through the mechanism of 'emergency management days'; prisoners were granted a reduction of a day of their sentences for each day that they experienced additional restrictions due to the COVID-19 pandemic (such as less time spent out of their cells).[126] In New South Wales, the *Crimes (Administration of Sentences) Act 1999* (NSW) was amended in order to permit the Corrections Commissioner to make an order releasing on parole a prisoner who 'belongs to a class of inmates prescribed by the regulations', which could be prescribed based on, inter alia, 'an inmate's health or vulnerability'.[127] The Commissioner could release the prisoner on parole if they were 'satisfied' that doing so was 'reasonably necessary because of the risk to public health or to the good order and security of correctional premises arising from the COVID-19 pandemic' (though prisoners who were convicted of serious specified offences were ineligible for this leave).[128] This provision did not indicate that a prisoner's sentence was reduced as a result of being granted parole, though it presumably had that consequence. Most other Australian jurisdictions did not introduce such measures,[129] and a prisoner's application under the New South Wales provision would probably be rejected now that the COVID-19 pandemic is no longer classified as a public health emergency.

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122 Ibid s 16(1) (definition of 'licence period').

123 Ibid s 19APB(1)(b).

124 Natalia Antolak-Saper, 'COVID-19 and Prisoners: The Australian Experience of Early Release' (Blog, 17 June 2020) <https://blogs.law.ox.ac.uk/centres-institutes/centre-criminology/blog/2020/06/covid-19-and-prisoners-australian-experience>.

125 See Murphy, Anderson and Bagaric (n 70) 45–7.

126 *Corrections Regulations 2019* (Vic) reg 100; *Corrections Act 1986* (Vic) s 58E; Murphy, Anderson and Bagaric (n 70) 45–7; Tom Cowie and Noel Towell, 'Victorian Prisoners Get COVID-19 Sentence Cuts', *The Age* (Web Page, 25 September 2020) <https://www.theage.com.au/politics/victoria/victorian-prisoners-get-covid-sentence-cuts-20200924-p55yvi.html>.

127 Antolak-Saper (n 120); Murphy, Anderson and Bagaric (n 70) 46–7; *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) sch 2, s 2.5, inserting *Crimes (Administration of Sentences) Act 1999* (NSW) s 276.

128 *COVID-19 Legislation Amendment (Emergency Measures) Act 2020 No 1* (NSW) sch 2, s 2.5.

129 Antolak-Saper (n 120). See further Thalia Anthony et al, 'Australia', in Friedrich Dünkel et al (eds), *The Impact of COVID-19 on Prison Conditions and Penal Policy* (Routledge, 2022).

IV Reform Proposal

Part IV(A) discusses this article's recommendation to introduce in all Australian jurisdictions a similar statutory process to that available in Australia's federal jurisdiction for offenders to apply, based on compassionate reasons, for early release from prison subject to a licence. As discussed in Part IV(B), three established sentencing considerations — mercy, proportionality, and community protection — could underlie a process outlined in legislation for offenders to apply for such a licence. These considerations could also inform courts' decisions regarding appeals of custodial sentences on the basis of prisoners' changed personal circumstances.[130] Part IV(C) proposes some compassionate grounds for issuing licences to offenders to be released early from prison in Australia. It suggests that the grounds articulated in the US Sentencing Commission's *Federal Sentencing Guidelines*, in particular, provide a starting point in developing those justifications. This part also recommends compassionate reasons that are especially relevant in Australia.

A *A Statutory Process for Applying for Early Compassionate Release from Prison*

This article recommends expanding the grounds on which a licence may be granted to criminal offenders to be released early from prison in the federal jurisdiction.[131] The article also suggests extending the licence process to other Australian jurisdictions, which could pass legislation establishing a similar mechanism. Hence, the scheme would apply to all prisoners in Australia.

As noted above,[132] it can be difficult for prisoners to produce fresh evidence that meets the high threshold that judges have imposed on the nature of evidence that can support an appeal of a sentence. Further, most prisoners would lack the legal training, funds and access to lawyers to initiate an appeal, and backlogs in the court system may inordinately delay the hearing of their appeals. By contrast, prisoners

130 This would only occur if the common law principle relating to mitigation of penalty on the basis of compassionate reasons personal to the offender was broadened in light of the considerations set out in this article. This might occur incidentally if the changes proposed in this article are implemented, but it is not the focus of this article.

131 The proposal for reform in this article is not related to the parole system. Parole boards in some jurisdictions can grant prisoners release on parole before they have completed the non-parole period of their sentence or another stipulated portion of their sentence in exceptional circumstances. See, e.g., *Corrections Act 1997* (Tas) s 70. However, there is no case law or data relating to the use of that provision, though it seems to have been raised in the context of end of life care for prisoners: see Tasmania Government, *Tasmania Prison Service Director's Standing Order DSO — 4.15 End of Life Care, Planning and Support* (2018) <https://www.justice.tas.gov.au/__data/assets/pdf_file/0011/708563/End_of_Life_Care,_Planning_and_Support_-_DSO_4.15.pdf>. In any event, the reform suggested in this article would provide a process for the early release of prisoners for compassionate reasons, irrespective of the portion of their prison term that they have already served.

132 See Part III(B) of this article.

would not require legal expertise to apply for a licence for early release on compassionate grounds, would not incur costs in doing so, and presumably need not experience lengthy delays in receiving an outcome of their application if a non-judicial body makes these decisions.

For these reasons, it is recommended that a non-judicial entity is empowered to determine applications for licences, rather than that Australia follow the model of the US federal jurisdiction in the respect that courts hear compassionate release motions. Some may argue that, in granting a licence for early release, a non-judicial body would be usurping the judiciary's role. Nevertheless, this body would be reviewing a custodial sentence on the basis of information that was not known to the original sentencing court and emerged after it made its decision, in the administration of the sentence, rather than during the process of passing the sentence.[133] Moreover, judicial review of a decision regarding whether to grant an application for early release on licence could be available; as noted above, it appears to be possible for courts to review a decision not to grant a licence in the federal jurisdiction.[134] In addition to the advantages of avoiding the potential costs and delays associated with court applications, a non-judicial body may more effectively preclude vexatious or frivolous applications for early release from prison than courts. To that end, s 19AP(5) of the *Crimes Act* provides that the 'Attorney-General is not required to consider an application … [for a release on licence] in respect of a person if an application has been made … in respect of that person within one year before the first-mentioned application'. The legislature could develop criteria for a non-judicial body to apply in determining licence applications so that this process operates consistently and transparently.

Issuing a licence to an offender might be especially apposite where the decision-maker is uncertain about the risk that the offender may pose to public safety if released from prison. The licence would give the offender an opportunity to be released from prison on compassionate grounds, but ensure they were monitored for the duration of the licence if it is subject to a supervision order or conditions. Also for this reason, the licence process is preferable to the exercise of the royal prerogative of mercy by issuing a pardon or remitting the offender's sentence.

Parole boards would be appropriate and well-suited entities to perform the function of hearing and making decisions in relation to applications from prisoners for licences to be released early from prison on compassionate grounds. Parole boards are independent statutory authorities that have been established in each state or territory, but not in the federal jurisdiction, which may explain why federal offenders' applications for licences for early release are currently determined by the Attorney-General.[135] Empowering parole boards to determine applications for

133 To this end, an analogy can be drawn with parole boards, which are not typically viewed as usurping the role of courts.

134 See *Ng* (n 109).

135 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006) 572 <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC103.pdf>.

licences for early release would obviate the need to establish a new independent entity for this purpose in jurisdictions other than the federal jurisdiction, and may even provide further impetus to act on calls for the creation of a parole board at the federal level.[136]

Parole boards have expertise in assessing prisoners' risks to the community and their prospects for rehabilitation. Moreover, they have demonstrated their capacity to make principled decisions without being unduly influenced by political pressure or community sentiment.[137] The membership of parole boards reflects a wide cross-section of the community, including, for instance, members of the legal profession, academics, health professionals and former police officers.[138] Various measures could nonetheless be undertaken to minimise the potential for corrupt practices to infiltrate the process of determining prisoners' applications for licences for early release on compassionate grounds, which, as noted above, have plagued some other early release schemes.[139] Amendments could be made to the legislation that establishes parole boards to empower them to make these decisions as well as to require them to produce clear written justifications for their determinations, which can be subject to public scrutiny and judicial review.

B *Consistency Between the Reform Proposal and Sentencing Considerations*

Although this article is not recommending that the judiciary exercise the authority to release offenders early from prison, the proposal is congruent with considerations that are taken into account in sentencing offenders in Australia. Those considerations reflect broad normative values and jurisprudential principles that underlie the Australian legal system. The consistency between an early compassionate release licence scheme and those sentencing considerations therefore highlights that the proposal would not represent a departure from the way in which criminal offenders are treated in Australia. Importantly, such a scheme advances the concept of individualised justice, which is integral to Australia's sentencing system. According to this notion, offenders receive sentences that differ from one another, depending on their particular circumstances.[140]

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136 Ibid 52; Law Council of Australia, *Principles Underpinning a Federal Parole Authority* (Position Paper, November 2022) <https://lawcouncil.au/publicassets/a7a4b479-1c80-ed11-9478-005056be13b5/2022%2012%2015%20-%20Attachment%20-%20Position%20Paper%20Federal%20Parole%20Authority.pdf>.

137 Robin Fitzgerald et al, 'Building Public Confidence in Parole Boards: Findings from a Four-Country Study' (2022) 62(6) *The British Journal of Criminology* 1395, 1401–2.

138 See, e.g., Adult Parole Board Victoria, 'Board Members' <https://www.adultparoleboard.vic.gov.au/about-us/board-members>.

139 See Part II of this article.

140 Thalia Anthony, Lorana Bartels and Anthony Hopkins, 'Lessons Lost in Sentencing: Welding Individualised Justice to Indigenous Justice' (2015) 39(1) *Melbourne University Law Review* 47, 51; Sarah Krasnostein and Arie Freiberg, 'Pursuing

1 *Mercy*

Mercy is an established sentencing consideration,[141] which is consistent with the grant of a licence to an offender to be released early from prison on compassionate grounds.

Judges and magistrates do not possess the prerogative of mercy;[142] rather, the principle of mercy is part of the sentencing discretion. The current consideration of mercy stems, but is distinct from, the royal prerogative of mercy, discussed above,[143] which has a religious origin and is rarely analysed in judicial decisions today.[144] Yet some Australian courts have commented on the role that the court's exercise of mercy can play in sentencing decisions and matters that should inform it. For instance, King CJ observed in *R v Osenkowski* that mercy reflects the court's sympathy for the defendant:

> There must always be a place for the exercise of mercy where a judge's sympathies are reasonably excited by the circumstances of the case. There must always be a place for the leniency which has traditionally been extended, even to offenders with bad records when the judge forms the view, almost intuitively in the case of experienced judges, that leniency at that particular stage of the offender's life might lead to reform.[145]

Nevertheless, in *R v Kane*,[146] the Full Court of the Victorian Supreme Court confirmed that, while sympathy for the defendant can influence the court's decision to exercise mercy, it must also be based on 'considerations which are supported by the evidence and which make an appeal … to well-balanced judgement'.[147] In that case, for instance, the Court considered that the trial judge had not given the sentencing goal of deterrence 'the weight that ought to have been allocated to' it.[148]

Consistency in an Individualistic Sentencing Framework: If You Know Where You're Going, How do You Know When You've Got There?' (2013) 76(1) *Law and Contemporary Problems* 265, 265, 267.

141 See, e.g., *R v Osenkowski* (1982) 30 SASR 212 ('*Osenkowski*'). A related concept to mercy is parsimony, which is the principle that a sentence should not be harsher than that required to fulfil its social purpose: *NOM v Director of Public Prosecutions* (2012) 38 VR 618, 640–1 [68]. It has been expressly noted that parsimony is probably not part of sentencing law; see: *Blundell v The Queen* (2008) 70 NSWLR 660, 665–6, [39]–[47]; *Foster v The Queen* [2011] NSWCCA 285, [50]–[53] (Adams J).

142 *Johanson v Dixon (No 3)* [1978] VR 377, 383 (Young CJ for the Court).

143 See Part III(C) of this article.

144 Fox, 'The Place of Mercy in Sentencing' (n 97) 1, 4–5, 22.

145 *Osenkowski* (n 141) 212–13. Other courts have quoted this statement with approval; see, e.g.: *R v Davies* (2006) 164 A Crim R 353, [106] (Gray J); *R v Darby* [2011] NSWCCA 52, [51] (Hoeben J); and *Markovic v The Queen* (2010) 30 VR 589, 590 [1] (Maxwell P, Nettle, Neave, Redlich and Weinberg JJA) ('*Markovic*'). See also Fox, 'The Place for Mercy in Sentencing' (n 97) 18–19.

146 [1974] VR 759.

147 Ibid 766.

148 Ibid 765.

Various circumstances could engender judges' sympathy for prisoners or their dependants, and lead them to exercise mercy by reducing a custodial sentence. In *Markovic v The Queen*, the Victorian Court of Appeal confirmed that, at common law, a defendant can seek the court's exercise of mercy on the ground of the hardship that their imprisonment would be likely to cause their immediate family or dependants to suffer.[149]

The principle of mercy is admittedly opaque in its application and cannot alone provide a doctrinal justification for the early release of offenders on compassionate grounds. However, mercy is relevant to the reforms proposed in this article because it demonstrates that the impulse to punish wrongdoers is not so strong that there is no place in our legal system for according leniency and compassion even to those offenders who have committed serious crimes. We now turn to another legal doctrine that is similarly consistent with our reform proposals.

2 *Proportionality*

The principle of proportionality is another established sentencing consideration that is congruent with the proposal for some prisoners' early release under a statutory licence for compassionate reasons. The High Court of Australia has confirmed that proportionality is a key objective of sentencing,[150] and legislation in all Australian jurisdictions recognises its importance.[151] The High Court explained the proportionality principle in *Hoare v The Queen*[152] as follows:

149 *Markovic* (n 145) 591 [2], [5], 593 [12].

150 *Veen v The Queen* (1979) 143 CLR 458, 467 (Stephen J), 468 (Mason J), 482–3 (Jacobs J), 495 (Murphy J); *Veen v The Queen [No 2]* (1988) 164 CLR 465, 472 (Mason CJ, Brennan, Dawson and Toohey JJ).

151 Section 5(1)(a) of the *Sentencing Act 1991* (Vic) provides that one of the purposes of sentencing is to impose just punishment. It further provides that in sentencing an offender, the court must have regard to the gravity of the offence and the offender's culpability and degree of responsibility: ss 5(2)(c)–(d). Section 6(1) of the *Sentencing Act 1995* (WA) states that the sentence must be 'commensurate with the seriousness of the offence', and s 7(1)(a) of the *Crimes (Sentencing) Act 2005* (ACT) provides that the punishment must be 'just and appropriate'. In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be 'just in all the circumstances': *Sentencing Act 1995* (NT) s 5(1)(a); *Penalties and Sentences Act 1992* (Qld) s 9(1)(a). In South Australia, the emphasis is upon ensuring that 'the defendant is adequately punished for the offence': *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j). The need for a sentencing court to ensure that the offender is 'adequately punished' is also fundamental to the sentencing of offenders for federal crimes: *Crimes Act* (n 9) s 16A(2)(k). The same phrase is used in the New South Wales legislation: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

152 (1989) 167 CLR 348.

> [A] basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the gravity of the crime considered in the light of its objective circumstances.[153]

As Richard Fox highlighted, the notion of proportionality — whereby 'punishments [have] to bear a reasonably predictable relationship to the offender's criminal conduct' — 'seems to embody notions of justice: People have a sense that punishments scaled to the gravity of offences are fairer than punishments that are not'.[154] Further, the principle is 'rooted in respect for the basic human rights of those before the court', and 'the idea that a response must be commensurate to the harm caused, or sought to be prevented, is to be found in many other areas of the law, both criminal and civil'.[155]

In the context of sentencing, courts apply the principle of proportionality by attempting to match the harshness of the penalty they impose to the gravity of the crime that the defendant committed. There is no precise, objective means of balancing these two factors,[156] but judges are able to determine the harshness of a sanction by evaluating its likely impact on the defendant's interests and welfare. Courts have acknowledged that aspects of a defendant's experience of incarceration, such as if they are compelled to serve time in solitary confinement, can increase the harshness of their sentence and potentially as significantly as the duration of the custodial sentence.[157]

Various shifts in an offender's personal circumstances that occur while they are in prison may make the experience of incarceration more onerous for them than the sentencing court envisaged. If that is the case, the offender's original sentence might not remain proportionate to the seriousness of their crime. Release of an offender early from prison pursuant to a statutory licence could restore the proportionality of their sentence. For example, it might be found that an offender's development of a serious medical condition while in prison has made incarceration more burdensome for them than if they had remained well, and this assessment could be balanced against the seriousness of the crime that they committed to reach a reduced sentence that remains proportionate.[158]

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153 Ibid 354 (Mason CJ, Deane, Dawson, Toohey and McHugh JJ) (citations omitted).

154 Richard G Fox, 'The Meaning of Proportionality in Sentencing' (1994) 19(3) *Melbourne University Law Review* 489, 491–2.

155 Ibid.

156 Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers, 2004) 184.

157 See: *AB v The Queen* 198 CLR 111, 151–152 [105]; *R v Rose* [2004] NSWCCA 326 [35] (Hoeben J); *R v Patison* (2003) 143 A Crim R 118, 136 [86]–[87] (Carruthers AJ).

158 This limb of the proportionality principle is also reflected in the view that sanctions should be structured so that they have the same impact on offenders who are deserving of the same punishment. It has been observed that the need for equal impact of sanctions minimally entails that 'the system should strive to avoid grossly unequal impacts on offenders': Andrew Ashworth and Rory Kelly, *Sentencing and Criminal Justice* (Butterworths, 7th ed, 2021) 97.

There is some precedent for courts adjusting sentences owing to the offender's medical condition, so that they reflect the principle of proportionality. Although judges have considered that a defendant's ill health cannot be used as a 'licence to commit crimes',[159] courts have frequently treated it as a mitigating sentencing factor.[160] They have often conferred a sentencing discount on a defendant whose medical condition would make prison a more difficult experience for them than for a prisoner in better health. Indeed, in *Brierley v The Queen*, the Court reduced the defendant's sentence because it found that

> [f]or an 84-year-old offender with many other fundamental health issues, the endurance of this acute episode [of a diagnosis of and treatment for skin cancer] is a circumstance that has made the relatively short period of imprisonment ordered by the learned sentencing judge very significantly more burdensome than it otherwise would have been and much more burdensome than her Honour anticipated.[161]

3 *Community Protection*

The early release of an offender from prison pursuant to a licence on compassionate grounds will also be consistent with the sentencing aim of community protection if, as a consequence of a prisoner's changed circumstances, the offender poses less risk to the community than at the time of the original sentence. Community protection is set out as a sentencing objective in sentencing legislation in Australia's states and territories, though not in the federal jurisdiction,[162] and some of this legislation expressly states that it is the most important sentencing aim.[163] Courts have also observed that community protection is an important and even the principal goal

159 *R v Martin* (1990) 47 A Crim R 168, 173 (Kirby P).

160 See, e.g.: *Eliasen v The Queen* (1991) 53 A Crim R 391 (the defendant had AIDS); *R v Magner* [2004] VSCA 202 (the defendant had bowel cancer); *AWP v The Queen* [2012] VSCA 41 (the defendant had a serious heart condition); *R v Van Boxtel* (2005) 11 VR 258, 266–7 [29]–[30] (Callaway JA) (the defendant had a spinal injury); *R v Puc* [2008] VSCA 159; *Pfeiffer v The Queen* [2009] NSWCCA 145 [13]–[14] (McClellan CJ at CL).

161 *Brierley* (n 93) [32] (Fagan J, Beech-Jones J agreeing at [1]).

162 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act* (NT) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Sentencing Act 2017* (SA) ss 9–10; *Sentencing Act 1997* (Tas) s 3(1)(b); *Sentencing Act 1991* (Vic) s 5(1)(e); *Sentencing Act 1995* (WA) s 6(4)(b). Section 16A(2) of the *Crimes Act* (n 8) nonetheless clarifies that its list of relevant matters that a court must take into account in sentencing is not exhaustive.

163 See, e.g.: *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 2017* (SA) s 3. See also *Crimes (Sentencing Procedure) Act 1999* (NSW) s 66(1), which states that 'community safety must be the paramount consideration when the sentencing court is deciding whether to make an intensive correction order in relation to an offender' (as an alternative to a prison sentence). For analysis of that provision, see: *R v Pullen* [2018] NSWCCA 264; *R v Fangaloka* [2019] NSWCCA 173.

of sentencing at common law, including in relation to federal offences.[164] Justice Brennan stated in *Channon v The Queen*:

> The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the law proscribes … Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose.[165]

To achieve the goal of community protection, courts will generally increase the severity of a sentence and often impose a prison term. Nevertheless, the decision-maker that is considering an application for early release from prison on compassionate grounds may find that fulfilling this objective is less necessary than it was at the time of sentencing owing to the offender's changed personal circumstances. This might especially be the case where the offender's physical condition deteriorates to the point that they cannot pose a risk to others' physical safety.

Thus, the three key established sentencing considerations discussed above are congruent with the proposal in this article for some offenders to be granted early release from prison on a licence for compassionate reasons.

C *Proposed Grounds for Early Compassionate Release of Prisoners in Australia*

We now propose compassionate grounds on which it might be appropriate to grant an offender early release from prison on a licence. We recommend that offenders be considered eligible for early release from prison when a circumstance arises during their incarceration that affects them in a way that could engender public compassion or sympathy for them. Generally, though not always, that circumstance would need to be unusual and unforeseen; otherwise, the court would have factored it into the sentencing calculus at the time of sentencing. Further, the circumstance must significantly increase the burden that the offender's imprisonment imposes on them and/or their dependant/s, which the offender's early release from prison could reduce or alleviate.

We recommend that Australian legislatures follow the model of the US federal jurisdiction by specifying several changes to prisoners' personal circumstances that may occur during their custodial sentence and make their experience of incarceration considerably more onerous than a sentencing court might have envisaged they would endure. Like the US Sentencing Commission's policy statement in the *Federal Sentencing Guidelines*,[166] they could also refer to various scenarios in

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164 See, e.g.: *Lodhi v The Queen* (2007) 179 A Crim R 470, 490–1 [87]–[88], 491 [92], 539 [274]; *DPP (Cth) v MHK* [2017] VSCA 157, [51], [66]; *DPP (Cth) v Besim* [2017] VSCA 158, [112]–[113].

165 (1978) 20 ALR 1, 5. This passage has been cited with approval in numerous cases, including: *Boulton v The Queen* (2014) 46 VR 308, 326 [68] (Maxwell P, Nettle, Neave, Redlich and Osborn JJA).

166 18 USC § 3553(a).

which those circumstances may arise. This would help address the concern raised by Greenwood J in *Hasim*.

Emulating that model, offenders' medical circumstances should be a key ground on which they may be eligible for early compassionate release from prison in Australia. Legislatures could outline that, as is the case in the US federal jurisdiction, such circumstances may include the offender's suffering from: (1) a terminal illness; (2) a serious physical or medical condition, functional or cognitive impairment or deterioration in their physical or mental health due to ageing, which reduces their capacity to look after themselves in prison and from which they are not expected to recover; or (3) a medical condition that requires long-term or specialised medical care that is unavailable in prison and without which their health may deteriorate significantly and from which they may die. This would expand the provision in the *Crimes Act* that, as noted above,[167] permits the Attorney-General, in deciding whether to grant a release on licence, to consider an offender's serious medical condition that is unable to be treated or managed satisfactorily in prison. Another medical circumstance of an offender that could be listed as a potential basis for early compassionate release is that the prison environment will cause their medical condition to worsen.

These medical circumstances of offenders might warrant their early compassionate release from prison. This might especially be the case, given the substantial deficiencies that numerous official investigations have identified in the healthcare that is available to prisoners in Australia.[168] Providing effective healthcare to offenders in a secure environment can be challenging.[169] Moreover, it has been well-documented that the prison population suffers disproportionately compared with the broader community from a range of serious physical and mental health conditions and thus has a greater need overall for health services.[170] The Australian Institute of Health and Welfare's report on the health of Australian prisoners, published in 2023, states that: 52% 'of prison entrants reported that they had ever been told they had a chronic physical condition'; 39% of 'prison entrants reported that a long-term

167 See Part III(D) of this article.

168 See, e.g.: *Prisoner Mental Health Care Taskforce* (Final Report, Tasmanian Department of Justice and Department of Health, March 2019) 6 <https://apo.org.au/sites/default/files/resource-files/2020-10/apo-nid308995.pdf>; Margaret Stevens, Department of Corrective Services, *Assessment of Clinical Service Provision of Health Services of the Western Australian Department of Corrective Services* (June 2010) 26–7, 31, 33, 45 <https://www.correctiveservices.wa.gov.au/_files/rehabilitation-services/health-care/hs-assessment-report.pdf>. For an extended exploration of these issues, see: Gabrielle Wolf, 'Health Care for Victoria's Prisoners: Honing Government Obligations' (2023) 34(4) *Public Law Review* 343; Gabrielle Wolf and Mirko Bagaric, 'Addressing a Human Rights Crisis: Health Care for Prisoners in Australia' (2024) 31(1) *Journal of Law and Medicine* 42.

169 New South Wales Inspector of Custodial Services, *Health Services in NSW Correctional Facilities* (Report, March 2021) 11 <https://inspectorcustodial.nsw.gov.au/documents/inspection-reports/Health_Services_in_NSW_Correctional_Facilities.pdf>.

170 Ibid.

health condition of disability affected their participation in everyday activities … or employment'; and 51% 'of prison entrants reported being told they had a mental health condition at some stage in their lives'.[171]

State and territory governments are responsible for the operation of prisons within their jurisdictions,[172] and it appears that many of them are not meeting the challenges of addressing offenders' healthcare needs adequately. Several inquiries have found that many prisoners may not obtain healthcare of the same standard as the healthcare that is available in the community.[173] Frequently, prisoners are unable to consult a medical practitioner promptly when they require it.[174] Prisons often lack enough health professionals and training of staff to respond to prisoners' healthcare needs,[175] mental health services,[176] support for prisoners with cognitive, intellectual and physical disabilities,[177] and facilities and treatment for prisoners

171 Australian Institute of Health and Welfare, *The Health of People in Australia's Prisons 2022* (Report, 2023) 25, 34, 37, 44 <https://www.aihw.gov.au/getmedia/e2245d01-07d1-4b8d-81b3-60d14fbf007f/aihw-phe-33-health-of-people-in-australias-prisons-2022.pdf?v=20231108163318&inline=true>.

172 As prisons are not designated as an area over which the Federal Government has legislative power under ss 51 and 52 of the *Australian Constitution*, the state and territory governments exercise this residual power.

173 See, e.g., Legislative Council Legal and Social Issues Committee, *Inquiry into Victoria's Criminal Justice System* (Report, 24 March 2022) 588 <https://new.parliament.vic.gov.au/get-involved/inquiries/inquiry-into-victorias-criminal-justice-system/reports>.

174 See: ibid 592; Victorian Ombudsman, *Implementing OPCAT in Victoria: Report and Inspection of the Dame Phyllis Frost Centre* (November 2017) 11, 70, 72 <https://www.ombudsman.vic.gov.au/our-impact/investigation-reports/implementing-opcat-in-victoria-report-and-inspection-of-dame-phyllis-frost-centre/> ('*Implementing OPCAT*'); NSW Inspector of Custodial Services (n 169) 112; Legislative Council Portfolio Committee No. 4 — Legal Affairs, Parliament of New South Wales, *Parklea Correctional Centre and Other Operational Issues* (Report No 38, December 2018) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2470/Report%20No%2038%20-%20Parklea%20Correctional%20Centre%20and%20other%20operational%20issues.pdf> 111–15.

175 See: Australian Capital Territory Inspector of Correctional Services, *Report of a Healthy Prison Review of the Alexander Maconochie Centre* (2022) 22–3 <https://www.ics.act.gov.au/reports-and-publications/healthy-prison-reviews/healthy-prison-reviews/healthy-prison-review-of-the-alexander-maconochie-centre-2022>; Victorian Ombudsman, *Implementing OPCAT* (n 174) 14, 99.

176 See: Human Rights Committee, Concluding Observations on the Sixth Periodic Report of Australia, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) para 41; Victorian Ombudsman, *Investigation into the Rehabilitation and Reintegration of Prisoners in Victoria* (September 2015) 62, 149–50 ('*Rehabilitation*').

177 See: Australian Capital Territory Inspector of Correctional Services (n 175) 22, 24, 166–7; Legislative Council Legal and Social Issues Committee (n 173) 598; Victorian Ombudsman, *Implementing OPCAT* (n 174) 14, 95–6.

who are withdrawing from drug and alcohol addiction.[178] Appointments with specialists are often cancelled or rescheduled, owing to difficulties in arranging for staff to escort prisoners to them.[179] Further, prisoners can face delays in obtaining necessary medication.[180]

Legislatures could specify a further medical circumstance of an offender that could justify their early compassionate release from prison, namely, their high risk of self-harm and/or dying in custody. This ground might be especially pertinent to Aboriginal and Torres Strait Islander people who are overrepresented in prisons and have an extremely high rate of deaths in custody.[181] Recent inquests into deaths in custody of Aboriginal and Torres Strait Islander prisoners (including Veronica Nelson and Tanya Day) have highlighted prisons' failure to meet their healthcare needs and implement key recommendations of the 1991 *Royal Commission into Aboriginal Deaths in Custody* regarding caring for prisoners who have a high risk of poor health outcomes, self-harm and suicide.[182]

The COVID-19 pandemic illuminated the heightened risks for prisoners of contracting and suffering from contagious diseases. It would therefore be appropriate for legislatures to mirror the relevant policy statement in the *Federal Sentencing Guidelines* by including in a list of offenders' medical circumstances that could justify their early compassionate release from prison that: they are incarcerated in a facility that is or has a high likelihood of being affected by an infectious disease; they have an inflated probability of suffering serious medical complications or dying if they contract it; and that risk cannot be reduced expeditiously.

178 See: Victorian Ombudsman, *Rehabilitation* (n 176) 6, 59, 149; Australian Capital Territory Inspector of Correctional Services (n 175) 171.

179 See: NSW Inspector of Custodial Services (n 169) 15, 101–6; Australian Capital Territory Inspector of Correctional Services (n 175) 158.

180 See Australian Capital Territory Inspector of Correctional Services (n 175) 21, 146, 174.

181 Megan Williams, 'Comprehensive Indigenous Health Care in Prisons Requires Federal Funding of Community-Controlled Services', *The Conversation* (online, 20 May 2021) <https://theconversation.com/comprehensive-indigenous-health-care-in-prisons-requires-federal-funding-of-community-controlled-services-158131>; 'Deaths Inside: Indigenous Deaths in Custody 2021', *The Guardian* (Web Page, 5 April 2021) <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>; Hannah Miles, Merran McAlister and Samantha Bricknell, *Deaths in Custody in Australia 2022–23* (Report, Australian Institute of Criminology, 17 December 2024) 10–12.

182 Coroners Court of Victoria, *Finding into the Death of Veronica Nelson with Inquest* (COR 2020 0021, 30 January 2023) (Coroner McGregor) [528], [536], [642], [829]–[830], [832]–[834]; Coroners Court of Victoria, *Finding into the Death of Tanya Louise Day with Inquest* (COR 2017 6424, 9 April 2020) (Deputy State Coroner English) [23]–[25], [167], [645], 107–9; Deloitte, *Review of the Implementation of the Recommendations of the Royal Commission into Aboriginal Deaths in Custody* (August 2018) 246–9.

Another recommended potential ground for early compassionate release of prisoners in Australia is their experience of family hardship. As noted above,[183] the Attorney-General's Department has considered that the suffering from a serious medical condition of a family member of the offender could be a basis for their release on licence. However, the policy statement in the *Federal Sentencing Guidelines* outlines more expansive 'family circumstances' of an offender that may warrant their early compassionate release from prison.[184] In referring to the death or incapacitation of the caregiver of an offender's relative or a person who has a similar relationship with the offender to that of a close family member, the statement contemplates that, in this situation, the offender is the only person who can provide care for them. If this recommendation is adopted, in the case of Indigenous prisoners who apply for early release on licence, this ground should recognise their cultural understanding of family and kinship, which may be broader than a non-Indigenous concept of a biological, nuclear family.[185]

Australian legislatures could specify other circumstances listed in the relevant policy statement in the *Federal Sentencing Guidelines* as compassionate grounds for the early release of prisoners, namely: the offender's old age and consequent worsening of their health; and their experience of abuse in prison.[186] While the policy statement refers to abuse of an offender that is perpetrated by or under the direction of corrections staff, an offender could perhaps also be eligible for early compassionate release if they are the victim of severe abuse perpetrated by another prisoner.

Given the difficulty in predicting all possible circumstances that could affect offenders' experience of incarceration and the many risks to prisoners' health and life that can arise during their custodial sentences, it would be prudent for legislatures to adopt the catch-all provision in the policy statement in the *Federal Sentencing Guidelines*.[187] This could enable a decision-maker to take into account circumstances other than those specified, which are similar in gravity to them and might also constitute compassionate grounds for early release from prison. This could encompass, for example, an offender's incarceration for a lengthy period of time in solitary confinement and other similarly harsh conditions.

Despite this article's recommendation to allow for an expansion of the types of matters that could constitute 'exceptional circumstances' and the imprecision of this term, it is envisaged that early release of prisoners on licence would still be

183 See Part III(D) of this article.

184 *Federal Sentencing Guidelines* (n 4) § 1B1.13(b)(3)(D).

185 See Queensland Government, *Child Safety Practice Manual: The Meaning of Family in Aboriginal and Torres Strait Islander Cultures* (2019) <https://cspm.csyw.qld.gov.au/practice-kits/safe-care-and-connection/working-with-aboriginal-and-torres-strait-islander/seeing-and-understanding/the-meaning-of-family-in-aboriginal-and-torres-str>.

186 *Federal Sentencing Guidelines* (n 4) § 1B1.13(b).

187 See ibid § 1B1.13(b)(5).

the exception rather than the rule. Licences would not be granted routinely and would only be available to some offenders in unusual cases where the impact of their circumstances on them is particularly grave. Legislatures could also provide the guidance that Greenwood J called for in *Hasim* regarding 'factors upon which the decision-maker might … be satisfied of that criterion' (namely, that 'exceptional circumstances' exist).[188] For instance, they might indicate the extent to which particular circumstances must have affected the offender's quality of life to warrant a grant of a licence, and the relative significance of various factors in determining whether to grant a licence. Moreover, it is likely that limits on the scope of the suggested catch-all provision would be imposed by reference to case law in the sentencing context regarding the use of similar terms.[189] Notably, in the US, the availability of the compassionate release motion on the basis of 'extraordinary and compelling reasons' (a term that is similarly broad),[190] and the catch-all provision, have not led to the early release of prisoners unless their circumstances are meritorious and exceptional. This is evident from the reasons that US courts have provided for granting a reduction in the custodial sentence, which are noted above.[191]

Mirroring the law in the US federal jurisdiction, Australian laws could require that, in making decisions regarding applications for early release from prison on a licence on compassionate grounds, the key sentencing objectives are also taken into account. As is the case in the US, it is suggested that the reduced sentence must still be 'sufficient', though 'not greater than necessary' to fulfil these aims.[192] A key sentencing goal that should be considered in such matters should always be community protection. It is suggested that compassion for an offender can never override the need to ensure that the community is as safe as is reasonably possible. Thus, offenders who continue to pose a significant risk of committing serious violent or sexual offences should not be eligible for early release from prison for compassionate reasons. Australian courts have in fact already undertaken this weighing process when sentencing offenders. In *R v Wickham*,[193] Howie J stated:

> Common humanity will sometimes require a court to consider a life-threatening physical illness as a matter of mitigation even though the offender was suffering from such an illness at the time of the commission of the offence. However, where as here, the issue is one of the protection of the community, it may be that common humanity for the offender gives way to concern for potential victims.[194]

188 *Hasim* (n 116) 36 [49].

189 For example, the Court in *DPP v Hudgson* [2016] VSCA 254, [112] (Weinberg, Whelan and Priest JJA) interpreted 'the word "compelling"' as '[connoting] powerful circumstances of a kind wholly outside what might be described as "run of the mill" factors, typically present in offending of this kind'.

190 18 USC § 3582(c)(1)(A).

191 See Part II of this article.

192 18 USC § 3553(a).

193 [2004] NSWCCA 193.

194 Ibid [18].

Like the policy statement in the *Federal Sentencing Guidelines*, Australian laws could stipulate that any victims of an offender must be notified of their application for early compassionate release from prison and given an opportunity to respond to it. It might also be reasonable for Australian law to adopt the specification in the policy statement of the *Federal Sentencing Guidelines* that a decision-maker can consider the offender's rehabilitation in determining whether, and if so the degree to which, it is appropriate to reduce their prison sentence on compassionate grounds. The extent of the offender's rehabilitation may be relevant to an assessment of the need to protect the community. It is recognised that evaluating an offender's prospects of rehabilitation is a difficult task. Nevertheless, sentencing judges and parole boards are required to and regularly do undertake such assessments. It is, however, important, especially in light of rising rates of recidivism in Australia in recent years, that such assessments are as accurate as possible. There are various means of predicting offenders' likelihood of rehabilitation as well as reoffending on which a decision-maker can rely. For instance, recent data shows that a strong predictor of an offender's reduced prospects of reoffending is if they undertake educational courses while in custody.[195]

It might be assumed that a law reform that will result in the early release of some offenders from prison, such as the one proposed in this article, would not appeal to the electorate. Nevertheless, that will not necessarily be the case. Some empirical studies found that the majority of community members who participated in them would have recommended more lenient sentences for offenders than judges.[196] Further, even if voters favour harsh punishment of offenders, they may nonetheless approve of a reform that is measured and jurisprudentially sound.[197] The US is a more punitive nation than Australia, yet its compassionate release provisions have not met with significant political resistance. That example provides a strong basis for having confidence in the smooth passage of similar laws through Australian legislatures.

The precise institutional framework that could be implemented to facilitate the proposed reforms is beyond the scope of this article, but we now canvas some options for decision-makers of licence applications. Decisions regarding prisoners' applications for early release on licence on compassionate grounds could be made

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195 See Mirko Bagaric, 'Reducing Recidivism and Incarceration Through Education' (2024) 54(1) *Australia Bar Review* 42. In the near future, it is possible that artificial intelligence tools will also be able to assist in predicting the likelihood of recidivism: see Dan Hunter, Mirko Bagaric and Nigel Stobbs, 'A Framework for the Efficient and Ethical Use of Artificial Intelligence in the Criminal Justice System' (2020) 47(4) *Florida State University Law Review* 749.

196 Victorian Sentencing Advisory Council, *Public Opinion About Sentencing: A Research Overview* (2019) 1, 9 <https://www.sentencingcouncil.vic.gov.au/sites/default/files/2019-08/Public_Opinion_about_Sentencing_Research_Overview.pdf>.

197 This is the situation even in countries that have very punitive sentencing practices, such as the US: see Mirko Bagaric et al, 'American Exceptionalism at its Finest: "Soft on Crime" Now a Vote-Winner in the World's Largest Incarcerator' (2021) 25(2) *Lewis and Clark Law Review* 489.

by the Attorney-General's Department or administered by an independent agency. Nevertheless, as discussed above, empowering parole boards to determine applications for licences for early release on compassionate grounds would have various advantages. Parole boards are well-established institutions and have shown they are able to make decisions on the basis of principle, without being swayed by political or public views. In any event, as noted previously, ensuring the transparency of parole boards' decision-making with respect to such applications, for instance, by requiring them to produce written determinations, could be one mechanism to preclude corrupt practices infiltrating this process, which has affected other early release schemes.[198]

V Conclusion

While incarcerated, and especially during long custodial sentences, prisoners can experience changed personal circumstances that may be dramatic and unforeseeable. Although some can have a positive impact on them, others can make their term of imprisonment considerably more onerous than the sentencing court contemplated they would endure and certain justifications for their custodial sentence will no longer be applicable. Incarceration is the harshest sanction in Australia's sentencing system. Creating the potential for an offender's original custodial term to be reduced in response to the impact on them of unfortunate and unforeseen vicissitudes in their life is humane. Early release from prison on compassionate grounds is also consistent with the notion of individualised justice, on which Australia's sentencing system is premised; as noted above, a sentence may deviate from one imposed for other offenders, in order to accommodate the individual's specific circumstances.

Yet there are currently few opportunities for early compassionate release from prison in Australia. Offenders can appeal their sentences, but will face the often difficult hurdle of producing fresh evidence. Further, courts rarely overturn sentences on appeal on compassionate grounds and lack clear rules for doing so. Notwithstanding the opportunity for an offender to petition the executive government to exercise the royal prerogative of mercy, its operation is vague, it is rarely exercised, and it has been criticised for contravening the separation of powers doctrine. In the federal jurisdiction, prisoners can apply for 'release on licence', though that, too, is available only in limited and extreme situations.

This article has suggested reforms to address this gap in the law. It proposes that all Australian jurisdictions pass legislation establishing a statutory process similar to the one that is available in Australia's federal jurisdiction for offenders to apply for early release from prison subject to a licence for compassionate reasons. As the article highlights, this reform proposal is consistent with three established sentencing considerations — mercy, proportionality, and community protection — which reflect significant normative and jurisprudential principles that underlie Australia's legal system.

198 See Part II of this article.

This article has proposed adopting aspects of the law in the US federal jurisdiction to develop compassionate grounds for offenders' early release from prison in Australia. That jurisdiction has a process for prisoners to apply for early compassionate release and has recently expanded the potential for such applications to be granted. The article recommends that, following this model, legislatures specify changes to prisoners' personal circumstances that may occur during their custodial sentence and make their experience of incarceration substantially more burdensome than a sentencing court might have envisaged they would endure. According to this reform suggestion, the major changed circumstances of offenders that could make them eligible for early compassionate release from prison are: some serious medical circumstances (which may be especially applicable to certain offenders due to the documented inadequacies in prisoner healthcare in Australia); hardship for the offender's family and, in particular, where the offender's relative or someone who is as close to the offender as a family member depends on them for care; the offender's old age and consequent deterioration of their health; and the offender's experience of abuse in prison.

In addition, the article recommends that decision-makers be permitted to consider whether circumstances other than those specified are similar in gravity to them and might also constitute compassionate grounds for early release from prison. This could encompass an offender's incarceration for a lengthy time period in solitary confinement or similarly harsh conditions. Further, it is suggested that, in determining an application for early release from prison on a licence on compassionate grounds, decision-makers also be required to take into account the key sentencing objectives, and especially the need for community protection. While it is just and reasonable to consider an offender's changed circumstances, it is vital that their custodial sentence is not reduced if doing so would jeopardise public safety.

This article has focused on explaining the rationale for expanding the potential for some prisoners to be released early from custody on compassionate grounds, but it has also proposed a means of implementing the proposed reforms. As outlined in the article, it is recommended that parole boards determine prisoners' applications for compassionate early release. This would avoid the need to create new entities for this purpose. Moreover, parole boards are longstanding institutions with experience in making principled decisions, and are generally regarded as being less susceptible to political and populist pressure than other non-judicial bodies. Expanding the scope for compassionate early release is congruent with a sentencing system that is informed by principles of mercy and proportionality, and that aims to protect the community.

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A QUANTITATIVE ANALYSIS OF THE RISE OF PSEUDOLAW IN SOUTH AUSTRALIA

Abstract

The issue of pseudolaw has become a matter of increasing concern in Australian courts, and indeed all around the world. Yet there remains little empirical research into the topic, and few attempts to study the extent of the issue. This is the first research globally to map the prevalence and form of the general phenomenon of pseudolaw litigation in a single jurisdiction.

By looking at the published case records in South Australia, it is evident that pseudolaw is emerging as a distinct phenomenon. The analysis found 50% more pseudolaw cases in the last 10 years than in the previous 40 years. The data demonstrates some distinct patterns in the types of cases in which pseudolaw arguments are being used, in terms of jurisdictions, representation and demographics of litigants. The research also assessed the type of pseudolegal argumentation which is being deployed in these cases. It develops six categories for characterising cases: (1) strawman arguments; (2) law is a contract; (3) state law is defective; (4) private prosecution; (5) other; and (6) pseudolaw adjacent. The research sets out the distribution and form of reported cases against these categories.

This first-of-its-kind study demonstrates the emergence of pseudolaw as a distinct and growing phenomenon. Not only does this research cement the themes introduced by anecdotal evidence, but the empirical doctrinal analysis provides a rich insight into the scale and form of pseudolaw in South Australia, with implications both locally and globally.

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I Introduction

> **Her Honour:** Ms Georganas, I'm sorry. You really just can't interrupt and, when it's your turn, I will not interrupt you. But for the moment
>
> **Applicant:** I'm Angela — I'd just like to say to you, I'm Angela.
>
> **Her Honour:** Okay, Angela
>
> **Applicant:** The only liable woman in this courthouse under Genesis 1:26
>
> …
>
> **Applicant:** I will not engage in the necromancy as this witchcraft and sorcery and magic is foreign…"[1]

Strange things are happening in South Australian courtrooms. In fact, strange things are happening in courtrooms worldwide,[2] as some litigants increasingly resort to a particular anti-authority, conspiratorial form of argumentation best described as 'pseudolaw'.[3] This phenomenon is characterised by adherents utilising the structure and form of conventional legal reasoning, but without its substance. The appeal to legal sources and concepts (such as the Bill of Rights and treason) are typical of this approach, as is the belief that adherents possess unique insights into the 'true' meaning of the law. Adherents utilise tropes such as the 'strawman argument'[4] in attempts to control the legal proceedings (seen above in the insistence of the applicant to be referred to by her given name) and display a level of confidence uncommon for self-represented litigants.

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1 Transcript of Proceedings, *Georganas v Georganas* (Supreme Court, CIV-20-000350, Judge Bochner, 8 August 2023) 2, 4, 10–11 ('*Georganas (Transcript of Proceedings)*'). See also: *Georganas v Georganas* [2024] SASCA 1 ('*Georganas*'); 'Federal MP's Sister Tells Supreme Court Judge He's Under Arrest', *The Advertiser* (online, 9 February 2024) <https://www.adelaidenow.com.au/news/south-australia/federal-mps-sister-tells-supreme-court-judge-hes-under-arrest/news-story/5762b6cdca5c89e77153b8949981409b>; Sean Fewster, 'MP and Sister in Battle of Will', *The Advertiser* (Adelaide, 10 February 2024).

2 Harry Hobbs, Stephen Young and Joe McIntyre (eds), *Pseudolaw and Sovereign Citizens* (Hart, 2025).

3 Harry Hobbs, Stephen Young and Joe McIntyre, 'The Internationalisation of Pseudolaw: The Growth of Sovereign Citizen Arguments in Australia and Aotearoa New Zealand' (2024) 47(1) *UNSW Law Journal* 309 ('The Internationalisation of Pseudolaw').

4 See, e.g., Joe McIntyre, Harry Hobbs and Stephen Young, 'The Strawmen Trap: Non-Appearance and the Pitfalls of Pseudolaw' (2025) 99(4) *Australian Law Journal* 319.

Despite these arguments never succeeding,[5] and courts routinely describing these pseudolegal claims in terms such as 'unintelligible',[6] 'fundamentally misguided',[7] and 'almost incomprehensible',[8] the phenomenon has spread. There is now anecdotal evidence that there has been a 'sharp rise' of these types of claims in Australian courts over the last few years.[9] This has been matched by increased media scrutiny of the phenomenon,[10] and a growing body of cases addressing pseudolaw.[11]

In Australia, public attention was drawn to the topic when 'sovereign citizens' — a loosely affiliated pseudolaw group — became a prominent part of the anti-vaccine movement at the height of the COVID-19 pandemic. The 'red ensign' flag used by

5 Hobbs, Young, and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 311; Joe McIntyre et al, 'The Rise of Pseudolaw in South Australia: An Empirical Analysis of the Emergence and Impact of Pseudolaw on South Australia's Courts' (Research Report, University of South Australia, September 2024).

6 Transcript of Proceedings, *Taylor, In the Matter of an Application for Leave to Issue or File* [2023] HCATrans 63.

7 *Kelly v Fiander* [2023] WASC 187, [11] ('*Kelly*').

8 *National Australia Bank Ltd v Norman* [2012] VSC 14, [4] ('*Norman*').

9 Sophie Kesteven and Damien Carrick, 'Magistrates Witness a "Sharp Rise" in Sovereign Citizen Cases brought before the Local Courts', *ABC Radio National* (online, 8 May 2023) <https://www.abc.net.au/news/2023-05-08/nsw-magistrates-report-sharp-rise-in-sovereign-citizen-cases/102285772>.

10 See, e.g.: ibid; Hannah Murphy, 'Australian Taxation Office Fires Warning Shot Over "Hopelessly Flawed" Sovereign Citizen Movement's Tax Advice', *ABC News* (online, 20 August 2024) <https://www.abc.net.au/news/2024-08-20/sovereign-citizen-australian-taxation-office-tax/104064368>; Eric Tlozek, 'Man in Custody After Police Raid Alternative Community Meeting Over Public Safety Concerns', *ABC News* (online, 17 September 2021) <https://www.abc.net.au/news/2021-09-17/sa-police-raid-adelaide-alternative-community-meeting/100472728>; Ariel Bogle, 'The Rise of a "Dangerous" Ideology Among Parents is Causing Havoc in Custody Disputes' *The Guardian* (online, 15 December 2024) <https://www.theguardian.com/law/2024/dec/15/sovereign-citizen-pseudolaw-family-court-dangerous-ideology-custody-disputes-ntwnfb>. See also '"Sovereign Citizens" in the Courts', *ABC Radio National* (online, 2 May 2023) <https://www.abc.net.au/listen/programs/lawreport/sovereign-citizens/102215332>. The issue was subject to an in-depth investigation by the flagship 'Four Corners' program in August 2025: 'Lawfare' *ABC Four Corners* (online, 18 August 2025) <https://www.abc.net.au/news/2025-08-18/lawfare/105668528>.

11 See, e.g.: *Nelson v Greenman* [2024] VSC 704, [70] (Gobbo J) ('*Nelson*'); *Rossiter v Adelaide City Council* [2020] SASC 61, [50] (Livesey J) ('*Rossiter*'); *Kelly* (n 7); *Deputy Commissioner of Taxation v Casley* [2017] WASC 161, [15] (Le Miere J) ('*Casley*'); *Kosteska v Magistrate Manthey* [2013] QCA 105, [17] (Martin J); *Re Magistrate M M Flynn; Ex parte McJannett* [2013] WASC 372, [15] (McKechnie J); *Yap v Matic (No 4)* [2022] WASC 422, [23] (Solomon J); *Yap v Matic (No 7)* [2023] WASC 55, [44] (Solomon J).

that group became a highly visible symbol of the protests of that era.[12] The anti-authority tendencies of pseudolaw were well adapted to that period, and it appears that these conspiratorial forms have continued to flourish.[13] Yet, the real prevalence and scale of the phenomenon in Australia is poorly understood, with contemporary domestic scholarship only recently beginning to emerge.[14]

Cases such as *Georganas v Georganas* ('*Georganas*')[15] highlight both the way in which pseudolaw is manifesting in South Australia ('SA') and the detrimental impacts of the phenomenon. That case, concerning the administration of a deceased estate, became front page news as a result of the conduct of the pseudolaw litigant and her supporters. The litigant accused the Judge of 'witchcraft', 'treason', and 'necromancy',[16] before a vocal and aggressive group of supporters, led by an interstate 'guru' (the 'unknown speaker' in the transcript), attempted to 'arrest' the Judge whom they deemed a criminal, forcing the evacuation of the courtroom.[17]

Georganas aptly demonstrates the 'performance' of pseudolaw, whereby language and physical intimidation can disrupt the proceedings. The conduct of the supporters in that case extended to the overt intimidation of court staff outside buildings and raised ongoing security concerns.[18] These violent undertones reflect an earlier incident, a few years prior, when a leading pseudolaw adherent in SA was arrested after a police raid uncovered a cache of weapons on his property.[19] The public record of such high-profile incidents highlights that pseudolaw is present in SA and is posing a threat to the administration of justice in the State. However, the presence of pseudolaw extends beyond such cases, with strong anecdotal evidence — including informal conversations with judicial officers[20] — suggesting that this is an increasingly common phenomenon.

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12 See Joe McIntyre, 'What is the Australian Merchant Navy Flag, the Red Ensign? And Why do Anti-Government Groups Use It?' *The Conversation* (online, 12 November 2021) <https://theconversation.com/what-is-the-australian-merchant-navy-flag-the-red-ensign-and-why-do-anti-government-groups-use-it-170270> ('What is the Australian Merchant Navy Flag?').

13 See McIntyre et al (n 5).

14 See, e.g., the *Pseudolaw and The Administration of Justice* conference, convened by Harry Hobbs, Joe McIntyre and Stephen Young at the University of Technology Sydney in November 2023. The first edited collection on this topic was published in 2025: Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2).

15 *Georganas* (n 1).

16 *Georganas (Transcript of Proceedings)* (n 1) 2, 4, 10–11. See also *Georganas* (n 1) [3], [8]–[10] (Doyle JA).

17 See: McIntyre et al (n 5) pt IV; Jonathan Crichton, Fiona O'Neill and Joe McIntyre, 'Winning by Losing? Critical Moments and Communicative Expertise in Pseudolaw: An Applied Linguistic Analysis' (2025) 99(9) *Australian Law Journal* 724.

18 McIntyre et al (n 5) 80.

19 Tlozek (n 10).

20 See McIntyre et al (n 5) pt IV.

The research outlined in this article employed empirical techniques to identify any trends or patterns that emerge from the reported pseudolaw cases in SA and to identify whether this constitutes a distinct and growing social phenomenon.[21] SA was selected as the focus of the study as a relatively small but representative jurisdiction to enable a proof of concept of the research methods. The research focused on the following questions:

(1) Is there evidence in the publicly available case law that pseudolaw is emerging as a distinct phenomenon in SA?
(2) In what types of cases do pseudolaw arguments arise (nature, type, jurisdiction etc)?
(3) What forms of pseudolegal argumentation are deployed in these cases?

To answer these questions, it was necessary to adopt a mixed empirical doctrinal method that combined two distinct forms of research to help map pseudolaw in SA. As outlined below, this work involved the construction of a dataset of reported cases from the State that could be categorised as 'pseudolaw' cases. The identified cases were then coded against several criteria directed to both the type of case (nature/type/jurisdiction/identity) and, through doctrinal content analysis, the forms of pseudolegal arguments employed.

Ultimately, the data from publicly available cases — while an inherently limited dataset — demonstrates the emergence of pseudolaw as a distinct and growing phenomenon. In total, 69 cases were identified between 1973 and 2024,[22] with 50% more pseudolaw cases in the last 10 years than in the previous 40 years. This analysis highlighted a number of distinct patterns in pseudolaw cases, including as to the gender of adherents, the outsized impact of certain individuals, and the wide range of matters where these arguments arise. The empirical doctrinal analysis of pseudolaw cases provides a rich insight into the rise of this increasingly disruptive phenomenon.

This research confirms some key information about pseudolaw. It demonstrates that: (1) pseudolaw grew during the pandemic and can now be regarded as a distinct social phenomenon; (2) that males are the primary litigants; (3) that many cases involve traffic law; and (4) that adherents *never* win on the merits. Yet the research also highlights the ways in which the focus on only publicly available sources can distort our understanding of pseudolaw.[23] The focus on reported cases heavily

21 This research was part of a broader project to understand the rise of pseudolaw in South Australia, and its impact on the courts of the State, funded by the Law Foundation of South Australia. That broader project involved a number of other methodological approaches, including thematic analysis of interviews and linguistic analysis of transcripts, to better understand pseudolaw in South Australia: McIntyre et al (n 5).

22 Ibid.

23 For these reasons, it is necessary to go beyond the reported judgments if one is to get a fulsome account of the phenomenon. For a discussion of this issue, see Joe McIntyre et al, 'Pseudolaw Behind the Judgments: The Hidden Impact on the Administration of Justice' (2025) 99(9) *Australian Law Journal* 685.

skews this form of analysis to Supreme Court and appellate matters at the expense of first instance lower court cases. This can be problematic for understanding the breadth and impact of pseudolaw, particularly when reported judgments show only a small (and not necessarily representative) sample of the broader phenomenon in comparison to other methods.[24] For example, the three most dominant pseudolaw arguments in the broader literature (the strawman argument, state law is defective, and law is a contract) appeared in less than half the cases, yet these arguments appear far more common in unreported lower court proceedings.[25]

Nevertheless, this study of the reported cases on pseudolaw represents the first study internationally that seeks to provide a comprehensive analysis of the scale and form of pseudolaw in a specific jurisdiction. While other studies have looked at manifestations of discrete pseudolaw movements, like 'sovereign citizens', this study is the first attempt to map the prevalence of the broader phenomenon in any jurisdiction. Ultimately, it demonstrates that this should now be regarded as a distinct, and growing, phenomenon, especially when combined with other data and analysis.[26]

II The Existing Analysis of Pseudolaw in Australia

Over the last few years, 'pseudolaw' has become the preferred term to describe the collection of movements, groups and practices that share a common methodological approach to engaging with the law.[27] This phenomenon encompasses a range of groups, including sovereign citizens, freemen on the land, 'detaxers', American

24 For instance, the interview-based parts of the broader research project: see McIntyre et al (n 5) pts III–VI.

25 See McIntyre et al (n 5) 64–7 for a discussion of the substantive arguments that were experienced by participants, noting the particular experiences of magistrates. It is worth noting that the first significant scholarly exposition of pseudolaw argumentation in contemporary Australia has been by a sitting magistrate: Glen Cash, 'A Kind of Magic: The Origins and Culture of "Pseudolaw"' (Conference Paper, Queensland Magistrates' State Conference, 26 May 2022), and that perhaps the most vocal early discussant of the topic is former magistrate David Heilpern.

26 See McIntyre et al (n 5).

27 See, e.g., Colin McRoberts, 'Tinfoil Hats and Powdered Wigs: Thoughts on Pseudolaw' (2019) 58(3) *Washburn Law Journal* 637. See also Donald J Netolitzky, 'A Rebellion of Furious Paper: Pseudolaw as a Revolutionary System' (Conference Paper, Sovereign Citizens in Canada Symposium, Centre d'Expertise et de Formation sur les Intégrismes Religieux et la Radicalisation, 3 May 2018) 1 ('A Rebellion of Furious Paper'). Some authors continue to prefer the term 'sovereign citizen' to refer to the broader phenomenon, encompassing both the Sovereign Citizen movement proper and other movements that reflect some of those same patterns: see Amy Cohen and Ilana Gershon, 'Prefigurative Neoliberalism: A Provisional Analysis of the Global Sovereign Citizen Movement' (2025) 48(1) *PoLAR: Political and Legal Anthropology Review* 1.

State Nationals, and the German Reichsbürger movement.[28] It also influences certain proponents of micronations, and individuals involved in movements like anti-vaccination protests. Common to all these movements is the distorted use of legal forms, an anti-authority mindset, a lack of success, and a significant detrimental impact on the administration of justice. As Livesey J observed in *Rossiter v Adelaide City Council* ('*Rossiter*'):

> Various terms have been used to describe 'pseudolegal arguments' such as those advocated by the appellant in this case. They have without reservation been rejected as involving both legal nonsense and an unnecessary waste of scarce public and judicial resources. So too here.[29]

The following section first outlines both the nature of pseudolaw and pseudolaw scholarship, tracing the emergence, evolution, and growth across jurisdictions. The examination of pseudolaw scholarship highlights the application of doctrinal and empirical methods to understand the prevalence, arguments, and socio-legal dynamics of pseudolaw adherents. The section then examines pseudolaw and how it has been understood in Australia.

A *Conceptual Contours of Pseudolaw*

At first glance, pseudolaw often seems nonsensical. Courts have described it as 'obvious nonsense',[30] 'pseudo-legal gibberish',[31] or 'gobbledygook'.[32] When the legally trained encounter pseudolegal arguments, their first instinct is often to dismiss them as hallucinations that warrant no further analysis.[33] Yet, underlying this gibberish, is a discernible structure that can be understood. As three of the authors of this article (Hobbs, Young and McIntyre) have argued previously, pseudolaw can be identified by three key components:[34]

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28 See: Donald J Netolitzsky, 'The Dead Sleep Quiet: History of the Organized Pseudo-legal Commercial Argument Phenomenon in Canada: Part II' (2023) 60(3) *Alberta Law Review* 795, 813–30 ('The Dead Sleep Quiet'); Anna Löbbert, '"Germanite" is a Rare Mineral: Sovereignism in Germany' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2) 175; Christine M Sarteschi, 'American State Nationals: The Next Iteration of the Sovereign Citizen Movement' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2) 227.

29 *Rossiter* (n 11) [50].

30 *Bradley v The Crown* [2020] QCA 252.

31 *Casley* (n 11) [15].

32 *Norman* (n 8) [4].

33 For a discussion on the ways in which pseudolaw creates hallucinations that are effectively illusions of meaning, see Joe McIntyre, 'Pareidolic Illusions of Meaning: ChatGPT, Pseudolaw and the Triumph of Form Over Substance' (Research Paper, 16 March 2025).

34 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 310.

(1) *A Co-Opted Legal Form*: it borrows legal terminology and forms of reasoning to *appear* like conventional legal argumentation,[35] creating the illusion of legal legitimacy;
(2) *Use of Contra-Narratives/Alternative Legal Universe*: pseudolaw creates an 'alternate legal universe'[36] that draws from, yet distorts, traditional legal sources[37] to develop its own set of rules; and
(3) *Internalised Belief in the 'True Law'*: it engenders in adherents a genuine belief that they are upholding the 'true law' and can use this knowledge to lawfully achieve their goals.[38]

Although adherents are often motivated by an underlying distrust of government and authority, pseudolaw is not anarchistic. Instead, they tend to believe that applying their version of legal reasoning in a precise manner achieves miraculous results — avoiding taxes, debts, fines, and other legal liabilities *without breaking the law*. For this reason, pseudolaw is sometimes described as akin to a form of 'magic'.[39]

The various groups described above highlight that pseudolaw is not monolithic. Rather, it is fragmented and decentralised, drawing adherents who may not neatly align with a specific group or self-identify with a broader movement. Marilyn McMahon notes that followers often '"cherry-pick" aspects that appeal to them'.[40] In many respects, pseudolaw is best understood through the behaviours and attitudes of its followers. These include a conspiratorial worldview, a constant questioning of authority, the proliferation of irrelevant and voluminous filings, and the use of scripted, often illogical, arguments. Adherents typically perceive themselves as engaged in a righteous struggle against a corrupt and biased system.[41]

B *Tracking the Rise of Pseudolaw*

The fragmented and decentralised nature of pseudolaw has had a significant impact upon the study of the phenomenon. There is no structured creed or organisation that coheres the various movements, but there are common forms of behaviour and argumentation. Many of these can be traced back to the 'sovereign citizen' movement

35 Netolitzky, 'A Rebellion of Furious Paper' (n 27) 1.

36 McRoberts (n 27) 643.

37 Hobbs, Young and McIntyre 'The Internationalisation of Pseudolaw' (n 3) 310.

38 See, e.g., Chief Justice Peter Quinlan, 'The Rule of Law in a Social Media Age' (Speech, Sir Francis Burt Oration, 3 November 2022) 18.

39 Cash (n 25).

40 Marilyn McMahon, 'Asserting Sovereignty: An Empirical Analysis of Sovereign Citizen Litigation in Australian Courts' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2) 175, 178.

41 Harry Hobbs, Stephen Young and Joe McIntyre, 'Understanding Pseudolaw' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2) 13–14.

that arose in the United States of America in the 1990s.[42] That movement popularised a series of arguments previously advanced by the 'common law movement', which sought to revert to some mythical 'common law' because of a view that state law, its actors, and legislation were corrupt.[43] In the late 1990s or early 2000s, the phenomenon began to crystallise into a distinct movement whose foundational beliefs included that the government is corrupt (perhaps because it became a corporation), and that 'free' or 'flesh and blood' individuals follow the common law (or natural law or God's law).[44] Around 2000, sovereign citizen-style legal claims began to spread to Canada,[45] and became an international issue following the Global Financial Crisis around 2009–11. This has meant that most scholarly work on this movement in this period was conducted by North American authors.[46] While there is evidence that the movement began to take hold in Australia in the 2010s,[47] there was no scholarly legal research on the topic during this period, though there was some early work in criminology and policing studies.[48]

Pseudolaw, however, appeared to enter a new period of explosive growth in response to the COVID-19 pandemic.[49] The phenomenon's increased prominence

42 Stephen Young, Harry Hobbs and Rachel Goldwasser, 'The Rise of Sovereign Citizen Pseudolaw in the United States of America' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2). For an example of some literature, which may not use the term 'sovereign citizen' or 'pseudolaw', see: Susan P Koniak, 'When Law Risks Madness' (1996) 8(1) *Cardozo Studies in Law and Literature* 65; Susan P Koniak, 'The Chosen People in Our Wilderness' (1997) 95(6) *Michigan Law Review* 1761; Wilson Huhn, 'Political Alienation in America and the Legal Premises of the Patriot Movement' (1999) 34(3) *Gonzaga Law Review* 417; Daniel Lessard Levin and Michael W Mitchell, 'A Law Unto Themselves: The Ideology of the Common Law Court Movement' (1999) 44(1) *South Dakota Law Review* 9; Francis X Sullivan, 'The "Usurping Octopus of Jurisdictional/Authority": The Legal Theories of the Sovereign Citizen Movement' [1999] (4) *Wisconsin Law Review* 785.

43 See: Young, Hobbs and Goldwasser (n 42) 105–9; Koniak, 'When Law Risks Madness' (n 42); Koniak, 'The Chosen People in Our Wilderness' (n 42); Levin and Mitchell (n 42).

44 Young, Hobbs, and Goldwasser (n 42) 113.

45 Netolitzky, 'A Rebellion of Furious Paper' (n 27) 1; Donald J Netolitzky, 'Organized Pseudolegal Commercial Arguments as Magic and Ceremony' (2018) 55(4) *Alberta Law Review* 1045; *Meads v Meads* [2012] ABQB 571 [417] ('*Meads*').

46 Caesar Kalinowski IV, 'A Legal Response to the Sovereign Citizen Movement' (2019) 80(2) *Montana Law Review* 153; Sullivan (n 42); James Evans, 'The "Flesh and Blood" Defense' (2012) 53(4) *William and Mary Quarterly* 1361; Joshua Weir, 'Sovereign Citizens: A Reasoned Response to the Madness' (2015) 19(3) *Lewis and Clark Law Review* 829.

47 See McIntyre et al (n 5) 25. See also: Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3).

48 See, e.g., Daniel Baldino and Kosta Lucas, 'Anti-Government Rage: Understanding, Identifying and Responding to the Sovereign Citizen Movement in Australia' (2019) 14(3) *Journal of Policing, Intelligence and Counter Terrorism* 24.

49 See Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 309.

during the pandemic prompted a new wave of scholars to begin focusing on the topic. This seems to have begun with 'explainers' and commentary for news and media platforms,[50] before progressing to more considered scholarship[51] augmented by more rapid online practices of engaging in public discourse around prominent judgments.[52]

As the number of pseudolaw cases increased over the last 15 years, a new mode of 'doctrinal' pseudolaw scholarship emerged. Here, judges and academics have — in a manner that reflects orthodox doctrinal reasoning — sought to analogise and distinguish cases where a party has made similar-sounding arguments. The most significant of these cases is the Canadian case of *Meads v Meads* ('*Meads*'),[53] where Rooke ACJ surveyed nearly 150 cases before aggregating them as forms of 'Organized Pseudolegal Commercial Argument'.[54] This approach has been described as a form of 'weaponised judgment'.[55] Although Australia does not have a landmark pseudolaw case like *Meads*, post-COVID-19 decisions like *Nelson*[56] provide useful summaries of pseudolaw cases in the country,[57] while cases such as *Kelly v Fiander*[58] have wielded influence in addressing specific pseudolegal arguments.[59]

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50 See, e.g.: Joe McIntyre and Rick Sarre, 'Many Anti-Lockdown Protesters Believe the Government is Illegitimate: Their Legal Arguments Don't Stand Up', *The Conversation* (online, 28 September 2020) <https://theconversation.com/many-anti-lockdown-protesters-believe-the-government-is-illegitimate-their-legal-arguments-dont-stand-up-146668>; McIntyre, 'What is the Australian Merchant Navy Flag?' (n 12); Sarah Moulds, 'No, That's Not the Law: The Danger of Using Pseudo-legal Arguments Against COVID-19 Rules', *The Conversation* (online, 3 November 2021) <https://theconversation.com/no-thats-not-the-law-the-danger-of-using-pseudolegal-arguments-against-covid-19-rules-170630>; Harry Hobbs, Joe McIntyre and Stephen Young, 'Some People Think Income Tax is Illegal. It's Pseudolaw, and it's Damaging the Legal System', *The Conversation* (online, 31 October 2023) <https://theconversation.com/some-people-think-income-tax-is-illegal-its-pseudolaw-and-its-damaging-the-legal-system-214847>; Kesteven and Carrick (n 9); Murphy (n 10); Tlozek (n 10); Bogle (n 10).

51 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3). See also Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2).

52 See, e.g., *Hoek v WA Police* [2024] WASC 34, discussed in McIntyre, Hobbs and Young (n 4).

53 *Meads* (n 45). See also Donald J Netolitzky, 'After the Hammer: Six Years of Meads v. Meads' (2019) 56(4) *Alberta Law Review* 1167.

54 *Meads* (n 45) [40].

55 Donald Netolitzky, 'The Sun Only Shines on YouTube: The Marginal Presence of Pseudolaw in Canada' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2) 121 ('The Sun Only Shines on YouTube').

56 *Nelson* (n 11).

57 Ibid [69].

58 *Kelly* (n 7).

59 See McIntyre, Hobbs and Young (n 4).

The approach championed by *Meads* has led to academics engaging in similar doctrinal reviews of case law within specific jurisdictions. For instance, Donald Netolitzky has drawn on *Meads* and a doctrinal review of Canadian case law to define pseudolaw as 'a collection of legal-sounding but false rules that purport to be law',[60] identifying six key elements of the pseudolaw 'memeplex'.[61] Netolitzky's memeplex has become influential in understanding contemporary pseudolaw,[62] and helps to summarise the contours of pseudolaw ideology.[63] Similar doctrinal analyses of pseudolaw have been conducted in the United States, with examinations of case law from a single jurisdiction, such as South Carolina,[64] or Connecticut.[65] Others have also investigated how these arguments arise in a court with special jurisdiction, like tax or bankruptcy.[66]

In the Australian context, Queensland District Court Judge Glen Cash offered one of the earliest surveys of pseudolaw in Australia through an extra-curial publication in 2022.[67] Cash observed that pseudolaw adherents engage in a kind of magical thinking to avoid unwanted legal consequences. More recently, three of the authors of this article (Hobbs, Young and McIntyre) undertook a doctrinal analysis of the forms of pseudolegal argumentation as they appear in the reported judgments of

60 Netolitzky, 'A Rebellion of Furious Paper' (n 27).

61 These are: (1) Everything is a Contract; (2) Silence Means Agreement; (3) No Injured Party; (4) Defective or Limited State Authority; (5) The 'Strawman' Duality; and (6) Fiscal Misconceptions: Donald Netolitzky, 'A Pathogen Astride the Minds of Men: The Epidemiological History of Pseudolaw' (Conference Paper, Sovereign Citizens in Canada Symposium, Centre d'Expertise et de Formation sur les Intégrismes Religieux et la Radicalisation, 3 May 2018) 2.

62 See, e.g., Samuel Barrows, 'Sovereigns, Freemen, and Desperate Souls: Towards a Rigorous Understanding of Pseudolitigation Tactics in United States Courts' (2021) (62) *Boston College Law Review* 905, 911–19 (employing the same typology).

63 The 'memeplex' can be summarised as follows: pseudolaw adherents maintain that State law and government are defective. The State has been influenced or taken over by corporations, which has subverted all law into contracts. Individuals who study the common law can de-subjectify themselves from the State's corporate-legislative regime by distinguishing their real, living self, from the legal persona, the 'strawman', that the government made to stabilise national debt (and enter into contracts). State actors do not have authority over those 'living people' who follow common law. State actors will try to entangle living people in various contractual or legislative schemes, but under common law, if there is no injured party, then there is no legal basis for stopping someone. Those living under common law can draw on the trust accounts associated with their 'strawman' as a type of bank account, as a type of credit, or to discharge debts.

64 Michelle Theret, 'Sovereign Citizens: Homegrown Terrorist Threat and its Negative Impact on South Carolina' (2012) 63(4) *South Carolina Law Review* 853.

65 Michael Mastrony, 'Common-Sense Responses to Radical Practices: Stifling Sovereign Citizens in Connecticut' (2016) 48(3) *Connecticut Law Review* 1013.

66 Leslie R Masterson, 'Sovereign Citizens: Fringe in the Courtroom' (2011) 30(2) *American Bankruptcy Institute Journal* 66.

67 Cash (n 25).

Australia and Aotearoa New Zealand.[68] In that work, we identified three broad categories of arguments: (1) the strawman argument; (2) absence of individual consent; and (3) state law is defective.[69] These works highlight the utility of doctrinal methods to help understand the arguments pseudolaw adherents use, and to trace how those arguments are used in — and by — the courts.

Over the past decade, researchers worldwide have begun to employ various empirical and socio-legal methods to gain a deeper understanding of the phenomenon. For example, in the United States, Stephen Garrett Smith aggregated and coded federal court cases involving sovereign citizens to find a distinction between members of this movement and other far-right defendants.[70] Jessica Middleton also sought to quantify sovereign citizen movement activity through reported incidents.[71] Nevertheless, research on adherents remains sparse. Luuk de Boer recently observed that 'empirical data about these people [pseudolaw adherents] and their concerns are all but missing'.[72]

There is an increasing trend to undertake systematic surveys aimed at more comprehensively studying the prevalence and scope of the phenomenon. For example, de Boer undertook a comprehensive survey of 166 cases lodged in Dutch courts by sovereign citizens between 2013 and 2024.[73] This analysis, part of a larger endeavour to look at sovereign citizens through a lens of legal alienation,[74] set out to test a number of hypotheses about the causes and demographics of the rise of sovereign citizens in the Netherlands. In that study, cases were coded to enable tracking of their temporal and geographic distributions, as well as the socio-economic status and gender of litigants. The data showed a growth that coincided with the COVID-19 pandemic, a tentative overrepresentation of sovereign citizens in rural areas, and an overrepresentation of older men and entrepreneurs.[75]

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68 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3).

69 Ibid 324.

70 Stephen Garrett Smith, 'An Analysis of the Sovereign Citizen Movement: Demographics and Trial Behaviors' (MA Thesis, University of Arkansas, 2016).

71 Jessica L Middleton, 'The Sovereign Citizen Movement: Strain, Conflict, and the American Dream' (MA Thesis, Arkansas State University, 2014).

72 Luuk de Boer, 'Limit Cases: Sovereign Citizens and a Jurisprudence of Consequences' in Marc Hertogh and Paulien de Winter (eds), *Empirical Legal Studies in the Netherlands: Towards a Jurisprudence of Consequences* (Boom, 2025) 163, 163; Baldino and Lucas (n 48); Christine M Sarteschi, 'Sovereign Citizens: A Narrative Review with Implications of Violence Towards Law Enforcement' (2021) 60 *Aggression and Violent Behavior* 101509; Lee M Vargen and Darin J Challacombe, 'Violence Risk Assessment of Sovereign Citizens: An Exploratory Examination of the HCR-20 Version 3 and the TRAP-18' (2023) 41(4) *Behavioral Sciences and the Law* 55.

73 de Boer (n 72) 166–7.

74 Ibid 165.

75 Ibid 178.

While de Boer focused on socio-legal questions about potential causes and explanations for the data, a recent study by McMahon in Australia sought to track the frequency and form of pseudolegal arguments in 'sovereign citizen' cases in Australia.[76] In that study, McMahon identified all cases reported in the *AustLII* database from 2014 to 2023 in which a litigant was described as a 'sovereign citizen'. In doing so, McMahon generated a database of 103 cases from all jurisdictions in Australia. McMahon then analysed those cases to identify common patterns such as the nature of the proceedings and representation of litigants.[77] A doctrinal analysis was also undertaken to identify the type and form of arguments used by litigants, with nine key arguments found.[78] The data showed an initial peak of this type of litigation in the early 2010s with a relatively stable longer-term trendline averaging around 10 cases nationally per year. The content analysis revealed recurring themes and patterns in the types of pseudolaw arguments presented, highlighting the most common legal misconceptions and strategies used by sovereign citizens in Australian courts.

While de Boer and McMahon recognised the limitations of their datasets,[79] they both focus in on the narrow subset of 'sovereign citizen' rather than the broader phenomenon of 'pseudolaw', restricting the generalizability of their findings.[80] It therefore remains that concrete data about the frequency, scope and nature of the broader phenomenon of 'pseudolaw' is lacking. While focused only on a single, small jurisdiction, this is the first study globally to track the general phenomena of 'pseudolaw' cases over the longer term.

III Methodology

This research sought to examine the extent to which the reported case law in SA reveals pseudolaw as a distinct phenomenon. The focus was on the visible and public way in which the courts engage with pseudolaw, through the lens of the most visible artifact of the courts — the written public judgment. We sought to utilise a publicly available dataset to study the frequency, scope and nature of that emergent phenomenon. This involved constructing a dataset of relevant pseudolaw cases and

76 McMahon (n 40) 180.

77 Ibid 180–1.

78 Ibid 185–6.

79 de Boer (n 72) 166; McMahon (n 40) 181–2.

80 There is some uncertainty as to the extent to which these studies focused explicitly on 'sovereign citizen' cases properly or were actually studying 'pseudolaw' generally. For example, the explicit language of McMahon's methodology sought to limit the cases to instances where a key participant self-identified as a sovereign citizen or where 'they used language or other indicia employed by sovereign citizens': McMahon (n 40) 181. That latter case may potentially have captured many 'pseudolaw-but-not-sovereign-citizen' cases. This ambiguity is precisely why the language of 'pseudolaw' has been preferred in this study.

coding them regarding: (1) the nature and type of case; and (2) the form of pseudolegal arguments used.

To this end, this study adopts a methodology similar to McMahon's study. However, the two studies have distinct objects of inquiry. Whereas McMahon focused on the narrow sub-category of 'sovereign citizens' in the broader domain of all Australian jurisdictions,[81] this study's focus is the broader category of 'pseudolaw' cases (which includes within it instances of 'sovereign citizens'), but only as they occur in the jurisdiction of SA. This difference in focus is evidenced by the fact that McMahon identified *no reported cases* from SA in this period,[82] as opposed to the 69 cases we identified. These cases may not have been identified with the 'sovereign citizen' label, but are, in our view, properly regarded as 'pseudolaw'. While the expanded scope (both temporal and subject-matter) made identifying relevant cases more challenging, it revealed a clear trend of increasing pseudolaw cases over time. It also facilitated a deeper, more comprehensive survey of the phenomenon, although limitations remain.

A *Construction of the Dataset*

To effectively study the scope of pseudolaw cases in South Australian legal proceedings, it was first necessary to compile a systematic dataset of cases in which pseudolaw arguments have been raised. The objective was to capture a comprehensive set of all cases where pseudolaw claims were either central to the case or significantly influenced the outcome. This section outlines the methodology by which the dataset was created. This involves issues of both scope of inquiry and identification of cases.

1 *Scope and Design of the Dataset*

In constructing the dataset, careful consideration was given to the scope of the inquiry. Four key parameters were established to ensure that the dataset was both focused and manageable, while remaining responsive to the research questions. The first parameter ('Jurisdictional Scope') is that only cases from South Australian courts and tribunals were included in this dataset. Cases involving South Australian litigants but adjudicated in federal courts or tribunals were therefore omitted from the dataset.

The second parameter ('Temporal Scope') was directed to the temporal element of cases. While no strict temporal boundaries were imposed at the outset, the earliest case identified was from 1973. The emphasis on more recent cases reflects the growing prominence of pseudolaw as a legal challenge in contemporary Australian courts, while also acknowledging the historical development of pseudolegal arguments.

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81 McMahon (n 40) 180–1, but see above n 80.

82 Ibid 183.

The third parameter ('Subject Matter Scope') saw the dataset designed to focus on the broader concept of 'pseudolaw', rather than focusing on any particular manifestation, sect or movement that utilises pseudolegal arguments (such as 'sovereign citizens', 'freemen on the land', etc). This is one of the principal distinctions of this research from the research of McMahon[83] and de Boer[84] (outlined above). This broader approach allows for the inclusion of cases where specific affiliations were not immediately identifiable, but which nonetheless involve pseudolegal claims or arguments. As such, the dataset encompasses cases where pseudolaw is invoked as a legal strategy, irrespective of the underlying ideological affiliations of the litigants. The fact that affiliations to particular movements tend to be amorphous and contingent, and that there is an emerging preference for the overarching term,[85] supports this focus on the overall phenomenon rather than any particular manifestation.

The fourth parameter ('Public Accessibility Scope') is that the study is restricted to publicly available reported judgments, excluding unreported decisions.[86] The decision to exclude unreported cases is driven by practical implications, including the difficulty in accessing such cases and the disproportionate effort required to track down *ex tempore* judgments. Excluding unreported cases means that the dataset does not capture the full spectrum of pseudolaw cases that may have been adjudicated in South Australia. Proceedings before lower courts that are routinely unreported (specifically the Magistrates Court), as well as (also routinely unreported) interlocutory judgments, were not included. Given that other evidence suggests that both are significant sites of pseudolegal litigation,[87] the dataset is likely to have significantly underrepresented the scale of pseudolegal litigation in SA. Despite this,

83 Ibid.

84 de Boer (n 72).

85 See, e.g.: @DNetolitzky (Dr Donald J Netolitzky KC) (X, 14 December 2024, 3:51am) <https://x.com/DNetolitzky/status/1867620766772342935>; Donald J Netolitzky, 'The Perfect Weed for This Spoiling Soil: The Ideology, Orientation, Organization, Cohesion, Social Control, and Deleterious Effects of Pseudolaw Social Constructs' (2023) 6(1) *International Journal of Coercion, Abuse, and Manipulation* 1 ('The Perfect Weed for This Spoiling Soil'); Donald J Netolitzsky, 'A Legion of Misshapen Cogs: Pseudolaw in Canadian Criminal Proceedings and Amicus Requirements' (2025) 62(3) *Alberta Law Review* 710; Netolitzsky, 'The Dead Sleep Quiet' (n 28).

86 In Australia, all written judgments of superior courts, such as the Supreme Court of South Australia, will typically be immediately published on both court websites and a range of commercial and open-access websites. While only certain judgments may be selected to be reported in 'official' subscription reports (with additional headnotes and commentary), all judgments will be publicly available. In contrast, for inferior courts the approach is much less systematic. Commonly intermediate level courts (such as the District Court) will publish some judgments (often the more serious or noteworthy, as judicially determined), whereas lower-level courts (such as the Magistrates Court) will not publicly publish any decisions. In those cases, the decision may be delivered orally only, or if a full written judgment is delivered it will only be available by directly accessing the file which while possible is labour intensive.

87 McIntyre et al (n 5) pt IV.

the exclusion of unreported cases is justified by the focus on those judgments that have a more visible impact on public discourse and legal precedent.

These design parameters struck a balance between scope, resource limits, and methodological rigour. While not exhaustive, the dataset provides valuable insights into the cases involving pseudolaw arguments, the legal principles at issue, and the challenges these arguments present to the judiciary.

2 *Identification of Relevant Cases*

Within these parameters, we undertook a process of searching through key legal databases of reported cases to identify relevant 'pseudolaw' cases.[88] The search for relevant cases involved the use of targeted search terms designed to identify pseudolaw arguments within judicial decisions. Initial searches employing terms such as 'pseudolaw', 'pseudo legal', and 'straw man' yielded limited results (n=6), which, while not initially encouraging, was also not surprising. McMahon, for example, found no sovereign citizen cases in South Australia.[89] Other research has detailed the difficulties in identifying the more specific 'sovereign citizen' cases.[90]

Recognising the lack of standardised terminology for pseudolaw claims, the search strategy evolved to incorporate a more flexible approach. A chain-referral/snowball sampling method was employed,[91] wherein new search terms were added based on the results of previous searches, allowing the identification of cases that may not explicitly reference pseudolaw but contain relevant arguments. This process

88 The databases used were *Westlaw Australia*, a paywalled legal database <https://www.thomsonreuters.com.au/en-au/products/westlaw.html> and *AustLII*, an open-access platform for Australian legal materials <www.austlii.edu.au>.

89 McMahon (n 40) 183.

90 See, e.g.: Brian Slater, 'Sovereign Citizen Movement: An Empirical Study on the Rise in Activity, Explanations of Growth, and Policy Prescriptions' (MA Thesis, Naval Postgraduate School, 2016) 22–3; Netolitzky, 'Organized Pseudolegal Commercial Arguments as Magic and Ceremony' (n 45); Netolitzky, 'A Rebellion of Furious Paper' (n 27); Netolitzky, 'The Perfect Weed for This Spoiling Soil' (n 85); David Griffin, 'Lexomancy: Law and Magic in the Pseudolegal Writings of the Sovereign Citizen Movement' (PhD Thesis, Cardiff University, 2022) 63–90; de Boer (n 72) 166.

91 See: Netolitzky, 'Organized Pseudolegal Commercial Arguments as Magic and Ceremony' (n 45); Netolitzky, 'A Rebellion of Furious Paper' (n 27); Netolitzky, 'The Perfect Weed for This Spoiling Soil' (n 85); de Boer (n 72) 166. As de Boer notes, assembling a dataset of sovereign citizen cases is methodologically challenging due to the lack of formal labelling in court databases. In the Canadian context, Netolitzky has pioneered a form of iterative case identification that aligns with what de Boer describes as the snowball method. While Netolitzky does not explicitly label his approach as such, his methodology involves starting with known sovereign citizen cases and tracing distinctive terminology, legal motifs, and litigant behaviours to identity further cases — an approach consistent with chain-referral sampling. Accordingly, we adopt de Boer's terminology to describe this method and acknowledge its roots in Netolitzky's work.

allowed the identification of 69 pseudolaw cases dating from 1973 to 2024. Search terms were categorised into five broad groups: (1) 'Pseudolaw' terms, including 'pseudolaw', or other well-known tropes (n=6, 9%); (2) 'Invalidity of Statute' terms that challenge valid statutes as 'unconstitutional' or 'invalid' (n=25, 36%); (3) 'Lack of Merit' terms where the judgment dismisses the claim for lack of merit, including 'self-represented' and 'appeal dismissed' (n=6, 9%); (4) **'**Road Traffic Validity' terms where claims challenged the constitutionality or validity of road traffic laws (n=15, 22%); and (5) 'Vexatious Litigant' terms involving vexatious litigants arising from repeated pseudolaw claims (n=17, 25%).[92]

Despite the outlined method, the task of identifying such cases was hindered by inconsistent terminology and the frequent and indirect references made in judicial reasoning. Some cases mention pseudolaw arguments in passing without explicitly labelling them, complicating keyword-based searches. For example, in the appeal decision in *Georganas*,[93] Doyle JA held:

> [T]he arguments raised below in opposition to the orders sought — as summarised in paragraph [6] of the Master's reasons, and involving various, largely unparticularised, assertions of treason, fraud and fictitious people — were, and are, entirely without merit.[94]

This case lacked explicit identifiers of pseudolaw and was recognised only through subsequent discussions. The true number of such cases is unknown. Nevertheless, we are confident the dataset captures a substantial portion of reported pseudolaw cases, providing a reliable basis for meaningful analysis.

B *Method for Coding and Analysis of Cases*

Following the creation of the dataset of pseudolaw cases, the next task was to code those cases against a number of criteria to enable us to interrogate the key research questions. This process was divided into two parts — the first focused upon the nature and type of pseudolaw cases; the second on the type of pseudolaw arguments presented in the cases.

1 *Coding Nature and Type of Cases*

The first set of coding was designed to help understand whether there is evidence of the emergence of a pseudolaw phenomenon in SA, and if so, in what types of cases it is occurring. In this phase, each case was analysed and coded against two overarching categories of criteria. The first, 'Case Identifying Data', was directed to the identification of each case and included several modes of identification to enable replicability and location of cases. The second overall category, 'Case

92 For details regarding the specific search terms utilised, and the number of cases identified through these terms, see tables 9 and 10 in McIntyre et al (n 5) 20–1.

93 *Georganas* (n 1).

94 Ibid [10] (Doyle JA).

Overview Data', included seven key datapoints to enable us to analyse the type and nature of the case, and the parties to that case. The relevant criteria are as follows:

Table 1: Criteria for Coding

Overall Category	**Specific Criteria**
Case Identifying Data	Year
	Case Name
	Citation
	Link
Case Overview Data	Self-Represented
	Civil or Criminal
	Nature of Hearing
	Jurisdiction
	Success
	Gender of Applicant
	Traffic Matter

The criteria were refined iteratively to enable effective differentiation between cases. For instance, adherent demographics gained relevance during the project, and while data was limited, gender was identifiable. Similarly, traffic law emerged as a key area, and this subject was easily classified. Each case was downloaded, manually reviewed, and coded based on these criteria, requiring familiarity with reporting styles but minimal evaluative judgment. These sections are presented in more detail below.[95]

3 *Coding Content and Form of Argumentation*

Secondly, a doctrinal approach was used to code each case, enabling the tracking of the specific forms of pseudolegal arguments presented. At first glance, it may make little sense to understand pseudolaw through doctrinal methods. After all, pseudolaw is not law. If doctrinal analysis is the study of the primary sources of law to identify and assess the law in its present state,[96] from the perspective of legal participants it may appear nonsensical to apply that method to

95 See below Part IV(A).

96 See e.g., Jan M Smits, *What is Legal Doctrine? On the Aims and Methods of Legal-Dogmatic Research* (Working Paper No 2015/06, Maastricht European Private Law Institute, Maastricht University Faculty of Law, September 2015) 7. See also: Christopher McCrudden, 'Legal Research and Social Sciences' (2006) 122 *Law Quarterly Review* 632; Terry Hutchinson, *Researching and Writing in the Law* (Thomson Reuters, 4th ed, 2018) 51.

pseudolaw.[97] However, there are two responses to this perceived error in methodology. First, while pseudolegal arguments may be incomprehensible to the outsider, they draw on similar and comparable themes and bases, and can be considered legal arguments that exist in an 'alternative legal universe'.[98] This invites an analogous form of doctrinal analysis that mirrors that found in traditional legal scholarship. Secondly, and more directly, the modes of pseudolegal argumentation used by adherents can be conceived of as factual objects of inquiry that are discussed and analysed by judges in legal cases, allowing a doctrinal analysis of those secondary judicial discussions. As discussed above, relatively robust literature has sought to apply doctrinal methods to the analysis of pseudolaw in such a manner.

Each case was analysed to identify the pseudolegal argument the applicant made. Initially, those cases were coded against the three principal categories of pseudolaw argumentations in Australia identified by Hobbs, Young and McIntyre:[99]

(1) *The Strawman Argument*: the law does not apply because it applies only to 'artificial' persons who possess a separate legal personality — the strawman duality;
(2) *Absence of Individual Consent*: government authority is illegitimate in the absence of individual consent, and they did not consent to the law operating upon them — everything is a contract; and/or
(3) *State Law is Defective*: the law was invalidly enacted and is of no legal effect — state authority is defective or limited.[100]

While populating the dataset, it became clear that the initial categories were insufficient to encompass the full range of pseudolaw cases identified. Consequently, three additional categories were introduced:

(4) *Private Prosecutions*: captured cases where individuals attempted to initiate private prosecutions, often targeting members of the judiciary with accusations of 'treason' or similar claims.
(5) *Other*: was used for cases featuring pseudolaw-style arguments that did not fit into the predefined categories.
(6) *Substantive Pseudolaw Adjacent*: included cases that did not explicitly feature pseudolaw arguments in the written judgment, but involved parties previously associated with pseudolaw or other pseudolaw-related cases. This category recognised the tendency of adherents to engage in repeated litigation using these arguments. For example, it encompassed cases involving individuals labelled as vexatious litigants or cases resembling known pseudolaw matters where explicit arguments were absent but pseudolaw beliefs or motives were likely.

97 See, e.g., Smits (n 96) for a discussion of how the common traits of the doctrinal approach are recognisable to any well-trained legal academic or lawyer: at 7.

98 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 314.

99 Ibid 324.

100 Ibid (emphasis added).

Each case was coded against these six categories, and the relevant paragraphs of the judgment where these arguments were made were recorded. This coding process was non-exclusive, so a single case may involve more than one category or form of argument.

IV Findings and Discussion

With the cases in the dataset coded against the criteria outlined above, the next step was to collate the results and discuss those findings. Cases were organised according to the methods of coding in a two-step analysis. The first focused on the nature and type of pseudolaw cases. The second focused on the type of pseudolaw arguments presented.

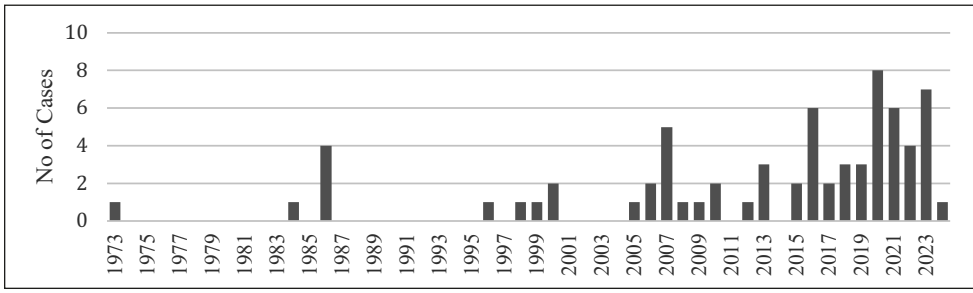
A *Analysis One: The Nature and Type of Cases*

The following section outlines the key findings and discussion with respect to the type and nature of reported pseudolaw cases. We found evidence of a growth of pseudolaw cases, particularly in the last five years. It is, therefore, appropriate to identify pseudolaw as an emergent phenomenon in South Australian case law. This data allows us to identify the types of matters where pseudolaw is present in reported cases and provides the opportunity for seven distinct modes of analysis.

1 *Occurrence Over Time*

Applying the methodology described above, we identified 69 pseudolaw cases, with the earliest case occurring in 1973,[101] and the most recent case occurring at the end of the survey period in January 2024.[102] There has been a growth in the rate of these cases, with 50% more pseudolaw cases (n=42) in the last 10 years than in the previous 40 years (n=27). This is evident from the data in Figure 1 below:

Figure 1: Pseudolaw Cases Over Time (1973–2024)[103]



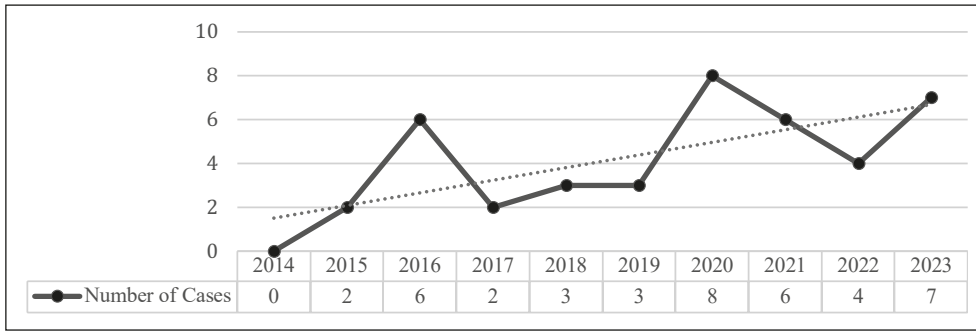
101 *Howie v Hollobone* (1973) 8 SASR 148 (‘*Howie v Hollobone*’).

102 *Georganas* (n 1).

103 This is an updated figure based on data presented in McIntyre et al (n 5) 24.

The trend towards a greater number of pseudolaw cases accelerated in recent years. The final five full years in this set (2019–23) saw more cases (n=28) than the first 40 years of the dataset (1973–2012, n=24). In that first 40 years, the average number of pseudolaw cases was 0.6 reported cases/year. In the 11 full years of the survey since (2013–23) there was an average 4.1 reported cases/year.

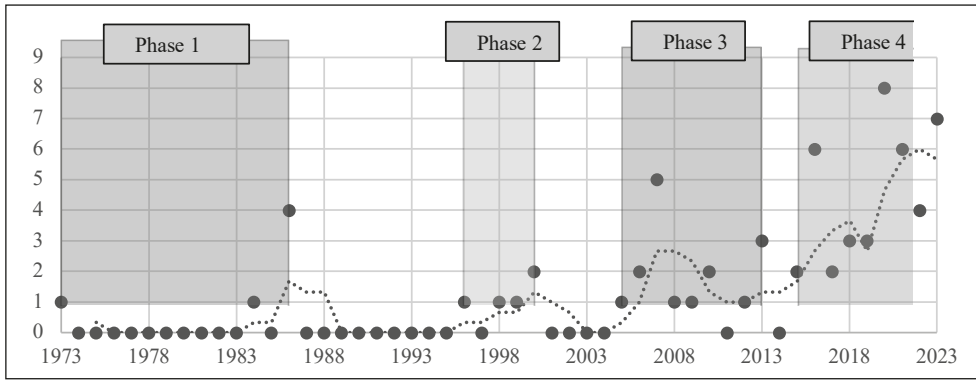
Figure 2: Recent Pseudolaw Cases (2014–23)



Over the past decade, the number of pseudolaw cases in SA has trended upwards. This study shows clear growth in the pseudolaw phenomenon, even given the limitations of the dataset to reported cases.

One unexpected result of this data is that it illustrates four broad phases of pseudolaw argumentation. This can be seen in the figure below:

Figure 3: Distinct Phases of Pseudolaw Cases in South Australia



In Figure 3, the black dotted line represents the moving three-year trendline, which illustrates the emergence of each of these four phases. The number of cases in each phase — and a label we developed for each phase — are as follows:

Table 2: Phases of Pseudolaw Cases in South Australia

Phase #	Period	No of Cases	Name
Phase 1	1973–86	6	The 'Lone Wolf' Period
Phase 2	1996–2000	5	The 'Unaffiliated Pseudolaw' Period
Phase 3	2005–13	16	The 'Movement Pseudolaw' Period
Phase 4	2015–23	42	The 'Contemporary Pseudolaw' Period

Interestingly, these phases reflect broader literature and case law trends. For example, Netolitzky has characterised pseudolaw in Canada as occurring in three phases: the 'Early Influences' (pre-2000), 'First Wave' (early 2000–14) and 'Second Wave' (2020 onwards).[104] While there is not yet a definitive history of pseudolaw in Australia,[105] it is possible to identify certain practices.

For example, the *Phase 1* cases in our dataset are almost overwhelmingly driven by the actions of a single applicant, Gordon Howie, who initiated a series of cases in the 1970s and 1980s.[106] That one disruptive (and potentially vexatious) individual was responsible for these actions is consistent with pseudolaw activity occurring elsewhere in Australia. This is reminiscent of a series of cases brought over several decades in Queensland by serial litigant Alan Skyring.[107] It is also consistent with the development of individuals purporting to secede and establish their own micro-nations across Australia.[108] This period can be considered the 'Lone Wolf' Period, as it is largely driven by single individuals.

The second grouping, *Phase 2*, is more loosely defined and includes an assortment of various arguments, as individuals began experimenting with, and sharing, various pseudolaw arguments. In the United States, this period from the late 1980s to early 1990s saw the consolidation of the 'Common Law Movement', which developed

104 Netolitzky, 'The Sun Only Shines on YouTube' (n 55).

105 See, e.g., Cash (n 25).

106 *Howie v Hollobone* (n 101); *Howie v Scheer (No 1)* (1986) 59 LGRA 342 ('*Howie v Scheer (No 1)*'); *Howie v Scheer (No 3)* (1986) 59 LGRA 367; *Howie v Scheer (No 4)* (1986) 61 LGRA 44.

107 For a brief overview of the impact and various cases that Skyring initiated, see Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 336–8. For an illustrative selection of cases, see: *Skyring v Commissioner of Taxation* (Supreme Court of Queensland, McPherson J, 19 August 1983) 4; *Skyring v Commissioner of Taxation* (2007) 244 ALR 505, 507 [10] (Greenwood J); *Skyring v Commissioner of Taxation* (Queensland Court of Appeal, Smithers, Northrop and Beaumont JJ, 18 April 1984) 29 [10]; *Re Skyring's Application [No 2]* (1985) 58 ALR 629 (Deane J); *Skyring v Cooper* [2014] QSC 103 (Daubney J).

108 Prominent examples include the Principality of Hutt River in Western Australia (1972) and the Province of Bumbunga in South Australia (1976): see generally Harry Hobbs and George Williams, *Micronations and the Search for Sovereignty* (Cambridge University Press, 2021).

many of the familiar pseudolaw tropes and forms of argumentation.[109] In Australia, we do not seem to have had a similar movement, but there were examples of this type of unaffiliated pseudolegal argument in this period. As our data illustrates, there was an increase in pseudolaw cases in this period relative to the immediately preceding five years. This can be considered the 'Unaffiliated Pseudolaw' Period.

The third grouping, *Phase 3*, reflects the emergence of 'Movement' pseudolaw — notably the 'detaxers' of Canada and the 'Freemen-on-the-Land' in the United Kingdom, Canada and Australia.[110] While the South Australian dataset does not reflect these self-identified movements (those search terms did not return any results in SA), it is interesting that there was an evident 'bump' in this period, which can be considered the 'Movement Pseudolaw' Period.

The final grouping, *Phase 4*, reflects the current growth period of pseudolaw in Australia. This period, from 2015 to 2024, includes two key phases. The first five years of this period reflect the emergence of a distinct 'sovereign citizen' movement in Australia, with a growing public awareness of this movement.[111] Following the COVID-19 pandemic and the public health measures, there was an explosion of pseudolaw in Australian courts.[112] This 'Contemporary Pseudolaw' period is the most striking in our data and reflects the clear emergence of pseudolaw as a distinct social phenomenon.

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109 Young, Hobbs and Goldwasser (n 42) 95.

110 Stephen A Kent, 'Freemen, Sovereign Citizens, and the Challenge to Public Order in British Heritage Countries' (2015) 6 *International Journal of Cultic Studies* 1, 11, citing Anti-Defamation League, *The Lawless Ones: The Resurgence of the Sovereign Citizen Movement: An Anti-Defamation League* (Report, 9 August 2010). There is also evidence that pseudolaw gurus from the United States, like David Wynn Miller, visited Australia in this period. See: Netolitzky, 'A Pathogen Astride the Minds of Men: The Epidemiological History of Pseudolaw' (n 61) 10, 16; Netolitzky, 'Organized Pseudolegal Commercial Arguments as Magic and Ceremony' (n 45) 1062; Natasha Wallace, 'Messiah-Like Figure Is Doing Own Harvesting', *Sydney Morning Herald* (online, 15 January 2011) <https://www.smh.com.au/world/messiahlike-figure-is-doing-own-harvesting-20110114-19r9v.html>.

111 See, e.g.: Kaz Ross, '"Living People": Who are the Sovereign Citizens, or SovCits, and Why Do They Believe They Have Immunity from the Law?', *The Conversation* (online, 28 July 2020) <https://theconversation.com/living-people-who-are-the-sovereign-citizens-or-sovcits-and-why-do-they-believe-they-have-immunity-from-the-law-143438>; Max Matza, 'What is the "Sovereign Citizen" Movement?', *BBC News* (online, 5 August 2020) <https://www.bbc.com/news/world-us-canada-53654318>; Eden Gillespie, 'The Rise of "Sovereign People" and Why They Argue Laws Don't Apply to Them', *SBS News* (online, 13 August 2020) <https://www.sbs.com.au/news/the-feed/article/the-rise-of-sovereign-people-and-why-they-argue-laws-dont-apply-to-them/i2g9jij7g>; James Thomas and Jeanavive McGregor, 'Sovereign Citizens: Terrorism Assessment Warns of Rising Threat from Anti-Government Extremists', *ABC News* (online, 30 November 2015) <https://www.abc.net.au/news/2015-11-30/australias-sovereign-citizen-terrorism-threat/6981114>.

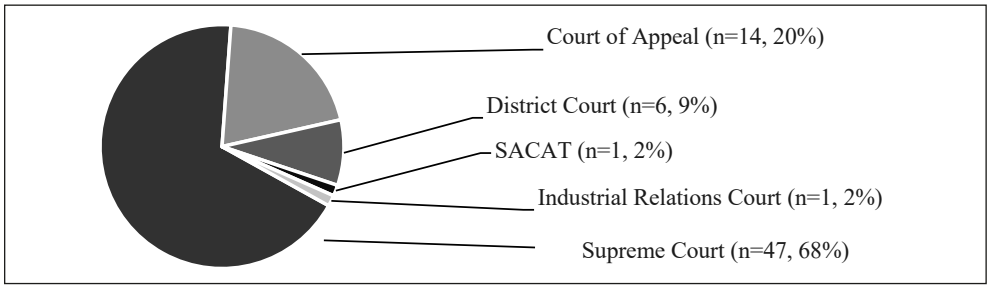
112 Kesteven and Carrick (n 9).

Ultimately, these 'Phases' are suggestive and illustrative only — the data is relatively sparse and particularly in the early years can be distorted by a small number of datapoints. However, the correlation with existing literature is provocative and suggests that there may be a correlation here worthy of further investigation.

2 *Jurisdiction*

The second coded data point in the dataset looked at the jurisdiction in which the reported pseudolaw case occurred. Given the limit of the dataset to reported judgments, it is no surprise that the overwhelming majority of cases which demonstrated pseudolaw arguments were heard in the Supreme Court of South Australia (n=46). A significant number of cases were heard in the Court of Appeal (n=14) and a small number (n=6) were heard in the District Court of South Australia, one in the South Australian Civil and Administrative Tribunal and one in the Industrial Relations Court.

Figure 4: Case by Court Jurisdiction

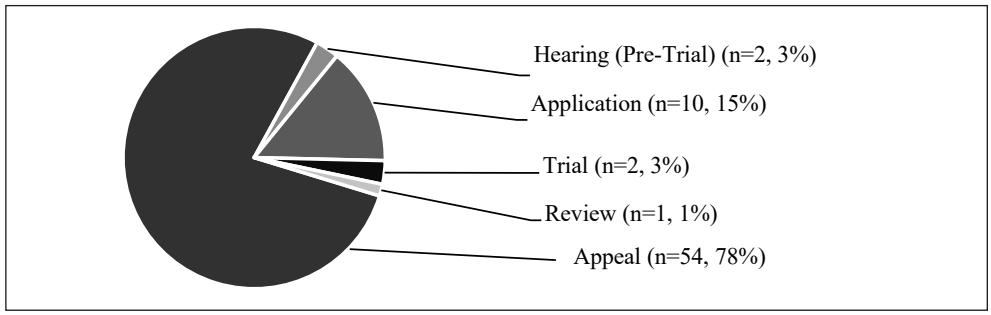


Pseudolaw cases are likely occurring in other jurisdictions, but we surmise that those jurisdictions are not routinely publishing pseudolaw cases. Most notably, the main court by volume, the Magistrates Court, is entirely (and necessarily) absent from this dataset.

3 *Nature of Proceeding*

The third coded data point looked at the nature of the proceedings. In terms of the procedural nature of the case, the majority of cases (n=54, 78%) are appeals, with only a smattering of other procedures:

Figure 5: Case by Hearing Type



Again, this is largely a function of the jurisdiction of the Supreme Court, which principally operates as an appellate court, with only relatively few matters commencing in its original jurisdiction (largely limited to the most serious crimes and largest scale civil matters). Notably, the judicial review jurisdiction of the Supreme Court is one of the few jurisdictions where 'smaller' civil matters may commence in the Supreme Court. The case of *Webb v Department for Correctional Services*[113] is illustrative of this form of pseudolaw claim.

In terms of the substantive nature of cases — with the distinction between civil and criminal matters — there is a fairly even split between the two jurisdictions, with 32 civil matters (46%) and 37 criminal matters (54%). Our dataset of reported cases shows that pseudolaw arguments are just as likely to occur in a civil context as in a criminal context.

4 *Success*

The fourth coded data point looked at the success of the action. Strikingly, only one applicant was successful, namely in the case of *Mathie v City of Playford* ('*Mathie*').[114] However, the appeal in that case was successful on the ground that the relevant notice was filed out of time, and *not* on the ground of the pseudolaw argument. Pseudolaw arguments did not succeed in any case.[115]

5 *Representation*

The fifth coded data point looked to whether the applicant in the matter had formal legal representation. The overwhelming experience was that applicants were litigants-in-person/self-represented (n=62, 90%). Only in seven cases (10%) was the applicant represented by legal counsel. In two cases, the applicant was a corporation

113 [2023] SASC 114.

114 [2023] SASC 145 ('*Mathie*').

115 See also Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 311.

and was represented by the director of the company.[116] Despite the different legal personalities involved, these cases were coded as 'Litigant-in-Person'.

Of the seven cases where there was legal representation, four matters were criminal.[117] In the case of *Hudson v Federal Commissioner of Taxation*,[118] the applicant had been unrepresented at trial but had retained counsel for the intermediate appeal, where the pseudolaw arguments were not directly agitated. The applicant was again unrepresented on the subsequent application for permission to appeal to the Full Court,[119] where pseudolaw arguments were again agitated.[120]

The remaining three cases were civil cases.[121] Again, in one of these cases, *Money Tree Management Services (No 3)*,[122] the applicant was unrepresented at the original trial,[123] but obtained counsel for the appeal. In this instance, a number of pseudo-legal arguments were made. These included that the judge in the initial matter,[124] and the Governor,[125] were both invalidly appointed. Though it was unnecessary to decide this point, given the refusal of permission to appeal, the Court held that these arguments were 'quite hopeless'.[126] This is one of the few cases where a represented party advanced pseudolaw arguments. Notably, the respondent, the Commissioner of Taxation, applied to join the solicitor for Money Tree as a party to the proceedings and sought an order that he pay the Commissioner's costs on an indemnity basis.[127] Ultimately, his Honour held this was such an extraordinary case that it was proper to join the solicitor as a party and ordered that he pay costs,[128] observing:

116 *Money Tree Management Services Pty Ltd v Deputy Federal Commissioner of Taxation (No 1)* (2000) 44 ATR 48 ('*Money Tree Management Services (No 1)*'); *Southdale Stud Pty Ltd v RJR Trading Pty Ltd* [2020] SASC 106 ('*Southdale*').

117 *Mathie* (n 114); *Adelaide City Council v Lepse* [2016] SASC 66 ('*Lepse*'); *Grace Bible Church v Reedman* (1984) 36 SASR 376 ('*Reedman*'); *Hudson v Federal Commissioner of Taxation* [2016] SASC 145 ('*Hudson*').

118 *Hudson* (n 117).

119 *Hudson v Federal Commissioner of Taxation* [2016] SASCFC 122.

120 The applicant argued that 'the requirement of the Commissioner to provide taxation returns was in some way unlawful because the notice included a reference to the applicant's tax file number (TFN) which was invalidly issued or unlawfully used despite demands made by the applicant that the Commissioner desist from doing so': ibid [3]. This assertion was found to be without merit: at [8].

121 *Maurici v South Australia* [2008] SASC 145 ('*Maurici*'); *Money Tree Management Services Pty Ltd and Institute of Taxation Research v Commissioner of Taxation (No 3)* [2000] SASC 286 ('*Money Tree Management Services (No 3)*'); *IAQ v Department for Health and Wellbeing* [2022] SACAT 9 ('*IAQ*').

122 *Money Tree Management Services (No 3)* (n 121).

123 *Money Tree Management Services (No 1)* (n 116).

124 *Money Tree Management Services (No 3)* (n 121) [14].

125 Ibid [16].

126 Ibid [22].

127 Ibid [27].

128 Ibid [32].

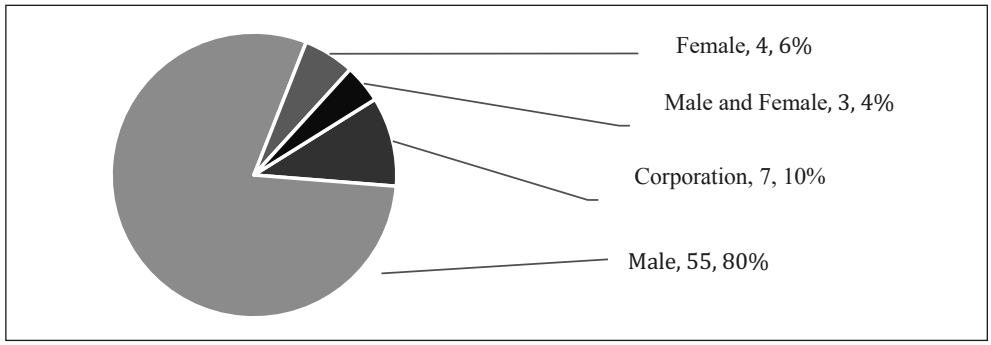
> This is not a case of a client seeking to pursue a hopeless case against the advice of its solicitor. Instead, it is a case of a solicitor taking a quite unreasonable step which has no prospect of success and on behalf of a person who is not the appellant. It is an abuse of process in that the appeal has been instituted without any, or indeed, any proper, consideration of its prospects of success.[129]

This is, so far as we are aware, the only instance of an Australian solicitor being held personally liable for advancing pseudolaw arguments in a case in which they are representing another party, though note this was not a focus of this study.

6 *Legal Personality / Gender of Pseudolaw Party*

The sixth data point sought to examine matters as to the demographics of applicants, drawing upon one factor that was reasonably clear on the face of the record, namely the applicant's gender.[130] There was a perception that most of the pseudolaw adherents were male, and this data point sought to examine that issue. The data confirmed that male applicants initiated the vast majority of such cases.

Figure 6: Legal Personality / Gender of Pseudolaw Party



Of the 69 cases in the dataset, 55 cases (80%) were initiated by males. Only four matters (6%) were brought by women, all of which were appeals. There were both male and female applicants in three matters (4%). All of these appear to be married couples (they each have the same surname). Finally, in seven matters (10%), a corporate entity (not an individual) was the formal party to the proceedings. However, the analysis of the judgments in these matters indicated that the entity was controlled by a male director.[131]

129 Ibid [31].

130 This was determined based on the language used in the judgment, specifically how the judge referred to the litigant.

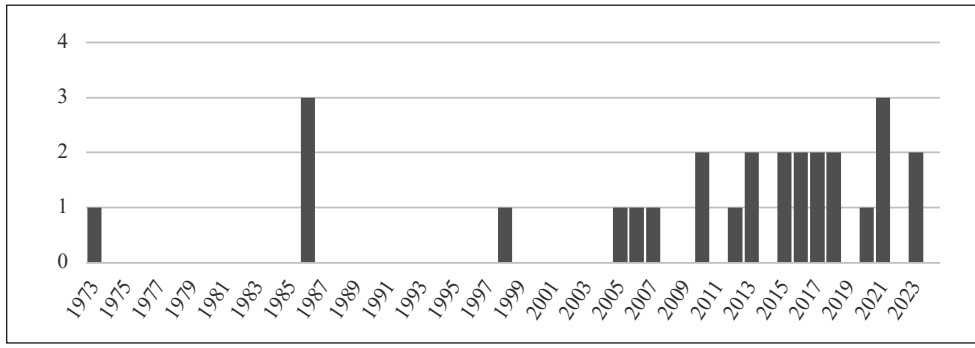
131 For these cases, issues of 'control' were apparent on the face of the judgment. For example, two of these cases involved 'Andrew Garrett Wines Resorts Pty Ltd' as a lead party, which was taken to be controlled by Andrew Morton Garrett — as evident

7 *Traffic Law*

Finally, we coded the cases to identify whether they involved traffic matters. As David Heilpern notes, Australian pseudolaw adherents have a particular and unique focus on traffic law.[132] This focus was replicated in the data, with nearly 40% (n=27) of all matters involving traffic law in some regard.

Of these matters, 25 (93%) involved litigants-in-person/self-represented litigants.[133] The cases were spread across the categories of pseudolaw argument, with the only category not represented being 'private prosecution'. This percentage is particularly notable given the constraints on these databases. Traffic law is a matter that the academy and the profession overlook,[134] not least because it largely manifests at the Local Court/Magistrates Court level, where cases are rarely reported. As a result, these matters will generally only appear in this dataset as an appeal from a lower court decision. Indeed, only a single traffic law case[135] involved a direct application, with all 26 other cases being appeals from lower court decisions.

Figure 7: Pseudolaw Arguments in Traffic Matters (1973–2023)



from the fact that orders were made directly against Mr Garrett. Similarly, each of the other cases showed little judicial doubt over identity of the person controlling the corporate entity. This is reflected in the data entry.

132 David Heilpern, 'Traffic Matters and Pseudolaw: The Big Shakedown' in Hobbs, Young and McIntyre (eds), *Pseudolaw and Sovereign Citizens* (n 2). Heilpern contrasts this with the situations in: (1) the US, where the movement is rooted in tax law, amongst other things: see, e.g., Kalinowski IV (n 46) 154; and (2) Canada, where the focus is constitutional law: see Donald Netolitzky and Richard Warman, 'Enjoy the Silence: Pseudolaw at the Supreme Court of Canada' (2020) 57 *Alberta Law Review* 715.

133 The exceptions were *Lepse* (n 117) and *Mathie* (n 114).

134 Heilpern (n 132).

135 *Kiparoglou v The Queen* [2021] SASC 2 ('*Kiparoglou*').

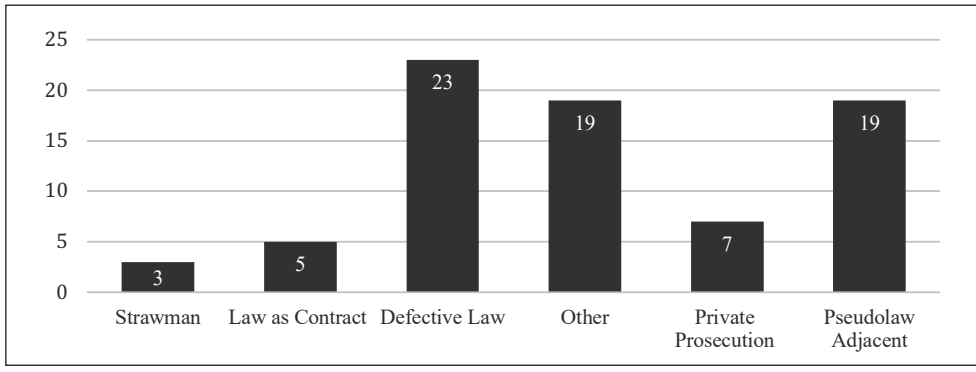
As illustrated in Figure 7, traffic matters occurred at points throughout the dataset, starting from the very first case and appearing through to the present day. Of these matters, the vast majority (89%, n=24) were criminal matters, and only 11% (n=3) were civil matters. It should be noted that identifying matters as 'traffic law' involved a degree of evaluative doctrinal identification.[136] However, this remained minimal, making it appropriate to analyse this category in this part.

B *Analysis Two: The Substance and Content of Pseudolaw Cases*

This section provides a discussion of the findings arising from the second method of coding. It looks at the type of pseudolaw arguments presented in the cases and is designed to understand how pseudolaw manifests in South Australian cases. This section involves doctrinal analysis of the cases identified in the dataset. Here, the focus is on identifying the arguments that are (unsuccessfully) raised by pseudolaw adherents in their submissions to the court.

Of the six common categories of arguments that we found, the single most common was the 'Defective Law' form (n=23, 33%). Strawman arguments were less pronounced (n=3, 4%), as were cases equating all law with contracts (n=5, 7%). Just over a quarter of cases (n=19, 28%) were 'Substantive Pseudolaw Adjacent' and did not explicitly and directly raise a pseudolaw argument. Notably, 10% of cases (n=7) involved attempted private prosecutions. This category of pseudolaw argumentation is not directly addressed in the Australian literature but is a not insubstantial problem for the operation of the judicial system. Finally, around a quarter of cases (n=19, 28%) displayed elements of pseudolaw but did not fit neatly into other categories.

Figure 8: Substantive Pseudolaw Argument of Cases



136 The classification of a matter as involving 'traffic law' was based on doctrinal evaluation of the legal issues raised in the case, particularly where the pseudolegal arguments were deployed in response to alleged breaches of road traffic legislation (for example, *Road Traffic Act 1961* (SA) and *Motor Vehicles Act 1959* (SA)).

In the following discussion, we will briefly outline the nature of each of these categories and examine our findings.

1 *Strawman Arguments*

The strawman argument, also known as the 'split-person' argument[137] or 'flesh-and-blood' defence,[138] claims a natural 'real' person is distinct and separate from their artificial 'legal' personality.[139] Adherents believe individuals have two personas: one of natural flesh-and-blood, and the other a strawman, doppelganger, or corporate personality.[140] By refusing to 'appear' before the court, litigants aim to evade its jurisdiction and authority. Although 'patently without merit',[141] this legal argument is relatively common and has proliferated through a range of courts.[142]

Among the 69 pseudolaw cases in this dataset, only three cases displayed the characteristics of a strawman argument.[143] One case, *Georganas* (discussed above), was identifiable as a strawman case only through extraneous evidence.[144] The other two matters, both involving traffic laws and the Adelaide City Council, were *Adelaide City Council v Lepse* ('*Lepse*')[145] and *Rossiter*.[146]

In *Lepse,* the defendant, convicted for stopping in a permit zone, refused to acknowledge court procedures, adopt plea options, or formally appear. Instead, she physically entered the courtroom but stood near the door, refusing judicial directions to approach the bar table. She declared statements such as:

> I am here. I am the personal representative of Waltraud Lepse. My name is called Traudi. Would you be so good as to call Traudi instead of Waltraud Lepse as I am here to represent in this case. Is this a court of reference? Is this a court of reference?[147]

---

137 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 325; *Meads* (n 45) [36].

138 See Evans (n 46).

139 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 325–8.

140 McIntyre, Hobbs and Young (n 4).

141 *United States v Mitchell*, 405 F Supp 2d 602, 604 (D Md 2005). As the Queensland Supreme Court observed in *Borleis v Wacol Correctional Centre* [2011] QSC 232, the strawman argument 'does not find any reflection in any provision of our law': at [4].

142 See, e.g., *Dent v Commissioner of Police* [2022] QDC 235. Dent won his appeal from his conviction after a 'frustrated' magistrate who was 'impatient' imposed an excessive sentence. See also Evans (n 46).

143 *Lepse* (n 117); *Rossiter* (n 11); *Georganas* (n 1).

144 *Georganas* (n 1). The classification of *Georganas* as a strawman case was not evident from the court judgment alone. This identification relied on extraneous evidence, specifically interviews conducted as part of the broader research project: McIntyre et al (n 5) pt IV.

145 *Lepse* (n 117).

146 *Rossiter* (n 11).

147 *Lepse* (n 117) [5] (emphasis removed).

Her refusal led the prosecution to request the case proceed *ex parte*, which the Special Magistrate granted. When the Magistrate called on the matter, they similarly faced her non-compliance. The defendant continued to recite pseudolaw phrases and ultimately had to be removed by the Sheriff's Officer. The Magistrate recognised her argument as a 'flesh and blood defence'.[148]

Rossiter similarly concerned a parking offence — here an expiation notice for exceeding the prescribed parking time limit. The appellant — who described himself as 'Tim: Rossiter, a man'[149] — elected to be prosecuted, and when the matter was called on, refused to formally make a plea, replying only with the words 'I am a man'.[150] In the absence of a plea, the Magistrate treated the response as a plea of 'not guilty' and set the matter down for trial. At trial the appellant did not directly participate.[151] The Magistrate treated the appellant's failure to respond as a plea of 'not guilty', proceeded as if the matter was *ex parte* and found the appellant guilty of the offence.[152] On appeal, eleven grounds were set out in a handwritten notice of appeal,[153] which included a range of pseudolaw arguments (including defective law and lack of consent). The most direct 'strawman' argument arose from a letter the appellant had sent to the respondent in 2014 when attempting to disengage from society. That letter was 'said to be from "Timothy-Noel: Rossiter, Free-spirit man" who is "man and man has certain inalienable rights"'.[154] This argument was

148 Ibid [16] (emphasis removed).

149 *Rossiter* (n 11) [1].

150 Ibid [4].

151 President Livesey of the Court of Appeal summarised the appellant's conduct as follows:

> On the day of the trial, but before the matter was called on, the appellant showed the prosecutor the notice that he said was displayed in the windscreen on the day the expiation notice was issued. It read: 'Notice: private property, no trespassing'. When the matter was called on, the appellant did not approach the bar table and remained seated in the back row of the public gallery. He apparently remained mute throughout the trial and during the delivery of *ex tempore* reasons.

Ibid [5].

152 Ibid [6], [9].

153 Ibid [10].

154 Ibid [45]. The letter set out a number of propositions along the following terms:

> 3. My truth and law exists inside me …
>
> …
>
> 15. People living on the geographical area commonly referred to as Australia have the right to revoke or deny consent to be represented and thus governed, and;
>
> 16. I, commonly known as Timothy-Noel: Rossiter do not consent to being governed/represented, and;
>
> 17. If anyone does revoke or deny consent they exist free of government control and statutory restraints.

recognised as a 'pseudolaw' argument, with Livesey P holding that such arguments 'have without reservation been rejected as involving both legal nonsense and an unnecessary waste of scarce public and judicial resources. So too here'.[155]

These two cases are the only reported South Australian examples directly addressing strawman arguments, despite their broader prominence in the pseudolaw ecosystem. The low frequency in reported cases may result from these arguments being more common in lower courts, such as the Magistrates Court, where litigants often use them to challenge court authority and jurisdiction. By contrast, appellants seeking redress in higher courts may be less likely to rely on pseudolaw arguments, especially after an adverse ruling at first instance. Nonetheless, anecdotal evidence and interview findings, as part of this study,[156] suggest that strawman arguments are more prevalent than this dataset indicates.

2 *Law is a Contract / Lack of Consent*

The second category against which cases were coded was the 'law as contract'/'lack of consent' argument. The essence of this argument can be seen as an attempt to take the Hobbesian/Lockean concept of a 'social contract'[157] literally and individually. This argument is based on a belief that all law (particularly legislation) is a kind of contract and, therefore, cannot be enforced unless both parties — namely the state and the individual — have consented to be bound by it.[158] While the precise arguments vary significantly, the core idea remains that the authority of law depends upon the ongoing consent of the individual and that the individual may, through certain forms and rituals, withdraw that consent.

Within our dataset, and despite the significance of the form in the broader context of pseudolaw, only n=5 cases (7%) demonstrated characteristics of the argument that law is a contract and has not been consented to by the individual.[159] All five cases were heard in the Supreme Court of South Australia. Three of these cases were criminal appeals,[160] while the two civil matters included an appeal and a pre-trial hearing.[161]

155 Ibid [50].

156 McIntyre et al (n 5) pt IV.

157 See generally Stephen Olynyk, 'Convenient Fictions: A Comparison and Critical Analysis of Hobbes' and Locke's Social Contract Theories' (2010) 1(1) *West Australian Jurist* 132.

158 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 328.

159 These cases were: *Brackstone v Police* [1999] SASC 35 ('*Brackstone*'); *Best v Police* [2015] SASC 190 ('*Best*'); *Haughton v Roder* [2019] SASC 199 ('*Haughton v Roder*'); *Commonwealth Bank of Australia v Haughton* [2020] SASC 135 ('*CBA v Haughton*'); *Rossiter* (n 11).

160 *Brackstone* (n 159); *Best* (n 159); *Rossiter* (n 11).

161 *CBA v Haughton* (n 159); *Haughton v Roder* (n 159).

3 *State Law is Defective*

The third category of argument against which cases were coded was the 'defective law' argument. The essence of this argument is that the relevant law is invalidly enacted, or in some other way defective, with the result that the enactment is without legal effect.[162] We identified 22 cases (32%) in the dataset which involved this form of pseudolegal argument.[163] This is the most common form of pseudolegal argument in the dataset. It was just as likely to occur in criminal matters (n=10) as civil matters (n=12).

There are a broad range of forms of this type of argument, depending upon the various ways the law is said to be defective. One of the most common forms of claim is that a relevant law is invalid because it violates *Magna Carta*.[164] For example, in *Arnold v State Bank of South Australia*,[165] the appellant sought a declaration that they did not need to pay their mortgage because *Magna Carta* guaranteed their rights 'to their matrimonial home'.[166] Other claims seek to identify the relevant fatal defect in 'the peculiar political and legal development of Australia as an independent nation'.[167] In particular, the passage of the one or more of the *Australia Acts 1986* is often treated as an illegitimate action invalidating all subsequently passed Acts.[168]

Cases in this category argued that the relevant statutory regime was invalid for various reasons. Two involved claims related to native title and the rights of Aboriginal and Torres Strait Islander peoples, though it is unclear if the claimants were Aboriginal or Torres Strait Islander people.[169] As with most pseudolaw arguments, these cases were distinct and difficult to categorise.

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162 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 324.

163 Ibid; *Howie v Hollobone* (n 101); *Reedman* (n 117); *Howie v Scheer (No 1)* (n 106); *Batten v Police* [1998] SASC 6778; *Howie v Burgess* [2005] SASC 368; *Jordan v Police* [2006] SASC 205; *Maurici* (n 121); *Morriss & Morriss v Puckridge* [2009] SAIRC 49; *Millington v Police* [2015] SASC 52; *Best* (n 159); *Westpac Banking Corporate v Chamberlain* [2016] SASC 3 ('*Chamberlain*'); *Westwill Pty Ltd v Barossa Council* [2016] SASC 189; *McDougall v City of Playford* [2017] SASC 169; *Pawlak v Police* [2017] SASC 40; *Scopacasa v City of Charles Sturt* [2018] SADC 31; *Timms v Police* [2018] SASC 69 ('*Timms*'); *Haughton v Australia and New Zealand Banking Group Ltd* [2019] SASC 198; *Haughton v Australia and New Zealand Banking Group Ltd* [2020] SASCFC 14; *Southdale* (n 116); *Rossiter* (n 11); *Kiparoglou* (n 135); *Georganas* (n 1).

164 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 332.

165 (1992) 38 FCR 484.

166 Ibid 484 (Burchett, Hill and Drummond JJ).

167 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 334.

168 See, e.g., *Kosteska* (n 11) [18] (Martin J).

169 *Chamberlain* (n 163); *Timms* (n 163).

4 *Private Prosecution*

In coding the cases in the dataset against the initial three principal forms of pseudolaw argumentation outlined by Hobbs, Young and McIntyre,[170] it quickly became apparent that many cases did not neatly fit within that taxonomy of arguments. That is not surprising, as that taxonomy never sought to be exhaustive, but rather sought to be illustrative of the key pseudolaw arguments. However, it was unanticipated how incompletely those forms of argumentation mapped onto the cases in the dataset, with only 31 instances of these arguments being identified, representing less than 44% of cases.[171]

As a result, we adopted an iterative process to identify other leading forms of pseudolegal argumentation. The first of these, and the fourth overall substantive category involved instances of 'private prosecution.' The term 'private prosecution' typically refers to a criminal proceeding initiated by an individual private citizen or organisation and has an ancient pedigree.[172] In this context, however, this history has been perverted and instead largely occurs where an individual has initiated proceedings against a member of the judiciary or executive branch of government.

Of the pseudolaw cases identified, seven fell into the 'private prosecution' category.[173] Four of these matters were heard in the Supreme Court of South Australia, and three were heard in the District Court of South Australia. Four were in criminal matters, and three civil. In each, the litigant was self-represented. Five of the seven cases coded as private prosecution were brought by individuals named in multiple cases containing pseudolaw arguments.

The earliest, but entirely representative, example of this type of case was the matter of *Russell-Taylor v Jackson-Nelson*.[174] The complainant sought to prosecute the Governor of South Australia on the basis that the Governor had 'deliberately and wilfully sought to deprive or depose her Majesty from the style, honour or royal name of the imperial crown of the United Kingdom'.[175] Justice Anderson dismissed the appeal because treason, a major indictable offence, could not be charged by way of complaint.[176] In two other cases, the applicant made an application for the Judge

170 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3) 314.

171 Indeed, the percentage is lower than this as several of these cases involve multiple forms of argument.

172 See: *Taylor v A-G (Cth)* (2019) 268 CLR 224; *Commonwealth Bank of Australia v Heinrich* [2003] SASC 322; Emma Kaufman, 'The Past and Persistence of Private Prosecution' (2024) 173(1) *University of Pennsylvania Law Review* 89.

173 [2007] SASC 15 ('*Russell-Taylor*'); *Plenty v A-G (SA)* [2013] SASC 35; *Haughton v Roder* (n 159); *Haughton v Chapman* [2019] SASC 200; *Kiparoglou v AZ* [2022] SADC 147; *Rowe v Bishop (No 1)* [2022] SADC 58 ('*Rowe v Bishop (No 1)*'); *Rowe v Bishop (No 4)* [2023] SADC 29 ('*Rowe v Bishop (No 4)*').

174 *Russell-Taylor* (n 173).

175 Ibid [2] (Anderson J).

176 Ibid [11].

to recuse themselves because they were 'sitting in Treason'.[177] While these are not technically instances of an attempted private prosecution, they are included in this category as they share the common characteristic of alleging, on the basis of the pseudolegal beliefs of the applicant, that the judicial officer had engaged in serious criminal conduct, relevantly treason.

5 *Other*

A catchall category of 'Other' was also developed to recognise cases that did not display any of the arguments defined in the preceding paragraphs, but utilised reasoning that is identifiable as having a pseudolaw conceptualisation. Given that pseudolaw is mainly defined by the mode and form of argument,[178] it is not surprising that there is a broad range of ways in which pseudolaw manifests. In total 19 cases (28%) fell within this category, 13 (19%) of which were coded into the 'other' category and not into any other category.

An illustration of the type of argument which fell into the 'other' category is the 'weights and measures' style argument used in cases such as *Jameson v Police*,[179] and *Kuipers-Lloyd v Police*.[180] This familiar pseudolaw argument, which arises in the context of traffic law, argues that speed cameras do not conform with the *National Measurement Act 1960* (Cth).[181] Though it may appear as a traditional issue of statutory interpretation, the manner and mode of these arguments are recognised as a form of pseudolegal argumentation in Australia.[182]

6 *Substantive Pseudolaw Adjacent*

While coding the dataset, several matters arose that did not display any characteristics of the pseudolaw arguments outlined in the other categories but still retained some connection to pseudolegal argumentation. As outlined above, there were good reasons to believe that the case is either actuated by pseudolaw beliefs or may have involved such arguments, but this did not appear on the face of the record. For example, some cases (n=10) involved individuals previously associated with pseudolaw or other pseudolaw-related cases — whether as party, witness, or in some other role. This recognised the tendency of adherents to engage in repeated litigation using these arguments. A second set (n=10) involved challenges to traffic law, such as involving the *National Measurement Act 1960* (Cth),[183] in ways that reflect pseudolaw claims but where the connection to pseudolaw is not directly apparent in

177 *Rowe v Bishop (No 4)* (n 173) [3]. See also *Rowe v Bishop (No 1)* (n 173).

178 Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3).

179 [2016] SASC 5.

180 [2013] SASC 137.

181 This form of argument was also made in *Best* (n 159) 40.

182 See Heilpern (n 132).

183 *Moran v Police* [2010] SASC 269; *Police v Young* [2012] SASC 210.

the judgment.[184] Other cases were identified by reference to legal phrases, such as 'coram non judice'[185] and 'original sovereign',[186] that appear out of context and are suggestive of pseudolaw elements.

Essentially, these are cases where the distinguishing pseudolaw feature is found in an aspect other than the core substantive argument being advanced, reflecting one of the modes of argumentation identified above. In seeking to identify pseudolegal behaviours beyond simply the form of arguments, this category sought to reflect the view that, in many respects, pseudolaw is best understood through the 'behaviours and attitudes of its followers, rather than simply through the style and content of arguments used'.[187] The difficulty of positively identifying pseudolegal cases purely on the text of the judgment was highlighted with *Georganas*,[188] which, despite being an almost archetypal pseudolaw case, does not display any identifying characteristics in the judgment. This final category sought to utilise other modes to identify cases that are likely to have involved significant pseudolegal elements.

An example of the way in which the identity of a party was used to help identify these cases is provided by the seven cases in which Mr Kon Kiparoglou was the litigant. However, only two cases fell into a substantive pseudolaw category on the basis of the argument advanced (one private prosecution, one state law is defective). The remaining cases were coded as 'pseudolaw adjacent' as they displayed pseudolaw behaviours but did not disclose a substantive pseudolaw argument.

Pseudolaw adherents often operate in networks. We were able to identify some cases by recognising these networks. One example is *Lindner v Scheer*,[189] a case concerning deliberate parking violations intended to provoke litigation as an opportunity to challenge the legitimacy of the relevant parking regime. In that case, the defendant Lindner consulted maps at the town clerk's office and conferred with Mr Gordon Howie before parking in the designated bays in an attempt to get infringement notices that could then be challenged on a number of grounds.[190] Mr Howie, who was listed as a witness for the appellant, is a frequent pseudolaw litigant who is a party in five cases listed in the dataset. This case displays the deliberate challenges to the authority of the court and the misguided reliance on the forms of legal argumentation that are the hallmark of pseudolaw, even though it does not fall neatly into one of the established substantive categories.

184 See generally Heilpern (n 132).

185 *Haughton v Chang* [2023] SASCA 112.

186 *IAQ* (n 121).

187 McIntyre, 'Pareidolic Illusions of Meaning: ChatGPT, Pseudolaw and the Triumph of Form over Substance' (n 33) 33.

188 *Georganas* (n 1).

189 (1986) 61 LGRA 137.

190 The judgment states, '[a]fter checking relevant maps at the town clerk's office and *conferring with Mr Howie,* the appellant parked in the middle standing bay on each of the days charged': ibid 142 (Von Doussa J) (emphasis added).

In total, nearly a third of all cases in the dataset (n=22, 32%) involved just four pseudolaw adherents as a party. This illustrates how individuals can have a disproportionate impact on the operation of the legal system.

V Conclusion

The data collected and analysed by this first-of-its-kind study clearly demonstrates the emergence of pseudolaw as a distinct and growing phenomenon. Not only does this research cement the themes introduced by anecdotal evidence, but the empirical doctrinal analysis provides a rich insight into the scale and form of pseudolaw in South Australia.

Pseudolaw arguments — often invoked by self-represented litigants — seek to undermine established principles through claims that laws are invalid or inapplicable, usually based on alternative interpretations of legal doctrines or conspiracy-based ideologies. In Australia, and indeed South Australia, the prevalence of such arguments in legal proceedings has attracted increasing attention due to the potential for significant disruption to legal processes and outcomes.[191] This study supports several key findings with respect to the research questions outlined earlier in the piece: (1) that pseudolaw is increasingly prevalent in reported judgments in South Australia; (2) that pseudolaw arguments are being used in a diverse set of circumstances; (3) and that pseudolaw arguments are broad and diverse.

This research confirms some key information about pseudolaw. It grew during the pandemic. Males are primarily involved in litigating pseudolaw. Many of these cases involve traffic law. They never win on the merits. Supreme Court cases are published more than non-appellate cases, which is methodologically problematic for understanding the breadth and impact of pseudolaw. Regarding the substance of pseudolaw, it is clear that pseudolaw activity is much broader than the arguments that are made. The three most identifiable arguments — strawman, state law is defective, and law is a contract — were demonstrated in less than half of the identified cases. Private prosecutions arose with some frequency. Most importantly, some arguments could not easily be categorised, and there is an area of pseudolaw that is not identified as pseudolaw at all, warranting a re-conceptualisation of what counts as pseudolaw.

This study has significantly contributed to the emerging scholarship on the phenomenon of pseudolaw. However, further progress is needed if we are to counter the impact of these fundamentally misguided individuals on our judicial processes.

191 Cash (n 25); Hobbs, Young and McIntyre, 'The Internationalisation of Pseudolaw' (n 3).

*Jessica March**

ARTIFICIAL INTELLIGENCE, REAL OBLIGATIONS: CAN PARTIES AND PRACTITIONERS USING TECHNOLOGY-ASSISTED REVIEW FULFIL THEIR DISCOVERY OBLIGATIONS?

I Introduction

Technological advancements constitute both the cause of and the solution to the perennial problem of modern discovery obligations: volume. As scholars have observed, 'the growth of electronically stored information … [has] led to an explosion in the scope of potentially discoverable documents', rendering the manual discovery process infeasible.[1] At best, the sheer volume of documents involved in most modern litigation imposes a significant burden — in time and expense — on parties.[2] At worst, it facilitates abuse, 'either by [parties] stonewalling the other party or by over inclusive discovery'.[3]

The advent of artificial intelligence ('AI') has led to the development of algorithmic, AI-based tools which automate the document review and classification processes required for discovery in litigation ('Technology-Assisted Review' or 'TAR'). This comment argues that lawyers can — and in some circumstances should — deploy AI-based tools to replace traditional manual review without breaching their discovery obligations.

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1 Felicity Bell and Michael Legg, 'Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer' (2019) 38(2) *University of Tasmania Law Review* 35, 44.

2 See generally: Australian Law Reform Commission, *Managing Justice: A Review of the Civil Justice System* (Report No 89, February 2000) 431 [6.67]; Victorian Law Reform Commission, *Artificial Intelligence in Victoria's Courts and Tribunals* (Consultation Paper, October 2024) 18 ('*AI in Victoria's Courts and Tribunals*'); Jason R Baron, 'Law in the Age of Exabytes: Some Further Thoughts on "Information Inflation" and Current Issues in E-Discovery Search' (2011) 17(3) *Richmond Journal of Law and Technology* 9:1–33.

3 Bridgette Toy-Cronin et al, *The Wheels of Justice: Understanding the Pace of Civil High Court Cases* (Report, 2015) 116. See also Margaret Castles, Stacey Henderson and Anne Hewitt, *Ethical Resolution of Civil Disputes: South Australian Theory and Practice* (Lawbook, 2nd ed, 2023) 199 [7.165].

Part II elaborates on the nature of TAR in the Australian context. Part III explains the direct[4] and indirect[5] discovery obligations imposed on parties and lawyers under the *Uniform Civil Rules 2020* (SA) ('*UCR*'). Part IV analyses whether it is possible for parties and lawyers who employ TAR in the discovery process to satisfy those obligations. Part V concludes that the responsible use of TAR does not breach any direct or indirect discovery obligations and, in some circumstances, might even be required to fulfil them.

II Technology-Assisted Review in Australia

A *What Is TAR?*

Technology-Assisted Review[6] is defined as:

> a process for [p]rioritizing or [c]oding a [c]ollection of [d]ocuments using a computerized system that harnesses human judgments of one or more [s]ubject [m]atter [e]xpert(s) on a smaller set of documents and then extrapolates those judgments to the remaining [d]ocument [c]ollection.[7]

In the discovery context,[8] TAR procedure can be summarised as follows: (1) a lawyer reviews a set of documents, often referred to as a 'seed set', and categorises each document as 'relevant' or 'not relevant', and 'privileged' or 'not privileged'; (2) the seed set is fed into the TAR software, and it codes the broader set of all documents in the 'discovery universe'; (3) the lawyer reviews a sample of the coded documents, identifies any errors, and feeds those corrections back to the software; (4) that process is repeated until the program is sufficiently accurate.[9] Using machine

4 *Uniform Civil Rules 2020* (SA) r 73 ('*UCR*').

5 Ibid r 3.1.

6 This comment adopts the terminology outlined by leading scholars from the United States on the subject of AI-based e-discovery: Maura Grossman and Gordon Cormack, 'The Grossman-Cormack Glossary of Technology-Assisted Review' (2013) 7(1) *Federal Courts Law Review* 1. See also: Shannon Brown, 'Peeking inside the Black Box: A Preliminary Survey of Technology Assisted Review (TAR) and Predictive Coding Algorithms for E-Discovery' (2016) 21(2) *Suffolk Journal of Trial and Appellate Advocacy* 221, 253–85. Other terms frequently used include 'computer-aided review', 'content-based advanced analytics', and 'predictive coding': Bell and Legg (n 1) 44.

7 Grossman and Cormack (n 6) 32.

8 Noting that TAR has other legal applications, such as in transactional due diligence: Lyria Bennett Moses, 'Artificial Intelligence in the Court, Legal Academia and Legal Practice' (2017) 91(7) *Australian Law Journal* 561, 575.

9 See generally: Bell and Legg (n 1) 46–7; Peter Cashman and Eliza Ginnivan, 'Digital Justice: Online Resolution of Minor Civil Disputes and the Use of Digital Technology in Complex Litigation and Class Actions' (2019) 19 *Macquarie Law Journal* 39, 66–7; David Caruso, Michael Legg and Jordan Phoustanis, 'The Automation Paradox in Litigation: The Inadequacy of Procedure and Evidence Law to Manage

learning throughout that iterative process, the software creates a predictive model to estimate the probability that a particular document is relevant or not relevant (and privileged or not privileged).[10] That process is easily adapted for orders for discovery by category or specific discovery, so long as the lawyer 'training' the software applies the correct test(s).[11] Scholars identify three sub-species of TAR: 'simple passive learning';[12] 'simple active learning'; [13] and 'continuous active learning'.[14]

B *Availability of TAR Tools in the Australian Market*

Since the early 2000s, the use of TAR technology has increased worldwide such that the global industry is now worth over one billion USD.[15] There are at least four major providers of TAR technology in the Australian market.[16] Australian law firms have begun recommending its use,[17] and developing tailored in-house

Electronic Evidence Generated by the "Internet of Things" in Civil Disputes' (2019) 19 *Macquarie Law Journal* 157, 169; John Tredennick et al, *TAR for Smart People: How Technology Assisted Review Works and Why It Matters for Legal Professionals* (Catalyst, 3rd ed, 2018). See also *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd (No 1)* (2016) 51 VR 421, 425–6 [20] (Vickery J) ('*McConnell Dowell*'), citing *Pyrrho Investments Ltd v MWB Property Ltd* [2016] EWHC 256 (Ch), [19]–[24] (Master Matthews) ('*Pyrrho*'); *ViiV Healthcare Company v Gilead Sciences Pty Ltd (No 2)* (2020) 155 IPR 490, 516 [134]–[139] (Beach J) ('*ViiV*'); *White v James Hardie New Zealand* [2020] NZHC 2202, [33] (Whata J) ('*White*').

10 Caruso, Legg and Phoustanis (n 9) 169.

11 Pursuant to *UCR* (n 4) rr 73.8–9.

12 Bell and Legg (n 1) 46–7.

13 Ibid.

14 Ibid.

15 Michael Mills and Julian Uebergang, 'Artificial Intelligence in Law: An Overview' (2017) 139 *Precedent* 35, 38.

16 Tony Nolan, 'Reform of Discovery in the 21st Century' (2017) 142 *Precedent* 20, 24. See, e.g.: *AI in Victoria's Courts and Tribunals* (n 2) 41, citing 'Nuix Discover Technology', *Nuix* (Web Page, 2024) <https://www.nuix.com/technology/nuixdiscover>; Relativity ODA LLC, 'Relativity — eDiscovery & Legal Search Software Solutions', *Relativity* (Web Page, 2024) <https://www.relativity.com/>; 'Intellidact AI Data Redaction', *Computing Systems Innovations* (Web Page, 2022) <https://csisoft.com/intellidact/>.

17 See, e.g.: David Benson, 'What is Technology Assisted Review and How Should It Be Used in Modern Discovery?', *Clayton Utz* (Blog Post, 24 July 2023) <https://www.claytonutz.com/insights/2023/july/what-is-technology-assisted-review-and-how-should-it-be-used-in-modern-discovery>; Luke Hastings, Andrew Eastwood and David Grainger, 'One Giant Leap for E-Discovery: Predictive Coding Approved by Australian Court', *Herbert Smith Freehills Kramer* (Blog Post, 6 December 2016) <https://www.hsfkramer.com/insights/2016-12/one-giant-leap-for-e-discovery-predictive-coding-approved-by-australian-court>.

TAR technologies.[18] As TAR software becomes cheaper and lawyers become more familiar with its use, its prevalence within the Australian legal industry is only expected to increase. Hence, examination of its compatibility with rules of civil procedure is paramount.

III Discovery Obligations under the *UCR*

A *Direct Obligations*

Subject to court order or unanimous agreement amongst parties,[19] r 73 of the *UCR* imposes a positive obligation on litigious parties to 'make discovery of discoverable documents that are or were in their possession, custody or power'[20] by filing and serving a list of documents[21] within 28 days after the close of pleadings.[22] For the purposes of the general discovery obligation, '[a] document is a discoverable document … if it is *directly relevant* to an issue raised in the proceeding' as determined by reference to pleadings (if filed).[23] Courts retain the discretion to modify that discovery obligation, including by ordering discovery by category or specific discovery.[24]

B *Indirect Obligations*

The discovery obligations contained in *UCR* r 73 import the broader ethical obligations applicable to parties and lawyers pursuant to r 3.1.[25] Most relevantly, this includes the obligations to: (1) 'act honestly'[26] and 'not engage in misleading conduct';[27] (2) use reasonable endeavours to 'ensure that the time and costs incurred

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18 'MinterEllison Shortlisted in Six Categories at FT Innovative Lawyers Awards Asia-Pacific', *MinterEllison* (Blog Post, 6 April 2025) <https://www.minterellison.com/articles/minterellison-shortlisted-at-ft-innovative-lawyers-awards>.

19 *UCR* (n 4) r 73.7(1).

20 Ibid r 73.7(2).

21 Ibid rr 73.2–3 and in accordance with Forms 73A–73C.

22 *UCR* (n 4) r 73.7(4).

23 Ibid r 73.7(5) (emphasis added). Absent pleadings, relevance is assessed by reference to the originating application: *Bellara Aged Care Village Pty Ltd v Serafini* [2024] SASC 101, [5] (McIntyre J) ('*Bellara*'), citing *Ryan v Light Regional Council* [2020] SAERDC 45, [27] (Judge Burnett) ('*Ryan*').

24 *UCR* (n 4) rr 73.8–9.

25 Bell and Legg (n 1); Castles, Henderson and Hewitt (n 3) 40 [2.145], 199 [7.165]. See also *Clone Pty Ltd v Players Pty Ltd (in liq)* (2016) 127 SASR 1, 45–6 [214]–[216] (Blue J, Stanley J agreeing) ('*Clone v Players*').

26 *UCR* (n 4) r 3.1(1)(a). See also: Law Society of South Australia, *South Australian Legal Practitioners Conduct Rules 2011* (at 10 June 2025) r 4.1.2 ('*SALPCR*'); Law Council of Australia, *Australian Solicitors' Conduct Rules 2021* (at 10 June 2025) r 4.1.2 ('*ASCR*').

27 *UCR* (n 4) r 3.1(1)(b). See also: *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

are reasonable and proportionate'[28] and 'minimise delay';[29] and, in respect of practitioners, (3) 'deliver legal services competently' and 'diligently'.[30] Part IV analyses the compatibility of the use of TAR tools with the requirements of each of those three obligations in relation to discovery.

IV Compatibility of TAR and Discovery Obligations in South Australia

This Part considers whether the use of TAR in discovery breaches any of the obligations identified in Part III. The direct obligation of parties and practitioners to disclose all discoverable documents will be considered together with practitioners' obligation to ensure legal services are delivered competently, since persons utilising TAR will only meet their direct discovery obligation if the relevant TAR tool is accurate (i.e. 'competent'). It is noted that the use of TAR does not affect the initial collection of potentially discoverable documents for review. Parties' and practitioners' enduring obligation to 'file and serve a revised list of documents' should they become aware that a discoverable document has not been disclosed also remains unaffected by the use of TAR.[31] Those two considerations are thus beyond the scope of this comment.

A *Competence and Diligence*

Practitioners who review documents on behalf of a client for the purposes of discovery are delivering a 'legal service'. The relevant Conduct Rules therefore require that service to be delivered competently and diligently.[32] It follows that practitioners must only rely on the intelligence of another person (or entity) insofar as they are (or it is) competent to complete the relevant task. That requirement applies equally to reliance on *human* and *artificial* intelligence.

Classification of documents for discovery often involves the application of highly technical principles, requiring considered professional judgement.[33] Practitioners' reliance on their practice instincts is particularly heightened in circumstances where, in the absence of pleadings, documents' future relevance must be predicted

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28 *UCR* (n 4) r 3.1(h). See also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

29 *UCR* (n 4) r 3.1(k). See also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

30 *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2.

31 *UCR* (n 4) r 73.10.

32 *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2. Note that unless otherwise specified, 'Conduct Rules' refers to SALPCR (n 26) and ASCR (n 26).

33 See, e.g.: *Quenchy Crusta Sales Pty Ltd v Logi-Tech Pty Ltd* (2002) 223 LSJS 266; *Rehn v Australian Football League* (2003) 227 LSJS 378; *Channel Seven Adelaide Pty Ltd v Lane* (2004) 234 LSJS 225; *Harris Scarfe Ltd (in liq) v Ernst & Young (No 4)* (2005) 93 SASR 300; *Morgan v Workcover Corporation* [2006] SADC 80; *Jennings v Idameneo (No 123) Pty Ltd* [2008] SASC 341.

by reference to the originating application.[34] Nonetheless, empirical research has shown that compared to manual review and classification by practitioners, the use of TAR software produces more precise and accurate results.[35] The risk of human error in the traditional manual review process should not be understated. That risk does not inhere in TAR tools except to the extent that human error is coded into the training process through misclassifications by the seed set reviewer. In that respect, an advantage of TAR is that the informed judgement of experienced senior practitioners can be extrapolated across the document set, so firms are not reliant on the judgement of junior (and less experienced) practitioners. Hence, to the extent that practitioners can rely on the work of other practitioners in the competent and diligent provision of legal services relating to discovery, they can also rely on AI-based TAR software.

The caveat is that scholarship also indicates that at least some TAR tools either do not work, or work less effectively, on certain classes of documents, such as 'old hard copies',[36] 'diagrams',[37] 'drawings',[38] and 'spreadsheets'.[39] Practitioners must therefore verify the competence of TAR technologies to accurately code those types of documents. The TAR 'training' stage provides a mechanism by which practitioners can make that assessment; training should continue until a particular accuracy confidence threshold is reached. So long as a practitioner has taken steps to verify the competence of a TAR tool, it is likely that this obligation would be satisfied.

B *Honesty and Not Misleading the Court*

UCR rr 3.1(1)(a) and 3.1(1)(b) jointly require parties and practitioners to act honestly and not engage in misleading conduct.[40] The Conduct Rules additionally require

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34 *Bellara* (n 23) [5] (McIntyre J), citing *Ryan* (n 23) [27] (Judge Burnett).

35 Maura R Grossman and Gordon V Cormack, 'Technology-Assisted Review in E-Discovery Can Be More Effective and More Efficient than Exhaustive Manual Review' (2011) 17(3) *Richmond Journal of Law and Technology* 11:1–48, 4. See also: Caruso, Legg and Phoustanis (n 9) 169; Elliott Cook, 'Blue Skies Still Ahead: A Retrospective and Prospective Look at Technology in the Legal Profession' (2021) 25(2) *Journal of Law, Information and Science* 176, 182; *Da Silva Moore v Publicis Groupe*, 287 FRD 182, 190 (SD NY, 2012) ('*Da Silva Moore*'), citing Herbert Roitblatt, Anne Kershaw and Patrick Oot, 'Document Categorization in Legal Electronic Discovery: Computer Classification vs Manual Review' (2010) 61 *Journal of the American Society for Information, Science and Technology* 70, 79; *Irish Bank Corporation Ltd v Quinn* [2015] IEHC 175, [12]–[48] ('*Irish Bank Corporation*').

36 Cashman and Ginnivan (n 9) 67.

37 Ibid.

38 Ibid.

39 Ibid; *Money Max International Pty Ltd v QBE Insurance Group Ltd* (2018) 358 ALR 382, 418 [166] (Murphy J) ('*Money Max*').

40 *UCR* (n 4) rr 3.1(1)(a)–(b). For practitioners, see also: *SALPCR* (n 26) r 4.1.2; *ASCR* (n 26) r 4.1.2.

practitioners not to 'deceive or knowingly or recklessly mislead the court'.[41] These obligations apply equally in the discovery process.[42] The analysis in this sub-part is confined to formal discovery processes wherein parties provide documents to practitioners for review and classification.[43]

1 *Parties' Obligations*

Parties' involvement in such a process is not affected by the use of TAR. Their obligations to *honestly* provide their lawyers with: (1) all possibly relevant documents in their possession, custody or power;[44] (2) information about documents that used to be in their possession, custody or power;[45] (3) documents which come into their possession, custody or power[46] after a consolidated list of documents has been filed; and (4) instructions to the same effect,[47] remain unchanged by practitioners' use of TAR.

2 *Practitioners' Obligations*

Conversely, lawyers' obligations are impacted. It is trite to observe that practitioners must not intentionally exclude relevant documents — to do so would squarely contravene the obligation not to 'deceive or knowingly … mislead the court'.[48] That is particularly pertinent for the filing practitioner, who must certify that 'to the best of [their] knowledge or belief the client has fully discharged the client's discovery obligations'.[49] It follows that practitioners must not deliberately 'train' TAR software to exclude certain types of documents. To do so would be analogous to instructing a junior practitioner not to disclose a discoverable document.

The question of whether inadvertent non-disclosure due to the failure of TAR software to identify one or more relevant documents amounts to a breach is more complex. Such a scenario would not contravene the obligation not to 'deceive or knowingly … mislead the court', since both 'deceive' and 'knowingly mislead' entail

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41 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

42 See, e.g., *Clone v Players* (n 25) 45–6 [214]–[216].

43 It is noted that self-represented litigants are unlikely to use TAR due to the typical scope of their matters and the comparative cost of TAR software. In-house counsel using TAR are subject to the same obligations as other practitioners.

44 *UCR* (n 4) rr 73.1 (definition of 'discovery by category', definition of 'general discovery', definition of 'specific discovery'), 73.2(a), 73.3(2)(a)–(b), 73.7(3).

45 Ibid r 73.3(2)(c).

46 Ibid r 73.10.

47 For the purposes of the filing lawyers' certification of the list of documents prescribed by Forms 73A–73C: ibid r 73.3(6).

48 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

49 As prescribed by Forms 73A–73C: *UCR* (n 4) r 73.3(6). Courts may also order practitioners to verify a list of documents on oath: r 73.14(2)(k).

actual knowledge of the existence of the non-disclosed document(s).[50] Hence, the question is this: can inadvertent non-disclosure due to TAR amount to 'recklessly' misleading the court?

A practitioner will breach their ethical obligations if they are recklessly indifferent 'as to the truth or falsity' of a statement or representation.[51] The term 'reckless' invokes standards of professional conduct. A practitioner can be shown to be recklessly indifferent if they do not take *reasonable* steps — assessed by reference to professional standards — to verify that their discovery process has produced accurate results.[52]

The use of TAR technology has been judicially approved as a permissible tool for use in litigation in Australia[53] and internationally.[54] The Supreme Court of Victoria has issued a practice note stating that 'technology assisted review will ordinarily be an accepted method of conducting a reasonable search in accordance with the Rules of Court' and that 'the Court may order discovery by technology assisted review, whether or not it is consented to'.[55] In *Jenkins Sh v Australian Council for the Arts*, the respondent's submission that the discovery sought by the applicant was oppressive or disproportionate was rejected due to the availability of TAR tools,

50 *Macquarie Dictionary* (online at 10 June 2025) 'deceive' (def 1), 'knowingly' (def 3). See also the discussion of what amounts to 'misleading' conduct in *Clone v Players* (n 25) 45–6 [214]–[216].

51 *Giudice v Legal Profession Complaints Committee* [2014] WASCA 115, [130] (Edelman JA); *LP 202012 v Council of the Law Society of the ACT* [2024] ACAT 12, [178] (McCarthy P).

52 *Prothonotary of the Supreme Court of New South Wales v McCaffery* [2004] NSWCA 470, [53] (McColl JA), citing *Clyne v New South Wales Bar Association* (1960) 104 CLR 186, 199–200 [22] (Dixon CJ, McTiernan, Fullagar, Menzies and Windeyer JJ); *Fidock v Legal Profession Complaints Committee* [2013] WASCA 108, [100]–[102] (Martin CJ, Newnes and Murphy JJA).

53 The use of TAR was first approved in Australia by Vickery J in *McConnell Dowell* (n 9). See also: *Money Max* (n 39); *McConnell Dowell Constructors (Aust) Pty Ltd v Santam (No 2)* [2017] VSC 640; *Cantor v Audi Australia Pty Ltd (No 3)* [2017] FCA 1079; *Peterson Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 2)* [2017] FCA 1231; *Parbery v QNI Metals Pty Ltd* (2018) 358 ALR 88; *ViiV* (n 9); *Queensland Motorways Pty Ltd v CPB Contractors Pty Ltd* [2023] QSC 107; *Bogan v Estate of Peter John Smedley* [2023] VSC 105.

54 In the United States, see, e.g.: *Rio Tinto Plc v Vale SA*, 306 FRD 125 (SD NY, 2015); *Da Silva Moore* (n 35). In the United Kingdom, see, e.g.: *Pyrrho* (n 9); *Brown v BCA Trading Ltd* [2016] EWHC 1464 (Ch) ('*Brown*'). In Ireland, see *Irish Bank Corporation* (n 35). In New Zealand, see *White* (n 9).

55 Supreme Court of Victoria, *Practice Note SC Gen 5: Technology in Civil Litigation*, 29 June 2018, [8.7]. Further, the Federal Court of Australia website indicates that parties should collectively consider the use of TAR prior to the first case management hearing: 'Litigation Using Electronic Discovery', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-tech/electronic-discovery>.

reflecting the pragmatic approach adopted by the judiciary.[56] Hence, the responsible use of TAR falls — and is even encouraged — under modern professional standards.

Practitioners may therefore discharge their burden to take reasonable steps to verify the accuracy of TAR results by critically evaluating the appropriateness and precision of the software in each case, including by repeating the 'training' process until the TAR program is consistently highly accurate. A necessary precursor is that practitioners must possess a sufficient understanding of the operation of TAR software and should seek out professional education on the technology before utilising it. In complex cases, it may be appropriate to engage an e-discovery expert for those purposes.[57] Having taken those steps, a practitioner may still inadvertently mislead the court if the TAR software erroneously excludes a relevant document, but the practitioner will not have done so 'knowingly or recklessly'.[58] Therefore, the practitioner will not have breached their ethical obligation under r 19.1 of the relevant Conduct Rules.[59]

C *Delay and Expense*

Parties and practitioners are required to use reasonable endeavours to 'ensure that the time and costs incurred [in proceedings] are reasonable and proportionate'[60] and to 'minimise delay'.[61] Discovery is a notoriously time-consuming and expensive process.[62] Scholars observe that discovery 'is often the most expensive … step' in litigation[63] and that 'the objectives of the [discovery] process are either not being achieved or can only be achieved at great cost'.[64] For that reason, '[t]he commercial realities of discovery … represent a significant barrier to justice for many litigants'.[65]

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56 [2024] FCA 309, [11] (Horan J).

57 See, e.g.: *McConnell Dowell* (n 9); *White* (n 9).

58 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

59 *SALPCR* (n 26) r 19.1; *ASCR* (n 26) r 19.1.

60 *UCR* (n 4) r 3.1(1)(h).

61 Ibid r 3.1(1)(k). For practitioners see also: *SALPCR* (n 26) r 4.1.3; *ASCR* (n 26) r 4.1.3.

62 Nolan (n 16) 24; Cashman and Ginnivan (n 9) 65; Toy-Cronin et al (n 3) 116, citing Danya Shocair Reda, 'The Cost-and-Delay Narrative in Civil Justice Reform: Its Fallacies and Functions' (2012) 90(4) *Oregon Law Review* 1085.

63 Law Council of Australia, *Final Report in Relation to Possible Innovations to Case Management* (Report, 2006) [75].

64 Victorian Law Reform Commission, *Civil Justice Review* (Report No 14, March 2008) 434. See also James Spigelman, 'Access to Justice and Access to Lawyers' (2007) 29(2) *Australian Bar Review* 136.

65 Australian Law Reform Commission (n 2) 67.

TAR is often significantly less expensive and time-consuming than manual review,[66] notwithstanding the additional expenses incurred in disputes over its application or in retaining e-discovery experts.[67] In *Da Silva Moore v Publicis Groupe*, it was observed that

> "technology-assisted reviews require, on average, human review of only 1.9% of the documents, a fifty-fold savings over manual review," thus establishing significant cost savings with TAR over manual review.[68]

Writing extracurially, Vickery J of the Supreme Court of Victoria estimated that the expense of TAR is 'one fifth of the cost' of manual review.[69] In that context, it is arguable that parties and practitioners have an ethical obligation to elect to use TAR where it would be cheaper and faster than manual review.[70] Such an interpretation of the obligations contained in rr 3.1(1)(h) and 3.1(1)(k) coheres with the overarching object of the *UCR*, being 'to facilitate the just, efficient, timely, cost-effective and proportionate resolution or determination of the issues in proceedings'.[71] Furthermore, the cost of litigation continues to impede access to justice.[72] The labour intensity of legal work, including discovery processes, has been identified as one of the drivers of high legal costs.[73] It follows that widespread adoption of TAR for discovery could improve access to justice insofar as it reduces litigation expenses.

66 Caruso, Legg and Phoustanis (n 9) 169; Peter Cashman and Amelia Simpson, 'Costs and Funding Commissions in Class Actions' (Class Actions Research Paper No 5, University of New South Wales Law, 11 December 2020) 35, citing Erick Gunawan and Tom Pritchards, 'Technology Assisted Review' (Research Paper, Law Institute of Victoria, 24 November 2017) 1; Cook (n 35) 186–7; Nolan (n 16) 2–3; Bennett Moses (n 8) 30.

67 Nolan (n 16) 24; *McConnell Dowell* (n 9) 424 [10], 427 [23]; Frank Pasquale and Glyn Cashwell, 'Four Futures of Legal Automation' (2015) 63 *UCLA Law Review Discourse* 26, 41.

68 *Da Silva Moore* (n 35) 190, citing Grossman and Cormack (n 35) 43.

69 Peter Vickery, 'New Horizons for the Bar in the Age of Technology' (Conference Paper, Australian Bar Association Conference, 7 July 2017) 17.

70 Clive Freedman, 'Technology Assisted Review Approved for Use in English High Court Litigation' (2016) 13 *Digital Evidence and Electronic Signature Law Review* 139, 141, referring to *Brown* (n 54) and *Pyrrho* (n 9). See also *Golden Vision Gold Coast Pty Ltd v Orchid Avenue Pty Ltd* [2022] QSC 49, [50] (Ryan J).

71 *UCR* (n 4) r 1.5.

72 Michael Duffy, Andrew Coleman and Matt Nichol, 'Mapping Changes in the Access to Civil Justice of Average Australians: An Analysis and Empirical Survey' (2021) 42(1) *Adelaide Law Review* 293, 303.

73 Ibid, citing Chief Justice Wayne Martin, 'Access to Justice' (2014) 16(1) *University of Notre Dame Australia Law Review* 1, 5.

V Conclusion

This comment has established that parties and practitioners who understand, critically evaluate, and responsibly use TAR in discovery do not contravene r 73 of the *UCR* or the ethical obligations that rule imports. Conversely, where TAR is more efficient than manual review, there may be an ethical obligation to adopt the former approach. It has been observed that 'in almost all studies of litigation, discovery is singled out as the procedure most open to abuse'.[74] Because the discovery process is opaque to counterparties and it is difficult to establish breach of a discovery obligation,[75] compliance 'depends on ethical self-management'.[76] To that end, notwithstanding the conclusion reached in this comment, practitioners and parties alike should continuously self-reflect on whether their use of TAR tools coheres with their broader civil litigation obligations.

74 Australian Law Reform Commission (n 2) 431 [6.67].

75 A party filing a list of documents is presumed to have discharged its discovery obligation; the onus falls upon the party seeking further discovery to displace that presumption: *Betterway Health Care International Group Pty Ltd v Ferngrove Pharmaceuticals Pty Ltd* [2023] SADC 107, [48] (Judge Slattery).

76 Castles, Henderson and Hewitt (n 3) 199 [7.165].

Ilya Aidman and Jonathan Davies***

THE BURDEN OF SELF-REPRESENTED LITIGANTS: INSIGHTS FROM A SOUTH AUSTRALIAN EMPIRICAL ANALYSIS

'Your Honour, I don't know about all these laws, all I want is justice!'[1]

I Introduction

Self-represented litigants ('SRLs') have caught the attention of the courts in South Australia and elsewhere. There has been judicial, academic, and political commentary on SRLs, often describing them as problematic, placing undue strain on courts' resources, increasing costs for opposing parties and, in some cases, bringing vexatious and disruptive actions.[2] Concurrently, there has been a rise in academic and judicial commentary on 'tackling the challenge' that SRLs pose for the profession.[3] John Faulks, former Deputy Chief Justice of the Family Court of Australia, has observed that

> [t]here are three things … that can be done in relation to self-representation by litigants: one is to get them lawyers, the second is to make them lawyers and the *third is to change the system*.[4]

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1 A self-represented litigant, overheard in Court Room 7 of the Supreme Court of South Australia, (January 2025).

2 Duncan Webb, 'The Right Not to Have a Lawyer' (2007) 16(3) *Journal of Judicial Administration* 165, 166; Elizabeth Richardson and Tania Sourdin, 'Mind the Gap: Making Evidence-Based Decisions About Self-Represented Litigants' (2013) 22(4) *Journal of Judicial Administration* 191, 193–4. See generally Emma Garret, 'The Impact of Self-Represented Litigants on the Administration of Justice in the Federal Court of Australia' (2020) 9(1) *Journal of Civil Litigation and Practice* 34. Cf Tania Sourdin and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants: The Dark Side' (2014) 24(1) *Journal of Judicial Administration* 61, 64–5.

3 John Faulks, 'Self-Represented Litigants: Tackling the Challenge' (Conference Paper, Managing People in Court Conference, National Judicial College of Australia and the Australian National University, February 2013).

4 Ibid 2 [3] (emphasis added).

The limited empirical data available has encouraged proposed reforms to pour more resources into the existing system: more legal aid funding,[5] more plain English guides,[6] and the general simplification of court procedures.[7] Unfortunately, despite the current generation of reform reaching nearly 30 years of age,[8] concerns about the sustainability of support systems for vulnerable people remain high.[9] As the SRL persona continues to evolve and more data slowly becomes available,[10] deeper adjustments in our dispute resolution system may be required.

This comment seeks to make a novel contribution to the field through analysis of a first-of-its-kind dataset made available by the South Australian Courts Administration Authority ('CAA'). The dataset consists of a census of matters in the South Australian Superior Courts, namely the Supreme Court and Court of Appeal, with corresponding SRL attributes alongside other data characteristics.

Part II will discuss the existing commentary on issues relating to SRLs, including examining the types of SRLs that engage in judicial review and the perception of their 'burdensome' persona in the courts. Additionally, this Part will examine how the courts and the profession have addressed the 'burden' the SRL poses. Part III will analyse the CAA data, drawing quantitative conclusions, summarising key patterns in relation to the prevalence of SRLs across various snapshots of the Courts' workload, and providing broader discussion where appropriate. Part IV will conclude.

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5 See: Law Council of Australia, 'Government Funding Needed to Avert Legal Aid Crisis' (Media Release, 27 February 2025) ('Funding 2025'); Commonwealth of Australia, Attorney-General's Department, *National Access to Justice Partnership* (Intergovernmental Agreement, 1 July 2025).

6 See, e.g., Legal Services Commission South Australia, *Law Handbook* (online, 2025) <https://lsc.sa.gov.au/LawHandbook>. See also Supreme Court of Victoria, *Annual Report 2023–24* (Report, November 2024) 37.

7 The seminal report on the matter is Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report, No 89, 17 February 2000) ('*Managing Justice Report*'). This report sparked a series of consolidations and reforms to the civil procedure Acts and Rules in Australia. See generally, on the issue of simplification: ch 8. For criticism of simplified procedure, see particularly, feedback from lawyers suggesting increased costs resulting from early simplification efforts: at 21.

8 The key government publications include: ibid; Senate Standing Committee on Legal and Constitutional References, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (Report, 8 June 2004) ('*Standing Committee Report*').

9 See, e.g., 'Funding 2025' (n 5).

10 See, e.g., McIntyre et al, 'A Quantitative Analysis of the Rise of Pseudolaw in South Australia' (2025) 46(2) *Adelaide Law Review* 439. Additionally, the prevalence of matters being brought by vexatious, sovereign-citizen-linked, applicants have been covered in media outlets: see e.g., 'Uncovering the Anti-Government Movement Brewing Across the Nation', *Four Corners* (Australian Broadcasting Corporation, 2025) ('*Four Corners Investigation*').

II The Self-Represented Litigant

A *Who Are SRLs?*

It is important to define the SRL. After all, the term 'self-represented litigant' refers to a broad class of persons.[11] The literature has observed that 'self-represented parties' may take the form of a criminal defendant at trial representing themselves, or an applicant before a tribunal.[12] However, this comment will primarily focus on the self-represented *litigant*: an unrepresented party in a civil proceeding.

It is important to clarify the *types* of SRLs that engage in civil actions. As Ben D'Andrea observes, there is no 'one-size fits-all description' of an SRL.[13] While r 25.6(2) of the *Uniform Civil Rules 2020* (SA) ('*UCR*') does not 'prevent an individual from acting … self-represented',[14] it is obviously counterintuitive that someone with no legal experience or training would elect to appear unrepresented given the complexity of civil litigation generally. Justice Kyrou (writing extracurially) has observed that the courts encounter two types of SRLs: (1) querulent SRLs, who could be described as persistent complainers obsessed 'by the legal process' and the pursuit of their definition of 'justice';[15] and (2) non-querulant SRLs, who may have a cogent, rational or meritorious case though appear without legal representation.[16] These non-querulent SRLs may be unrepresented for numerous reasons, including:

(1) an inability to afford the costs associated with legal representation;[17]
(2) no practitioner may be willing to act on their claim, possibly on the basis that it is weak or meritless;[18] or
(3) they are unable to access adequate funding through legal aid programs.[19]

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11 Harlis Kirimof and Erik Dober, 'Known Unknowns: The Overarching Obligations of Self-Represented Parties' (2015) 25(1) *Journal of Judicial Administration* 28, 30.

12 See, e.g., ibid.

13 Ben D'Andrea, 'Defeated "on the Battleground of Procedure": South Australia's Universal Pleading Rules and Access to Justice for Self-Represented Litigants' (2021) 43(3) *Bulletin (Law Society of South Australia)* 32, 33.

14 *Uniform Civil Rules 2020* (SA) r 25.6(2) ('*UCR*').

15 Emilios Kyrou, 'Managing Litigants in Person' (2013) 25(2) *Judicial Officers' Bulletin* 11, 11–12; Australian Institute of Judicial Administration, *Forum on Self-Represented Litigants* (Report, 17 September 2004) ('*SRL Forum*') 2–3. See also: D'Andrea (n 13) 35, citing *Australian Law Dictionary* (3rd ed, 2018) 'querulant'. See also McIntyre et al (n 10).

16 Kyrou (n 15) 11. See also D'Andrea (n 13) 35.

17 Productivity Commission, 'Access to Justice Arrangements' (Report, No 72, 5 September 2014) vol 1, 492 ('*Productivity Commission Report*').

18 Ibid 494. See *South Australian Legal Practitioners Conduct Rules 2022* (SA) ('*SALPCR*'), which states that practitioners 'must not act as [a] mere mouthpiece' for clients, elevating the duty not to bring unmeritorious claims to a professional obligation: r 17.1.

19 *Productivity Commission Report* (n 17) 491–2.

In parallel, the querulent SRL has attracted attention in the form of 'sovereign citizens' who argue 'pseudolaw' and are associated with anti-establishment ideology.[20] In *McConnell v Albanese*,[21] for example, an SRL applicant sought to advance several causes of action against the Prime Minister of Australia, Anthony Albanese. The applicant argued causes of action including negligence resulting in harm and breach of provisions of the *Criminal Law Consolidation Act 1935* (SA).[22] President Livesey rejected the applicant's notice and grounds of appeal on the basis they were 'nonsensical'.[23] This phenomenon has crossed into popular discourse, receiving media attention such as the Australian Broadcasting Corporation's *Four Corners* investigation into the sovereign citizen movement, which covered fringe groups who use 'pseudolaw' to target what they view as oppressive institutions.[24]

B *The SRL 'Burden'*

As a social phenomenon that is not contained to the courts, there are several fundamentally different lenses to approach the issue of SRLs. The authors wish to acknowledge the significant inquiries that have been undertaken on this topic from the perspective of SRLs — focussing on the negative effects of the justice system on SRLs, the nature of the legal needs left unmet by the present system, and the difficulties faced by lay persons navigating an appreciably complex system.[25] However, addressing the vulnerabilities of SRLs is only one aspect of promoting access to justice.

The High Court of Australia has long observed, as it did in *Cachia v Hanes*,[26] that litigants have the right to appear in person — describing this right as 'fundamental'.[27] However, the Court went on to say that an increasing number of SRLs were 'creating a problem for the courts'.[28] Thus, while acknowledging the peculiar challenges faced by SRLs, this comment will speak to the issue of administering the justice system. As the majority went on to explain:

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20 See, for the full-scope initial report, Joe McIntyre et al, *The Rise of Pseudolaw in South Australia: An Empirical Analysis of the Emergence and Impact of Pseudolaw on South Australia's Courts* (Report, 30 September 2024) ('*McIntyre Report*').

21 [2024] SASCA 131.

22 Ibid [1]–[4] (Livesey P).

23 Ibid [2].

24 See: *Four Corners Investigation* (n 10); Mahmood Fazel, Amy Donaldson and Dylan Welch, 'Inside the Fringe Groups Fighting a "Quasi Civil War' with Self-Styled Sheriffs and Their Own Court", *Australian Broadcasting Corporation* (online, 18 August 2025) <https://www.abc.net.au/news/2025-08-18/sovereign-citizen-movement-law-court-four corners/105655100>.

25 *Productivity Commission Report* (n 17) 494–5. For a Canadian perspective of the 'vulnerable' SRL, see Farrow et al, *Addressing the Needs of Self-represented Litigants in the Canadian Justice System* (Report, 27 March 2012) 14–16.

26 (1994) 179 CLR 403.

27 Ibid 415 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

28 Ibid.

> All too frequently, the *burden* of ensuring that the necessary work of a litigant in person is done falls on the court administration or the court itself. Even so, litigation involving a litigant in person is usually *less efficiently conducted and tends to be prolonged*. The costs of legal representation for the opposing litigant are increased and the drain upon court resources is considerable.[29]

Declining efficiency in the justice system is an issue that affects everyone — SRLs and represented parties alike.[30] Thus, the issue of the burden, for the purposes of this comment, must refer to the effect of SRLs on the resources required to sustain courts. Attempting to identify exactly where that burden lies within the system, it has anecdotally been observed that matters with an SRL party are affected by: (1) the SRL having difficulty understanding and complying with procedural requirements under the *UCR* or directions of the court;[31] (2) hearings taking more time due to the judge having to explain processes and procedures to the SRL;[32] or (3) the SRL having difficulty articulating their case in a cogent way.[33]

Without a comprehensive framework to respond to SRLs, the obligation of assisting the SRL has fallen on: (1) the South Australian courts themselves; or (2) the opposing party.

1 *The Court's Increased Role*

Judges have a duty to ensure that proceedings involving an SRL are fair. While judges generally play a passive role in regular proceedings, when dealing with an SRL, they have a more active role in ensuring a fair trial.[34] Usually, the court relies on counsel to prepare the necessary pleadings and draft submissions.[35] However, the common law has recognised that the duty of ensuring a fair trial may extend to intervening or providing assistance to SRLs in proceedings.[36] The Full Court of the South Australian Supreme Court has characterised this obligation in the following terms:

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29 Ibid (emphasis added).

30 See, e.g., *Managing Justice Report* (n 7) 80 [1.59], citing Murray Gleeson, 'The State of the Judicature' (Speech, Australian Legal Convention, 10 October 1999).

31 Kirimof and Dober (n 11) 30, citing *SRL Forum* (n 15) 2. See also *Productivity Commission Report* (n 17) 487.

32 Kirimof and Dober (n 11) 30, citing *SRL Forum* (n 15) 2.

33 Ibid. See also Webb (n 2) 165–6.

34 *Kenny v Ritter* [2009] SASC 139. Justices Gray and Layton provide a comprehensive commentary regarding the authorities and principles surrounding SRLs: at [23]. See also Kirimof and Dober (n 11) 31.

35 Faulks (n 3) 3 [6]. See also *Cachia v Hanes* (n 26) where the Court observed that '[i]t would be mere pretence to regard the work done by most litigants in person in the preparation and conduct of their cases as the equivalent of work done by qualified legal representatives': at 415.

36 See *Kenny v Ritter* (n 34) [23]. See also Kirimof and Dober (n 11) 31–5.

> The duty of the judge is not to advise the unrepresented party how to conduct that party's case but to ensure that the party is fully aware of the legal position in relation to the procedural and substantive aspects of the case, thereby putting the party in a position to make effective choices.[37]

The Court went on to observe that this duty does not extend to '[stepping] into the shoes' of an SRL to perform critical roles, such as preparing examination of witnesses or preparing submissions.[38] But without adequate legal advice or knowledge, how can an SRL make 'effective choices'?

In *Badcock v Channel Seven Adelaide Pty Ltd*,[39] the pleadings prepared by the applicant (an SRL) were 'seiv[ed] through … for the purpose of leaving intact … paragraphs … disclos[ing] a cause of action'.[40] Therefore, this duty allows the court to exercise a degree of flexibility when overseeing proceedings. In other words, a judge is allowed to read between the lines, as it were, when considering submissions or pleadings. This ensures that an SRL does not immediately lose 'on the battleground of procedure'.[41] However, there is the risk that the court may go too far when exercising their duty.

For instance, in *Kenny v Ritter*,[42] the Full Court of the Supreme Court of South Australia found the trial judge was excessive in her assistance to the SRL. The trial judge undertook a substantial part of the examination-in-chief of the SRL's own witness. The extent of the trial judge's assistance was so extensive, that of the 63 pages of the transcript for the examination-in-chief, the trial judge's examination occupied some 59 pages.[43] Further, the Court observed that the trial judge 'largely conducted the cross examination' of several witnesses.[44] The Court ultimately held that 'the extent of questioning by the Judge indicated that she had stepped into the shoes of counsel for the plaintiff and was in fact conducting his case for him'.[45]

When examining these cases, a tenuous balance materialises when the court is confronted with an SRL. As the court must remain impartial — and for that matter, must preserve the appearance of impartiality — if a judge were to provide assistance or advise the SRL during proceedings, this may appear as acting favourably towards

37 *Kenny v Ritter* (n 34) [18] (Gray and Layton JJ).

38 Ibid [37].

39 [2005] SADC 32 ('*Badcock (No 1)*').

40 Ibid [36] (Lee J).

41 Ibid [37]. See also D'Andrea (n 13) 33.

42 *Kenny v Ritter* (n 34).

43 Ibid [33].

44 Ibid [36].

45 Ibid [37].

the SRL and 'adversely to the litigant who is represented'.[46] The court is left with two options: (1) open a ground of appeal through assisting the SRL due to the appearance of partiality; or (2) allow the SRL to suffer a irremediable disadvantage and potentially extinguish a legitimate cause of action. This balance has been described as 'something of a dilemma' by the Full Court of the Federal Court of Australia,[47] whereby a judge

> may be bound to provide some advice and assistance to an unrepresented litigant, [but] the authorities make it clear that the Judge should not intervene to such an extent that he or she cannot maintain a position of neutrality in the litigation. … However, the boundaries of legitimate intervention are flexible and will be influenced by the need for intervention to ensure a fair and just trial.[48]

The degree of assistance that a judge may provide an SRL will vary depending on the 'particular litigant', 'the nature of the case',[49] 'and the course of the hearing'.[50] Harlis Kirimof and Erik Dober observe, anecdotally, that when dealing with the 'unstructured fashion' of arguments made by SRLs, judges are left to make out causes of actions in incompliant pleadings or identify cogent arguments in pleadings.[51] It is from this additional responsibility that the duty of assisting SRLs has been described as a 'time-consuming duty'[52] — with claims that SRL-brought proceedings take up to 'five times as long'.[53]

However, what these commentaries lack is consistent identification of 'where' the extra time-burden arises. Is it through regular hearings taking a longer duration? Is it through judges devoting additional time in chambers? Or is it an increased number of hearings generally? This comment speaks directly to the last question, suggesting that, in fact, SRL matters require less hearings to resolve than non-SRL matters. If not in the number of hearings, this finding adds further cause to identify the true source of the burden.

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46 Ibid [19], citing *Hunter v Webb* (unreported, Federal Court of Australia, 19 July 1996). See also Paul Sigar, 'Unrepresented Litigants in South Australia: A Successful Pre-Trial Framework?' (2021) 43(2) *Bulletin (Law Society of South Australia)* 24.

47 *Minogue v Human Rights and Equal Opportunity Commission* (1999) 84 FCR 438, 446 [29] (Sackville, North and Kenny JJ).

48 Ibid.

49 *Tomasevic v Travaglini* [2007] VSC 337, [141] (Bell J).

50 *Downes v Maxwell Richard Rhys Pty Ltd* [2014] VSCA 193, [27] (Osborn JA).

51 Kirimof and Dober (n 11) 30.

52 Ibid 31. See also *Badcock (No 1)* (n 39) where Lee J observed that it would have been appropriate just to 'sieve' the applicant's second statement of claim for the purpose of 'leaving intact' a cogent cause of action: at [36].

53 Kirimof and Dober (n 11) 28, citing Liz Richardson and Liz Porter, 'Self-Representation Piling Pressure on Justice System', *The Age* (online, 16 April 2014) 18.

2 *Duties on Practitioners*

The responsibility to assist the SRL has, in some circumstances, been passed onto the representatives of opposing parties.[54] In *Kenny v Ritter*, Gray and Layton JJ observed that when proceedings involve an SRL, opposing counsel should ensure necessary topics are raised and should avoid pedantic objections.[55] Evidently, in a civil jurisdiction based on adversarial principles, placing expectations and responsibilities on opposing counsel seems incompatible with their main role: an advocate for their client, and an adversary to the SRL.

The *South Australian Legal Practitioners Conduct Rules 2022* (SA) ('*SALPCR*') are silent on how practitioners should treat SRLs.[56] While many other interstate jurisdictions have published practice notes on how to interact with SRLs in proceedings, neither the Law Society of South Australia nor the courts have formally commented on this increasing class of litigant in this way.[57] The profession, therefore, rightly may be confused as to how to approach matters involving SRLs. Without clarification, the authors share the concern expressed in the literature examined above that civil litigation may be prone to abusive or over-litigious processes: where legally trained and skilled parties use procedural mechanisms to defeat incompliant pleadings or submissions in an effort to avoid liability for otherwise meritorious claims and cogent causes of action.

3 *Looking Forward: A Need for Empirical Analysis.*

It is clear that there is growing concern from members of the profession that SRLs are causing a widespread burden.[58] Judges see this as taking up their time in session and in chambers,[59] prompting calls for increased judicial capacity to deal with the increased workload. Additionally, there is concern that the cost burden of judicial intervention falls not on SRLs but opposing parties.[60] All this occurs against the backdrop of concerns from non-governmental organisations and the public about

54 Garrett (n 2) 38–9; Sourdin and Wallace (n 2) 66.

55 See: *Kenny v Ritter* (n 34) [26]; D'Andrea (n 13) 34.

56 See, e.g., *SALPCR* (n 18) r 22.

57 See, e.g.: County Court Victoria, *Self-Represented Litigant* (Practice Note, 1 July 2020); The Law Society of New South Wales, *Guidelines for Dealing with Self-Represented Parties in Civil Proceedings* (Practice Note, December 2016); Queensland Law Society, *Self-Represented Litigants: Guidelines for Solicitors* (Practice Support, November 2017).

58 Faulks (n 3) 3–4; Garret (n 2) 38–40.

59 Garret (n 2) 38; Kirimof and Dober (n 11) 30.

60 Garret (n 2) 42; Elizabeth Richardson, Genevieve Grant and Janina Boughey, Australasian Institute of Judicial Administration, *The Impacts of Self-Represented Litigants on Civil and Administrative Justice: Environmental Scan of Research, Policy and Practice* (Report, 2018) 42 ('*2018 Study*').

the legal system's failure to accommodate the inability of SRLs to argue a cogent cause of action.[61]

Given the sheer breadth currently ascribed to the 'burden', funding to compensate every harm is not feasible. Yet, persistent commentary suggests that the issue is not manufactured. Therefore, the task ahead is one of pragmatic policymaking — a task that must ask questions before suggesting answers. To judges, where precisely in a matter's workflow do SRLs require more time, and are these burdens administrative or do they require judicial attention? To practitioners, in what contexts do they encounter SRLs and do some contexts work better than others? And to the public, what categories of unresolved legal problems represent the greatest instances of unfairness? All of these questions contribute to the proper fulfillment of the role of policymakers, but to know exactly what questions to ask and of whom, it is necessary to have a quantitative foundation to avoid pursuing popular myths and to accelerate the identification of areas needing acute attention. It is providing this data-informed foundation that the next Part of this comment is devoted to.

III SRLs In The South Australian Superior Courts: CAA Data

South Australia, like Australia generally, continues to lack detailed data about SRLs.[62] Even drawing from Australia's common law counterparts, much of the empirical research that has been undertaken focusses on jurisdictions where there are uniquely elevated rates of self-representation, such as family law.[63] And where

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61 See, e.g.: *Productivity Commission Report* (n 17) 506–23; D'Andrea (n 13); LawRight, 'Self-Represented Litigants in the Australian Civil Justice System 10 Years of the Self Representation Service in Australia' (Conference Paper, National Access to Justice and Pro Bono Conference, 23 March 2017) 12 [53]–[57]; Law Council of Australia, *Addressing the Legal Needs of the Missing Middle* (Paper, November 2021).

62 A series of early works, some exceeding a decade in age, form the regularly cited quantitative authorities for analysis in this area. A pioneering 2012 study identified information gathered by tribunals and Commonwealth courts with respect to SRLs: Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information* (Final Report, June 2012) ('*2012 Study*'). That data served as the bedrock for further analysis on the actual impact and prevalence of SRLs in the courts. A 2018 report assessed the impact of SRLs on various dispute-resolution institutions: *2018 Study* (n 60). Concurrent to these developments, there were two significant government publications: *Standing Committee Report* (n 8); *Productivity Commission Report* (n 17). Besides these major reports, further quantitative data has been sparse.

63 See, e.g.: in the UK: Richard Moorhead and Mark Sefton, *Litigants in Person: Unrepresented Litigants in First Instance Proceedings* (Report, Department for Constitutional Affairs, March 2020); Liz Trinder et al, *Litigants In Person in Private Family Law Cases* (Report, Ministry of Justice, November 2014); in Canada: Rachel Birnbaum, Nicholas Bala and Lorne Bertrand 'The Rise of Self-Representation in Canada's Family Courts: The Complex Picture Revealed in Surveys of Judges, Lawyers and Litigants' (2013) 91(1) *Canadian Bar Review* 67; in the USA: John Greacen, 'Self-Represented Litigants, the Courts, and the Legal Profession: Myths and Realities' (2014) 52(4) *Family Court Review* 662.

pockets of general data have been extracted and analysed, the frequency with which each jurisdiction is examined makes it difficult to maintain a current picture of evolving needs.[64] This has resulted in academic and professional discussion having a tendency to characterise SRLs as a monolithic category.[65] Yet, without effective discrimination within the broader SRL category, it is challenging to develop targeted policy solutions in the context of ever-present funding constraints.

The CAA's new courts management system collects a significant range of data as part of its regular reporting capability. Critically, it links a range of data to specific matters, allowing some analysis connecting: (1) SRL status; (2) matter type (e.g., judicial review, contract dispute); (3) matter duration; (4) hearing instances; and (5) mode of outcome (e.g., judgment delivered, dismissed). This Part will present and analyse a dataset obtained from the CAA in January 2025 outlining the prevalence of SRLs in the South Australian Superior Courts.

A *Dataset Scope and Exclusions*

The dataset comprises all civil matters commenced in the South Australian Supreme Court and Court of Appeal in the 2022 and 2023 calendar years. The dataset is a completely deidentified census of that period.

The dataset intentionally excluded matters commenced subsequent to 2023. This allowed analysis to focus on matters which have progressed substantially through the litigation process, or in fact concluded. This avoids capturing recently commenced matters that are still, by necessity, in the pre-trial stage. This selection permits rational conclusions to be drawn from the full life cycle of the matter.

The dataset was intentionally limited to civil matters to reflect the special concerns in relation to SRLs in the civil jurisdiction discussed above.[66]

1 *Technical Characteristics*

The dataset identified each matter with the following labels:

64 See e.g., a generalist study in the USA: Paula Hannaford-Agor and Nicole Mott, 'Research on Self-Represented Litigation: Preliminary Results and Methodological Considerations' (2003) 24(2) *Justice System Journal* 163.

65 *SRL Forum* (n 15), cited by Richardson and Sourdin (n 2) 193. See also Sourdin and Wallace (n 2) 64.

66 See the discussion in Part II.

Table 1: Relevant Dataset Identifiers

Description	Identifier Label	Data Type
Court in which the matter was commenced	CaseCourtLabel	Categorical, Nominal
Civil or criminal	CaseTypeLabel	Categorical, Nominal
Whether a matter was in the court's regular or appellate jurisdiction	CaseAppealCategory	Categorical, Nominal
High-level matter type (i.e., what cause of action) classification	CaseCategory1Label	Categorical, Nominal
Specific matter type classification	CaseCategory2Label	Categorical, Nominal
Date on which the claim/originating application was lodged	LodgeDate	Numerical, Discrete
Date on which the final matter event occurred	FinalEventDate	Numerical, Discrete
Total duration of the matter[67]	DaysToFinal	Numerical, Discrete
The manner in which a matter resolved	FinalEventCodeLabel	Categorical, Nominal
Whether the applicant is an SRL	ApplicantSelfRepFlag	Categorical, Ordinal
Whether the respondent is an SRL	RespondentSelfRepFlag	Categorical, Ordinal

In addition, the dataset identifies the number of instances for various hearing types (being numerical, discrete data). The hearing types are categorised as follows: (1) directions; (2) argument; (3) in chambers; (4) mediation/settlement; (5) Court of Appeal hearing; (6) trial; (7) judgment; (8) possession hearing; (9) costs hearing; (10) enforcement hearing; and (11) other.

The nominal categories for the identifiers described in Table 1 above are as follows:

Table 2: Categorical Data Nominal Categories

Identifier Label	Categories (delineated by //)
CaseCourtLabel	District Court // Supreme Court
CaseTypeLabel	Civil // Criminal
CaseAppealCategory	Non-Appeal // Single Judge // Court of Appeal
CaseCategory1Label	(distinct matter categories, including 'Other' and '(blank)')
CaseCategory2Label	(distinct sub-categories, including 'Other' and '(blank)')
FinalEventCodeLabel	(distinct categories, including '(blank)' and '*Undefined' for matters that have not yet concluded[68])
ApplicantSelfRepFlag	1 (meaning the applicant *is* flagged as an SRL) // 0 (vice versa)
RespondentSelfRepFlag	1 (meaning the respondent *is* flagged as an SRL // 0 (vice versa)

67 Assumed to be a secondary identifier calculated based on *FinalEventDate* and *LodgeDate*.

68 I.e., *DaysToFinal* = 'NULL'.

Two further identifiers, being unique item codes for the above-described items, are duplicates for the purpose of this analysis and are merely a feature of the CAA's systems.

Notably, the dataset does not record who 'won' a particular matter upon conclusion — this point, in any case, can be highly ambiguous given that a claim may succeed only in part, a matter may be withdrawn, or parties may settle. Issues with properly assessing matter outcome in this sense have been the subject of some discussion.[69] These are made more complex by the difficulties in linking SRL status, in amongst the myriad of factors at play in litigation, as *causes* of success or failure.

2 *Faulty SLR Respondent Flag*

Prima facie, the data calls into serious question the accuracy of the SRL respondent flag. The dataset suggests that an extraordinary 79% of all respondents are self-represented.[70] This should not be accepted based on recent interview studies and anecdotal observations of the Courts' operation.[71] A potential reason for this is that while an originating application lodged by a represented party will be immediately noted in court management software as such, at the time a matter is created, legal representatives for the respondent are less likely to be identified. While there is no actual visibility of this fact, the natural conduct of matters suggests that an application would only note a respondent's legal representative on initiation if there was pre-existing communication between applicants and respondents with representation for prospective litigation confirmed as the relevant addressee for service *prior to the commencement of the matter* with respect to a particular matter.

An error at matter initiation is unlikely to be rectified in the ordinary course of a matter, other than through an internal procedure designed to ensure the continued accuracy of the SRL flag. Whether such a policy exists should be investigated with the CAA. This limitation is similar to that identified by Elizabeth Richardson, Tania Sourdin and Nerida Wallace with respect to the Federal Court's SRL flag system.[72]

Notwithstanding, the manner in which the SRL flag is created suggests an SRL applicant flag is inherently likely to be correct, even if the subsequent SRL status may not be properly tracked. Therefore, this analysis will focus exclusively on SRL applicants.[73] Any mention of SRL-related data hereafter refers exclusively to SRL-applicant matters.

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69 See, e.g., *2018 Study* (n 60) 49, citing Bridgette Toy-Cronin, *Keeping Up Appearances: Accessing New Zealand's Civil Courts as a Litigant in Person* (PhD Thesis, University of Otago, New Zealand, 31 July 2015) 30.

70 79% (1665 of 2102).

71 See, e.g., McIntyre Report (n 20).

72 *2012 Study* (n 62) 21–3.

73 For instance, the *RespondantSelfRepFlag* is excluded from analysis.

While the identification of concerns with the SRL respondent flag in this dataset is unique, narrowing reporting and analysis to matters brought by SRLs (as opposed to merely matters *with* an SRL party) is not novel.[74]

3 *Exclusion of Procedural Matters*

A further scoping consideration is the fact that a large number of Supreme Court matters are procedural in nature.[75] In these matters, the Court undertakes an often-straightforward fact-finding exercise to make a decision on a frequently occurring subject matter. For example, applications for possession are listed in bulk and can be resolved in a matter of minutes — non-appearance can result in immediate judgment given proof of service,[76] and otherwise, the matter often concerns a simple default of a mortgagor.[77] Additionally, there are matters secondary to others which resolve the substantive dispute — namely interpleader applications and applications for pre-action discovery. To emphasise the effect these procedural matters have on the dataset, just two types of these procedural matters account for nearly half of the 'matters' dealt with by the Supreme Court.[78] Taken together, these procedural matters are not representative of the substantive work of the Supreme Court and are excluded from analysis.

B *General Features*

In the 2022–23 calendar years, 2,102 matters were commenced in the Supreme Court. Of these matters, 10% (n=211) remained active as of January 2025.

Excluding procedural applications, the Supreme Court dealt with a total of 1,127 matters. In this sample, 15.5% (n=175) were brought by SRLs. While this figure could be used as a general assessment of the prevalence of SRLs in the Supreme Court, a further distinction may be beneficial.

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74 See, e.g., *Productivity Commission Report* (n 17) which isolates family law and Federal Court matters brought by SRL applicants. The *2012 Study* (n 62) identifies that the Federal Court did not record respondent SRL status at the time, suggesting a general limitation that may have shaped methodologies on the subject of SRLs: at 68. Additionally, the Queensland Supreme Court extracts data related to the success of SRL litigants — necessarily focusing on SRL applicants as opposed to SRL respondents: Supreme Court of Queensland, *Annual Report 2023 –24* (Report, 31 October 2024) 22 ('*QSC Annual Report 2023–24*').

75 For the purpose of this comment, the following 'procedural' matters are excluded: (1) applications for possession; (2) interpleader applications; (3) applications for taxation of costs; (4) appointments of senior counsel; (5) applications for pre-action discovery; (6) issuance of subpoena; and (7) applications for cross-vesting.

76 *Real Property Act 1886* (SA) s 194.

77 Ibid ss 192(b), 195.

78 These being interpleader applications and applications for possession.

There were 967 non-appeal matters;[79] 98 of these had an applicant SRL flagged. This means that approximately 10% of matters in the Supreme Court's original jurisdiction were brought by an SRL. This figure — 10% SRL prevalence — ought to be treated as a baseline SRL prevalence figure in the Supreme Court.

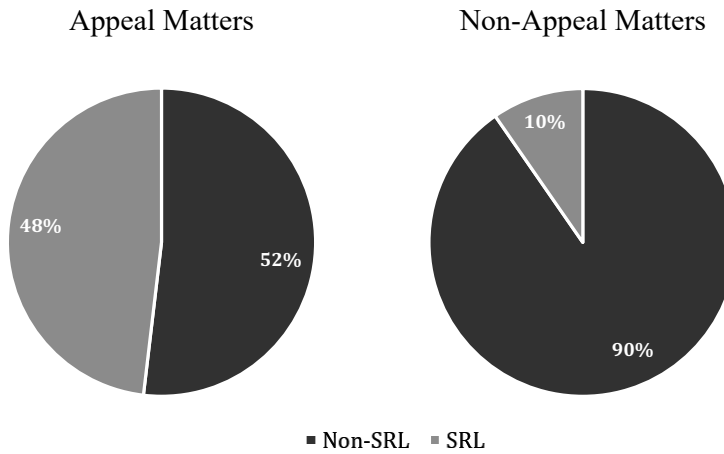
There is no comparison dataset in Australia that captures all matters in a state superior court. This view is endorsed by Richardson et al as at 2018.[80]

By way of a loose comparison, in 2003–04, approximately 32% of all matters in the Federal Court of Australia had at least one party that was an SRL.[81] Though, it was noted that the high prevalence in the Federal Court was attributed to the migration division, where most applicants were SRLs.[82]

C *Civil Appeals*

The Supreme Court dealt with 160 civil appeal matters.[83] Of the 160 matters, 77 had an applicant SRL flagged — being 48%.

Figure 1: Comparison of SRL Proportion in Appeal and Non-Appeal Matters



The primary observation from this comparison is the considerably higher prevalence of SRLs in appeal matters compared to non-appeal matters.

79 Post-exclusion. See (n 75)

80 *2018 Study* (n 60) 29–30.

81 *Productivity Commission Report* (n 17) Appendix F: Data on Self-Represented Litigants, Figure F.3.

82 Ibid 997–8. See also ibid Figure F.2.

83 Including both 'Court of Appeal' and 'Single Judge' matters per the *CaseAppeal Category* identifier.

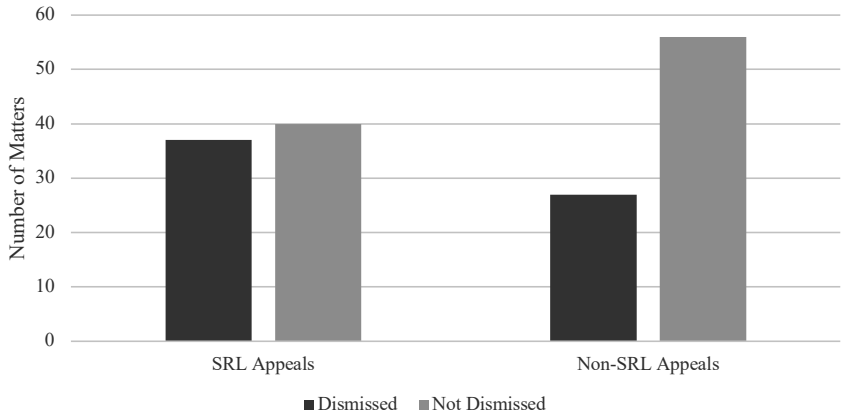
By way of comparison, in the 2023–24 financial year, of the civil matters finalised by the Queensland Court of Appeal — the only state superior court to publish SRL statistics in its annual report — 39% of matters had at least one SRL party.[84] Additionally, while an aged dataset, in 2013, approximately 22% of matters commenced in the Supreme Court of Victoria civil appeal jurisdiction were commenced by SRLs.[85]

While South Australia thus appears to have a comparatively high rate of SRLs in its Supreme Court civil appeals jurisdiction, this should not be interpreted as evidence of a unique set of conditions. The comparison rests on an aged Victorian dataset (which had a substantial upward trend from 2001–13) and a single current comparative dataset. Therefore, the prevalence observed in the South Australian courts is more likely a general trend nationally. Further empirical study would enable a cohesive picture to develop.

D *Appeal Dismissals*

There has been particular concern about the use of strike-out and dismissal procedures to discriminate against SRLs.[86] Thus, the following will briefly extract data on the resolution of matters by dismissal.

Figure 2: Supreme Court Appeals Distinguished by SRL Status



84 *QSC Annual Report 2023–24* (n 74) Appendix 1, Table 3 and 12.

85 *Productivity Commission Report* (n 17) Appendix F: Data on Self-Represented Litigants 1003, Figure F.10.

86 For a focussed, Canadian analysis of the subject, see Julie Macfarlane, Katrina Trask and Erin Chesney, *The Use of Summary Judgment Procedures Against Self-Represented Litigants: Efficient Case Management or Denial of Access to Justice?* (Report, National Self-Represented Litigants Project (Canada), November 2015). See also, in Australia: D'Andrea (n 13).

The data shows a significant relationship between SRL status and the chance of dismissal (χ^2 (1, n = 160) = 6.19, p = 0.13, α = 0.1). The general hypothesis that SRL appeals are more likely to be dismissed is supported.

Appeals brought by SRLs have a dismissal rate of 48%, while those not brought by SRLs have a dismissal rate of 33%. Thus, this dataset suggests appeals brought by SRLs are 45% more likely to be dismissed.

There is a perception that the appellate jurisdiction is particularly complex and thus inaccessible to SRLs who are likely not to have the technical skills to prepare legally sound grounds of appeal.[87] Additionally, there is a view that querulant SRLs are responsible for a glut of unmeritorious appeals.[88] Both of these hypotheses could explain an elevated dismissal rate for SRL appellants. The analysis presented here does not allow for causality to be determined, so while the data reveals that there is a higher rate of dismissal for appeals brought by SRLs, it is not possible to identify what accounts for this.

Whether this higher dismissal rate for SRL appellants is of concern depends on which of these features accounts for the higher dismissal rate. If it is caused by the inability of SRLs to effectively present their case, this would be concerning; if it simply reflects the taking of unmeritorious appeals, this would be appropriate. What does stand out from this data is that appeals brought by SRLs are much less likely to succeed, albeit that we cannot be certain as to the reasons for this.

E *SRL Concentration by Non-Appeal Matter Type*

The concentration of SRLs across different matter types may inform the scope of the need of potential applicants. If entirely private actions — like contract matters or estate-related matters — evidence high-SRL concentrations, there is little alternative to greater broad-based legal aid funding. Alternatively, if matters involve the government as a respondent or interested party, there are substantial alternative policy levers to prevent the need for litigation.

Excluding matter types with less than 10 instances to abate reliability concerns, the following table shows SRL prevalence by matter type ordered by SRL prevalence.

87 D'Andrea (n 13) 33. See also: *Cachia v Hanes* (n 26); *Kenny v Ritter* (n 34); *Badcock (No 1)* (n 39).

88 See: McIntyre et al (n 10); Kirimof and Dober (n 11) 30–1. Cf D'Andrea (n 13) 33.

Table 3: SRL Prevalence by Non-Appeal Matter Type

Matter Type	Number of Instance of Matter Type	Number of Applicant SRLs	% Applicant SRL
SACAT	34	19	55.88
Judicial Review	53	24	45.28
Debt Recovery	11	2	18.18
Personal injury — medical negligence	13	2	15.38
Personal injury — other	13	2	15.38
Extend Caveat — *Real Property Act*	33	5	15.15
Negligence	19	2	10.53
Equity	34	3	8.82
Other	277	23	8.30
South Australian Employment Tribunal	17	1	5.88
Contract Dispute	59	3	5.08
Application Corporation	93	4	4.30
Real Property Act Other (other)	33	1	3.03
Provision out of estate — Inheritance	163	2	1.23
Corporations Act	20	0	0.00
Land	12	0	0.00
Personal injury — motor vehicle	24	0	0.00

Two matter types substantially exceed the general distribution of SRL applicants. Around 56% of judicial review applications (n=34) and around 45% of SACAT-related applications (n=53) were brought by SRLs. The prevalence of SRLs in these two types of matters roughly match the proportion of civil appeal matters brought by SRLs (48%) The prevalence of SRLs in all other matter types is notably lower, and closer to the 10% baseline prevalence of SRLs in non-appeal matters identified earlier.

Notably, both judicial review and SACAT application matter types can be described as quasi-appeals, in that the Court is not the first adjudicative institution dealing with a particular subject matter. In each of these quasi-appeals, and civil appeals themselves, the applicant is seeking further redress from another adjudicator's decision — whether an administrative decision of a state government in the case of judicial review; further appeal of the SACAT's decision; or an appeal of an unsuccessful matter in the Supreme Court.

In these instances where government possesses a substantial degree of control of downstream processes, there is an alternative arena in which to improve litigant outcomes. Governments can instead modify legislative schemes under which rights arise, improve internal departmental governance and review processes, and add or strengthen pathways into lower-tier dispute resolution mechanisms such as tribunals. Enacting change at this level may avoid the challenges associated with modifying the entrenched procedures of the Superior Courts. Particularly, given that these courts continue to deal primarily with factually and legally complex disputes, and

for most causes of actions hear matters with litigants represented by lawyers, any potential reforms may harm elements of the system designed over decades, even centuries, to best resolve these complex disputes.

The concentration of SRLs in judicial review and appellate matters also supports recent judicial and academic focus on the rise of 'pseudolaw'.[89] These litigants, particularly the subcategory of sovereign citizens, are characterised by their distrust of government authority.[90] Many are relentless in bringing actions against government decisions and are known for pursuing appeals which have no legal basis.[91] In addition, these litigants are generally unable to pursue actions with the assistance of legal representation as a legal practitioner would be unable to bring these actions to court without acting in breach of the *SALPCR*.

A high volume of SRLs in these specific categories of matters, therefore, may suggest a unique manifestation of increased SRL prevalence unrelated to a lack of legal aid resourcing. The headline SRL prevalence figures produced in this comment may need to be further moderated for the purpose of assessing the general deficiency of legal aid in civil matters. Excluding these three matter types, SRL applicant prevalence falls to just 6% in the Supreme Court — far below figures that have been quoted in commentaries on this topic, albeit that some of these refer to lower courts and include SRLs as respondent as well, whereas the dataset analysed in this comment relates only to superior courts and to SRLs as applicant.[92]

F *Hearing Instances and Matter Duration*

A common viewpoint is that SRL-led matters increase the workload upon courts and are otherwise less efficient than practitioner-led matters.[93] The dataset allows the assessment of two factors which could evaluate that hypothesis — the number of hearings held in a matter, and the total duration of a matter. This section will analyse these matter attributes in relation to all non-excluded matter types, i.e., including both appeal and non-appeal matter types.

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89 South Australia, especially, has been the subject of substantial inquiry on the issue of pseudo-law litigants led by Joe McIntyre (University of South Australia), which resulted in the publication of the following report: McIntyre Report (n 20); and in addition, an article published in this issue of the *Adelaide Law Review* (n 10).

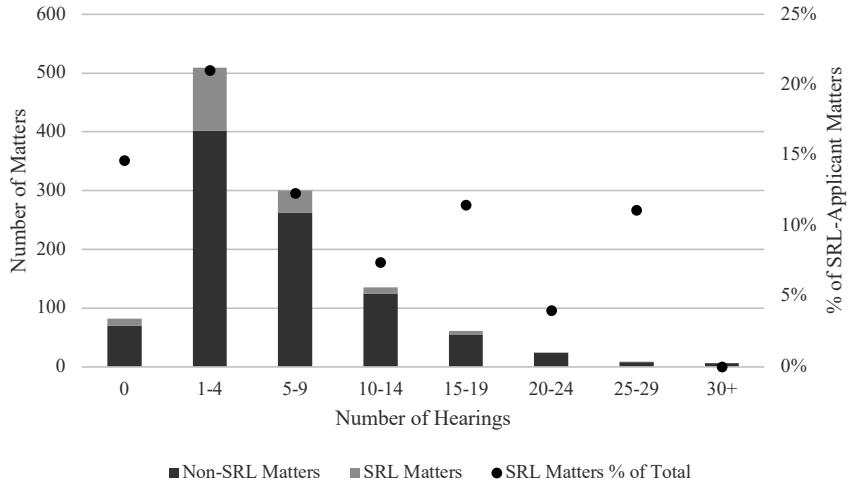
90 McIntyre Report (n 20) 8–13.

91 See: ibid; *Four Corners Investigation* (n 10).

92 See, e.g.: Jess Smith and Victoria Worrell, 'Assessing the Impact of Self-Represented Litigants' (2015) 37(9) *Bulletin (Law Society of South Australia)* 15; Margaret Castles, 'Self Represented Litigants: A Major 21st Century Challenge' (2015) 37(9) *Bulletin (Law Society of South Australia)* 14.

93 See: Kirimof and Dober (n 11) 30; *SRL Forum* (n 15) 2; *Productivity Commission Report* (n 17) 487; *Cachia v Hanes* (n 26) 415.

Figure 3: Number of Hearings per Matter, Distinguished by SRL Status



Recall that SRL prevalence in the Supreme Court across *all* non-excluded matters is 15.5%. Therefore, the hypothesis would be validated if the proportion of matters with high numbers of hearings (e.g., 10+), show an SRL prevalence of greater than 15.5%.

Only matters with 1–4 hearings show an elevated SRL prevalence, with 21% of these matters having an SRL applicant. In contrast with the hypothesis, the SRL prevalence markedly reduces amongst matters with high numbers of hearings. Despite the specific proportion having substantial variance across the 'Number of Hearings' groupings, there is still an evident downward trend.

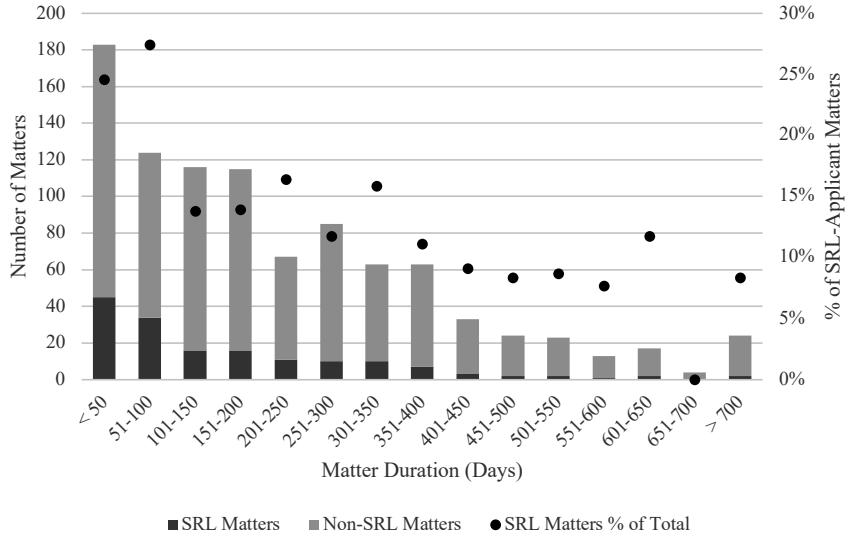
Table 4: Number of Hearings and Proportion of SRL-Brought Matters[94]

# of Hearing	Total # of Matters	% of SRL Matters
0	82	14.6%
1–4	509	21.0%
5–9	300	12.3%
10–14	135	7.4%
15–19	61	11.5%
20–24	25	4.0%
25–29	9	11.1%
30+	6	0%

94 Note reliability concerns for number of hearings 20–24, 25–29, 30+ as there were only 25, 9 and 6 total matters in these groups respectively, and only 1, 1 and 0 SRL-applicant matters respectively.

In fact, when comparing the average number of hearings between all non-SRL matters and all SRL matters, the opposite of what is predicted by the hypothesis appears to be true. Whereas, on average, an SRL matter requires 4.5 hearings over the matter's lifetime, a non-SRL matter requires 6.4. This suggests that any increased workload resulting from SRLs is not found in the number of times the court is called to deal with the matter.

Figure 4: Matter Duration and Proportion of SRL Matters



For both SRL and non-SRL matters, the data showed a positively skewed distribution, i.e., a larger number of matters were resolved in a shorter duration of time. Of all matters finalised, the average duration of an SRL-applicant matter was 163 days, compared to 208 days for non-SRL matters. Again, the SRL prevalence across this dataset does not correspond to a view that SRL-applicant matters take longer to finalise. In fact, there is a clear downward trend in the proportion of matters with SRL applicants (marked by black points) as the duration of matters increases.

To statistically assess the hypothesis that SRL matters take longer to finalise across a skewed distribution, it is appropriate to use the Mann-Whitney-Wilcoxon test. This hypothesis (single tail) was not supported ($p > 1$). However, the opposite hypothesis, that matters not brought by an SRL applicant take longer to finalise, (single tail) was supported ($p = .000001351$; $z = –4.69$, $\alpha = 0.1$).

One mode of analysis was identified that demonstrated a more neutral relationship between matter duration and SRL status. Of the matters yet to be finalised that were commenced in the 2022 calendar year, (i.e., as at the dataset were at least 762 days in duration (and counting) (n=58)), 14% had SRL applicants. This level of prevalence, in line with the baseline average presented above, demonstrates that of the ultra-prolonged matters, SRLs continue to play a role equivalent to their general prevalence in the court system.

Taken together, an interesting pattern can be surmised: SRL matters tend to finalise within 1–4 hearing instances and within 200 days at a greater rate than non-SRL matters; on average, SRL matters require fewer hearings, and are around 20% shorter in duration than non-SRL matters; however, a small number remain very protracted at a similar rate to their general proportion of all matters.

Admittedly, this data does not speak to the duration of each hearing instance, or the qualitative difficulty of each hearing for judicial officers. However, it remains notable that the pattern identified, at least in the metrics that the data is able to speak to, does not support the hypothesis of an increased workload on courts resulting from matters with SRL applicants when measured by either the number of hearings required in a matter or the length of time taken to resolve the matter.

While the data is far from conclusive, what this comment hopes to do is enable focussed study on these issues — informed by qualitative data — to improve the accessibility of definitive answers.

For example, because this quantitative study does not identify an increase in either the number of hearings or duration of a matter to resolution in cases involving SRLs, a qualitative study on the nature of the hearings in matters brought by SRLs may be an appropriate next step. If sheer volume isn't the cause of the additional workload, then it is necessary to examine the extra judicial labour involved in detail, or conduct special research beyond the standard reporting of court administrators to map the complexity of matters with SRLs. Due to the labour-intensive nature of qualitative, interview-based studies, the authors view the ability to rationally narrow the scope of such studies as particularly valuable.

IV Conclusion

This comment seeks to make a supportive contribution to Australian scholarship by adding to the pool of data available for understanding issues relating to access to justice in the context of SRLs. The most prominent features of the dataset analysed are as follows:

(1) Approximately 10% of the Supreme Court of South Australia's original jurisdiction civil workload features a matter with an SRL applicant; approximately 15.5% of its total civil workload (i.e., including appeals) feature an SRL applicant.
(2) SRLs are highly concentrated in three matter types: civil appeals, SACAT-related matters, and judicial review. In each of these three matter types, matters with an SRL applicant make up approximately 50% of all matters.
(3) Appeals brought by SRLs are approximately 45% more likely to be dismissed than appeals brought by represented appellants.
(4) There is no connection between a matter being brought by an SRL applicant and an increase in either the total number of hearings, or the total duration of a matter. In fact, there is a statistically significant reduction in total matter duration associated with SRL-applicant matters.

This contribution comes at a time of heightened attention on SRLs in Australia, and indeed in many of our common law counterparts. While recognising the boundaries set for the purpose of this comment, the authors hope that some of the points of discussion raised, and the patterns identified in this data, can be put into context with broader policy analysis and discussion to inform Australia's approach to improving access to justice.

At the very least, the dataset requires observers to abandon any sense of a monolithic SRL issue — the distribution of SRLs across courts is simply not even. Returning to the comments made by Judge Faulks, this realisation may encourage policymakers to pay close attention to the third of his Honour's solutions, that is: 'to change the system'.[95]

South Australia's minor civil jurisdiction already serves as an example where a unique group of matters resulted in the introduction of special rules — simplifying and excluding select procedural requirements, and restricting representation in the first instance.[96] But this approach would not have achieved the same positive response across the Magistrates Court's work. Rather than changing the *UCR*s for all matter types and jurisdictions, empirical findings of the sort contained in this comment invite policymakers to consider focussing in on quasi-appeals to create a separate jurisdiction designed to deal with the subject matter — with flexible procedure, an expectation that the court may step in and 'sieve through … to disclose a cause of action',[97] and at the same time allow for the Court to exercise greater summary judgment powers to recognise the heightened volume of querulant litigants unique to these apparently anti-government matter types.

The authors hope that this comment is not just an outlier in a continued vacuum of data — this comment captures just a small snapshot of the dataset relatively readily accessible in South Australia, yet both validates some popular narratives, while challenging others. Every popular narrative challenged by empirical datasets represents potential resources not wasted. Empirical data on the administration of justice must always be welcomed to allow for special treatment to be focussed on the special issues facing the justice system. Doing so maximises the chance of achieving meaningful, pragmatic policy outcomes.

95 Faulks (n 3) 2 [3].

96 See e.g.: *Magistrates Court Act 1991* (SA) ss 38(1), (4); *UCR* (n 14) ch 24.

97 *Badcock (No 1)* (n 39) [36] (Lee J). See also the discussion above in Part II(B)(1).

*Jessica March**

(DON'T) READ BETWEEN THE LINES: CONSTITUTIONAL IMPLICATIONS IN *BABET V COMMONWEALTH* (2025) 423 ALR 83

I Introduction

The extent to which the legislative freedom of the Commonwealth Parliament is constrained by implications arising from the text or structure of the *Constitution* has been one of the most frequently litigated issues in recent constitutional jurisprudence.[1] *Babet v Commonwealth* ('*Babet*')[2] constituted the first opportunity for the Gageler Court to show its colours on these questions. In this case, the High Court unanimously dismissed a challenge to the validity of s 135(3) of the *Commonwealth Electoral Act 1918* (Cth) ('*Electoral Act*') for infringing: (1) the requirement of 'direct choice'; (2) the implied freedom of political communication; and (3) a novel implication disallowing discrimination between electoral candidates.[3] In so

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1 See generally: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*'); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*ACTV*'); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'); *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211 ('*Stephens*'); *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*'); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'); *Levy v Victoria* (1997) 189 CLR 520 ('*Levy*'); *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*'); *Coleman v Power* (2004) 220 CLR 1 ('*Coleman*'); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 ('*Mulholland*'); *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*'); *Rowe v Electoral Commissioner* (2010) 243 CLR 1 ('*Rowe*'); *Monis v The Queen* (2013) 249 CLR 92 ('*Monis*'); *Unions NSW v New South Wales (No 1)* (2013) 252 CLR 520; *McCloy v New South Wales* (2015) 257 CLR 178 ('*McCloy*'); *Murphy v Electoral Commissioner* (2016) 261 CLR 28 ('*Murphy*'); *Brown v Tasmania* (2017) 261 CLR 328 ('*Brown*'); *Unions NSW v New South Wales [No 2]* (2019) 264 CLR 595 ('*Unions NSW [No 2]*'); *Comcare v Banerji* (2019) 267 CLR 373 ('*Comcare*'); *LibertyWorks Inc v* Commonwealth (2021) 274 CLR 1 ('*LibertyWorks*'); *Ruddick v Commonwealth* (2022) 399 ALR 476 ('*Ruddick*'); *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537 ('*Farm Transparency*'); *Unions NSW v New South Wales [No 3]* (2023) 407 ALR 277 ('*Unions NSW [No 3]*'); *Ravbar v Commonwealth* (2025) 99 ALJR 1000 ('*Ravbar*'); *Farmer v Minister for Home Affairs* [2025] HCA 38; *Lees v New South Wales* [2025] NSWSC 1209.

2 (2025) 423 ALR 83 ('*Babet*').

3 Ibid 88 [8] (Gageler CJ and Jagot J).

doing, the Court rejected the existence of the new putative implication.[4] Further, despite the unanimous outcome, comparison of the six separate judgments[5] reveals a notable divergence: a majority of the Court[6] appears to have departed from the tri-stage approach to proportionality testing, termed 'structured proportionality', treated as mandatory by the other two members.[7]

This case note challenges those two developments. Parts II and III contextualise the impugned provision and explain the salient facts underlying the decision in *Babet*. Parts IV–VI detail the constitutional background and reasoning informing the Court's decision on each challenge to s 135(3). Part VII advances two critiques. First, I argue that the Court should continue to employ structured proportionality irrespective of whether the duty of fidelity to precedent demands it. Second, I argue that the Court's rejection of the novel implication is incompatible with its continued recognition of the implied freedom of political communication. Part VIII concludes.

II The *Electoral Act*

Part XI of the *Electoral Act* provides for the voluntary registration[8] of eligible political parties[9] on the public Register of Political Parties established and maintained by the Australian Electoral Commissioner ('AEC').[10] Registration confers three primary benefits: (1) a 'streamlining of the nomination process in so far as nominations of candidates endorsed by a registered political party are permitted to be signed by its registered officer and submitted in bulk';[11] (2) an entitlement to have the registered name and logo printed on ballot papers adjacent to the names of endorsed candidates;[12] and (3) an entitlement to have the registered name and logo appear 'above the line' on Senate ballot papers if the party has endorsed two or more candidates for election to the Senate.[13] Concomitantly, registration triggers annual financial disclosure obligations on the part of both the registered parties themselves and their

4 Ibid 95–6 [41]–[42] (Gageler CJ and Jagot J), 115–17 [121]–[128] (Gordon J), 136 [190] (Edelman J), 139–40 [205] (Steward J), 141–2 [213], [217] (Gleeson J), 149–50 [247]–[250] (Beech-Jones J).

5 Ibid 87–99 [1]–[58] (Gageler CJ and Jagot J), 99–117 [59]–[128] (Gordon J), 117–39 [129]–[204] (Edelman J), 139–41 [205]–[212] (Steward J), 141–46 [213]–[235] (Gleeson J), 146–53 [236]–[261] (Beech-Jones J).

6 Ibid 97 [49] (Gageler CJ and Jagot J), 102 [72] (Gordon J), 148 [242] (Beech-Jones J), 144–5 [225]–[229] (Gleeson J).

7 Ibid 144–5 [225]–[229] (Gleeson J), 131 [176] (Edelman J).

8 *Commonwealth Electoral Act 1918* (Cth) s 126 ('*Electoral Act*').

9 Ibid ss 123(1) (def 'eligible political party'), 124.

10 Ibid ss 125(1)–(1A), 133(1)(a).

11 *Babet* (n 2) 89 [15] (Gageler CJ and Jagot J), citing *Electoral Act* (n 8) ss 166(1)(b)(ii), 167(3).

12 *Electoral Act* (n 8) ss 169(1), 214(1), 214A(1)–(2).

13 Ibid ss 169(4), 210A, 214(2), 214A(2)

'associated entities'.[14] Those financial disclosures are then required to be published by the AEC on the public Transparency Register.[15]

A political party may be voluntarily deregistered on application to the AEC by an entitled person.[16] The benefits and obligations of registration cease to apply upon deregistration. The 'inexorable consequence'[17] of voluntary deregistration is the triggering of s 135(3), which provides that

> [w]here a political party is deregistered under subsection (1), that party … is *ineligible for registration under this Part until after the general election next following the deregistration*.[18]

III Facts

After the 2022 general election, the United Australia Party ('UAP') applied for deregistration and was subsequently deregistered pursuant to s 135(1).[19] On 29 November 2024, and importantly ahead of the 2025 general election, Ralph Babet — a UAP Senator — applied to have the Party re-registered.[20] The AEC refused Senator Babet's application in accordance with s 135(3).[21] Following the AEC's refusal, Senator Babet and Neil Favager, National Director of the UAP, commenced proceedings in the High Court's original jurisdiction, challenging the validity of s 135(3).[22] Clive Palmer, as owner of the registered trademarks in the UAP's name, abbreviation, and logo, separately commenced similar proceedings.[23] The defendant in each proceeding was the Commonwealth of Australia.[24]

The parties did not dispute that s 135(3) is properly characterised as a law 'relating to elections' within the scope of ss 10 and 31 of the *Constitution* so as to fall within the power reposed in the Commonwealth Parliament.[25] Rather, the plaintiffs submitted that the impugned provision is invalid for infringing three distinct constitutional limitations. Hence, by special cases, the parties in both proceedings agreed to state five identical questions of law:

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14 Ibid ss 314AB, 314AEA.

15 Ibid s 320.

16 Ibid s 135(1).

17 *Babet* (n 2) 92 [26] (Gageler CJ and Jagot J).

18 *Electoral Act* (n 8) s 135(3) (emphasis added).

19 *Babet* (n 2) 87 [4] (Gageler CJ and Jagot J).

20 Ibid 87–8 [5].

21 Ibid 87–8 [5].

22 Ibid 87–8 [5].

23 Ibid 88 [6].

24 Ibid 88 [6].

25 *Australian Constitution* ss 10, 31, 51(xxxvi); *Babet* (n 2) 94 [35] (Gageler CJ and Jagot J).

> Question 1: Is s 135(3) of the Act invalid … on the ground that it impairs the direct choice by the people of Senators and Members of the House of Representatives, contrary to ss 7 and 24 of the *Constitution*?
>
> Question 2: Is s 135(3) of the Act invalid … on the ground that it impermissibly discriminates against candidates of:
>
> (i) a political party that has deregistered voluntarily; or
>
> (ii) a Parliamentary party that has deregistered voluntarily?
>
> Question 3: Is s 135(3) of the Act invalid … on the ground that it infringes the implied freedom of political communication?
>
> Question 4: In light of the answers to questions 1 to 3, what relief, if any, should issue?
>
> Question 5: Who should pay the costs of and incidental to these special cases?[26]

On 12 February 2025, the Court made orders answering the first three questions in the negative, thereby upholding the validity of s 135(3).[27] In answer to questions 4 and 5, it followed that no relief should issue and the plaintiffs should pay the costs of and incidental to the special cases.[28] The Court published reasons for giving those answers on 14 May 2025, comprising six separate judgments.[29] The balance of this case note explains and evaluates the Court's reasoning in respect of the first three questions stated.

IV Question 1: Direct Choice

A *Constitutional Background*

Sections 7 and 24 of the *Constitution* expressly require that senators and members of the House of Representatives be 'directly chosen by the people'[30] — a principle described by multiple former High Court judges as 'constitutional bedrock'.[31] The express language of direct choice has been held to give rise to a constitutional limitation: Parliament may not legislate to burden the informed choice of electors unless the law is 'reasonably appropriate and adapted to serve an end which is

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26 *Babet* (n 2) 88 [8].

27 Ibid 88 [7]–[8].

28 Ibid.

29 Ibid 87–99 [1]–[58] (Gleeson CJ and Jagot J), 99–117 [59]–[128] (Gordon J), 117–34 [129]–[204] (Edelman J), 139–41 [205]–[212] (Steward J), 141–6 [213]–[235] (Gleeson J), 146–53 [236]–[261] (Beech-Jones J).

30 *Australian Constitution* ss 7, 24.

31 *Rowe* (n 1) 12 [1] (French CJ), quoting *Roach* (n 1) 198 [82] (Gummow, Kirby and Crennan JJ).

consistent or compatible with the maintenance of the constitutionally prescribed system of representative government'.[32] Relevantly, in *Ruddick v Commonwealth*,[33] a majority held that the requirement of direct choice constrains Parliament's ability to burden, or impair, 'the quality of information that is intended or likely to affect voting choice in Commonwealth elections'.[34]

B *Decision*

1 *Does s 135(3) Burden Informed Electoral Choice?*

All but one judge held that s 135(3) imposes a burden on informed electoral choice.[35] Borrowing the language of Gageler CJ and Jagot J, that burden arises 'through omission from the ballot paper, a source of information about the party affiliations of some but not all candidates who wish to provide that information', being information relevant to voters' choices between candidates.[36] Justices Gleeson and Beech-Jones expressed similar reasoning.[37] Justices Gordon and Edelman opined that whilst s 135(3) does impose a burden, that burden is slight as assessment of the overall burden must balance the denial of information pertaining to candidates' affiliation against the potential benefit of the information gained from the financial disclosures.[38] Whilst Steward J explicitly agreed with Gordon J, and inferably with Edelman J, that the burden imposed by s 135(3) 'must be considered within the wider scheme of the *Electoral Act*',[39] his Honour held that no burden on informed choice arises because: (1) the constitutional implication of informed choice does not require that all candidates must be treated uniformly 'for the purpose of their identification on a ballot paper; and (2) there is no pre-existing and independent right to such information.[40]

2 *Is s 135(3) Reasonably Appropriated and Adapted?*

The Court unanimously construed the purpose of s 135(3) as promoting financial transparency in the political process, being a purpose that 'affirmatively promotes'[41]

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32 *Ruddick* (n 1) 388–9 [148], quoting *Roach* (n 1) 199 [85]. See also: *Lange* (n 1) 557; *Murphy* (n 1) 113 [262] (Gordon J).

33 *Ruddick* (n 1).

34 *Babet* (n 2) 125 [159] (Edelman J), quoting *Ruddick* (n 1) 390 [151] (Gordon, Edelman and Gleeson JJ), 398 [174] (Steward J).

35 *Babet* (n 2) 96 [44] (Gageler CJ and Jagot J), 108 [91] (Gordon J), 137 [196] (Edelman J), 143 [220]–[221] (Gleeson J), 149 [244] (Beech-Jones J), citing *Ruddick* (n 1).

36 *Babet* (n 2) 96–7 [44]–[46].

37 Ibid 143 [220]–[221] (Gleeson J), 149 [244] (Beech-Jones J).

38 Ibid 108 [91] (Gordon J), 137 [196] (Edelman J).

39 Ibid 140 [207].

40 Ibid 140 [207]–[208].

41 Ibid 98 [52] (Gageler CJ and Jagot J).

the constitutionally prescribed system of representative government.[42] Given his Honour's conclusion that no burden arises, Steward J held it 'unnecessary' to consider whether s 135(3) is justified.[43] Otherwise, all six judges who held that s 135(3) burdens informed choice agreed that the provision is reasonably appropriate and adapted to that purpose.[44] It followed that s 135(3) was not invalid for infringing the 'direct choice' implication.

V Question 2: Impermissible Discrimination

The second question stated in each special case was framed to facilitate consideration of the plaintiffs' submission that the Court should recognise a new constitutional limitation that constrains Parliament's ability to discriminate against candidates.[45] The Court unanimously declined to recognise the new putative limitation, holding that the existing implications of direct choice and freedom of political communication are adequate for the preservation of the integrity of representative democracy.[46] In explaining that conclusion, Gageler CJ and Jagot J (Beech-Jones J agreeing) observed that

> legislated inequality or discrimination between participants in political discourse or in the electoral process has been demonstrated by numerous decisions … to be a dimension of a burden imposed by a law which … warrants close scrutiny to assess its justification.[47]

The correctness of that finding is discussed in Part VII. In any event, it is unlikely that the reverse finding would have altered the overall outcome. As Gordon and Beech-Jones JJ (Steward J agreeing) opined, even if such an implication were recognised, the impugned provision would not infringe it.[48] Section 135(3) does not discriminate between candidates as it 'applies equally to all registered political parties and provides for the same consequences in the event that a registered political party voluntarily deregisters.'[49]

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42 Ibid 98 [52]. See also *Babet* (n 2) 109 [94]–[95] (Gordon J), 138 [198] (Edelman J), 139–40 [205] (Steward J), 144 [225] (Gleeson J), 149 [245] (Beech-Jones J).

43 *Babet* (n 2) 140 [210].

44 Ibid 98 [53] (Gageler CJ and Jagot J), 109 [94]–[95] (Gordon J), 138 [198] (Edelman J), 146 [235] (Gleeson J),

45 Ibid 95 [40]–[41] (Gageler CJ and Jagot J).

46 Ibid 95–6 [41]–[42], 115–17 [121]–[128] (Gordon J), 136 [190] (Edelman J), 139 [205] (Steward J), 141–2 [213], [217] (Gleeson J), 149–50 [247]–[250] (Beech-Jones J).

47 Ibid 95 [42].

48 Ibid 116 [128] (Gordon J), 139 [205] (Steward J), 150 [251] (Beech-Jones J).

49 Ibid 116–17 [128] (Gordon J). See also: 139 [205] (Steward J), 150 [251] (Beech-Jones J).

VI Question 3: Implied Freedom of Political Communication

A *Constitutional Background*

The implied freedom of political communication was first recognised in two cases handed down on the same date: *Australian Capital Television v Commonwealth*[50] and *Nationwide News v Wills*.[51] But judicial disagreement[52] concerning the source of the implication was not resolved until *Lange v Australian Broadcasting Corporation* ('*Lange*').[53]

In *Lange*, the court unanimously held that '[f]reedom of communication on matters of government and politics is an indispensable incident of that system of representative government' mandated by the aforementioned 'direct choice' language in ss 7 and 24.[54] To determine whether a law infringes that implied freedom, the Court adopted a two-stage inquiry, modified in *Coleman v Power*[55] to comprise three questions:

1. Does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?

2. Are the purpose of the law and the means adopted to achieve that purpose legitimate, in the sense that they are compatible with the constitutionally prescribed system … of representative government?

3. Is the law reasonably appropriate and adapted to advance that legitimate object?[56]

In *Mulholland v Australian Electoral Commission* ('*Mulholland*'),[57] five judges held that a law which restricted the circumstances under which a political party could have its name included on the ballot paper did not burden the implied freedom because it did not diminish any independently existing entitlement.[58] That ratio was endorsed in *Ruddick v Commonwealth* ('*Ruddick*')[59] to find that provisions of the

50 *ACTV* (n 1).

51 *Nationwide News* (n 1).

52 See e.g.: *Theophanous* (n 1); *Stephens* (n 1).

53 *Lange* (n 1). Cf *Lenah* (n 1) 330–9 (Callinan J); *Monis* (n 1) 181 [249]–[251] (Heydon J); *LibertyWorks* (n 1) 95 [249] (Steward J).

54 *Lange* (n 1) 559.

55 *Coleman* (n 1).

56 *McCloy* (n 1) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Coleman* (n 1); *Lange* (n 1) 561–2, 567.

57 *Mulholland* (n 1).

58 Ibid 233 [105] (McHugh J), 246 [184], 247 [186]–[187] (Gummow and Hayne JJ), 298 [337] (Callinan J), 303–5 [354]–[356] (Heydon J), citing *Levy* (n 1) 622 (McHugh J).

59 *Ruddick* (n 1).

Electoral Act requiring a later registered political party to deregister or change its name in certain circumstances similarly imposed no burden.[60]

B *Decision*

The Court accepted the Commonwealth's submission[61] that the reasoning in *Mulholland*, as applied in *Ruddick*, was dispositive of the case in *Babet*.[62] Hence, consistent with the modern requirement,[63] the plaintiffs sought leave to reopen *Mulholland*.[64] Justices Edelman and Gordon (Steward J agreeing) considered the plaintiffs' application to re-open but decided leave should not be granted.[65] Chief Justice Gageler and Beech-Jones, Gleeson and Jagot JJ declined to entertain the plaintiffs' application to re-open *Mulholland* as re-opening could not be dispositive;[66] even if s 135(3) did burden the implied freedom,

> the considerations which demonstrate the justification for the burden on informed electoral choice would equally demonstrate the justification for the putative burden which would be so placed on freedom of political communication.[67]

Accordingly, s 135(3) was not found invalid for infringing the implied freedom of political communication and the third question stated was answered: 'no'.[68]

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60 Ibid 396–7 [171]–[172] (Gordon, Edelman and Gleeson JJ), 398 [174] (Steward J).

61 Commonwealth of Australia, 'Defendant's Submissions', Submission in *Babet v Commonwealth*, B73/2024, 28 January 2025, 16–17 [37]–[40].

62 *Babet* (n 2) 98 [55] (Gageler CJ and Jagot J), 109–10 [97] (Gordon J), 138–9 [202] (Edelman J), 139–40 [205] (Steward J), 151 [255] (Beech-Jones J).

63 See e.g.: *Evda Nominees Pty Ltd v Victoria* (1984) 154 CLR 311; *John v Federal Commissioner of Taxation* (1989) 166 CLR 417; *Ravbar* (n 1) 1016 [24] (Gageler CJ), citing *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137, 150 [17] quoting *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 352 [70] (French CJ).

64 Ralph Babet and Neil Favager, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth*, B73/2024, 17 January 2025, 15 [56]; Clive Palmer, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth* B74/2024, 17 January 2025, 2 [2].

65 *Babet* (n 2) 110–11 [98]–[103] (Gordon J), 139 [203] (Edelman J), 139–40 [205] (Steward J).

66 Ibid 98 [56] (Gageler CJ and Jagot J), 146 [235] (Gleeson J), 152 [259] (Beech-Jones J).

67 Ibid 98 [56].

68 Ibid 88 [8].

VII Comment

A *Structured Proportionality: Preferable Irrespective of Precedential Status*

In *McCloy v New South Wales*,[69] the High Court specified a tri-limb approach to proportionality testing, described as 'structured proportionality'.[70] In determining whether a law is 'reasonably appropriate and adapted', structured proportionality prompts courts to determine whether it is: (1) suitable; (2) necessary; and (3) adequate in its balance.[71] Whilst not dispositive, the Court's commentary in *Babet* as to the endurance of structured proportionality warrants examination.

Four judges in *Babet* considered that the 'express or ritual invocation' of structured proportionality is 'by no means necessary in every case'.[72] Justice Gleeson inferably agreed, emphasising the Court's 'discretion' and observing — in my view correctly — that '[n]o case … has depended for its outcome on the application of the structured proportionality framework'.[73] That observation undercuts the opinion of Edelman[74] and Steward[75] JJ that the Court is obliged to apply structured proportionality as a matter of 'fidelity to precedent' as it has become '*the* doctrinal test for justification'.[76] It is clear that at least four judges view structured proportionality not as comprising a 'test' itself, but rather as an analytical tool which can guide the application of the broader proportionality test. If that premise is accepted, Edelman and Steward JJ's argument holds no water.

But regardless of whether the Court is *bound* to apply structured proportionality, I argue that it should. By 'demanding identification of the factors on the basis of which the balance is struck' and 'necessitating explanation of how they are weighted', structured proportionality ensures that judicial reasoning is 'more fully exposed'.[77] Whilst each judge's ultimate *conclusion* in implied freedom cases may not depend

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69 *McCloy* (n 1).

70 Ibid 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

71 Ibid 194–5 [2].

72 *Babet* (n 2) 97 [49] (Gageler CJ and Jagot J), 102–3 [72] (Gordon J), 148 [242] (Beech-Jones J).

73 Ibid 144–5 [225]–[229].

74 Ibid 131–2 [176].

75 Ibid 140–1 [210].

76 Ibid 131–2 [176] (Edelman J), quoting James Stellios, *Zines and Stellios's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 647. See also: *Brown* (n 1); *Unions NSW [No 2]* (n 1); *Clubb v Edwards* (2019) 267 CLR 171 ('*Clubb v Edwards*'); *Comcare* (n 1); *Spence v Queensland* (2019) 268 CLR 355; *LibertyWorks* (n 1); *Farm Transparency* (n 1); *Unions NSW [No 3]* (n 1).

77 Geoffrey Nettle, 'Whither the Implied Freedom of Political Communication?' (2021) 41 *Monash University Law Review* , 23, citing Susan Kiefel, 'Proportionality: A Rule of Reason' (2012) 23(2) *Public Law Review* 85, 87–8; *Clubb v Edwards* (n 77), 333 [469] (Edelman J).

on the application (or disapplication) of structured proportionality, as Edelman J observes, greater transparency reduces 'the prospect of idiosyncratic judicial policy preferences supplanting the policy of a democratically elected Parliament'.[78] It is no secret that judges 'legislate', but the perceived or actual legitimacy of that task depends, at least in part, on transparency of reasoning.[79]

B *Improper Rejection of the Implication Against Discrimination*

As discussed, the Court unanimously dismissed the existence of the putative implication against discrimination between electoral candidates as legislated inequality in the electoral process 'has been demonstrated … to be a dimension of a burden' warranting scrutiny under the 'adequate' existing implications.[80] At least for Gordon and Steward JJ, it followed that recognition of the new implication was not 'logically or practically necessary'.[81] I advance two critiques of that position.

First, I challenge the test of strict necessity. It has been described as 'well settled' that different tests exist to recognise an implication from the *text* of the *Constitution* as compared to its *structure*.[82] For textual implications, it is 'sufficient that the relevant intention is manifested according to the accepted principles of interpretation'.[83] Conversely, implications sought to be implied from the structure of the *Constitution* must be '*logically or practically necessary* for the preservation of the integrity of that structure' to be recognised.[84] With respect, such a distinction cannot be maintained. As Edelman J aptly observed, 'such statements, if taken literally, would be nonsense' as '[t]he structural concerns of the *Constitution* are all derived … from the meaning of the text and the manner in which that textual meaning is arranged'.[85]

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78 *Babet* (n 2) 132–3 [178]. See also: *ACTV* (n 1) 180–6 (Dawson J); *Theophanous* (n 1) 193–4 (Dawson J); *Langer v Commonwealth* (1996) 186 CLR 302, 324 (Dawson J); *McGinty* (n 1) 234–5 (McHugh J), 291 (Gummow J); *Lenah* (n 1) 330–40 [337]–[348] (Callinan J); *Monis* (n 1) 179–82 [243]–[251] (Heydon J); *LibertyWorks* (n 1) 95 [249], 111–15 [298]–[304] (Steward J); *Ruddick* (n 1) 398 [174] (Steward J); *Farm Transparency* (n 1) 623–4 [270] (Steward J).

79 Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 21. See also: Karl Llewellyn, 'Some Realism about Realism: Responding to Dean Pound' (1931) 44(8) *Harvard Law Review* 1222; Brian Leiter, 'Legal Realisms, Old and New' (2013) 47 *Valparaiso University Law Review* 949.

80 *Babet* (n 2) 95–6 [42] (Gageler CJ and Jagot J)

81 Ibid 115 [122] (Gordon J),

82 *Gerner v Victoria* (2020) 270 CLR 412, 422 [14] (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ).

83 *McGinty* (n 1) 169 (Brennan CJ), quoting *ACTV* (n 1) 134 (Mason CJ); *Lange* (n 1) 566–7.

84 *McGinty* (n 1) 169 (Brennan CJ), quoting *ACTV* (n 1) 134 (Mason CJ) (emphasis added).

85 *Babet* (n 2) 126 [162].

Second, even if the test of strict necessity *is* accepted, it follows that the same reasoning deployed in *Babet* to deny the existence of a distinct implication against discrimination between candidates should also operate to deny the implied freedom of political communication. That is because the implied freedom is similarly a corollary of the requirement of direct choice;[86] it arises because direct choice entails 'free, fair and *informed*' voting.[87] To that end, the two recognised implications operate as concentric circles. No decision has held a law to infringe the implied freedom without infringing direct choice where both implications have been raised. It is difficult to imagine such a scenario. The putative implication against discrimination between electors, it was argued,[88] also arises from the direct choice requirement, as such discrimination impedes the capacity of an election to be 'fair'.[89] It is thus manifestly inconsistent to dismiss the existence of a separate implication against discrimination whilst continuing to recognise the implied freedom. If the test is strict necessity, neither the implied freedom nor the implication against discrimination ought to be recognised because the requirement of direct choice subsumes them both.

VIII Conclusion

Babet represented an opportunity for the Gageler Court to present a coherent, unified approach to the constitutional implicatures. Instead, the decision fosters confusion. It is apparent from the High Court's subsequent judgment in *Ravbar v Commonwealth*[90] that the Court's 'sudden' departure from structured proportionality has meant 'there is presently no majority view as to when structured proportionality should be applied'.[91] It is incumbent upon Australia's apex court to clarify the application of structured proportionality and resolve the tension between the simultaneous rejection of the implication against discrimination and recognition of the implied freedom of political communication at the next available opportunity. Unless and until it does, as Edelman J has lamented, the status quo will remain 'the worst of all worlds'.[92]

86 See e.g., *McCloy* (n 1) 193–4 [2] (French CJ, Kiefel, Bell and Keane JJ), citing *Lange* (n 1) 560. See also *Babet* (n 2) 142 [218] (Gleeson J).

87 *Ruddick* (n 1) 348 [18] (Kiefel CJ and Keane J), citing *Lange* (n 1) 560 (emphasis added).

88 Ralph Babet and Neil Favager, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth*, B73/2024, 17 January 2025, 10–1 [41]–[45]; Clive Palmer, 'Plaintiffs' Submissions', Submission in *Babet v Commonwealth* B74/2024, 17 January 2025, 2 [2].

89 See e.g.: *ACTV* (n 1) 146 (Mason CJ), 227–8 (McHugh J); *Mulholland* (n 1) 217 [86] (McHugh J), 296 [332] (Callinan J); *McCloy* (n 1) 207 [45] (French CJ, Kiefel, Bell and Keane JJ).

90 *Ravbar* (n 1).

91 Ibid 1055 [218] (Edelman J).

92 Ibid [219].

*Ilya Aidman**

ANOTHER ROUND OF WHACK-A-MOLE: *YBFZ V MINISTER FOR IMMIGRATION, CITIZENSHIP AND MULTICULTURAL AFFAIRS* (2024) 419 ALR 457

I Introduction

Since the High Court of Australia's decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*'),[1] the Minister for Immigration and Citizenship[2] ('Minister') has led substantial efforts to develop alternative schemes to manage what has become known as the *NZYQ* cohort ('cohort'). The cohort is a group of 153 detainees released from detention in November 2023, the majority of whom have serious criminal histories. With detention excluded by the High Court, the *Migration Act 1958* (Cth) ('*Act*') and *Migration Regulations 1994* (Cth) ('*Regulations*') imposed conditions on the cohort's bridging visas. These conditions, namely location monitoring and a curfew, were imposed as an exercise of executive power. Striking down the validity of the two visa conditions 5:2, the Court's four judgments in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*')[3] provide valuable insight into the extent of the Ch III limitation established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').[4] It also highlights a greater nuance in the Court's approach following the unanimous joint judgment in *NZYQ*.

This case note will analyse *YBFZ* as follows. Part II will explain the visa regime and conditions enacted following *NZYQ*, and the factual context of *YBFZ*. Part III will extract key statements on the Ch III question. Part IV will step through each of the judgments, identifying key bases and comparing the approach of various Justices. Part V will briefly consider events following the decision. Part VI will conclude.

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1 (2023) 280 CLR 137 ('*NZYQ*').

2 The relevant Minister's title has changed several times since *NZYQ*. The Minister has previously been known as: Minister for Immigration and Multicultural Affairs (2024), and Minister for Immigration, Citizenship and Multicultural Affairs (2022–2024). This case note will make simple reference to 'the Minister'.

3 (2024) 419 ALR 457 ('*YBFZ*').

4 (1992) 176 CLR 1 ('*Lim*').

II Background

A *The Post-*NZYQ *Regime*

Persons in the cohort who do not hold a substantive visa must rely on a bridging visa to avoid the mandatory detention requirement pursuant to s 189(1) of the *Act*. The Minister is able to grant these bridging visas with various 'specified conditions'.[5] In certain cases, the Minister is authorised to grant a bridging visa without the request or consent of a person.[6]

The first tranche of post-*NZYQ* amendments were effected through the *Migration Amendment (Bridging Visa Conditions) Act 2023* (Cth). These came into force on 18 November 2023, amending the *Act* and the *Regulations* directly. These amendments extended powers to grant visas without application to the *NZYQ* cohort,[7] and gave powers to grant Bridging R (Class WR) visas ('BVR') to the cohort.[8] Rules 2.25AB and 2.25AA — the new and extant regulation relating to BVRs — were further amended on 8 December 2023 following the publication of reasons for decision.[9]

Four conditions were automatically imposed unless the Minister was satisfied that they were not reasonably necessary.[10] In *YBFZ,* two of the four conditions were in question: the monitoring condition (8621) and the curfew condition (8620) ('relevant conditions'). Sections 76B to 76D of the *Act* made breaches of the relevant conditions a criminal offence where there was no reasonable excuse, with a maximum penalty of five years imprisonment. Section 76DA required courts to 'impose a minimum sentence of imprisonment of at least one year'.

The monitoring condition required a BVR holder to 'wear a monitoring device at all times'.[11] The specific device was not prescribed,[12] but in practice, took the form of an ankle monitor. The plaintiff's monitor had two parts: the monitoring device itself, and a portable charger. The portable charger attached to the monitoring device, was charged from mains power, but could charge the monitoring device without being

5 *Migration Act 1958* (Cth) ss 41, 73, as at 18 November 2023 ('*Migration Act*'). An unrestricted authority to grant bridging visas was provided in s 41(1), while further subsections provided general guidance on the effect of certain conditions, and general non-binding guidance on the potential scope of conditions.

6 *Migration Regulations 1994* (Cth) reg 2.20, as at 8 December 2023 ('*Migration Regulations*').

7 Ibid reg 2.20(18).

8 Ibid reg 2.25AB.

9 *Migration and Other Legislation Amendment (Bridging Visa, Serious Offenders and Other Measures) Act 2023* (Cth).

10 *Migration Regulations* (n 6) sch 2 cl 070.612A.

11 Ibid sch 8 condition 8621(1).

12 Ibid sch 8 condition 8621(5).

tethered to mains power. Instructions required the person to charge the monitoring device twice a day for 90 minutes, enforced by threat of imprisonment.[13]

The curfew condition required a BVR holder to remain at a notified address for up to eight hours, ordinarily from 10pm to 6am.[14] This notified address could have been, inter alia, the person's residential address,[15] or any address notified ad hoc by the BVR holder before 12pm the previous day.[16]

B *Facts of* YBFZ

The plaintiff was a stateless Eritrean man who arrived in Australia in 2002 as the holder of a Refugee (Subclass 200) visa.[17] Between 2005 (at which point the plaintiff was aged 17) and 2017, he was convicted of a series of criminal offences. These included inflicting grievous bodily harm and malicious wounding, criminal damage, and making a threat to kill.[18]

During this period, and as a result of his criminal behaviour, his refugee visa was cancelled. Upon his release from prison in 2018, he was taken into immigration detention.[19] Shortly thereafter, he made an application for a Protection (Subclass 866) visa. Despite the application being refused, the Minister's delegate made findings which amounted to a 'protection finding'.[20] This meant that the Commonwealth was not authorised to remove the plaintiff.[21]

The plaintiff remained in immigration detention until shortly after the decision in *NZYQ*, when he was released on the basis that there was 'no real prospect of his removal from Australia becoming practicable in the reasonably foreseeable future'.[22] Shortly thereafter, the Minister granted the plaintiff a BVR with the relevant conditions, with a total of six further BVRs granted (variously including the relevant conditions) between 13 December 2023 and 2 April 2024.[23]

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13 Ibid sch 8 condition 8621(3); *Migration Act* (n 5) s 76D(3)(b); *YBFZ* (n 3) 477 [59].

14 *Migration Regulations* (n 6) sch 8 condition 8620(1)–(2).

15 Ibid sch 8 condition 8620(3)(a), which referred to condition 8513, which required notification of the holder's residential address, and condition 8625, which required the notification of several of the holder's details including their address.

16 Ibid sch 8 conditions 8620(3)(b)–(c).

17 *YBFZ* (n 3) 473 [39].

18 Ibid 515 [191].

19 Per *Migration Act* (n 5) s 189(1).

20 *YBFZ* (n 3) 473 [40].

21 See *Migration Act* (n 5) s 198.

22 *YBFZ* (n 3) 474 [41].

23 Ibid 474 [42]–[43].

III Legal Framework

Chapter III of the *Constitution* places a limitation on executive and legislative power by reserving exclusive powers to the judiciary.[24] It is helpful to extract a few of the Court's previous statements verbatim.

Lim stands for the principle that

> involuntary detention … is penal or punitive in character and … exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[25]

So, given the foundational principle that only Ch III courts may exercise Commonwealth judicial power, *Lim* prevents the executive from exercising that power by characterising involuntary detention and other acts that are penal or punitive in character as exclusively judicial functions.

Therefore, to assess the proper limit of the executive's power, we are left with a framework established in *Jones v Commonwealth of Australia*,[26] that asks

> a single question of characterisation: whether the power to impose the detriment conferred by the law is properly characterised as punitive and therefore as exclusively judicial.[27]

A law is only 'properly characterised as punitive' if, through 'an assessment of the relationship between means and ends',[28] the Court finds that the law is not 'reasonably capable of being seen to be [reasonably appropriate and adapted] for a legitimate and non-punitive purpose'.[29]

What was new in *YBFZ* was the need to assess the lower limits of 'punitive' actions. Unlike immigration detention — the context in which *Lim* arose — the conditions imposed on BVR holders in this case were not necessarily 'prima facie punitive'. It is on this question that approaches differ.

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24 This is commonly described as one of the two limbs in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers Case*'). That case established that only Ch III courts can exercise the judicial power of the Commonwealth.

25 *Lim* (n 4) 27.

26 (2023) 280 CLR 62 ('*Jones*').

27 Ibid 82 [43].

28 Ibid 94 [78].

29 *NZYQ* (n 1) 157 [39], substituting 'necessary' for the appropriate definition found in *Jones* (n 26) 81 [42].

IV Decision

The Court delivered four judgments: a joint majority of four justices, including the Chief Justice, which declared the regulations invalid;[30] a sole concurring opinion;[31] and two sole dissents.[32]

A *The Majority: Gageler CJ, Gordon, Gleeson and Jagot JJ*

The majority's decision is grounded in the common law's refusal to 'deny its fundamental protections against … deprivation of … liberty'.[33] Their Honours identified the source of this protection as 'the compact between the individual and the state', which is the context in which our *Constitution* came to exist.[34] Despite acknowledging early on that the *Constitution* does not create a limitation for every law imposing a detriment on a person,[35] their Honours emphasised that 'judicial protection of individual liberty' and the separation of powers 'spring from the same underlying values'.[36]

1 *The Curfew Condition*

The majority (along with the other members of the Court) rejected the plaintiff's submission that the Ch III concept of interference with liberty is aligned with the common law tort of false imprisonment.[37] Concurrently, the majority distinguished *Thomas v Mowbray* ('*Thomas*')[38] on the basis that *Thomas* considered an act of the judiciary, not the executive.[39] Instead, through a practical analysis,[40] their Honours considered how the fact that one-third of a BVR holder's day must be spent in a specific place inherently restricted the BVR holder's liberty during the other two-thirds of the day by preventing them from travelling substantial distances from a notified address. In effect, the majority concluded that the curfew produced a continuous depravation of liberty.

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30 *YBFZ* (n 3) 463–84 [1]–[88] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

31 Ibid 484–510 [89]–[171] (Edelman J).

32 Ibid 511–23 [172]–[226] (Steward J), 523–50 [227]–[327] (Beech-Jones J).

33 Ibid 465 [9] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

34 Ibid 466 [12].

35 Ibid 464–5 [6].

36 Ibid 467 [14], citing *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 276 [141]; *YBFZ* (n 3) 467 [15].

37 While not explicitly rejecting the submissions, the majority emphasised that the correctness of the plaintiff's position did not depend on the correctness of his submissions: *YBFZ* (n 3) 474–5 [46]–[47]. The Court went on to form an alternative argument in favour of the plaintiff's position: *YBFZ* (n 3) 475–7 [47]–[55]. See also at 546–7 [312] (Beech-Jones J).

38 (2007) 233 CLR 307 ('*Thomas*').

39 *YBFZ* (n 3) 476 [53] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

40 Ibid 475–6 [50].

Their Honours could be accused of characterising the curfew condition at its worst. By that logic, a curfew for *any* amount of time had *some* impact on the plaintiff for the entirety of their day. Their Honours also did not give weight to the fact that the BVR holder was entitled to nominate *any* location by midday on the day prior. On the other hand, it remains true that BVR holder's liberty is different to the sort had by an ordinary member of the community — the ability to nominate alternative addresses did not allow the BVR holder to act spontaneously or respond to emergencies. And perhaps that is the precise protective point of the conditions.

In deciding whether the condition had a punitive or merely protective character, their Honours observed that the 'detention imposed by the curfew condition is neither trivial nor transient in nature',[41] concluding that this burden was prima facie punitive.

2 *The Monitoring Condition*

Their Honours described three effects of wearing the monitoring device.[42]

First, that the wearer would have been constantly aware of the device's presence. Their Honours' explanation of the 'real psychological burden and emotional burden'[43] resulting merely from the BVR holder's awareness of the physical presence of the monitoring device is brief. It is unclear whether the mere breach of bodily autonomy was the crux of the issue,[44] or whether the deterrence from visiting lawful places through the indirect awareness of monitoring was contributory.[45] The majority's affirmation of the BVR holder's fear that the Commonwealth would impose a detriment resulting from attending places that divulge their religious or sexual characteristics is also unusual. Assuming their Honours did not intend to suggest that there was a general risk that the Commonwealth Government would cause a person to suffer harm based on their religious, sexual, or political identity, the majority appears to have been sympathetic to a BVR holder's *subjective* anxiety resulting from location monitoring as indicative of the prima facie punitive nature of the burden.

The majority's second concern — that the visible mark 'conveying [the wearer's] status as an unworthy or dangerous person' exposed the wearer to a degradation of autonomy — is consistent with the indirect effect of the first.[46] Their Honours sought to recognise the subjective shame that may have resulted from the average passer-by acting in a certain way towards the BVR holder. Further, their Honours appear to have contemplated that the apprehension of negative treatment by the

41 Ibid 476 [51].

42 Ibid 477–8 [60].

43 Ibid.

44 Ibid 477 [57].

45 Ibid 478 [61].

46 Ibid 478 [62].

community meant that the BVR holder would avoid placing themselves in certain lawful situations. Their Honours' consistent emphasis on social or self-imposed restrictions resulting indirectly from the monitoring equipment, as opposed to the limitations plainly imposed by the scheme, demonstrates the majority's desire to consider the maximal practical impact of burdens.

Their Honours' third concern about the need to access mains power emphasises that the monitoring condition placed a further restraint on freedom of movement, exacerbating the impact of the curfew condition.[47]

Their Honours therefore found that both conditions were prima facie punitive.

3 *Justification*

Their Honours noted that the stated purpose of 'protection of any part of the Australian community' was very general and did not speak to the specific function of the scheme.[48] They also noted that the scheme was not necessarily limited to the existing *NZYQ* cohort,[49] and could capture persons without a criminal record.[50] The Minister submitted that the purpose should be read as protecting Australians 'from the risk of harm arising from future offending'.[51] Unlike all other justices (concurring and dissenting),[52] the majority took the most literal approach.[53]

Further, the majority did not consider the role of the Community Protection Board (and its guidelines) in the Minister's decision-making,[54] a view shared by Beech-Jones J (dissenting),[55] in contrast with Edelman J who took limited account for the purpose of understanding legislative intent.[56] The majority concluded that the analysis of whether there is a legitimate non-punitive purpose must be based on the most general purpose.[57]

As a result, the majority found that the scheme extended beyond protection from harm arising from persons committing future offences, and noted especially that

47 Ibid 477 [59].

48 Ibid 479 [65].

49 Ibid 473 [38].

50 Ibid 473 [37]. See also *Migration Regulations* (n 6) reg 2.20(18). Recall that this bridging visa could be granted on the Minister's initiative, without the person's involvement.

51 *YBFZ* (n 3) 479 [66] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

52 Justice Edelman made amusing criticism of the majority's interpretation: ibid 492 [113], [115]. See also at 529–30 [245]–[249] (Beech-Jones J).

53 Ibid 481 [75] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

54 Ibid 482–3 [80].

55 Ibid 543 [296] (Beech-Jones J).

56 Ibid 492 [113], 493 [117] (Edelman J).

57 Ibid 482 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

the scheme did not require the Minister to reach a 'required state of satisfaction' *before* imposing the conditions.[58]

The majority's judgment thus concluded that the scheme was: (1) not for a legitimate non-punitive purpose;[59] and (2) even if it were, could not be reasonably necessary for that purpose.[60]

B *Concurring Judgment: Edelman J*

Justice Edelman's reasons resolved the matter through a simpler inquiry by addressing what his Honour called the '*Lim* fiction'.[61] His Honour's further practical contribution is a deeper analysis of the concept of punishment and a differing view on the scheme's purpose.

1 *The Lim Fiction*

His Honour's view was that a certain act is either punitive, or it is not, in contrast with the premise of *Lim* that a specific act *becomes* punitive by being disproportionate to a certain legitimate aim.[62] Therefore, Edelman J narrowed the legal question to whether the purpose of the regulations is punishment.[63] His Honour concluded this portion of his judgment by folding the *Lim* analysis into a far more general rule: that there is 'no head of power to impose [punishment]' to the extent that a detriment is not reasonably necessary, or in other words, part of a proportionate legislative regime.[64]

2 *Purpose*

Justice Edelman resisted the majority's broad reading. To demonstrate this point, he tested the extremes of the majority's view that the scope of 'protection of any part of the Australian community' is unbounded.[65] His Honour jested that parliament could not rationally be concerned with persons 'who sneeze a lot'[66] — though that, so his Honour implied, could be moulded to protect against some cursory concern of the Australian community within the 'free-floating' interpretation of the majority.[67] Instead, his Honour looked to: (1) the combination of cls 070.612A and 070.612B

58 Ibid 482 [79].

59 Ibid 475 [47], 478 [63].

60 Ibid 483 [84].

61 See *NZYQ* (n 1) 160–2 [51]–[54].

62 See generally *YBFZ* (n 3) 502 [142]–[144].

63 Ibid 487 [95] (Edelman J).

64 Ibid 508 [161].

65 See, e.g., ibid 479 [65] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

66 Ibid 492 [113] (Edelman J).

67 Ibid 482 [79] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

(i.e., statutory context);[68] (2) the executive government's interpretation as evident from the non-statutory establishment of the Community Protection Board and its guidelines;[69] and (3) the broader *NZYQ* context, which he viewed as inseparable from the context of the *Regulations*. Considering these factors, his Honour found the purpose of the relevant regulations to be a response to 'the prospect of future offending in very general terms'.[70]

3 *Characterisation of Conditions*

His Honour described this condition as 'home detention', as it constricted location rather than movement and could do so during daytime.[71] After stating his conclusion in favour of the plaintiff,[72] the judgment went on in the abstract. Justice Edelman started with a 'core or standard' purpose linked to retribution and deterrence.[73] His Honour joined with Beech-Jones J to prioritise harshness and severity as a relevant factor in constituting punishment,[74] but also emphasised, together with Steward J, the historical delineation between the judiciary, executive and legislature at the time of Federation.[75] In doing the latter, Edelman J reinforced that the start and end of the constitutional limitation must be the protection of judicial power.

In this sense, his Honour finished on a simple position: protective punishment is semantic description;[76] a sufficiently harsh condition imposed in a backwards-looking inquiry relating to previous criminal conduct must be punishment.[77]

Justice Edelman summarised four bases for his conclusion: (1) the effect of the decision in *NZYQ* is that the cohort is entitled to release from detention — the circumstances do not reflect a blank slate onto which any conditions can be added to substitute a sub-detention regime; (2) the purpose of the curfew condition was to deter crime based on a pattern of past criminal activity; (3) the conditions were not imposed through a merely forward-looking inquiry — the assessment of the need for conditions, despite resulting in 'protective punishment', was based on past criminal

68 The former used the general test of 'harm' resulting in the subject provisions, while the latter related to a specific group of criminal offences linked to a separate group of conditions.

69 *YBFZ* (n 3) 494 [120] (Edelman J).

70 Ibid 493 [117].

71 Ibid 489 [104].

72 Ibid 485–6 [92].

73 Ibid 500 [136]. See also at 495–6 [124]–[125], citing HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford University Press, 1968).

74 *YBFZ* (n 3) 499 [135] (Edelman J), 525 [242] (Beech-Jones J).

75 Ibid 514 [187] (Steward J).

76 Ibid 497–8 [130]–[132].

77 Synthesising Edelman J's views expressed inter alia at ibid 497–8 [130], 502–3 [145]–[147], 504 [150], 508 [161].

activity; and (4) the curfew rose to a harshness described as 'home detention', suggesting this as a prima facie indicator of the purpose being punishment.[78]

C *First Dissent: Steward J*

Justice Steward's reasons are comparatively short. Like Edelman J, Steward J took issue with the modern application of *Lim* and adopted a somewhat revisionist approach. His Honour concluded that the conditions were not prima facie punitive,[79] and avoided comprehensively assessing reasonable necessity.[80]

The crux of Steward J's disagreement is what he viewed as the overextension of *Lim* to strike down laws granting power to the executive 'concerning matters which have not ever, historically or otherwise, been the exclusive preserve of the courts'.[81] Justice Steward returned frequently to *Falzon v Minister for Border Protection*,[82] which his Honour suggested captured the proper application of the *Lim* doctrine prior to its overextension. Justice Steward explored the distinction between punishment 'in the relevant sense' and the broader category of 'punitive' acts, applying a substantial degree of historical determinism to suggest that unless courts have historically exercised a specific power, there should be significant resistance to adding that to their exclusive domain per Ch III.[83] His Honour further emphasised the 'vulnerability … of an alien to exclusion',[84] to demonstrate the overarching right of the executive to permit non-punitive extreme outcomes.

It is at this point that Steward J may have 'over-egged the omelette',[85] leaving himself an easy path to characterise the curfew and monitoring conditions as outside the 'core' of punishment historically reserved to courts. By enforcing historical determinism, his Honour limited the scope of executive action that informs the definition of punishment to a time where the government played a fundamentally different role in society. As at Federation, the Commonwealth Government had a lesser capacity to involve itself comprehensively with the lives of its constituents; the scale of government administration was smaller; geographies more intensely bounded the administration of justice (e.g., through the significant role of local courts in criminal punishment); and the volume of immigration we see today was technologically impossible. For the same reason that strictly originalistic constitutional

78 Ibid 508–9 [164]–[167].

79 Ibid 522 [215] (Steward J).

80 See ibid 524 [223]–[224].

81 Ibid 511–12 [176].

82 (2018) 262 CLR 333 ('*Falzon*').

83 *YBFZ* (n 3) 514 [187].

84 Ibid 521 [212], citing *Falzon* (n 82) 346 [39].

85 To borrow Kerr J's choice words in: *CHVS v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCA 34, [78].

interpretation has subsided in Australia in favour of legalism and realism,[86] Steward J's assertion that judicial functions end at adjudging and punishing guilt '*simpliciter*' does not do justice to his Honour's basic proposition that the modern High Court has overextended its powers to set limits on all legislation.[87]

Effectively, by making such a confident position on the nature of punishment, supposedly to exclude 'free-ranging [judicial] investigation',[88] his Honour avoided the obligation of considering the effect of the substance of the conditions. His Honour's judgment completed only one half of the *Lim* analysis. Meanwhile, his Honour's view on whether the conditions were reasonably capable of being seen as necessary for a non-punitive purpose would have been informative. If Steward J had expressed a view on this issue, his Honour could have formed a practical alternative — together with Beech-Jones J — to the negative, conceptual characterisation by the majority and Edelman J to produce a complete two-judge dissent.

D *Second Dissent: Beech-Jones J*

In the absence of Steward J's assistance on the characterisation of the conditions, Beech-Jones J's approach has substantial weight as *the* alternative assessment of the relevant burden of curfews and monitoring. Critical to Beech-Jones J's analysis was an acknowledgement that 'the more severe the detriment … the more difficult it will be to characterise the power [as valid]'.[89] Justice Beech-Jones joined Steward J in emphasising that any protection of individual rights cannot be more than incidental to the source of the separation of powers — Ch III.[90] Detriment beyond punishment is ordinary.[91] Additionally, his Honour weighed the frequency with which a detriment is imposed other than by courts (e.g., cancellation of a visa), and whether the power is imposed selectively on the individual or society at large (e.g., COVID-19 lockdowns).[92]

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86 The scope for interpreting the *Constitution* was notably expanded in *Cole v Whitfield* (1988) 165 CLR 360. See also Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5(2) *Constitutional Law and Policy Review* 21, cited in Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(1) *Federal Law Review* 455. Cf the textualism attributed to Gleeson Court: Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004' (2008) 30(1) *Sydney Law Review* 5, 21–5.

87 *YBFZ* (n 3) 513 [182] (Steward J) (emphasis in original).

88 Ibid 513 [183].

89 Ibid 527 [239] (Beech-Jones J).

90 Ibid 527–8 [240] (Beech-Jones J), 511 [175] (Steward J).

91 Ibid 527–8 [240]. Taken together, Beech-Jones J identified these two factors — severity and historic use — as the established factors for identifying punishment: at 528 [242], citing *Alexander v Minister for Home Affairs* (2022) 276 CLR 336, 367–8 [72], 368–9 [75] (Kiefel CJ, Keane and Gleeson JJ), 397 [159] (Gordon J), 428 [250] (Edelman J).

92 *YBFZ* (n 3) 528 [242], 528–9 [244] (Beech-Jones J).

On the curfew condition, his Honour explained that surveillance creates deterrence merely because the person is aware of a greater risk of detection, thereby reducing the likelihood of a person entering a problematic area. As this is not in line with the 'deterrence by example' at the core of criminal punishment, Beech-Jones J concluded that it can be a non-punitive form of protection. Justice Beech-Jones spent time rejecting the majority's concerns in relation to the 'stigma' associated with wearing the monitoring device,[93] combatting this both practically — highlighting that the device was not actually so large as to be unable to be covered by ordinary clothing, and theoretically — emphasising 'the difficulty with using an inferred incidental consequence' as a basis to declare the condition punitive.[94]

His Honour went on, perhaps too quickly, to conclude that curfews have a similar operation and purpose to the monitoring condition.[95] Justice Beech-Jones pointed to their combined use in bail and post-incarceration regimes without much dedicated analysis of the material effect of the monitoring condition on BVR holders.[96] In doing so, Beech-Jones J seems not to have differentiated between global and specific restraints on freedom of movement. Whereas a monitoring condition ostensibly prevents a BVR holder from attending an unlawful place, a curfew condition prevents a BVR holder from attending *any* place, whether lawful or not. His Honour's approach did not engage with the effect of this evident restriction of liberty, nor evaluate the curfew condition against detention — the standard against which the majority and Edelman J defined the condition as prima facie punitive. In this sense, despite the three alternative perspectives in *YBFZ*, the combined decision does not present an independent characterisation of the curfew condition as non-punitive.

Justice Beech-Jones also devoted significant attention to the question of how the scheme 'ensures [its] power[s] [are] only exercised to pursue the relevant legitimate … purpose'.[97] His Honour was able to respond to many criticisms of the scheme: (1) despite the conditions arising automatically, the necessity of the conditions was assessed on a 12-month basis;[98] (2) while rules of natural justice were excluded (i.e., there was no right to be heard), there was a right to have submissions considered;[99] and (3) there remained a right for the court to review the Minister's absence of satisfaction.[100]

In concluding, Beech-Jones J generally rejected many of the secondary detriments submitted by the plaintiff, including the stigma, and the equation between detention in

93 See above Part IV(A)(2).

94 *YBFZ* (n 3) 545 [308] (Beech-Jones J).

95 Ibid 538–9 [278].

96 Ibid 539 [279].

97 Ibid 531 [254].

98 Ibid 533 [261], 542 [292]–[293].

99 Ibid 542 [295].

100 Ibid 542 [294].

custody and the curfew condition.[101] For his Honour, this case concerned a far lesser restraint on liberty, whereas *Lim* and *NZYQ* spoke to the 'involuntary detention of a [person] in custody'.[102] On that basis, and noting the existence of several elements of due process, his Honour found against the plaintiff on all questions.

V Beyond *YBFZ*

YBFZ was handed down on 6 November 2024 with the prima facie effect of ending the mandatory monitoring and curfew regime. The next day, the Minister amended the *Regulations* to reinstate the practical effect of the scheme rejected in *YBFZ*.[103]

Of course, the amendments addressed the Court's concerns. The new scheme: (1) reversed the state of satisfaction requirement so that the Minister must reach a certain state of mind *before* being required to impose the relevant conditions, above and beyond any other conditions;[104] (2) specified that the relevant risk is the 'substantial risk of seriously harming … by committing a serious offence';[105] and (3) added language about an assessment of reasonable necessity being reasonably appropriate and adapted.[106]

But, for all of the majority's choice words on the strength of Ch III in protecting individual liberties against punitive measures, the same conditions are now able to be imposed by meeting similar standards of satisfaction — albeit within a slightly revised framework. Chapter III has lost the first round of whack-a-mole. Advocacy organisations like the Australian Human Rights Commission and Human Rights Law Centre remain as concerned as they were before.[107]

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101 See, e.g., ibid 545 [308], 547 [314]–[315].

102 Ibid 547 [313], citing *Lim* (n 4) 27.

103 *Migration Amendment (Bridging Visa Conditions) Regulations 2024* (Cth).

104 *Migration Regulations 1994* (Cth) cls 070.612A(1)(b)–(c), as at 8 November 2024 ('*Amended Migration Regulations*'). See also *YBFZ* (n 3) 483–4 [85] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

105 *Amended Migration Regulations* (n 104) cl 070.612A(1)(b). See also *YBFZ* (n 3) 479–82 [64]–[76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

106 *Amended Migration Regulations* (n 104) cls 070.612A(c)(i)–(ii). See also *YBFZ* (n 3) 483 [84].

107 'Explainer: Labor's Brutal Deportation and Surveillance Bill', *Human Rights Law Centre* (Web Page, 8 November 2024) <https://www.hrlc.org.au/explainers/2024-11-8-deportation-surveillance/>; Australian Human Rights Commission, Submission No 25 to Senate Legal and Constitutional Affairs Committee, Parliament of Australia, *Migration Amendment Bill 2024* (21 November 2024). See also Adriana Boisen, 'The Government Must Respect the High Court's Decision in YBFZ v Minister for Immigration' (Media Release, New South Wales Council for Civil Liberties, 11 November 2024) <https://www.nswccl.org.au/high_court_decision_ybfz/>.

Instead, noting the continued challenges in relation to the criminal behaviour of the *NZYQ* cohort,[108] the Minister continues to explore more creative solutions — including third country reception arrangements such as those with Nauru,[109] more extreme (and yet unused) powers to re-detain members of the cohort, and the ability to revisit protection findings.[110] Many of these 'solutions' present more serious issues than even the original *YBFZ* scheme, including, for example, the potential indirect breach of non-refoulment obligations.[111]

Finally, it is interesting to reflect on the variety of approaches to Ch III now evident in the Court. Despite each having unique disagreements, Edelman, Steward, and Beech-Jones JJ have each resisted extending *Lim* beyond *NZYQ*. Each set a very different philosophical starting point to that of the majority. Their Honours raised the importance of a narrow historical context in constitutional interpretation and affirmed that interpretation of Ch III is no place to create individual liberties except those incidental to the inherent function and duties of courts. While Steward J may be alone in his resistance to other limitations in the *Constitution*,[112] there remains a real possibility that the unanimous position in *NZYQ* will further fragment as Australia's evolving immigration scheme is tested.

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108 See, e.g., Shannon Schubert, 'Man Charged Over Serious Footscray Assault Was Released Immigration Detainee', *Australian Broadcasting Corporation* (online, 16 June 2025 <https://www.abc.net.au/news/2025-06-16/immigration-detention-high-court-ruling-footscray-assault/105423632/>.

109 *Migration Act 1958* (Cth), as amended by *Migration Amendment Act 2024* (Cth); Tony Burke, 'Statement on NZYQ' (Media Release, Department of Home Affairs, 15 February 2025) <https://minister.homeaffairs.gov.au/TonyBurke/Pages/statement-on-nzyq.aspx/>.

110 Jake Evans, 'New Powers Allow NZYQ Group To Be Re-Detained, and a Foreign Nation To Be Paid to Accept Them', *Australian Broadcasting Corporation* (online, 7 November 2024) <https://www.abc.net.au/news/2024-11-07/new-powers-allow-nzyq-group-to-be-re-detained/104572456/>; Daniel Ghezelbash and Anna Talbot, 'Another Rushed Migration Bill Would Give the Government Sweeping Powers To Deport Potentially Thousands of People', *The Conversation* (online, 18 November 2024) <https://theconversation.com/another-rushed-migration-bill-would-give-the-government-sweeping-powers-to-deport-potentially-thousands-of-people-243365/>.

111 See 'Labor's Secret Nauru Deal: A Concerning Precedent for Back-Door Deportations', *Amensty International* (Web Page, 18 February 2025) <https://www.amnesty.org.au/labors-secret-nauru-deal-a-concerning-precedent-for-back-door-deportations/>. For an older but comprehensive discussion on non-refoulement obligations in relation to third-party transfers see: Australian Human Rights Commission, *Human Rights Issues Raised by the Transfer of Asylm Seekers to Third Countries* (Report, 15 November 2012).

112 See *Ravbar v Commonwealth* (2025) 423 ALR 241, 254 [25] (Gageler CJ), 321–8 [272]–[296] (Steward J).

VI Conclusion

YBFZ has extended *Lim* beyond detention in custody. There is now a general opportunity for judicial inquiry into detriments against persons authorised by parliament. The four-justice majority, grounded in the role of the judiciary as the protector of personal liberty, set and met a low constitutional bar for a punishment to be punitive. Further, the majority endorsed a strict reading of the purpose of the scheme. At the high level of generality that the majority interpreted the purpose, it found that it was not a 'legitimate non-punitive purpose'. This interpretative approach was inter alia resisted by both the concurring and dissenting justices. Several points of contention — some practical and others philosophical — are now live on the Ch III question. These include a stark disagreement between the majority and all others on the correct approach to the interpretation of broadly stated statutory powers; the continued evolution of Edelman J's reconceptualisation of *Lim*; a growing disagreement over the general capacity of the Court to make even preliminary inquiries into executive burdens on personal freedom; and a diverging view on the relevance of inherent common law protections of liberty in constitutional interpretation. Despite the apparent judicial intervention, in practice, the Minister has amended the *Regulations* to maintain the substantive effect of the existing scheme. It is yet to be seen whether the majority has left *Lim* and Ch III barking at the end of their leash, or whether the majority's philosophical basis will sustain further challenges to new measures implemented to deal with the fallout of *NZYQ*.

*Elke Dawson**

THE PRACTITIONER'S OUT OF THE BAG: *LEGAL PROFESSION CONDUCT COMMISSIONER V BELPERIO (NO 2)* [2024] SASCA 133

I Introduction

The legal profession stands as the gatekeeper and protector of justice. Despite this responsibility, the high rate of sexual harassment in the profession[1] reveals a cultural complicity in protecting the very misconduct it is meant to regulate. Following a charge of professional misconduct in the form of sexual harassment, a practitioner, Mr Enzo Belperio, sought to maintain a confidentiality regime through a range of orders including the anonymisation of his name, restricted access to court documents and a suppression order. In *Legal Profession Conduct Commissioner v Belperio (No 2)* ('*Belperio (No 2)*'),[2] the Court of Appeal unanimously dismissed each of Mr Belperio's applications.

Belperio (No 2) makes clear that the open justice principle is alive and well, and that allegations of professional misconduct and the protection of personal and professional reputation are not privileged exceptions. The decision firmly rejects the outdated traditional rule that a practitioner's name be suppressed until an adverse finding be made,[3] standing as a culmination of changing societal and judicial attitudes towards sexual harassment, professional misconduct, and transparency of disciplinary proceedings.[4] The decision is a step towards deconstructing the power imbalances that thrive on a culture of secrecy and impunity which pervade the legal profession, shining a light on what has, for so long, been shrouded.

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1 See: Equal Opportunity SA, *2024 Review of Harassment in the South Australian Legal Profession* (Report, 4 December 2024) ('*2024 Review*'); Equal Opportunity SA, *Review of Harassment in the South Australian Legal Profession* (Report, 9 April 2021) ('*2021 Report*'); Kieran Pender, *Us Too? Bullying and Sexual Harassment in the Legal Profession* (Report, International Bar Association, 2019) ('*Us Too?*'); Law Council of Australia, *National Action Plan to Reduce Sexual Harassment in the Australian Legal Profession* (Report, 23 December 2020); Helen Szoke, *Review of Sexual Harassment in Victorian Courts and VCAT: Report and Recommendations* (Report, Victorian Equal Opportunity and Human Rights Commission, March 2021) 31.

2 [2024] SASCA 133 ('*Belperio (No 2)*').

3 Ibid [68]; *Re (Attorney)* (1860) 2 LT Rep (NS) 432 (Erle CJ) ('*Re (Attorney)*').

4 *Belperio (No 2)* (n 2) [66]–[72].

In Part II, this case note considers the procedural background of *Belperio (No 2)* and the grounds for Mr Belperio's applications for confidentiality. Part III then outlines the decision of the Court of Appeal on each of the confidentiality applications. Part IV comments on the broader implications of *Belperio (No 2)*, including how the decision addresses power imbalances, the pattern of silence and transparency within the legal profession.

II Background

Belperio (No 2) arose out of a complaint of professional misconduct in July 2020[5] against Mr Belperio in relation to 'alleged inappropriate and uninvited physical and sexual contact with, or advances to, a female solicitor colleague, junior in age and position'.[6] In October 2022, a charge was laid alleging professional misconduct pursuant to s 82(2) of the *Legal Practitioners Act 1981* (SA).[7]

A *Tribunal Decision*

In March 2024, the Legal Practitioners Disciplinary Tribunal ('Tribunal') dismissed the charge laid by the Legal Profession Conduct Commissioner ('LPCC') against Mr Belperio, on grounds that the LPCC did not have jurisdiction to lay the charge.[8]

B *Appeal*

The LPCC appealed that decision. In August 2024, the Court of Appeal upheld the appeal of the LPCC, setting aside the orders and remitting the matter to the Tribunal.[9] That judgment anonymised Mr Belperio's name as 'A Practitioner'.[10]

C *Confidentiality Applications*

Following the successful appeal, Mr Belperio sought a range of orders from the Court in order to maintain his anonymity. In summary, Mr Belperio sought:

1) A suppression order pursuant to s 69A of the *Evidence Act 1929* (SA) ('*Evidence Act*') ('Suppression Application');
2) In the event a suppression order was not granted, that certain materials filed or to be filed be treated as having been filed on a party-access basis only pursuant

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5 *Legal Profession Conduct Commissioner v Belperio* [2024] SASCA 102, [11] ('*Belperio (No 1)*').

6 Ibid [17].

7 Ibid [17]–[18].

8 *Belperio (No 2)* (n 2) [1]; *Belperio (No 1)* (n 5) [22].

9 *Belperio (No 1)* (n 5).

10 Ibid; *Legal Profession Conduct Commissioner v Belperio (No 3)* [2025] SASCA 28 ('*Belperio (No 3)*').

to r 32.2 of the *Uniform Civil Rules 2020* (SA) ('*UCR*') ('Restricted Access Application');

3) In the alternative, a range of orders pursuant to s 131 of the *Supreme Court Act 1935* (SA) ('*Supreme Court Act*'), restricting access to records which would otherwise be available to the public ('s 131 Application').

The Court stated that the Suppression Application would 'largely be determinative' of the other applications.[11]

The Court summarised the grounds upon which Mr Belperio (and his wife) sought to rely on to maintain their anonymity:

> 1. expected damage to Mr Belperio's personal and professional reputation;
> 2. injury to Mr Belperio's mental health, which will compromise his capacity to earn a livelihood;
> 3. Mr Belperio's mental health will be so affected by publication of the allegations against him that he is unlikely to have the psychological and mental capacity to defend them before the Tribunal properly;
> 4. undue hardship to the couple's daughter; and
> 5. undue hardship to his [sic] Mrs Belperio, who might be a witness in any disciplinary proceedings before the Tribunal.[12]

III Decision

The Court of Appeal unanimously dismissed Mr Belperio's applications for confidentiality, including the Suppression Application, the Restricted Access Application and the s 131 Application.

A *Suppression Application*

The Court traversed the common law history of the open justice principle, as well as the legislative history of s 69A of the *Evidence Act.* While acknowledging the traditional rule — that a practitioner subject to disciplinary proceedings have their name suppressed until an adverse finding was made[13] — Kourakis CJ concluded that this rule was 'of doubtful authority' and 'formulated at a time when the public interest in the regulation of the legal profession was little recognised'.[14] While the traditional rule was applied in 1970 in South Australia in *Re a Practitioner of the*

11 *Belperio (No 2)* (n 2) [15].

12 Ibid [120].

13 See *Re (Attorney)* (n 3) 432. The traditional rule was rejected in New South Wales in *Re Readett* (1888) 5 WN (NSW) 20, 20 (Darley CJ, Windeyer and Stephen JJ) and *Ex parte Pratt; Re M'Culloch* (1889) 6 WN (NSW) 31, 31 (Darley CJ), but restored in *Re a Gentleman, One* (1897) 13 WN (NSW) 229, 229 (Darley CJ, Stephen and Owen JJ).

14 *Belperio (No 2)* (n 2) [68] (Kourakis CJ).

Supreme Court,[15] Kourakis CJ emphasised that the decision 'pre-dates by nearly three decades the amendments to the *Evidence Act* which strengthened and extended the scope of the open justice principle'.[16] His Honour gave weight to the articulation of open justice as expounded in *Scott v Scott*,[17] which provided 'a mere desire to consider feelings of delicacy' alone was not sufficient to depart from the principle.[18] His Honour concluded that the legislative history of the *Evidence Act* '[maintained] a clear intention to restrict the power of courts to make suppression orders in order to maintain and extend the principle of open justice'.[19]

The Court ultimately held that pure social embarrassment or reputational damage before a charge of professional misconduct is determined is not enough to override the principle of open justice, and does not amount to an interest of justice generally.[20] Chief Justice Kourakis adopted the reasoning of the Victorian Court of Appeal in *WEQ (a Pseudonym) v Medical Board of Australia* ('*WEQ*'),[21] which set aside a wide suppression order and affirmed that protecting professionals from embarrassment was not an interest of justice.[22] His Honour further held that preservation of reputation 'is a consideration exogenous' to determining whether the granting of a suppression order is appropriate.[23] The Court maintained that '[p]ublicity before adjudication is necessarily an ordinary incident of the open justice principle',[24] comparing that '[t]he law does not protect the personal and professional reputations of persons charged with criminal offences'.[25]

The Court held that Mr Belperio's Suppression Application '[served] a personal interest, not a public interest in the administration of justice'.[26] Ultimately, the exercise of the power pursuant to s 69A of the *Evidence Act* 'must be based on an evaluative judgment' and that any departure from the open justice principle must be 'justified in order to preserve another object of the administration of justice'.[27]

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15 [1970] SASR 199. Chief Justice Bray, Mitchell and Zelling JJ stated that '[t]here is no doubt … that it is proper to make a suppression order in matters such as this until the matter has been finally disposed of': at [202].

16 *Belperio (No 2)* (n 2) [70] (Kourakis CJ).

17 [1913] AC 417.

18 Ibid 438–40 (Viscount Haldane LC).

19 *Belperio (No 2)* (n 2) [119].

20 Ibid [80].

21 (2021) 69 VR 1 ('*WEQ*').

22 Ibid, cited in *Belperio (No 2)* (n 2) [73]–[79].

23 *Belperio (No 2)* (n 2) [81] (Kourakis CJ).

24 Ibid [59].

25 Ibid [285].

26 Ibid [295] (Bleby JA and Stein AJA).

27 Ibid [39].

The Court further rejected grounds four and five relied on by Mr Belperio, that his daughter and wife would face undue hardship should the orders not be granted. The Court held the evidence did not establish that 'any hardship over and above that which is a necessary and common incident of the open justice principle' would be suffered.[28] Indeed, the Court similarly commented in *WEQ* that in the case of disciplinary proceedings against health practitioners, suppression orders were only granted in exceptional circumstances where 'publicity would imperil the health and safety of the professional or their family'.[29]

Further, the Court was not satisfied that Mrs Belperio's ability to testify as a potential witness would be compromised, thus prejudicing the administration of justice.[30] Chief Justice Kourakis commented that the hardship that would be suffered by Mrs Belperio was 'an inherent consequence of the charging of a person with allegations of criminal or professional misconduct'.[31] On the fifth ground, his Honour warned that closing the Court pursuant to s 69(1) of the *Evidence Act* 'should not be used for a collateral purpose'.[32]

In addition, the Court rejected grounds two and three, finding that the evidence did not establish that Mr Belperio's capacity to earn a livelihood would be impacted,[33] nor that his mental health would be compromised such that he could not defend the charge should the information be made public.[34]

B *Restricted Access Application*

The Court dismissed Mr Belperio's application and revoked interim orders made pursuant to r 32.2 of the *UCR*.[35] Chief Justice Kourakis commented that r 32.2(2), which allows the Court to order documents to be filed (or if already filed, to be treated as filed) on a restricted access basis, must be read down to conform with s 131 of the *Supreme Court Act*.[36]

C *Section 131 Application*

The Court also dismissed the s 131 Application. Following the outline of the legislative history, the Court found that documents including the Notice of Appeal,

28 Ibid [121]. See also *Channel Nine SA Pty Ltd v Police* (2014) 119 SASR 447, 458–9 [64]–[67] (Blue J).

29 *WEQ* (n 21) [69]–[72].

30 Ibid [164].

31 *Belperio (No 2)* (n 2) [60] (Kourakis CJ). See also *Packer v Police* [2007] SASC 98, [23], [25] (Doyle CJ).

32 *Belperio (No 2)* (n 2) [102] (Kourakis CJ).

33 Ibid [136].

34 Ibid [121], [136], [147].

35 Ibid [286]. Chief Justice Kourakis further held that there was no material before the Tribunal to warrant such an order, even if it were empowered to do so: at [5].

36 Ibid [245].

Statement of Facts and Contentions, and interlocutory applications fell within the meaning of 'process' pursuant to s 131(1)(aa) of the *Supreme Court Act*.[37] The Court held that 'the mandate' of the section was 'clear': 'the public must be given access, on application, to the documents and materials falling within the ambit of pars (aa)–(f) of s 131(1)'.[38]

Chief Justice Kourakis described the approach put by Mr Belperio's counsel as 'fictive' and 'fundamentally at odds with the plain text and context of, and the statutory purpose underpinning, s 131 of the *Supreme Court Act*'.[39] The application to uplift court documents and substitute a redacted copy was refused on its merits, with his Honour highlighting that: (1) Mr Belperio filed the document willingly;[40] and (2) redacting 'the name of an essential party to the controversy' in a document over which s 131(1) of the *Supreme Court Act* did not grant a right of access would be 'an exceptional course'.[41]

IV Comment

Belperio (No 2) affirms the importance of open justice in the context of professional misconduct (and particularly sexual misconduct) in maintaining the integrity of, and addressing power imbalances within, the legal profession. The decision of the Court of Appeal draws a line in the sand with respect to open justice and disciplinary proceedings, judicially affirming contemporary societal and jurisprudential attitudes towards the transparency of disciplinary proceedings.

A *Power Imbalances in the Legal Profession*

There are evident power imbalances within the legal profession, which contribute to the prevalence of sexual harassment. In 2021, Equal Opportunity SA released the *Review of Harassment in the South Australian Legal Profession* ('*2021 Report*').[42] The report found that cultural features of legal workplaces include

> a patriarchal and hierarchical culture characterised by intense competition and widespread incivility; a lack of cultural diversity; a deeply entrenched gender bias; and a culture of silence in which instances of harassment were minimised, normalised and kept quiet.[43]

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37 Ibid [220]. See further Kourakis CJ's reasoning as to the correct construction of 'process' pursuant to s 131(1)(aa) of the *Supreme Court Act*: at [195]–[232].

38 Ibid [241].

39 Ibid [241] (Kourakis CJ).

40 Ibid [235].

41 Ibid [237].

42 *2021 Report* (n 1).

43 Ibid 88–96.

In 2019, the International Bar Association conducted the largest-ever survey on bullying and sexual harassment in the legal profession,[44] concluding that the profession 'is rife with bullying and sexual harassment'.[45] Sexual harassment disproportionately impacts female members of the profession, with 37% of female respondents having experienced sexual harassment during their career.[46] Younger members of the profession are also disproportionately impacted.[47] Amongst younger members, sexual harassment was more likely to be perpetrated by a senior colleague than by someone equal in position.[48] The *2021 Report* similarly found that two out of every five respondents 'reported that they had experienced sexual or discriminatory harassment in the legal profession',[49] with '[f]our out of every five incidents … perpetrated by a person in the workplace *more senior* than the victim'.[50] The report found that power imbalances such as the 'patriarchal and hierarchical culture' caused and drove sexual harassment in the legal profession.[51]

Sexual harassment is also 'chronically underreported',[52] reflecting a culture of silence around workplace sexual harassment generally, and in the legal profession specifically. In 2018, 75% of sexual harassment cases globally were not reported.[53] In 2022, the Australian Human Rights Commission found that only 18% of sexual harassment incidents were reported.[54] Of those that were reported, 25% said the harasser faced no consequences.[55] In the legal profession, the *2024 Review of Harassment in the Legal Profession* ('*2024 Review*') found that only 1% of respondents reported sexual harassment to a complaint body.[56] The *2021 Report* found that

> cultural features were also a barrier to reporting, with almost 70% of survey participants who had experienced sexual harassment — more than two in every three — electing not to report it because they did not understand or trust the reporting process; were afraid of experiencing repercussions on their career and work life; or were inhibited by a workplace culture where it was considered best not to 'rock the boat'.[57]

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44 *Us Too?* (n 1).

45 Ibid 112.

46 Ibid 49.

47 Ibid 53.

48 Ibid 60.

49 *2024 Review* (n 1) 36, citing *2021 Report* (n 1) 55–72.

50 *2024 Review* (n 1) 36, citing *2021 Report* (n 1) 61 (emphasis added).

51 *2021 Report* (n 1) 4–5; *2024 Review* (n 1) 86.

52 Ibid 62.

53 *Us Too?* (n 1) 11.

54 Australian Human Rights Commission, *Time for Respect: Fifth National Survey on Sexual Harassment in Australian Workplaces* (Report, November 2022) 8.

55 Ibid.

56 *2024 Review* (n 1) 81.

57 Ibid, citing *2021 Report* (n 1) 74–85.

Such issues are not unique to the legal profession. In 2018, the Australian Human Rights Commission published the *Respect@Work* report, situated in the broader context of increasing transparency around sexual harassment, the costs of sexual harassment, and the global response to sexual harassment.[58] The inquiry found that 20% of Australian workers had experienced sexual harassment in the workplace within the previous 12 months.[59] Indeed, 'societal and structural causes' clearly underlie the prevalence of such conduct.[60] Such conduct is, however, persistent and pervasive, with the legal profession being no exception. The subsequent *2024 Review* revealed that despite the recommendations of the *2021 Report*, these power imbalances remained, concluding that 'harassment, in all its forms persists' and that 'senior members of the profession … continue to offend'.[61]

These power imbalances were acknowledged in the judgment, with Bleby JA and Stein AJA highlighting that unsatisfactory professional conduct and professional misconduct can extend to social settings, reflecting 'contemporary understandings' which 'recognise … abuses of imbalanced power relationships within the profession'.[62] Likewise, Kourakis CJ commented that the specific circumstances of the alleged misconduct involved 'imbalances of power, founded in the hierarchy of the legal profession'.[63]

B *A Broader Pattern of Silence*

Mr Belperio's application and submissions to keep his identity a secret reflect a broader pattern of silence in the profession, not just one individual's legal strategy. While the 'court is not concerned with the character of proved allegations',[64] it is indeed the very character of the allegations — their sexual character — which gave rise to Mr Belperio's extensive and convoluted applications to prevent his identity from becoming tied to such charges. The embarrassment, shame, and reputational damage that will arise from publicity relating to allegedly perpetrating sexual misconduct is arguably more intense than that which would arise from other forms of professional misconduct. Indeed, Bleby JA and Stein AJA commented that sexual allegations, particularly involving the behaviour of a practitioner toward a junior practitioner, should be especially open to public scrutiny.[65] Chief Justice

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58 Australian Human Rights Commission, *Respect@Work: National Inquiry Into Sexual Harassment in Australian Workplaces* (Report, 29 January 2020) 78–82 ('*Respect@Work*').

59 Australian Human Rights Commission, *Everyone's Business: Fourth National Survey on Sexual Harassment in Australian Workplaces* (Report, 2020) 25 ('*Everyone's Business*').

60 Ibid 19.

61 *2024 Review* (n 1) 7.

62 *Belperio (No 2)* (n 2) [294] (Bleby JA and Stein AJA).

63 Ibid [62] (Kourakis CJ).

64 Ibid [294].

65 Ibid [296].

Kourakis noted that s 69A of the *Evidence Act* is a 'significant change from the section's predecessors' reflecting a 'policy choice to give greater weight to the open justice principle' than to the hardship incidental to the publicity of litigation.[66] As the Court ultimately decided, such applications to withhold the allegations from public scrutiny 'to avoid "the potential prejudgment of the practitioner"', as phrased by counsel, serves a personal, not public, interest.[67]

Power imbalances and the pattern of silence in the legal profession are further reflected in Mr Belperio's self-serving applications in *Belperio (No 2)*. The Court expressed clear displeasure with the motivation behind the applications, with Kourakis CJ commenting that the orders sought in the alternative to a suppression order attempted to 'circumvent',[68] obstruct[69] and 'obviate'[70] the legislation which upholds the open justice principle.[71] These applications were made 'in aid of his personal interest in his reputation and not to prevent prejudice to the administration of justice'[72] as required by s 69A(1)(a) of the *Evidence Act*. Chief Justice Kourakis commented that seeking an order 'for the collateral purpose of outflanking s 69A of the *Evidence Act*'[73] would 'generally be an abuse of process'.[74]

The sentiment reflects an attitude of impunity characteristic of many senior legal practitioners. A sense of entitlement, a lack of accountability, and general incivility by those who hold powerful positions are drivers of sexual harassment in the legal profession.[75] University of South Australia law lecturer, Associate Professor Joe McIntyre, commented that '[m]en in positions of power are operating with a sense of practical immunity, because if the women speak out, they know their career is dust'.[76] Indeed, in the *2024 Review*, a respondent cited that 'a few senior practitioners in the legal profession … hold the misguided belief that they are entitled and can act with impunity when it comes to sexually harassing junior practitioners and staff'.[77] The enduring prevalence of sexual harassment in the profession supports this hypothesis, with a further respondent suggesting that certain members of the

66 Ibid [108] (Kourakis CJ).

67 Ibid [295].

68 Ibid [191].

69 Ibid [238].

70 Ibid.

71 See *Evidence Act 1929* (SA) ss 69, 69A.

72 *Belperio (No 2)* (n 2) [238].

73 Ibid (Kourakis CJ).

74 Ibid.

75 See: *2024 Review* (n 1) 12; Szoke (n 1) 31.

76 @Dr_Joe_McIntyre (X, 23 June 2020, 1:05pm ACST) <https://x.com/Dr_Joe_McIntyre/status/1275271193323376640>, quoted in 'Sexual Harassment and the Legal Profession', *Sexual Harassment Australia* (Web Page, 2020) <https://sexualharassmentaustralia.com.au/sexual-harassment-and-the-legal-profession-why/>. See also Szoke (n 1) 32.

77 *2024 Review* (n 1) 78.

profession believe they 'have a right to feel entitled because they have been getting away with this behaviour for years'.[78] As noted by Fiona McLeay, the sense of impunity strengthened by existing power imbalances means that such behaviour 'becomes entrenched'.[79]

This attitude was acknowledged and criticised in the judgment. Chief Justice Kourakis drew attention to comments made by counsel for Mr Belperio during the course of the substantive proceedings. During an oral application to exclude certain persons from the Court, Mr Dick Whitington KC addressed members of the profession sitting in the open court, 'in effect warning them against making any disclosure to any persons about the hearing' by '[seeking] to impose consequences' and by '[announcing] why they think they should be here'.[80] The Chief Justice starkly warned that '[c]onduct of that kind should never be repeated'.[81] His Honour emphasised that those who attend open court hearings 'do not owe anyone, including those seeking to warn them "in terrorem", any explanation for their presence'.[82] As the *2024 Review* observed, a 'culture of denial, threat, intimidation and incivility … remains'.[83] His Honour's remarks serve as a critical affirmation of the open justice principle while simultaneously calling out the entitlement and authority that senior, male legal professionals have historically wielded, contributing to the culture of silence.

C *Transparency and the Legal Profession*

Belperio (No 2) sets a precedent for increasing public accountability in the legal profession with respect to sexual misconduct, asserting that the bar for granting suppression, anonymity, and restriction of documents in professional misconduct cases is high. This brings the legal profession in line with other disciplines, where a 'move toward the recognition of the public's interest' in knowing whether a professional is the subject of disciplinary proceedings is being recognised more broadly.[84] As aptly stated by the Federal Sex Discrimination Commissioner, 'the legal profession is not any other profession. It administers the law and knows it well and should rightly be held to a higher standard'.[85] Further, Bleby JA and Stein AJA noted that open justice

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78 Ibid.

79 'Balancing Power: Sexual Harassment in Australia's Legal Profession', *Melbourne Law School* (Web Page, 31 August 2020) <https://law.unimelb.edu.au/news/MLS/balancing-power-sexual-harassment-in-australias-legal-profession>.

80 *Belperio (No 2)* (n 2) [226].

81 Ibid [227] (Kourakis CJ).

82 Ibid.

83 *2024 Review* (n 1) 7.

84 *Belperio (No 2)* (n 2) [72] (Kourakis CJ), citing *Craig v Medical Board of South Australia* (2001) 79 SASR 545, 554 [41] (Doyle CJ, Williams and Martin JJ agreeing); *Zollo v Commissioner for Consumer Affairs* [2020] SASCFC 118, [46] (Peek, Blue and Stanely JJ); *Marin v Chiropractic Board of Australia* [2020] SASCFC 74, [2] (Kourakis CJ, Peek and Nicholson JJ agreeing).

85 *2024 Review* (n 1) 8.

and transparency surrounding 'allegations against members of a relatively small and privileged profession are extremely important in promoting public confidence in the profession'.[86] Chief Justice Kourakis similarly asserted that public interest in transparency of such proceedings is 'strong' and 'countervailing'.[87] The LPCC commented that the

> [*Belperio (No 2)*] decision is an important step in ensuring that the public can be properly apprised of matters of interest to them in their dealings with the legal profession and in lifting the veil of suspicion which might otherwise fall on members of the profession where proceedings occur out of the public gaze.[88]

The Court found it relevant that not only was the suppression of information contrary to the open justice principle, but that 'it is also a paternalistic denial of the personal autonomy of those legal practitioners and of members of the public who may have dealings with Mr Belperio in his professional capacity'.[89]

D *Practical Implications*

Belperio (No 2) is a step towards addressing and breaking the cycle of power imbalances that enable sexual misconduct within the legal profession.[90] The cycle begins with these power imbalances, which enable misconduct; practitioners with power feel emboldened or enabled to act inappropriately, knowing the victim may not feel safe or able to speak up. The culture of silence in the profession further contributes to victims not reporting the misconduct, fearing incredulity, damage to their careers, retaliation, or a potential lack of consequences for the perpetrator.[91] The power imbalances make reporting feel risky and intimidating.[92] This creates a cycle — when conduct isn't reported, the perpetrator faces no consequences — power imbalances not only remain intact, but are reinforced, and future misconduct feels safe to commit.[93] The anonymisation of an alleged perpetrator's identity through a suppression order, or through restricting public access to court processes, shields perpetrators from reputational consequences. Power imbalances are reinforced, and the cycle continues.

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86 *Belperio (No 2)* (n 2) [296] (Bleby JA and Stein AJA).

87 Ibid [61] (Kourakis CJ).

88 Legal Profession Conduct Commissioner, 'Further Update in Disciplinary Matter' (Web Page, 25 November 2024) <https://lpcc.sa.gov.au/posts/2024/11/25/further-update-in-disciplinary-matter>.

89 *Belperio (No 2)* (n 2) [65].

90 See generally *2024 Review* (n 1) 86.

91 See: *2024 Review* (n 1) 78–85; *Everyone's Business* (n 59) 73; *Us Too?* (n 1) 63–5.

92 See *2024 Review* (n 1). Respondents cite 'power imbalances' as a key barrier to reporting: at 77.

93 See *Us Too?* (n 1). For example, a female respondent from a law firm in the United Kingdom responded that '[t]he partner closed ranks around the perpetrator … [t]he firm did nothing to sanction him and later promoted him into a more senior, but marginally less public position': at 67.

Belperio (No 2) disturbs this cycle. The Court of Appeal has made clear that statutory protections of the open justice principle function only to protect the interests of justice, and that mere preservation of reputation, or personal interests, will not attract these protections.

In light of this, two outcomes may practically result from the decision: (1) perpetrators know that there is a real risk they will be publicly named; and (2) victims may feel more empowered to speak up, knowing that the complaint itself will be taken seriously, and *be seen* to be taken seriously. As found by the *Us Too?* report, when incidents are reported, perpetrators are infrequently sanctioned;[94] numerous respondents 'indicated concern for the proportionality of a perpetrator's punishment'.[95] Having even *alleged* perpetrators face sanctions may encourage the reporting of incidents and the further discouragement of the misconduct itself. Notably, the *2024 Review* reported that almost half of respondents said if they witnessed or experienced sexual harassment in future, they would report the conduct; in part, due to greater public awareness and discussion of the issue.[96] This suggests that the decision itself — and the increased transparency that may result — could encourage future reporting of sexual harassment incidents. Future reporting intent optimistically reflects a cultural shift and may be the first step to breaking down the culture of silence that enables misconduct. This decision emphasises that public accountability at the complaints stage matters; Mr Belperio's submissions that a suppression order was justified because the charges were not yet proven[97] reflects a key aspect of the cycle of power imbalances. Misconduct complaints should reflect the open justice principle in this respect: not only having justice be done, but having justice *be seen* to be done.[98]

V Conclusion

The orders sought by Mr Belperio in *Belperio (No 2)* are representative of archaic power structures and expectations in the legal profession surrounding professional misconduct and secrecy. The dismissal of the applications and the reasoning of the Court of Appeal give credence to changing attitudes towards sexual misconduct in the legal profession, as well as asserting the ongoing relevance of the open justice principle in the 21st century. This decision declares that personal interests will no longer prevail over public interests in the legal profession, and that disciplinary proceedings occurring in the public eye is more imperative than ever. However, the decision must not allow progress to become stagnant. Affirming the open justice principle is not a cure-all, and the judiciary alone cannot drive cultural change.

94 Ibid 49.

95 Ibid 64.

96 *2024 Review* (n 1) 81–2.

97 *Belperio (No 2)* (n 2) [17], [295].

98 See: *R v Sussex Justices; Ex parte McCarthy* [1923] EWHC KB 1, 259 (Hewart LCJ); JJ Spigelman, 'The Principle of Open Justice: A Comparative Perspective' (2006) 29(2) *UNSW Law Journal* 147.

Individual and collective action is needed to address professional misconduct at the root, before it reaches the Tribunal and television screens. To borrow the words of the Commissioner for Equal Opportunity: 'I urge all who work in the profession and who care about its state to champion change'.[99]

99 *2024 Review* (n 1) 8.

Patrick B Davison* and Daniel Manera**

A BRUSH WITH JUSTICE — *QUEENSLAND V STRADFORD (A PSUEDONYM)* (2025) 421 ALR 376

Note: this article addresses themes of suicide which may be disturbing to some readers.

> 'HIS HONOUR: I have told you, I will put you in jail in contempt of this court if you talk over the top of me. Do you understand? I am not happy at all with you… *if it is that she comes here, and she complains that she has asked for things and you have not given them to her, bring your toothbrush*…'[1]

I Introduction

It is difficult to imagine Mr Stradford's day in court going much worse. On 6 December 2018, when Mr Stradford walked into court, he likely expected a routine hearing. Rather, he was summarily jailed for being in contempt of court by Judge Vasta. The problem, however, was that Mr Stradford *was not in contempt of court*. Judge Vasta proceeded under the erroneous belief that another Judge had found Mr Stradford in contempt of court at a prior hearing.

After the Full Court of the Family Court set aside the contempt order,[2] Mr Stradford successfully sought compensation in the Federal Court of Australia against Judge Vasta, the Commonwealth of Australia and the State of Queensland.[3] However, the High Court of Australia in *Queensland v Stradford (a pseudonym)*[4] held that Judge Vasta — an inferior court judge — was immune from civil suit by judicial immunity. Meanwhile, in response to *Stradford v Judge Vasta*,[5] the Federal Government amended the law so that Division 2 judges of the Federal Circuit and Family Court

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1 *Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020, [23] ('*Stradford v Judge Vasta*') (emphasis in original).

2 *Stradford v Stradford* (2019) 59 Fam LR 194 ('*Stradford FamC*').

3 *Stradford v Judge Vasta* (n 1).

4 (2025) 421 ALR 376 ('*Queensland v Stradford*').

5 *Stradford v Judge Vasta* (n 1).

of Australia share the same immunity as Division 1 judges.[6] Mr Stradford's chance of compensation ended there.

Part II of this case note sets out the facts of *Queensland v Stradford* and the relevant litigation. Justice Wigney's decision in *Stradford v Judge Vasta* is explained in Part III. Part IV then discusses the High Court's decision in *Queensland v Stradford*. Part V comments on the broader implications of *Queensland v Stradford* on the division between superior and inferior courts and further explores alternative means for judicial accountability.

II Factual Background

From April 2017, Mr Stradford sought property-adjustment orders against his then-wife in the former Federal Circuit Court.[7] In June 2018, Mr Stradford appeared before Judge Spelleken for a directions hearing; her Honour ordered both parties to file statements setting out evidence relevant to their financial positions.[8] In August 2018, the proceedings came to a final hearing before Judge Vasta.

Concluding that Mr Stradford had not made 'full and frank disclosure' in relation to his financial position,[9] Judge Vasta directed the production of Mr Stradford's statements from gambling accounts and tax returns.[10] Judge Vasta warned:

> *If people don't comply with my orders there's only [one] place they go.* Okay. And I don't have any hesitation in jailing people for not complying with my orders …[11]

When Mr Stradford tried to explain the missing documents, Judge Vasta interjected: 'Rubbish — rubbish. Do not accept that for one second, one iota of a second … Do not ever talk over the top of me.'[12] The matter was adjourned.

In November 2018, the matter came before Judge Turner for directions. Mr Stradford still had not produced the documents, so her Honour adjourned the matter for a 'hearing on contempt application'.[13] Importantly, *no finding* had been made on contempt.

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6 Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023 (Cth). See also Explanatory Memorandum, Federal Courts Legislation Amendment (Judicial Immunity) Bill 2023 (Cth) 2.

7 *Stradford v Stradford* [2018] FCCA 3890, [1] ('*Stradford v Stradford*').

8 *Stradford v Judge Vasta* (n 1) [20]; *Family Law Act 1975* (Cth) s 79(2) ('*Family Law Act*').

9 *Stradford v Stradford* (n 7) [10].

10 Ibid [11].

11 Transcript excerpts from the original proceedings were produced in the Federal Court judgment: *Stradford v Judge Vasta* (n 1) [22] (emphasis in original).

12 Ibid [23].

13 Ibid [27].

When the parties returned in December 2018, Judge Vasta opened:

> So that's that. So the matter can't go anywhere at this point in time, *because Judge Turner has determined that you are in contempt of the orders*…[14]

Judge Vasta asked Mrs Stradford her view on the supposed contempt. She pressed that she merely wanted disclosure of documents.[15] Mr Stradford tried to explain why the documents were not produced. This was dismissed.[16] Judge Vasta noted:

> *So I hope you brought your toothbrush*, [Mr Stradford].[17]

Judge Vasta ordered that Mr Stradford be imprisoned for 12 months.[18]

The consequences of this 'gross miscarriage of justice'[19] were both immediate and harrowing. On arrival at the watch house, Mr Stradford was strip searched.[20] When placed into a holding cell, he was punched in the head by another inmate.[21] On his second night, he awoke to find his cellmate strangling him.[22] By the next morning, he had already witnessed various acts of violence, and learnt it was better for him to 'shut his mouth' and 'conform' with the other inmates.[23]

After four nights and five days of detention at the watch house, Mr Stradford was transferred to the Brisbane Correctional Centre.[24] After seeing a psychologist, Mr Stradford was strip searched again.[25] Another inmate later elbowed Mr Stradford in the head while lining up for breakfast.[26] It was clear the mere days spent in detention had a profound mental impact on Mr Stradford. After being groped by an inmate who remarked to Mr Stradford that he would 'look a lot sexier if he shaved his legs', that night, using soap and a razor, Mr Stradford shaved his legs.[27] The immense trauma of his incarceration was most starkly illustrated by Wigney J:

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14 Ibid [30] (emphasis in original).

15 Ibid [33].

16 Ibid [35].

17 Ibid [34] (emphasis in original).

18 *Stradford v Stradford* (n 7) [29].

19 *Stradford v Judge Vasta* (n 1) [1].

20 Ibid [600].

21 Ibid [602].

22 Ibid [607].

23 Ibid [610].

24 Ibid [618].

25 Ibid [621].

26 Ibid [628].

27 Ibid.

> On one occasion, he took some preliminary steps towards a suicide attempt. On that occasion, a guard had not closed the food hatch in the door of his cell. Mr Stradford made a noose out of a blanket or towel and hung it on the hatch, thinking that he could strangle himself by twisting it around his neck. The only reason he did not take that step was that he heard his daughter's favourite song playing on the radio at the time. This was one occasion where Mr Stradford became particularly emotional while giving his evidence.[28]

Six days later, Judge Vasta stayed the contempt order, pending the outcome of an appeal.[29] Judge Vasta noted that he may 'very well have been in error' in making the order.[30] On appeal, Strickland, Murphy and Kent JJ set aside Judge Vasta's orders, and remarked that allowing a decision 'so devoid of procedural fairness' to stand 'would be an affront to justice'.[31]

Mr Stradford initiated proceedings in the Federal Court against Judge Vasta for false imprisonment, and against the Commonwealth and the State of Queensland for vicarious liability — through their court security guards, and police officers and correctional services officers respectively (together, 'enforcing officers') — for enforcing the contempt order.

III Federal Court

The judgment delivered by Wigney J in *Stradford v Judge Vasta* was scathing.[32] While the High Court overturned almost all of his Honour's judgment, it agreed that *Stradford v Stradford* was a 'parody' of a hearing.[33] The Commonwealth did not dispute this.[34] The Attorney-General (SA) did not dispute this.[35] Judge Vasta — though unsurprisingly, less emphatic than Wigney J or the others — did not dispute this.[36]

Justice Wigney held — among other things — that: (1) Judge Vasta was liable for the tort of false imprisonment;[37] and (2) the Commonwealth and Queensland were

28 Ibid [613].

29 *Stradford v Stradford (No 2)* [2018] FCCA 3961, [6].

30 Ibid [6].

31 *Stradford FamC* (n 2) 196 [9].

32 See *Stradford v Judge Vasta* (n 1).

33 *Stradford v Judge Vasta* (n 1) [1]; *Queensland v Stradford* (n 4) 380 [5].

34 Commonwealth of Australia, 'Submissions of the Commonwealth of Australia', Submission in *Commonwealth v Stradford*, C3/2024, 28 March 2024, [9].

35 Attorney-General (SA), 'Submissions of the Attorney-General for the State of South Australia (Intervening)', Submission in *Commonwealth v Stradford*, C3/2024, 12 April 2024, [14.2].

36 Judge Salvatore Paul Vasta, 'Appellant's Submissions', Submission in *Judge Vasta v Stradford*, C4/2024, 28 March 2024, [8], [46].

37 *Stradford v Judge Vasta* (n 1) [373].

vicariously liable for the tort of false imprisonment committed by their respective enforcing officers.[38]

Justice Wigney characterised the Australian doctrine of judicial immunity as follows: a superior court judge is immune from civil liability for anything done 'while acting judicially'.[39] Whereas an inferior court judge enjoys no such protection if the impugned act falls outside their jurisdiction.[40]

Accordingly, his Honour considered four circumstances in which an inferior court judge may lose their protection of judicial immunity: (1) an order is made in a proceeding in which they did not have 'subject-matter' jurisdiction — that is, no jurisdiction to hear or entertain in the first place;[41] (2) an order is made without, outside, or in excess of their jurisdiction; [42] (3) they are guilty of some gross and obvious irregularity in procedure;[43] or (4) an order is made for which there is no proper foundation in law.[44]

There was little debate that Judge Vasta was a judge of an inferior court.[45] The High Court has emphasised that

> the Federal Circuit Court is an inferior court, and as such has no inherent powers. Being a creation of Parliament, that Court has no authority other than that found in the powers and functions conferred upon it by legislation.[46]

When Judge Vasta imprisoned Mr Stradford for contempt, he did not disclose the legislative basis for the order.[47] Justice Wigney contemplated the applicability of: (1) s 17 of the (now repealed) *Federal Circuit Court of Australia Act 1999* (Cth) ('*FCC Act*');[48] (2) pt XIIIA of the *Family Law Act 1975* (Cth) ('*Family Law Act*'); and (3) pt XIIIB of the *Family Law Act*. Each granted a Federal Circuit Court judge powers to deal with contempt or impose sanctions.

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38 Ibid [554], [549].

39 *Stradford v Judge Vasta* (n 1) [206], citing *Sirros v Moore* [1975] QB 118, 135D (Lord Denning).

40 *Stradford v Judge Vasta* (n 1) [207], citing *Wentworth v Wentworth* (2000) 52 NSWLR 602 [195].

41 *Stradford v Judge Vasta* (n 1) [343].

42 Ibid [344].

43 Ibid [345].

44 Ibid [346].

45 *Queensland v Stradford* (n 4) 380 [6].

46 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v AAM17* (2021) 272 CLR 329, 343 [26] (Steward J) ('*AAM17*').

47 See *Stradford v Stradford* (n 7).

48 *Federal Circuit Court of Australia Act 1999* (Cth) s 17 ('*FCC Act*'), as repealed by *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2021* (Cth).

His Honour considered that: (1) s 17 of the *FCC Act* did not confer a general power to punish contempts; and (2) pts XIIIA–XIIIB were not considered — and could not apply — in imprisoning Mr Stradford. Therefore, the order and warrant 'were invalid and of no effect'.[49] Accordingly, his Honour held that Judge Vasta was not immune from suit via judicial immunity. Mr Stradford received over $300,000 in damages.[50]

IV High Court

A *Validity of the Order*

1 *Chief Justice Gageler, Gleeson, Jagot, and Beech-Jones JJ*

The first question the majority turned to was whether the imprisonment order and the proceeding warrant was valid.[51] Judge Vasta submitted that by virtue of s 17 of the *FCC Act*, his Honour was conferred the same power to punish contempts as the High Court.[52] Section 17 of the *FCC Act* relevantly states:

> **17 Contempt of court**
>
> (1) The *Federal Circuit Court* of Australia *has the same power to punish contempts* of its power and authority *as is possessed by the High Court* in respect of contempts of the High Court.
> (2) Subsection (1) has effect subject to any other Act.
> (3) …
>
> Note: See also section 112AP of the *Family Law Act 1975*, which deals with family law or child support proceedings.[53]

The majority relied on *New South Wales v Kable*[54] to explain the effect of the critical distinction between inferior and superior court judges, namely, that a 'judicial order of an inferior court made without jurisdiction has no legal force as an order of that court'.[55]

If Judge Vasta's submissions regarding the effect of s 17 were correct, then the imprisonment order against Mr Stradford would have been valid until eventually

49 *Stradford v Judge Vasta* (n 1) [373].

50 Ibid [843]–[847].

51 *Queensland v Stradford* (n 4) 380 [5].

52 Ibid 384–5 [32].

53 (emphasis added).

54 (2013) 252 CLR 118 ('*Kable*').

55 Ibid 141 [56] (Gageler CJ).

set aside, irrespective of the jurisdictional errors present.[56] In *Stradford v Judge Vasta*, Wigney J relied on pts XIIIA–XIIIB of the *Family Law Act* in finding the order invalid.

Parts XIIIA–XIIIB of the *Family Law Act* confer on courts the power to impose sanctions for contravention of orders and contempt, respectively. Under pt XIIIA, a court may impose a sanction if a person:[57] (1) intentionally fails to comply with an order or makes no reasonable attempt to comply;[58] and (2) if the person has no reasonable excuse for the contravention.[59] Further, if the sanction imposed is imprisonment, the court must be satisfied it is the most appropriate sanction in the circumstances.[60] Additionally, pt XIIIB allows the court to punish contempt by committing a person to prison,[61] where a person: both contravenes a court order and flagrantly challenges the authority of the court.[62]

The majority rejected Wigney J's argument that the existence of pts XIIIA–XIIIB excluded the operation of s 17 to punish for contempts.[63] Their Honours held that s 17 expanded the power of the Federal Circuit Court to punish contempts in all jurisdictions, whereas pts XIIIA–XIIIB conferred any court the power to deal with contempts and contraventions under the *Family Law Act*'s jurisdiction.[64] Each were different regimes dealing with a different subject matter.

It does not, however, follow that in accepting the differences between s 17 and pts XIIIA–XIIIB that a Federal Circuit Court judge exercising power under s 17 would render them 'superior' for the purposes of the validity of their orders.[65] While s 17 grants 'the same power' as a superior court to punish contempts, it does not grant the same jurisdiction.[66]

The majority compared s 17 with s 42(1) of the *District Court of Western Australia Act 1969* (WA), which confers on the District Court of Western Australia 'all the jurisdiction and powers that the Supreme Court has in respect of any indictable offence'.[67]

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56 *Queensland v Stradford* (n 4) 389 [55].

57 *Family Law Act* (n 8) s 112AD(3).

58 Ibid ss 112AB(1)(a)–(b).

59 Ibid s 112AD(3).

60 Ibid s 112AE(2).

61 Ibid ss 112AP(4), (7).

62 Ibid.

63 *Queensland v Stradford* (n 4) 389 [57].

64 Ibid 392 [65].

65 Ibid.

66 *FCC Act* (n 48) s 17.

67 *District Court of Western Australia Act 1969* (WA) s 42(2); *Queensland v Stradford* (n 4) 389 [54].

In *Day v R*[68] the High Court held that the effect of s 42(1) was to provide that 'for this purpose the District Court is a superior court'.[69] Section 17 does not purport to provide such a conferral.[70] The difference being that conferring the power to punish does not equate to a conferral of jurisdiction such that orders impacted by jurisdictional error would be valid until set aside.[71]

Judge Vasta did not challenge the jurisdictional errors present within the order, merely the effect of s 17.[72] As such, the majority held that the imprisonment order and the warrant were invalid.[73]

2 *Justice Gordon*

Justice Gordon (with whom Steward J agreed) held that the orders sentencing Mr Stradford to imprisonment and the commitment warrant were valid until set aside or quashed, even if affected by jurisdictional error.[74] Justice Gordon opined that by virtue of the wording of s 17 — which confers the '*same power*' to the Federal Circuit Court as the High Court for punishing contempts[75] — the *Family Law Act* also conferred the jurisdiction to make such an order which was valid until set aside. If Parliament had intended for the punishment of contempts under s 17 *not* to be valid until set aside, then the wording of s 17 would reflect as such.[76] Her Honour further considered that it would be incoherent for federal courts exercising the same Ch III judicial power to have different standards of validity for their orders.

Her Honour noted that s 17, like its legislative predecessors, was not a simple grant of jurisdiction.[77] Instead, it was 'declaratory of an *attribute* of the judicial power of the Commonwealth' that is vested in all Ch III courts under s 71 of the *Constitution*.[78] The power to punish for contempt is an inherent attribute of that judicial power. Her Honour reasoned that if the power to make orders that are valid until set aside is an attribute of the judicial power itself, then that attribute should not differ between the federal courts that exercise it.[79]

68 (1984) 153 CLR 475.

69 Ibid 479.

70 *FCC Act* (n 48) s 17.

71 *Queensland v Stradford* (n 4) 391–2 [62]–[63].

72 Ibid 388 [52].

73 Ibid 393 [73].

74 Ibid 419–20 [169] (Gordon J).

75 Ibid (emphasis in original).

76 Ibid 420 [171].

77 Ibid 421 [174].

78 Ibid 421 [175] (emphasis in original), citing *Re Colina; Ex parte Torney* (1999) 200 CLR 386.

79 *Queensland v Stradford* (n 4) 438 [176].

B *Judicial Immunity of Inferior Court Judges*

With the jurisdictional validity of the contempt order narrowly determined, the majority turned to the question of judicial immunity. It is well established at common law that judicial officers of superior courts possess an immunity from civil liability for actions arising out of the exercise of their judicial function.[80] This immunity protects judicial independence by allowing judges to exercise their powers without fear of personal liability and provides finality to the public.[81] However, the common law is less clear as to how that immunity applies to judges of inferior courts. Therefore, Judge Vasta's ability to rely on judicial immunity was uncertain.[82]

It is necessary to explore the distinction between inferior and superior courts, as it applies to judicial immunity. There is a line of Australian and United Kingdom case law holding that inferior court judges enjoy narrower immunities than their superior court counterparts.[83] In *Re McC*, the House of Lords held that the distinction between superior and inferior courts persists:

> Whatever the juridical basis for the distinction between superior and inferior courts in this regard, and however anomalous it may seem to some, the distinction unquestionably remains part of the law affecting justices…[84]

Justice Wigney applied that reasoning, and as discussed above, found that judicial immunity did not attach to Judge Vasta's actions in respect of Mr Stradford's imprisonment.[85]

On appeal, Judge Vasta and the Commonwealth argued that the common law does not — or should no longer — recognise any distinction between the scope of immunity for superior and inferior court judges.[86] Mr Stradford argued that the primary judge's reasoning should be upheld.[87]

The Court treated the resolution of this issue as an opportunity to authoritatively state the principle of judicial immunity.[88] The majority found that judges of both inferior and superior courts possess 'immunity from actions arising out of acts done

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80 *Re East; Ex parte Nguyen* (1998) 196 CLR 354, 365–6 [30] ('*Re East*').

81 *Fingleton v The Queen* (2005) 227 CLR 166, 186 [38]–[39] ('*Fingleton*').

82 *AAM17* (n 46) 343 [26].

83 See, e.g.: *Wood v Fetherston* (1901) 27 VLR 492, 501; *Ward v Murphy* (1937) 38 SR (NSW) 85, 94. See generally *Re McC* [1985] 1 AC 528 ('*Re McC*').

84 *Re McC* (n 83) 541, cited in *Queensland v Stradford* (n 4) 398 [89].

85 *Stradford v Judge Vasta* (n 1) [207].

86 *Queensland v Stradford* (n 4) 395–6 [80].

87 Ibid.

88 Ibid 402 [104].

in the exercise, *or purported exercise*, of their judicial function or capacity'.[89] The Court laid out a limited number of circumstances where judicial immunity does not apply.[90] This principle applies across all federal, state and territory courts.[91] The minority judgments principally agreed.[92]

The Court's reasoning was as follows. The purpose of the immunity is uniform across all courts, superior or inferior;[93] any factor that might have historically justified a distinction has fallen away in the modern Australian context.[94] Modern inferior courts are staffed by legally qualified professionals, and any differences in experience or training are insufficient to justify a difference in the scope of immunity.[95] Further, in order for the immunity to fulfil its purpose of removing the 'spectre of litigation', it ought to be stated clearly.[96] An immunity subject to complex, fact-intensive exceptions is not capable of summary judgment and thus fails to protect judges from being harassed by unmeritorious litigation.[97] The Court unanimously found that the common law should not recognise a distinction between the immunity of superior and inferior court judges.[98]

With respect to Judge Vasta's conduct, the majority found that, despite his 'many and egregious errors', Judge Vasta was acting in the purported exercise of his judicial function and was therefore protected by judicial immunity.[99] No civil action in respect of the orders against Mr Stradford could therefore stand.

C *Liability of Enforcing Officers*

The final issue on appeal concerned the enforcing officers who effected Mr Stradford's detention and their liability for false imprisonment. Given that Judge Vasta's imprisonment order and commitment warrant were found invalid for jurisdictional error,[100] it follows that the enforcing officers had acted on invalid orders or

89 Ibid 403–4 [112] (emphasis in original). The majority used the formulation of judicial immunity established in *Re East* (n 80) [30], but expanded it to also include the words 'purported exercise'.

90 *Queensland v Stradford* (n 4) 397–8 [88]. The immunity does not extend to: (1) a judge's private acts unrelated to their judicial office; or (2) an attempt to perform the judicial function of a court to which a judge is not appointed.

91 Ibid 404 [113].

92 Ibid 427 [195] (Gordon J), 467 [324] (Steward J), 448 [262] (Edelman J).

93 Ibid 379 [2].

94 Ibid 402 [107].

95 Ibid.

96 Ibid 379 [2], 401 [100].

97 Ibid.

98 Ibid 403–4 [112] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 427 [197] (Gordon J), 435 [227] (Edelman J), 467–8 [325] (Steward J).

99 Ibid 404 [114].

100 Ibid 393 [73].

warrants. The key question considered by the majority was whether the various enforcing officers possessed protection from civil liability, despite acting on an invalid order.[101]

As a starting point, the majority found that each category of enforcing officer carries a legal duty to enforce orders and warrants issued in judicial proceedings.[102] The majority considered that this may lead to a difficult tension between an officer's obligations to a court and to the law more broadly:

> To perform their role effectively, courts must have their orders enforced and that must be done by officials not subject to the unreasonable burden of having to investigate the validity of the orders or warrants presented to them.[103]

As such, the common law provides some protection from civil liability to individuals who are under a legal obligation to execute the orders of a court.[104] The majority noted that this protection does not extend to circumstances where an official acts on an order that is, on its face, 'of a "kind" that is … beyond the power of the relevant court to grant'.[105] This exception did not apply with respect to Judge Vasta, as his Honour was empowered to make the relevant orders as a judge of the Federal Circuit Court, making them of an appropriate 'kind'.[106] Therefore, the enforcing officers were shielded from civil liability.[107]

Justice Edelman agreed with the majority to the extent that the enforcing officers are not liable; however, his reasoning differed considerably. The majority's judgment treated an order that is attended by jurisdictional error as being invalid from the outset, but, in essence, forgave officials who follow that order.[108] Justice Edelman warned against this approach, instead arguing that even a flawed judicial order is not a nullity, and must be obeyed until set aside.[109] Therefore, officers who act in accordance with a flawed judicial order ought to have a defence of 'justification', as the order still carries inherent legal authority.[110]

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101 Ibid 381 [10].

102 Ibid 416 [155], 417 [159].

103 Ibid 415 [149].

104 Ibid 381 [13].

105 Ibid 416 [153].

106 Ibid 416 [154].

107 Ibid 381 [13].

108 Ibid.

109 Ibid 436 [230].

110 Ibid 448 [264].

V Comment

A *The Inferior and Superior Divide*

Before the High Court's decision in *Queensland v Stradford*, the terms 'superior court' and 'inferior court' were all but meaningless. Now, they are meaningless with respect to judicial immunity.

Two decades ago, Kirby J labelled the superior/inferior binary an 'artificial distinction'.[111] The terminology likely emerged in the United Kingdom as a way of distinguishing courts of record and courts not of record.[112] This meaning later shifted, with the Court of King's Bench beginning to use the terms to describe loosely the scope of a court's jurisdiction.[113] By the 20th century, these definitions were largely settled, with inferior courts being courts whose jurisdiction is limited, and superior courts being courts of unlimited jurisdiction, or which are presumed to have unlimited jurisdiction.[114]

Justice Edelman identified a number of issues with this definition. His Honour argued that the notion of a court with 'unlimited jurisdiction' is incoherent, as all courts in Australia, including the High Court, are courts of limited jurisdiction.[115] His Honour described the distinction as a 'historical anachronism of English and Australian legal history which, if it ever had any sensible justification, lost that justification by the 18th century at the latest'.[116]

Indeed, prior to this judgment, the practical effect the superior/inferior binary generally only manifested itself in one of two ways: (1) it delineated the extent to which judges were protected by judicial immunity; and (2) it determined whether a judgment affected by jurisdictional error was enforceable.[117] In *Queensland v Stradford*, the majority ultimately did away with the first of these practical effects.

For now, the final practical effect of the superior/inferior divide lives on. This means that when a superior court makes a decision, the decision will be enforceable until set aside, irrespective of the presence of a jurisdictional error.[118] When an inferior

111 *Fingleton* (n 81) 214 [137].

112 *Queensland v Stradford* (n 4) 436–7 [233] (Edelman J), citing Henry John Stephen, *New Commentaries on the Laws of England* (Butterworths, 3rd ed, 1853) vol 3, 585.

113 *Peacock v Bell* (1667) 85 ER 81, 87–8.

114 *Queensland v Stradford* (n 4) 438 [237] (Edelman J), citing Butterworth, *The Laws of England*, vol 9 (at 1909), Courts, '1 Introductory' 11–12.

115 *Queensland v Stradford* (n 4) 438–9 [238].

116 Ibid 435 [227].

117 Kristen Walker, 'When Can a Court's Decision Be Ignored?' (2023) 46(2) *Melbourne University Law Review* 572, 580–1.

118 *Kable* (n 54) 133 [32] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Kable*').

court, on the other hand, makes certain jurisdictional errors, the decision may have no legal effect, in which case it can theoretically be ignored.[119]

This approach is antiquated for a number of reasons. First, there is no Australian court with unlimited jurisdiction.[120] Therefore, the conceptual basis for having one category of courts that is immune to jurisdictional error, and another category that is not, is incoherent. Additionally, the distinction between superior and inferior courts serves no practical purpose in terms of enforcement: both exercise their authority through the same mechanisms and depend equally on the executive to give effect to their orders.[121] Given this functional parity, treating one court's orders as presumptively valid and the other's as voidable is an artificial notion with no bearing on how judgments are actually enforced in modern Australia. The United Kingdom's Supreme Court has done away with the principle that decisions of inferior courts can be ignored in certain circumstances.[122] Australia is yet to follow.

Queensland v Stradford presented the High Court with an opportunity to formally put that outdated terminology to rest. Despite the antiquated nature of designating some courts as superior and others as inferior, the majority in *Queensland v Stradford* did not venture to abandon the terms themselves. In fact, the majority perpetuated the terminology by concluding that judicial immunity 'applies to judges of both superior and inferior courts'.[123] By equalising judicial immunity, the High Court has stripped the superior/inferior distinction of a primary practical consequence, and left behind a hollowed-out label with little practical substance. Justice Edelman warned that the 'application of the distinction has the potential to cause real damage to the fabric of the legal system by creating a quality of justice in so-called "inferior courts" which is inferior'.[124] In the future, the High Court ought to follow its own reasoning to a logical conclusion, and fully embrace a unified conception of judicial authority for all courts.

B *Alternative Sources of Judicial Accountability*

The principle of judicial immunity is instrumental in protecting the independence of Australia's judiciary. As such, the High Court was justified in recasting the immunity in more certain terms, with broad application across all Australian courts. However, in overturning the Federal Court's decision, the High Court has laid bare the lack of avenues for judicial accountability in the federal judiciary:

> Recourse against a wrongful act or omission by a judicial officer … is to be found within such system of appeals as might be applicable, such means of collateral

119 Walker (n 117) 580–1.

120 *Kable* (n 54) 132 [30] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

121 Walker (n 117) 577–8.

122 *R (Majera) v Secretary of State for the Home Department* [2022] AC 461, 484 [56].

123 *Queensland v Stradford* (n 4) 403–4 [112].

124 Ibid 435 [228].

> challenge as might be available, and such processes of discipline and removal from office to which the judicial officer might be amenable. It is not to be found in a civil suit against the judicial officer.[125]

In spite of the majority's above suggestion, it is difficult to conceive of a judicial officer in Judge Vasta's position being 'amenable' to voluntary discipline or removal.[126] In circumstances where a judicial officer errs in their decision making, an appellate court may provide a form of systemic accountability through overturning a decision. Additionally, a judicial officer who has acted wrongfully may experience something approximating personal accountability through public admonishment of their actions by an appellate court.[127] However, the system of appeals remains a dubious way of achieving accountability for the *wrongdoing* of judicial officers as opposed to righting a legal error, not least due to the considerable difficulty of accessing appellate justice.[128]

If a person cannot access redress for judicial wrongdoing in a federal court through an appeal, they will be caught between non-action and the nuclear option — that is, seeking dismissal by Parliament on the grounds of proved misbehaviour or incapacity.[129] Federal Parliament has never utilised its power of removal, and a state parliament has only used the power once post-Federation — to remove Justice Angelo Vasta, Judge Vasta's father.[130]

An alternative, intermediate approach to managing judicial misconduct might be the introduction by parliament of a federal judicial commission — an independent statutory body responsible for investigating complaints against federal judicial officers.[131] Most Australian states and territories currently operate their own judicial

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125 Ibid 479 [3].

126 Courts do have informal mechanisms to hear complaints of judicial misconduct. Complaints are typically managed by the court's head of jurisdiction (i.e. the Chief Justice/Judge): Law Council of Australia, *Principles Underpinning a Federal Judicial Commission* (Policy Statement, 25 March 2023) 3. However, as the majority suggests, participation by a judge in any proposed disciplinary measures will be entirely voluntary and unenforceable.

127 For an example of such appellate reprimand in relation to this matter, see *Stradford FamC* (n 2) 207 [53].

128 Gabrielle Appleby and Suzanne Le Mire, 'Judicial Conduct: Crafting a System That Enhances Institutional Integrity' (2014) 38(1) *Melbourne University Law Review* 1, 7–8.

129 *Constitution* s 72(ii).

130 Maxim Shanahan, 'Appeal Decision Finds Judges Cannot Be Sued', *Australian Financial Review* (Sydney, 13 February 2025) 11.

131 Australian Law Reform Commission, *Without Fear or Favour: Judicial Impartiality and the Law on Bias* (Final Report No 138, December 2021) 304 [9.4] ('*Without Fear or Favour*').

commissions,[132] and at present, there is considerable political momentum towards a federal commission. In 2021, the Australian Law Reform Commission called for the establishment of a federal judicial commission,[133] and in 2023, the Attorney-General's Department published a discussion paper on the subject.[134] These initiatives demonstrate that the establishment of a federal judicial commission is realistic, even if ambitious.

Some scholars believe that a judicial commission is an inappropriate means of policing judicial misconduct. Chief Judge in Equity McLelland, for example, argues the following:

> Unless a judge is to be removed, there is a powerful public interest in preserving his effectiveness and authority as a judge from serious damage … which a formal investigatory process, as well as the imposition of some sanction short of removal, would cause. Litigants and practitioners may not have full confidence in a judge with some kind of 'black mark' on his record.[135]

To mitigate those concerns, it would be important for a judicial commission to operate with a high degree of confidentiality.[136] Its primary role would be to dismiss unmeritorious complaints privately, thereby protecting judicial reputations. A properly constructed commission would impose formal sanctions only in circumstances where independence and public confidence in the judiciary would be more greatly damaged by inaction than by the imposition of a 'black mark'.[137]

Additionally, a jurisdictional mandate should strictly confine the commission to investigating matters of conduct and capacity, as opposed to issues around reasoning and judicial error. This construction would avoid a commission being (erroneously) perceived by litigants as an alternative to the appeals process, and potentially being seen to supplant the role of appellate courts.[138] Gabrielle Appleby and Suzanne Le Mire also suggest that where cases of misconduct are intertwined with appealable legal error, a disciplinary system ought to wait until any appeals have been resolved, as to avoid overlap with the appellate jurisdiction.[139]

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132 See generally: *Judicial Officers Act 1986* (NSW); *Judicial Commissions Act 1994* (ACT); *Judicial Conduct Commissioner Act 2015* (SA); *Judicial Commission of Victoria Act 2016* (Vic); *Judicial Commission Act 2020* (NT).

133 *Without Fear or Favour* (n 131) 310 [9.25].

134 Attorney-General's Department (Cth), 'Scoping the Establishment of a Federal Judicial Commission' (Discussion Paper, January 2023).

135 Malcolm McLelland, 'Disciplining Australian Judges' (1990) 64(7) *Australian Law Journal* 388, 393.

136 Appleby and Le Mire (n 128) 60.

137 Elizabeth Handsley, 'Issues Paper on Judicial Accountability' (2001) 10(4) *Journal of Judicial Administration* 180, 184–5.

138 Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System* (Report No 89, January 2000) 229–30 [2.267].

139 Appleby and Le Mire (n 128) 50–1.

As it stands, the status quo presents significant challenges for enforcing judicial accountability. A federal judicial commission, carefully designed to preserve judicial independence, would provide an accessible, structured path to greater accountability. In cases like *Queensland v Stradford*, where judicial misconduct is a central issue and civil action is barred, such a body may offer the only realistic mechanism for upholding the integrity of the judiciary.

VI Conclusion

Though Mr Stradford's brush with justice in the Federal Court was short-lived, the case itself threw into question centuries-old legal principles. The High Court's decision provides a definitive statement on judicial immunity, establishing a uniform standard for all courts, and clarifying common law protections for individuals enforcing court orders. However, by further raising the bar for civil suits against judicial officers, the judgment serves as a reminder of Australia's lack of judicial accountability mechanisms. Only time will tell whether Parliament chooses to introduce new mechanisms of enforcing accountability.

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