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THE JUDICIARY AND THE PUBLIC: JUDICIAL PERCEPTIONS

ABSTRACT

The relationship among the judiciary, public attitudes, public confidence and the institutional authority of courts in a democracy is complex. It is frequently asserted that courts depend on public confidence for the effectiveness and, indeed, legitimacy of judicial authority. Drawing on national interviews and surveys with Australian judicial officers, this article considers the judiciary's views about the nature and prevalence of public attitudes. It investigates individual judicial and institutional responses to perceived public criticism and commentary and considers activities aimed at affirmatively promoting improved public knowledge of courts and judicial work. Understanding the judiciary's own perceptions and attitudes generates important insights into the nature and limits of communication between courts and the public.

I INTRODUCTION

The relationship among judicial decisions, public attitudes, public confidence, and the institutional role of courts in a democracy, has been a topic of academic research¹

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¹ Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton University Press, 2006); Leslie J Moran, 'Managing the "Critical Independencies" of the Media and Judiciary in the United Kingdom' in Michael Asimow, Kathryn Brown and David Ray Papke (eds), *Law and Popular Culture: International Perspectives* (Cambridge Scholars Publishing, 2014) 195, 195–6; Ralph Henham, 'Penal Ideology, Sentencing and the Legitimacy of Trial Justice' (2012) 57 *Crime, Law and Social Change* 77, 79 n 4 (discussing the concept of the 'relevance audience' of criminal trials). For research in Australia, see Stephen Parker, *Courts and the Public* (Australian Institute of Judicial Administration, 1998) see especially 6–34; Australasian Institute of Judicial Administration, *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013). For a general review of research on 'public opinion and confidence', see Pamela D Schulz, *Courts*

and extra-curial judicial comment.² It is frequently asserted that the courts depend on public confidence for the effectiveness and legitimacy of judicial authority.³ However, judicial perceptions of and concerns about public attitudes and public confidence have not been studied systematically or empirically in Australia.

This article first investigates judicial officers' perceptions and experiences of public attitudes and their expression. Second, it examines how individual judicial officers grapple with the need to communicate and engage with multiple audiences, ranging from an individual in court to an abstract or amorphous public. This analysis of the varied understandings expressed by judicial officers sheds important light on the nature and limits of the changing judicial, political and public roles in the communication between courts and the public.

This article uses different research methods and combines quantitative and qualitative data to investigate judicial perceptions. It draws primarily on face-to-face

and Judges on Trial: Analysing and Managing the Discourses of Disapproval (Lit Verlag, 2010) 4–21. For broader reviews of related empirical research, see Mike Hough and Julian V Roberts, 'Public Confidence in Justice: An International Review' (Institute for Criminal Policy Research, 2004) (reviewing public confidence in criminal justice systems); James L Gibson, 'Public Images and Understandings of Courts' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 828 (reviewing 'contemporary work on public knowledge of, information about, and perceptions and judgments of law and courts': 829).

² For more recent extra-curial comment, see eg, Chief Justice Marilyn Warren, 'Open Justice in the Technological Age' (2014) 40 *Monash University Law Review* 45; Chief Justice T F Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12 *Judicial Review* 27; Justice P A Keane, 'The Idea of the Professional Judge: The Challenges of Communication' (2015) 12 *Judicial Review* 301; Justice Robert Beech-Jones, 'The Dogs Bark but the Caravan Rolls On: Extra Judicial Responses to Criticism' (Speech delivered at a conference of South Australian magistrates, Adelaide, 8 May 2017) <http://www.jca.asn.au/wp-content/uploads/2017/07/P83_02_02-Extra-Judicial-Responses-to-Criticism-for-publication.pdf>. See also Justice Susan Kenny, 'Maintaining Public Confidence in the Judiciary: A Precarious Equilibrium' (1999) 25 *Monash University Law Review* 209; George Zdenkowski, 'Magistrates' Courts and Public Confidence' (2007) 8 *Judicial Review* 385; Justice Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (1998) 72 *Australian Law Journal* 599. For further references, see James Thomas, *Judicial Ethics in Australia* (LexisNexis Butterworths, 3rd ed, 2009) 114 n 9; Parker, above n 1, 22 n 73; and papers presented at the National Judicial College of Australia conference 'Confidence in the Courts', Canberra, 9–11 February 2007.

³ See Gibson, above n 1, 836–44; Hough and Roberts, above n 1, 2. The Council of Chief Justices of Australia and New Zealand, *Guide to Judicial Conduct* (Australasian Institute of Judicial Administration, 3rd ed, 2017) 5 [2]. Cf, eg, similar comments by Chief Justice Murray Gleeson, 'Juries and Public Confidence in the Courts' [2007] (90) *Reform* 12, 12. See also Justice Kenny, above n 2, 210, 213, quoting *Gallagher v Durack* (1983) 152 CLR 238, 245 (Gibbs CJ, Mason, Wilson and Brennan JJ); Chief Justice Bathurst, above n 2, 38, quoting Chief Justice Brennan.

interviews with judicial officers throughout Australia,⁴ as well as national surveys of the entire Australian judiciary conducted over several years, and extra-curial comments from judicial officers in speeches or writings. Interviews provide direct accounts of judicial attitudes and experiences, coupled with opportunities for judicial officers to be reflexive regarding the judicial role.⁵ The surveys allow the views of a large number of judicial officers to be aggregated. Judicial speeches and writings are occasions where members of the judiciary can express views on issues affecting the courts and judiciary outside of the limits of formal judgments. Using these different sources provides in-depth understanding of the attitudes of the judiciary generally, as well as capturing specific individual views and experiences.⁶

Part II provides a brief overview of the relationship among public attitudes, courts and the judiciary in a democracy, as background to the analysis of judicial perceptions about public attitudes towards the courts. Part III considers the judiciary's views about the nature and prevalence of public attitudes, as well as individual and institutional responses to perceived public criticism, especially when thought to be unwarranted or ill-informed. Part IV examines judicial attitudes towards activities affirmatively promoting positive public understanding of courts and judicial work.

II THE JUDICIARY AND PUBLIC IN A DEMOCRACY

The judiciary and courts occupy an ambivalent position in relation to the public and its attitudes. As a branch of government, the judiciary is subject to criticism, commentary and opinion expressed in the public sphere across different media. In spite of this, courts and judicial officers have limited capacity to respond to or influence public opinion, in part due to the nature of the judicial role.⁷ The separation of powers allocates constitutional responsibility to the executive and legislature to

⁴ A total of 38 interviews were conducted in 2012–13 with judicial officers from all court levels, in every state and territory, including metropolitan and regional locations, but not federal courts. Quotes taken from the interviews are used verbatim, only deleting identifying and potentially identifying material, and retaining qualities of natural, 'everyday speech' such as unfinished sentences, repeated phrases and filler words like 'umm', to maintain the narrative quality of the interviews: David Silverman, *Doing Qualitative Research* (SAGE Publications, 5th ed, 2018). This data source is indicated by the code 'I ##,' in which I identifies these interviews and ## refers to an individual interviewee. For more information, see the Appendix.

⁵ Mary Holmes, 'Researching Emotional Reflexivity' (2015) 9 *Emotion Review* 61; Jason L Pierce, 'Interviewing Australia's Judiciary: Research Note' (2002) 37 *Australian Journal of Political Science* 131.

⁶ Robert K Merton and Patricia L Kendall, 'The Focused Interview' (1946) 51 *American Journal of Sociology* 541; see also Deborah R Hensler, 'Studying Gender Bias in the Courts: Stories and Statistics' (1993) 45 *Stanford Law Review* 2187.

⁷ See The Council of Chief Justices of Australia and New Zealand, above n 3, 7 [2.2.2], 25–6 [5.7]; Thomas, above n 2, ch 7; Chief Justice Bathurst, above n 2, 36–7; Justice Keane, above n 2, 311, 314; Justice Geoffrey L Davies, 'Judicial Reticence' (1998) 8 *Journal of Judicial Administration* 88; Justice Kenny, above n 2, 221.

engage politically with the electorate.⁸ This contrasts with the judicial role: to decide cases brought before the court by parties, and to do so impartially and dispassionately, by applying law to fact. The complexity of the judiciary's position in relation to public attitudes and the media can result in tension for individual judicial officers and challenges for courts as institutions. Understanding judicial perceptions of these complexities may provide a basis for effectively addressing the challenges, especially because the judiciary — individually, collectively and institutionally through the courts — bears the primary responsibility for communicating with the public about its work.

A central concept in addressing the relation between the judiciary and the public in a democracy is the concept of public confidence, held out as a core requirement for the legitimacy of judicial authority.⁹ The importance of public confidence has been emphasised in the context of concern about generally declining trust in political leaders and government institutions: 'In a democracy, the authority of governmental leaders and institutions presumably depends in part on the extent to which the public has confidence and trust in those institutions and leaders.'¹⁰ However, the nature of this public confidence is difficult to identify. It is sometimes approached as an empirical fact capable of measurement, especially through public opinion surveys.¹¹

⁸ Gareth Griffith, 'Judicial Accountability' (Background Paper 1/98, NSW Parliamentary Library Research Service, 1998) 8–9; Chief Justice Bathurst, above n 2, 36; Justice Kenny, above n 2, 209–10.

⁹ See above n 3.

¹⁰ Michel J Crozier, Samuel P Huntington and Joji Watanuki, *The Crisis of Democracy: Report on the Governability of Democracies to the Trilateral Commission* (New York University Press, 1975) 76; Kenneth Newton and Pippa Norris, 'Confidence in Public Institutions: Faith, Culture or Performance' in Susan J Pharr and Robert D Putnam (eds), *Disaffected Democracies: What's Troubling the Trilateral Countries?* (Princeton University Press, 2000) 52.

¹¹ See generally Hough and Roberts, above n 1, 7–9 (reviewing the measurement of confidence in survey research); Karen Gelb, 'Measuring Public Opinion about Sentencing' (Sentencing Advisory Council, September 2008) 2–28 (reviewing the literature on survey methods and public opinion about sentencing). See, eg, in Australia, Lynne Roberts and David Indermaur, 'What Australians Think about Crime and Justice: Results from the 2007 Survey of Social Attitudes' (AIC Report 101, Australian Institute of Criminology, 2009) (drawing on data from the *2007 Australian Survey of Social Attitudes*, N=8, 133). See, eg, in NSW, the three waves of the New South Wales Bureau of Crime and Statistics and Research ('BOCSAR') *Confidence in the Criminal Justice System* surveys: Craig Jones, Don Weatherburn and Katherine McFarlane, 'Public Confidence in the New South Wales Criminal Justice System' [2008] (118) *Crime and Justice Bulletin* (first wave 2007 survey, N=2002); Lucy Snowball and Craig Jones, 'Public Confidence in the New South Wales Criminal Justice System: 2012 Update' [2012] (165) *Crime and Justice Bulletin* (second wave 2012 survey, N=2001); Imogen Halstead, 'Public Confidence in the New South Wales Criminal Justice System: 2014 Update' [2015] (182) *Crime and Justice Bulletin* (third wave 2014 survey, N=1989). See, eg, in Victoria, Karen Gelb, 'Predictors of Confidence: Community Views in Victoria' (Sentencing Advisory Council, 2011) (2008 survey, N=1200).

Public confidence is also often invoked as an abstract or self-evident notion, without interrogation or explanation, especially in relation to courts.¹²

Both the legal and empirical approaches are beset with ambiguities. Exactly what is confidence, how can it be identified, how can the extent or degree of confidence be assessed? What are the indicia of confidence? Towards what is the confidence directed? Referring to confidence in the courts, judiciary or legal system is vague, as these manifest in many ways. The concept of the ‘public’ is complex and can be ‘problematic’.¹³ Definitional questions arise over who or what constitutes ‘the public’,¹⁴ ‘the community’ and ‘the media’. While careful social and legal research can make definitions explicit, and identify indicators of public confidence, these are not conclusive, and the varied potential meanings are rarely addressed in the legal or judicial commentary which invokes public confidence.

In the research underpinning this article, interviewees use the terms ‘public’, ‘confidence’ and ‘media’ fairly broadly, as having ordinary shared conversational meanings. In analysing and commenting on the data, the authors continue this generic usage, as well as problematising or commenting on any implicit ambiguities.

Judicial engagement with the public is complicated by the realisation that, while some audiences can be addressed directly, most people engage with the courts only indirectly via media reports (both conventional and social). People may have direct experience with the courts as a litigant, criminal defendant, witness, juror or by attending court as a member of the public. However, research finds that ‘[v]ery few Australians have any first-hand experience of their courts’, though when they have such experience, it can be highly influential on their views of the judiciary.¹⁵ Other sources of information may include personal contact with someone else with experience of the courts, such as friends or family, or information provided by the courts themselves, such as through case decisions or sentencing remarks published online or in print, judgment summaries, social media communications or presentations to school or community groups. For most, the major sources of information

¹² Chief Justice Gleeson alluded to this characteristic of the concept of public confidence in his remark that ‘[m]uch of what we call public confidence consists of taking things for granted’: Chief Justice Murray Gleeson, ‘Public Confidence in the Courts’ (Speech delivered at the National Judicial College of Australia, Canberra, 9 February 2007) 5.

¹³ David Green, ‘Public Opinion versus Public Judgment about Crime: Correcting the “Comedy of Errors”’ (2006) 46 *British Journal of Criminology* 131, 131 n 1; Andrew J Perrin and Katherine McFarland, ‘Social Theory and Public Opinion’ (2011) 37 *Annual Review of Sociology* 87, 88.

¹⁴ See Parker, above n 1, 12–4, 35–48 (considering who constitutes the ‘publics of Australian courts’); *Wainohu v New South Wales* (2011) 243 CLR 181, 248–9 [174]–[175] (Hayne J); Justice Kenny, above n 2, 209–10.

¹⁵ Sharyn Roach Anleu and Kathy Mack, ‘The Work of the Australian Judiciary: Public and Judicial Attitudes’ (2010) 20 *Journal of Judicial Administration* 3, 3. See also Jones, Weatherburn and McFarlane, above n 11, 6–7 (where 20.6 per cent of respondents to a 2007 NSW survey responded that ‘personal experience’ was ‘the most influential’ source of information about the criminal justice system).

are from media including newspapers, television, radio, internet sites, and social media.¹⁶ These can play varied roles in the relationship between the courts, the judiciary and the public. Providing information about courts and judges and their decisions to wide audiences, or raising concerns or criticisms, can be important in ensuring judicial accountability in a largely informal regulatory scheme.¹⁷ Alternatively, the work of the courts can be a commercial resource for various media, to boost ratings, sell papers or increase page views or clicks, sometimes accomplished through reports that are sensational.¹⁸

The next section focuses concretely on judicial understanding of, and attitudes towards, various dimensions of public confidence or ‘the public’, in light of the myriad audiences for the courts and their work. There are notably different judicial views about the proper role for the court and the individual judicial officer in relation to public attitudes, particularly when public views are regarded as unwarranted or ill-informed. These varied attitudes may underpin difficulties with formulating appropriate responses from the judiciary or a court as a whole.

III JUDICIAL PERCEPTIONS

There are several themes in the judicial attitudes expressed in the interviews in relation to broad issues of communication about and between the judiciary and the public. Some interviewees express concern with negative views from various publics regarding the courts and their decisions, and some suggest that these are increasing in scope and intensity. Others disagree about both the seriousness of the criticism and any recent increase. Several interviewees identify the importance of changes in the kind of media in which communications might take place, whether among different publics or between the court and its various audiences. These interviewees

¹⁶ Roberts and Indermaur, drawing on 2007 data, report that ‘[b]roadcast and tabloid media provide the major source of information for most members of the public about crime and justice. Almost 80 per cent of respondents rate TV, radio and newspapers as fairly or very important sources of information’: above n 11, ix, see also 9. See also the results of the 2007 BOSCAR survey: Jones, Weatherburn and McFarlane, above n 11, 4, 7; Halstead, above n 11, 2, citing Roberts et al, *Penal Populism and Public Opinion* (Oxford University Press, 2003); but see Halstead, above n 11, 18: ‘[s]ince people tend to source information that accords with their pre-existing views ... the findings presented very likely at least in part reflects individuals’ purposeful selection of which news to consume, rather than necessarily demonstrating the influence of media providers’ (citations omitted).

¹⁷ Des Butler and Sharon Rodrick, *Australian Media Law* (Lawbook, 5th ed, 2015) 235–40; Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’, above n 2, 45–7; H P Lee, ‘Of Courts and Judges: Under the Spotlight, in the Limelight and Seeing the Light’ (2015) 41 *Monash University Law Review* 283, 283–4; Law Reform Commission of Western Australia, *Complaints against Judiciary: Final Report*, Project No 102 (2013) 13–4.

¹⁸ Leslie Moran, ‘Managing the News Image of the Judiciary: The Role of Judicial Press Officers’ (2014) 4 *Oñati Socio-Legal Series* 799, 804; Schulz, above n 1, 27–41.

identify a move away from conventional mass print and broadcast media to social media: blogs, Facebook and Twitter feeds which are quasi-public. Finally, there is a sense among some interviewees that public comment on judicial work, however critical or ill-informed, is inevitable.

A Negative Public Attitudes

In the interviews, some judicial officers express concern about the ways in which the public and the media engage with the courts and the judiciary. These concerns might be expressed as a belief that media reports are simplistic and inaccurate, leaving the public disadvantaged by its lack of access to full information.¹⁹ Several of these issues are raised by one magistrate, who expresses concern about perceived incorrect media coverage:

the problem ... is I think a lot of it's misinformed, a lot of it is inaccurate and I'm not sure that whilst the general public are getting what the papers and the talk back media are feeding them, that they really understand how things fit into the scheme of the justice system. You know, everybody wants everybody hung and quartered, sent to jail and that's just an unrealistic expectation.²⁰

This magistrate provides a view of an undifferentiated and un-reflexive public — like a sponge — just soaking up the material the media are ‘feeding them’. The magistrate suggests that the public relies on this misinformation and inaccuracies, precisely because of their considerable simplification, which makes them easy to understand or to accept. What is missing is a deeper understanding of the justice system among members of the ‘general public’. The view of the public that this judicial officer presents is itself somewhat simplistic and homogeneous. The statement that ‘everybody wants everyone hung and quartered’ presents an image of a public whose attitudes are mainly expressed through moral outrage, rather than rational reflection.²¹ This comment also implicitly contrasts the rational, impartial work of the judiciary with the irrational, partial sentiments of an abstract public, and associates the public with politics rather than law.

This comment also reflects a judicial understanding that the media plays an important-intermediary role in providing access to the court's work. This judicial

¹⁹ Compare the perceptions described by Justice Davies, above n 7, 91; Justice Keane, above n 2, 309–10.

²⁰ I 19, Interview Transcript. (When referencing interviewees, the term ‘judge’ will be used to identify any member of a higher court, irrespective of whether they are formally titled ‘Judge’ or ‘Justice’. The number indicates the particular judge or magistrate interviewed, so that it is possible to tell when comments come from the same or different interviewees, while maintaining anonymity. Quotes are given verbatim, with any identifying details deleted. For more information, see the Appendix).

²¹ See generally Stanley Cohen, *Folk Devils and Moral Panics: The Creation of the Mods and Rockers* (Macgibbon & Kee, 1972).

officer believes that misinformed media coverage leads the public to have negative, inaccurate attitudes towards the judiciary.

Some judicial officers interviewed express the view that the media's coverage of the courts and the judiciary has become more aggressively critical than in the past and subject to fewer quality controls. As one judge states:

over the course of, you know, my time in law, the media has become I think far more aggressive and less respectful of the judicial role. They're prepared to publish things more readily, and as I say, more aggressively. Yes I mean that's been progressing though for some years now.²²

Another judge identifies changes in the mass media and a lessening of respect for courts and judicial officers compared with the past. This judge expresses a belief that it was now acceptable 'to attack the institutions of democracy'.²³

Other interviewees suggest that there are fewer controls, particularly self-control regarding criticism, which may lead members of the public in and out of court to express more and more hostile criticism: 'I think people are quite bold about voicing such criticism. I don't know whether there is more criticism but I think it's just voiced more — you know nobody's reticent about criticising the judiciary these days'.²⁴

Another judge comments: 'I see Australia's always having been an egalitarian society but when I started in the law there was a sense that judicial authority was just accepted and people would, would be deferential. There's not that acceptance now. You sort of have to earn respect'.²⁵

There are several threads in these four comments. All describe a perceived change in the way the judiciary or judicial authority is regarded in the present day, though elements of the perceived change are identified differently. Three speak of reduced respect, while a fourth speaks of a perception of greater deference in an unspecified past. One interviewee speaks of 'criticism', others of 'attack' or 'aggress[ion]', while another refers to the loss of 'reticen[ce]'.²⁶

These differences may suggest variations in the nature of the perceived public discourse and the potential impact on public confidence. Criticism may be warranted, but attacks go beyond justified comment. Courts can be respected and still be criticised, as one interviewee comments. At least one judicial officer acknowledges 'sometimes the courts do get it wrong and they are out of touch with community expectations'.²⁶

²² I 10, Interview Transcript.

²³ Extract from interviewer's notes for I 14.

²⁴ I 09, Interview Transcript.

²⁵ I 15, Interview Transcript.

²⁶ I 24, Interview Transcript.

However, expectations of ‘reticence’ or ‘deference’ could imply a protected status which may go beyond what is justified in a democracy with freedom of political speech, in light of the court’s role as a branch of government in a democracy.²⁷ The time period over which change is identified is either unspecified, or linked to the respondent’s overall engagement with the law (eg ‘my time in law’), or based on a comparison to ‘when I started’, reflecting the way the question was phrased.

Data from the National Surveys provides further insight into judicial perceptions of personal and hostile criticism.²⁸ These surveys contain open-ended questions giving respondents scope to reflect generally about their judicial career or about other issues; there were no questions specifically about public or media attitudes. Concerns about how the media, the public and politicians relate to the courts and judges were specifically mentioned only by a small number of respondents and were made some years before social media had a very significant role. Nonetheless, they are important, first to suggest that this is a longstanding problem, at least for some in the judiciary, and second, to show how perceived criticism can affect individual judicial officers on a personal level.

Four judges describe their perceptions of the impact of negative media treatment:²⁹ ‘The media is generally unfair. That can be frustrating but it goes with the territory’;³⁰ ‘And I suspect that the *consistently negative media view* of judges gets me down though I try not to think about it’;³¹ ‘It grieves me that *so often* the media criticises the judiciary w/out [sic] opposition or response’;³² ‘Demanding, challenging but

²⁷ John Williams, ‘Of “Fragile Bastions”, “Political Judges” and “Robust Debates”: Judges and Their Critics’ in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 210, 212–5 (summarising the constitutional foundations of judicial criticism), 219–20 (discussing criticism of the impartiality, diligence and capacity of a judicial officer); Butler and Rodrick, above n 17, 444–5 (discussing the ‘right to criticise’ in the context of scandalising the court contempt). See especially Williams at 215, quoting *Coleman v Power* (2004) 220 CLR 1, 91 [230] (Kirby J). See also Chief Justice Bathurst, above n 2, 37; Justice Keane, above n 2, 307; Justice Steven Rares, ‘Politicians Attacking Judges’ (Media Release, 20 November 2015) <<http://www.jca.asn.au/wp-content/uploads/2013/10/JCA-Press-Release-20-November-2015.pdf>>.

²⁸ See Appendix.

²⁹ These quotes are from respondents to the National Survey of Australian Judges 2007. This data source is indicated by the code ‘NSAJ07 ####’ in which NSAJ07 identifies the Survey and the four-digit number refers to the individual interviewee. Quotations are provided verbatim, as written in the survey booklets, though any information which might identify a respondent has been removed. For more information on the surveys, see the Appendix.

³⁰ NSAJ07 1024.

³¹ NSAJ07 1095 (emphasis altered: underlined in original).

³² NSAJ07 1146 (emphasis altered: underlined in original).

interesting. Frustrating aspects are the ignorance of media and public about the role of judges'.³³

The first three comments speak only of the media and emphasise unfairness, negativity or criticism, while the fourth treats the public and media together and identifies the problem as ignorance, rather than negativity. All four express emotional responses: 'frustrating', 'grieves me' or 'gets me down'. The second and third comments also identify frequency as an aspect of the problem: that such criticism is 'consistently negative' or occurs 'so often'. However, each has slightly different reactions to their concerns. One recognises that criticism 'goes with the territory'; another finds that the judicial role is still interesting while a third tries not to think about it. Another implies that an opposing response would alleviate some of the harm done by criticism which may be unwarranted or proceed from ignorance.

Two judges use stronger language to describe the negative effects of criticism, identifying reduced satisfaction and loss of respect or status: 'The criticism of judges by the media and politicians over recent years has diminished the satisfaction of being a judge, and ... has demeaned a judge's status, and is a strong disincentive to accepting judicial appointment now';³⁴ '[r]ecent lack of respect for the separation of powers/judiciary/complexity & difficulty of our work & in fact constant ill-informed criticism by our political leaders & hence media & public, has made the job more intensely difficult & less satisfying'.³⁵

Each of these respondents sees the problem as criticism from politicians as well as media sources, which impacts on public opinion, and therefore diminishes the status of the judicial role, while increasing the difficulty of the work. These two judges also see this as a problem which is 'recent', or has occurred 'over recent years'. While 'recent' in 2007 is now 10 years ago, these comments indicate that the concerns expressed are not new.

A respondent to the 2002 Magistrates Survey also regards 'ill-informed media criticism' as a 'growing tendency', suggesting an even longer history of concern, before the advent of social media:³⁶ 'The most concerning feature of life on the bench is the growing tendency towards ill-informed media criticism of the judiciary, which I fear will eventually result in diminished community respect for the legal system and the judiciary'.³⁷

³³ NSAJ07 1253.

³⁴ NSAJ07 1261.

³⁵ NSAJ07 1133.

³⁶ This quote is from a respondent to the National Survey of Australian Magistrates 2002. This data source is indicated by the code 'NSAM02 ###' in which NSAM02 identifies the Survey and the three-digit number refers to the individual interviewee. Quotations are provided verbatim, as written in the survey booklets, though any information which might identify a respondent has been removed. For more information on the surveys, see the Appendix.

³⁷ NSAM02 113.

As well as regarding the judicial role and work as more difficult or less satisfying, a comment above suggests that this criticism is a ‘disincentive to accepting judicial appointment.’ Another judge suggests that it can also be a reason to leave the judiciary. In response to the question ‘What factors affect your planned retirement age?’, one judge lists four reasons, including ‘getting tired of the role & the opprobrium judges attract in the media’ and ‘the antipathy displayed by govt [sic] towards judges & courts’.³⁸

Although these experiences were described by a very small number of respondents, they were unprompted and suggest a range of possible effects of perceived personal, harsh or unwarranted commentary on judicial officers personally, and on the recruitment and retention of judicial officers.³⁹ Recently, Greg Reinhardt, Executive Director of the Australasian Institute of Judicial Administration (‘AIJA’), suggests that online criticism of judges ‘is distressing’ for judicial officers.⁴⁰

As well as a concern about generally and increasingly negative criticism, the more recent interviews identify a deeper lack of understanding on the part of the public about the role of courts. Interviewee 19 above states, ‘I’m not sure they really understand ... how things fit into the scheme of the justice system.’ One aspect of this lack of understanding has been the subject of public comment by Justice Keane, who writes of the importance of the ‘cold neutrality of an impartial judge’, citing Edmund Burke, and the need for ‘communicating the value of ... politically neutral professionalism ... [to] the broader community.’⁴¹ Empirical research suggests that a substantial proportion of Australians put a higher value on legal knowledge as an essential skill for the judiciary, ahead of impartiality, while nearly all judges and magistrates identify impartiality (and integrity) as essential for their work, well ahead of legal knowledge.⁴² This suggests that there is a need for improvement in public understanding of the value of judicial impartiality.

The interviews also reveal disagreement about the nature and extent of public criticism of the courts, and in particular, whether public criticism was becoming more problematic for the courts.

³⁸ NSAJ07 1017.

³⁹ Cf survey research in the United Kingdom which found that ‘[o]nly very small numbers of judges feel valued by the media (3 per cent or 46 of the 1559 judges who responded ... in the survey)’; see Cheryl Thomas, ‘2016 UK Judicial Attitude Survey: Report of Findings Covering Salaried Judges in England & Wales Courts and UK Tribunals’ (Report, UCL Judicial Institute, 7 February 2017) <<https://www.judiciary.gov.uk/wp-content/uploads/2017/02/jas-2016-england-wales-court-uk-tribunals-7-february-2017.pdf>>.

⁴⁰ G J Reinhardt, ‘Symposium: Challenges of Social Media for Courts & Tribunals’ (2016) 90 *Australian Law Journal* 542, 543. See also Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 10, who describes how ‘publicity’ in the media can be ‘distressing’ for judicial officers and courts.

⁴¹ Justice Keane, above n 2, 304; Justice Kenny, above n 2, 216.

⁴² Roach Anleu and Mack, above n 14, 14–7.

B Varied Perceptions about Public Attitudes

Unlike the views analysed in the section above, some judicial officers do not perceive a recent change in the frequency or nature of media and community criticism. One judge states: 'I think the expectation of the courts is, has always been a, there's always been a disconnect between, umm, what sometimes, umm, the press and the public call for [and] what we can do but I don't think that's new'.⁴³ Another interviewee comments:

I don't think that's changed. I think it's – no, I think, I was about to say it's more ill-informed than it used to be but I don't think, I don't think it's more ill-informed, I think it's continued to be uniformly, fairly ill-informed.⁴⁴

In contrast, others say they don't 'know whether there is more criticism' (I 9).

These differences in perceptions might be influenced by several factors. Some types of courts may receive more or less media coverage than others. One magistrate links the lack of media focus on the Magistrates Court to the 'lesser level' of crime heard in that court:

I mean the media focus has always been, or not always been but has been umm, if there is a focus, on adequacies of sentencing. ... You don't often get that in our court, you don't often get that criticism of inadequacy perhaps because we're dealing with a lesser level. We're not dealing with that, we're not dealing with that sort of category of horrendous or terrible crime, umm, and well we don't deal with that then the sentences that we impose are not usually open to criticism.⁴⁵

The geographic location of some courts may also affect media coverage. In one smaller jurisdiction, the local newspaper routinely publishes a photo of the face of the magistrate when reporting on a case. It is also likely that individual judicial officers experience criticism in different ways, perhaps reflecting previous experience with public or media engagement, either positive or negative. This difference between how individuals experience criticism is acknowledged by one judge in a comment in response to an open-ended survey question:

[there] is the constant tension one feels as a judge in the community because of the need for vigilance in relation to all aspects of behaviour. In my case, as a long term regional judge with a lot of community involvement and a large family, I am often asked in public places eg on the street, at the supermarket, about issues to do with my job. I do not find this stressful but some might. It is certainly not as acute in the city, however it is something that is often in my thoughts. My impression is that the community has a high regard for its judges and magistrates, and tends to significantly discount the negativity that is sometimes generated by

⁴³ I 36, Interview Transcript.

⁴⁴ I 20, Interview Transcript.

⁴⁵ I 17, Interview Transcript.

sections of the media. In relation to the media, I have served two long periods as a judge in a regional area served by a daily Murdoch tabloid and I have never felt victimised or unfairly treated by the papers. There are times when I feel their coverage of courts is superficial and overly simplistic, but I do not share the concern many judges feel about the effect of media coverage on public confidence in the judiciary.⁴⁶

This reflection contrasts with the experiences described by the judges in the section above.

Varied judicial views may also reflect different understandings of the judicial role and the extent to which criticism is acceptable or even legitimate. This is discussed more fully in Part III (D) below.

Another theme that arose was disagreement as to the extent to which media reporting and public opinion overlap. Like the survey respondent immediately above, some interviewees maintain that negative reporting is not indicative of public perceptions:

I think there's a perception that public views are what is written in the media and an acceptance that that's not necessarily so. Umm, what is written in the media is often the view of a small minority, umm, built up by a journalist to be the public's views, umm, and it's not necessarily so.⁴⁷

This response separates what is reported by the media from what the judicial officer thinks is believed by the public. This judicial officer describes reports as being 'the view of a small minority' or disconnected from a broader 'public'. This is a different conception of the relationship between the mass media — especially the print media — and public views to the one painted by the judicial officer (I 19) above.

The perception that actual public attitudes are not synonymous with the claims by mass media about public opinion, or that assertions of prominent individuals do not reflect wider public sentiment has been borne out in empirical research. Innovative research that relies on ex-jurors to ascertain public opinion finds that 'jurors, as informed members of the public, reach similar sentencing decisions as judges much more often than the populist view of public opinion suggests.'⁴⁸ When members of the public obtain information beyond that contained in sensationalist headlines and news stories, and when they are apprised of the details of actual cases, their assessment is closer to the judicial officer's decision and lacks the moral outrage reflected in media accounts, especially in relation to criminal cases.

⁴⁶ NSAJ07 1072.

⁴⁷ I 18, Interview Transcript.

⁴⁸ Kate Warner and Julia Davis, 'Using Jurors to Explore Public Attitudes to Sentencing' (2012) 52 *British Journal of Criminology* 93, 107. See also Kate Warner, Julia Davis, Maggie Walter and Caroline Spiranovic, 'Are Judges Out of Touch?' (2014) 25 *Current Issues in Criminal Justice* 729.

Some interviewees recognise that the task of reporting on courts and their work is sometimes difficult, and perhaps getting harder, as traditional media are losing resources to train journalists and to gather information independently.⁴⁹ For example, one judge comments that:

Trying to report something in a nutshell is what the media has to do, they can't report a summing up of three hours in three column inches but they do their best and I understand they're doing their best but they sometimes misrepresent either what the summing up was or what the judgment was or what the sentence remarks were because they're trying to distil it into a pithy phrase.⁵⁰

The analysis in the preceding two sections finds varied judicial perceptions about public attitudes generally and the role of the media in relation to courts and the public. While there is a strong view that media reporting is, at least sometimes, negative or sensational, this is regarded by some in the judiciary as not necessarily reflecting either media hostility or negative public opinion. However the 'media' referred to in these comments tends to be traditional print or broadcast media, with identifiable sources or authorship and available to public as a whole, such as newspapers, radio or TV. In contrast, some interviewees highlight the role of newer social media.

C Changes in Kind of Media

Several interviewees, from different levels of court, describe their experiences and perceptions that social media and the internet generally have led to less restrained commentary about courts and judges:

I went searching for that on the, via the net on the weekend and found some blogs that were absolutely scathing and very personal of me, umm, so I became aware of that. I don't spend a lot of time on the net but it is where people, people can express themselves, it's easier for people to express themselves and so I think it does follow that you are aware of that, umm, I don't know that it changes terribly much.⁵¹

the big change I suppose has been the internet where things can go out viral on the internet and there's no real ability to censor and to manage that.⁵²

Social media a real problem news about courts print, TV and online social media is out of control, there is no filter e.g. comments, blogs et cetera ... No facility to

⁴⁹ See also Moran, above n 1, 200–2; Sharon Rodrick, 'Opportunities and Challenges for Open Justice in Light of the Changing Nature of Judicial Proceedings' (2017) 26 *Journal of Judicial Administration* 76, 78–9, see especially n 22. A similar view is expressed by Chief Justice Marilyn Warren, 'Open Justice in the Technological Age', above n 2, 47–50.

⁵⁰ I 22, Interview Transcript.

⁵¹ I 30, Interview Transcript.

⁵² I 11, Interview Transcript.

filter, or police social media savvy youngsters think such comments are fair game without restrictions very dangerous.⁵³

These comments contain several different themes. First is the description or characterisation of the comments: ‘scathing’ and ‘personal’ suggest that some interviewees are particularly concerned about posts that go beyond justified or even rational criticisms of the process or outcome of a particular case, and so carry particular risks to individual judicial officers and to the legal system as a whole.⁵⁴ A second aspect, beyond the nature of the comments themselves, is the suggestion in the third quote that ‘such comments’ are now being normalised as appropriate commentary or ‘fair game’ on public figures or institutions, and that it is ‘easier for people to express themselves’ in these damaging ways. Frequent or sustained harsh and often anonymous commentary may generate desensitisation,⁵⁵ which could especially affect young people who are active on social media (the so-called ‘savvy youngsters’).

A third theme is the notion that the judicial officers themselves are now aware of certain kinds of comments about them, whereas, before the internet, they may not have realised how harshly some people felt toward courts or the judiciary. While some writers perceive a change in the nature or quality of attacks,⁵⁶ other commentators hold a different perception. Williams argues that ‘[t]he robust reflection on the courts or individual judges is by no means a new phenomenon.’⁵⁷ These mixed views are reflected in the point made by Interviewee 9 above: ‘I don’t know whether there is more criticism, but I think it is just voiced more.’ This judicial perception may be a consequence of social media.

This leads to a further theme: that such comments ‘can go out viral on the internet’ and so are now accessible to a much wider audience, while in the past, such comments might only have been made from one person to one or a few others, and perhaps

⁵³ Extract from interviewer’s notes for I 13.

⁵⁴ See, eg, Justice Rares, above n 28. In that media release, Justice Rares as President of the Judicial Conference of Australia argues that ‘personal and intemperate attacks on courts’ by politicians in response to an appellate decision on sentencing can ‘damage our democracy and public confidence in the rule of law’: at 1.

⁵⁵ See, eg, Steven Prentice-Dunn and Ronald W Rogers in Paul B Paulus (ed), *Psychology of Group Influence* (Psychology Press, 2nd ed, 2015) 87. The authors discuss theories of ‘deindividuation’, understood as a process where ‘antecedent variables [such as anonymity and group size] lower private self-awareness, and thus disrupt the process of self-regulation’: at 89.

⁵⁶ Sharon Rodrick, ‘Achieving the Aims of Open Justice? The Relationship Between the Courts, the Media and the Public’ (2014) 19 *Deakin Law Review* 123, 138–40; James Plunkett, ‘The Role of the Attorney-General in Defending the Judiciary’ (2010) 19 *Journal of Judicial Administration* 160, 160; Justice Kirby, above n 2, 599.

⁵⁷ Williams, above n 21, 210. Justice Sackville commented in 2005 that ‘[a]lthough some commentators bemoan the increasing incidence and intensity of attacks upon the judiciary, there is nothing novel about vehement or even vicious criticism of courts and individual judges’: Justice Ronald Sackville, ‘The Judiciary and the Media: A Clash of Cultures’ (2005) 27(1) *Australian Journalism Review* 7, 10–11.

only orally. This greater reach of harsh comments, the difficulty of responding with the same scope, and the potential for harm to public confidence in the courts is echoed by Sackville J who expresses the view that ‘what has changed is the effect that damaging comments can have’.⁵⁸ It is also possible that less notice of such comments is taken by some members of the public due to desensitisation; while some social media comments may ‘go viral’, they might not be long lasting.

Finally, several comments from interviewees identify the inability to ‘censor and to manage’, that the internet is ‘out of control’, and that there is ‘no filter’. The phrase ‘no filter’ can indicate, in line with earlier suggestions that the speakers themselves are less restrained by values of respect or deference, but the greater concern appears to be the inability of any external authority to control these kinds of attacks: there is ‘no facility to filter, or police, social media’.

D Judicial Perceptions of Public Criticism

Some interviewees express the view that criticism is an unavoidable aspect of being a judicial officer. According to one interviewee, ‘you know you’ve got to be robust when you’re a judge and recognise that people will criticise you and you’ve got to kind of rise above it and so on’.⁵⁹ Similarly, a magistrate comments: ‘I’ve got to have broad shoulders, it literally comes with the territory’.⁶⁰

These interviewees both use normative language to express a judicial officer’s obligation to be ‘robust’ to ‘rise above’ or to ‘have broad shoulders’ to carry the weight of negative comments. This expectation was also described by Chief Justice Robert French:

Well, of course it’s human nature perhaps for people to not enjoy criticism. On the other hand the judiciary, if you don’t have the capacity to, as it were, shrug off that kind of criticism and just say ... it’s like the weather, you know, it goes with the territory every now and again, it doesn’t happen very often, fortunately ... it goes with the territory and just get on with the job, then you really shouldn’t be in judicial office.⁶¹

This judicial acceptance of criticism might reflect an awareness of the limited ability for the judiciary to respond to criticism, even if that criticism is harsh, ill-informed

⁵⁸ Justice Sackville, above n 57, 11.

⁵⁹ I 11, Interview Transcript.

⁶⁰ I 30, Interview Transcript.

⁶¹ Damien Carrick, interview with Chief Justice Robert French (ABC Radio National, ‘Retiring Chief Justice Robert French’, *The Law Report*, 13 December 2016) <<http://www.abc.net.au/radionational/programs/lawreport/retiring-chief-justice-robert-french/8105828#transcript>>. See Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 11, who suggests that ‘[t]he most common, and sometimes the most advisable, approach to adopt in response to such criticism is to let it pass.’

or unjustified. If there is no realistic way to counter or respond, then being ‘robust’ and ‘rising above’ may be the best strategy.

On the other hand, some judicial officers’ acceptance of critical comment arises from a belief about the democratic right for people to criticise the courts and the judiciary.⁶² This may inevitably entail personal criticism of judicial officers individually, as they are the embodiment and public face of courts as legal institutions.

This is reflected by one interviewee:

Yes, yes, I mean there’s, maybe it’s part of the entitlement generation but there’s a sense that judges should explain themselves, the courts should umm, explain what they’re doing and shouldn’t be hurt or upset by criticism or call it unfounded or unfair that — and you know theoretically that’s absolutely right because courts are open to the public, confidence in the judiciary is a fundamental aspect of a strong democratic society.⁶³

Notwithstanding the acceptance suggested by this judicial officer, she goes on to emphasise the importance of engaging with the public in a positive way.

Overall, these judicial perceptions suggest several perspectives on the relationship between the public and the courts, and the role of the judiciary in a democracy. Judicial officers accept that commentary and (at least some) criticism of courts and judges is not a new phenomenon and is inevitable and even appropriate in a democracy. Interviewees also express the concern that public reporting of the courts’ work can be inaccurate, even aggressively so, and that members of the public are negatively influenced by that reporting leading to public attitudes about courts and the judiciary are misinformed and disrespectful. The changing media landscape raises particular concerns about the nature and reach of criticism, especially personal attacks.

These perceptions are regarded by some interviewees as contributing to an obligation or need for direct, positive communication with the various publics about their work and role.

IV INSTITUTIONAL RESPONSES TO PUBLIC CRITICISM

Whether public comments on the judiciary are unwarranted, ill-informed attacks or justified criticism inevitable for judicial officers as part of a key institution in a democracy, there is a judicial perception of a need to respond to criticisms by providing further information and explanation.⁶⁴ Some judicial officers appear to view criticism, especially when aggressive and unfiltered, as based on misinformation

⁶² See above n 22.

⁶³ I 15, Interview Transcript.

⁶⁴ Compare The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7].

or the absence of information regarding the nature of judicial authority, the working of the legal system and the role of judges.

The following comment suggests a long-standing need for a more positive focus to judicial communication in the public sphere: ‘I think there is an increased awareness amongst members of the judiciary to make sure that their decisions are understood and are explained — but I think that’s always been the case’.⁶⁵ This and earlier comments⁶⁶ indicate that some judicial officers believe that it is an institutional obligation to ensure that the work of courts and the judiciary is explained adequately. Bookman argues that community engagement ‘is an ethical obligation incumbent upon the judiciary’.⁶⁷ This duty is longstanding, reflecting principles of open justice and the importance of public confidence to judicial legitimacy and authority; it is also a response to perceptions of a changed media and public landscape.

Senior judicial officers are also promoting greater positive engagement with the public in light of social changes. Chief Justice Warren perceives that the changing ‘relationship between the courts and the media’ are among the ‘challenges driving the courts towards direct community engagement in order to preserve the operation of open justice’.⁶⁸ Similarly, Chief Justice Bathurst states:

the days when judges could speak solely through their judgments and expect the confidence of the community are ... gone. If judges do not take an active role in explaining what we do and why, criticisms of the administration of justice are likely to go unanswered and thus be accepted by many as unanswerable. Community confidence ... is too important to allow that to occur.⁶⁹

Whether the motivation to communicate with the public is from a positive sense of the judiciary’s duty to the public or to respond to criticism viewed as uninformed, communication from the judiciary to the public is perceived to be needed. This raises the question of how courts and the judiciary can or should respond to the media criticisms and alleged public concerns as well as to improve public knowledge more generally. Judicial officers interviewed identify three main sources for possible response: from the Attorney-General of the particular jurisdiction; from the courts as organisations, usually via the head of jurisdiction or a designated media representative; or from individual judicial officers themselves.

Justice Davies states that ‘in the past Attorneys-General defended the judiciary and their judgments against unjustified attack’.⁷⁰ Thomas regards this traditional role of

⁶⁵ I 12, Interview Transcript.

⁶⁶ See I 15, Interview Transcript, above n 63.

⁶⁷ Sam Bookman, ‘Judges and Community Engagement: An Institutional Obligation’ (2016) 26 *Journal of Judicial Administration* 3, 3.

⁶⁸ Chief Justice Marilyn Warren, ‘Open Justice in the Technological Age’, above n 2, 45.

⁶⁹ Chief Justice Bathurst, above n 2, 42.

⁷⁰ Geoffrey Davies, above n 7, 98; see generally Plunkett, above n 32.

Attorneys-General to respond to public criticisms as rising to the level of a constitutional convention.⁷¹ However, in 2002, then Commonwealth Attorney-General Daryl Williams stated that ‘it is up to the judiciary to take the lead in defending themselves and their courts against criticism’,⁷² indicating that this would no longer be his role. While this position was criticised within the judiciary as abdicating the Attorneys-General’s central responsibility for the justice system,⁷³ Davies J concludes that it is necessary to ‘accept that [the courts] can no longer rely on the Attorney[s]-General’ to defend the judiciary from public criticism.⁷⁴

Other traditional mechanisms of direct control — such as contempt of court or suppression orders — are used less often by the courts perhaps in part because they are regarded as less effective.⁷⁵ An interviewee comments that

towards the end of the twentieth century, largely as a result of the influence of Michael Kirby and Michael McHugh, the notion of contempt as a controlling mechanism for people who were critical of the judges has diminished. These days basically, people say what they like and there’s not much actual use of the law of contempt.⁷⁶

This shift might also reflect the current, more fragmented social and mass media landscape.⁷⁷ However, there has been legislation to formalise the powers of courts in the face of ‘disrespectful conduct’ in New South Wales,⁷⁸ and in June 2017, the

⁷¹ Thomas, above n 2, 131–3 [7.37]–[7.38].

⁷² Daryl Williams, ‘The Role of the Attorney-General’ (2002) 13 *Public Law Review* 252, 261.

⁷³ Geoffrey Davies, above n 7, 98; Thomas, above n 2, 132–3 [7.37]–[7.38].

⁷⁴ Geoffrey Davies, above n 7, 98.

⁷⁵ See for an overview Butler and Rodrick, above n 17, 245–308 (reviewing common law and statutory bases for courts to control what can be accessed and reported publicly), ch 6 (reviewing contempt of court law); see also Justice Beech-Jones, ‘The Dogs Bark but the Caravan Rolls On’, above n 2, 11 (describing these remedies as having ‘the potential to harm public respect for the Court in question not enhance it.’)

⁷⁶ I 21, Interview Transcript.

⁷⁷ See Reinhardt, above n 26, 543.

⁷⁸ Courts Legislation Amendment (Disrespectful Behaviour) Bill 2016 (NSW), inserting *Supreme Court Act 1970* (NSW) s 131, *Land and Environment Court Act 1979* (NSW) s 67A, *District Court Act 1973* (NSW) s 200A, *Local Court Act 2007* (NSW) s 24A, *Coroners Act 2009* (NSW) s 103A. See New South Wales, *Parliamentary Debates*, Legislative Assembly, 1 June 2016, 13–29; a litigant was charged with nine counts of a disrespectful behaviour offence for refusing to stand in the courtroom: see Ursula Malone, ‘Islamic State Recruiter’s Wife Moutia Elzahed Charged for Refusing to Stand in Court’, *ABC News* (online), 8 May 2017 <<http://www.abc.net.au/news/2017-05-08/isis-recruiters-wife-charged-for-refusing-to-stand-in-court/8508332>>.

Victorian Court of Appeal took the unusual approach of ordering three Federal Government ministers to appear in Court in relation to possible contempt of court.⁷⁹

The current practice of Attorneys-General not to respond to criticisms of the courts and judiciary, and the reduced utility of punitive measures or direct suppression, has led some in the judiciary, including some interviewees, to believe that the courts and perhaps even individual judicial officers need to take a more active role communicating with the public, whether directly or via social media.⁸⁰ As one interviewee describes:

the misinformation and the malicious attacks on members of the judiciary ... have been umm just outrageous and I've never seen anything like it before so, but that's extreme, that is strange government with a bad Attorney-General umm, but I, the other point that I made earlier about whatever government you've got, they've effectively let judges loose to speak for themselves, to protect themselves, that's you know, that holds whichever government you're talking about and that, that's a challenge. That's a challenge for judges because you know, judges, we're all trained to speak for our decisions and our reasons and umm, to be placed in a position where you're having to also respond to broader criticism or even engage in discussions publicly, engage in discussions about reform of the law. It's a bit problematic.⁸¹

This judicial officer alludes to the separation of powers and the ambivalent location of the judiciary: judicial officers are the crucial link between the law and those before the courts and are 'trained to speak for our decisions and our reasons' in particular cases. Yet it is 'a bit problematic' if they also must deal with 'broader criticism' or defend themselves. This judicial officer identifies the tension and expresses

⁷⁹ The Court of Appeal 'formed the view that there [was] a strong prima facie case' that the Ministers had committed contempt of court: Supreme Court of Victoria, 'Announcement of the Court of Appeal in Terrorism Matters' (Statement, 23 June 2017), 4–5 <<http://assets.justice.vic.gov.au/supreme/resources/ac9dfc82-53d2-4f75-b386-005b52447fce/statement+of+the+coa+in+dpp+v+mhk+and+dpp+v+besim.pdf>>. The Commonwealth Solicitor-General, on behalf of the Ministers, apologised and retracted the comments that constituted the contempt: at 4. The Court 'accept[ed] that the Ministers ... sufficiently acknowledged and accepted their contempt of Court and sufficiently purged the contempt': at 5; see also Lorraine Finlay and Joshua Forrester, 'Explainer: Why Three Government Ministers Might Face Contempt of Court Charges', *The Conversation*, 15 June 2017, <<http://theconversation.com/explainer-why-three-government-ministers-might-face-contempt-of-court-charges-79487>>. Justice Robert Beech-Jones, 'Grossly Improper and Unfair Attack on Victorian Judiciary' (Media Release, 13 June 2017).

⁸⁰ Compare similar comments from other judicial officers, eg, Chief Justice Bathurst, above n 2, 41–2; Chief Justice Marilyn Warren, 'Open Justice in the Technological Age', above n 2, 56–7; Justice Geoffrey L Davies, above n 7, 89–90, 93–6.

⁸¹ I 37, Interview Transcript.

discomfort at the potential compromise of the judicial role as separate from the executive and legislature and its political and policy roles. Judges commenting on policy might be regarded as indicating partiality or bias.⁸²

Given the limited role of Attorneys-General in responding to criticisms and concerns about individual judges engaging in public communication, the court as an organisation must itself take a key role in public engagement and communication, as one judicial officer points out: ‘The courts generally, here in [this state] particularly, have tried to reach out and communicate their role more effectively so that people are much more accepting of the, or understanding of the court’s role and how it operates’.⁸³ This comment demonstrates the assumption that communication about the role and work of courts is directly related to public understanding.

Interviewees identify a number of strategies courts undertake. These include publication of decisions, including summaries of judgments and detailed sentencing remarks, and providing general information about the court in a range of formats, including websites, as described by a magistrate: ‘we now publish on the website decisions that magistrates have made to try and encourage an understanding of why a decision’s been made and the public has access to that’.⁸⁴ More rarely, courts may publish a media release in response to a news article.⁸⁵

The interviewee’s comment above and the one below suggest a positive function of the internet and social media is to enable public access to the court’s actual work, rather than being limited to reports generated by others, through whatever media, which will inevitably be filtered:

I’m all in favour of people having access to, umm, information about sentencing, about judgments. I like the idea that people can look at it, umm, because I think, until recently, people were reliant on what little got printed in the press and now they can go and have a look if they, if they’re so, if they’re interested enough in it, umm. So I, I don’t find that a problem, I think it’s actually a very good thing.⁸⁶

‘Unfiltered’ reporting of court proceedings is sometimes allowed through media in court (including still or TV cameras, live Twitter or other social media feeds

⁸² The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7.1]; Thomas, above n 2, 120–3 [7.18]–[7.21].

⁸³ I 25, Interview Transcript.

⁸⁴ I 12, Interview Transcript.

⁸⁵ See, eg, Chief Justice Michael Grant, ‘Statement in Relation to Youth Sentencing’ (Statement, 20 January 2017) <<http://www.supremecourt.nt.gov.au/documents/2017-publications/Statement%20in%20relation%20to%20Youth%20Sentencing%20-%20NTSC%20website.pdf>>.

⁸⁶ I 36, Interview Transcript.

or platforms). These approaches have generated considerable discussion.⁸⁷ Live media activity making court proceedings available in real time has been limited in Australia, though some courts upload video recordings of court proceedings for later use.⁸⁸ Many courts now use a variety of social media platforms to communicate with diverse publics.⁸⁹

A more conventional approach to providing general background information about how courts work are court open days, which often involve tours of court premises and the presence of judicial officers and other court staff to meet with members of the public. One judge describes this as a very positive experience:

I like talking about the work in a general sense because I want people to know what we do and because I'm proud of what I do and I don't think we should be hiding it, I think we should be telling people what we do and most people are very interested — like genuinely interested — we have an Open Day here in the Court usually every year, I don't think we've had it this year but we have it — and I'm a tour leader and we get into the court and people ask you and I say to them, 'you can ask me any question that you like, I can't talk about specific cases but

⁸⁷ See Andrew Henderson, 'The High Court and the Cocktail Party from Hell: Can Social Media Improve Community Engagement with the Courts?' (2016) 25 *Journal of Judicial Administration* 175 (studying Twitter comments on two High Court of Australia matters); Marilyn Bromberg and Andrew Ekert, 'Haters Gonna Hate: When the Public Uses Social Media Comment Critically or Maliciously about Judicial Officers' (2017) 26 *Journal of Judicial Administration* 141 (studying government and business responses to critical or malicious social media comments); Marilyn Krawitz, 'Stop the Presses, But Not the Tweets: Why Australian Judicial Officials Should Permit Journalists to Use Social Media in the Courtroom' (2013) 15 *Flinders Law Journal* 1 (arguing that courts 'should release a standard policy that permits journalists to use social media in the courtroom' at 3); Alysia Blackham and George Williams, 'Social Media and the Judiciary: A Challenge to Judicial Independence?' in Rebecca Ananian-Welsh and Jonathan Crowe (eds), *Judicial Independence in Australia: Contemporary Challenges, Future Directions* (Federation Press, 2016) 223 (studying the Supreme Court of Victoria's use of Twitter).

⁸⁸ See, eg, the High Court of Australia, which upload videos of Full Court hearings: <<http://www.hcourt.gov.au/cases/recent-av-recordings>>; the Supreme Court of Victoria uploads audio recordings of some sentences and judgments: <<http://scvwebcast.com/sentences/#>>; the Federal Court of Australia uploaded video recordings for 21 judgments between 2000 and 2013: <<http://www.fedcourt.gov.au/digital-law-library/videos>>.

⁸⁹ See generally Butler and Rodrick, above n 17, 310–19 (summarising how courts and media have reported on court proceedings); Pamela D Schulz and Andrew J Cannon, 'Trial by Tweet? Findings on Facebook? Social Media Innovation or Degradation? The Future and Challenge of Change for Courts' (2013) 5(1) *International Journal for Court Administration* 9; Marilyn Krawitz, 'Summoned by Social Media: Why Australian Courts Should Have Social Media Accounts' (2014) 23 *Journal of Judicial Administration* 182.

you know just ask me questions' and a lot of people are very, very curious and very, you know, respectful of what you do.⁹⁰

This interviewee describes the apparent respect manifested by those who are interested enough in courts to attend open day, compared with the views expressed above about the loss of respect for courts and judges, especially linked to (often anonymous) material on social media. Of course, activities like open days depend on members of the public taking the initiative to attend. Such a program may not reach those members of the community who are harshly critical of the courts or the judiciary, whether for lack of information or any other reason.

In most courts, strategies for media communication or public engagement are overseen or coordinated by a designated professional media liaison officer.⁹¹ This initiative is consistent with Parker's recommendations to promote better communication between courts and the public⁹² and is supported at a national level by the AIJA.⁹³ However, the limits of the liaison role and the broader strategy are indicated by one interviewee:

We do have a Media Liaison Officer who works with [the courts] and you'll get requests for judgments and I'm happy to oblige, umm, but we don't have an arrangement with the media that's satisfactory in educating the media as to what is important and what's not and what they might be more interested in or what they should report upon and what they shouldn't report upon and things like that.⁹⁴

This comment suggests a perceived need for a more proactive strategy by courts to engage the media so that coverage can be shaped, to the extent possible, to reflect

⁹⁰ I 06.

⁹¹ Thomas, above n 2, 131; see, eg, in the Federal Court of Australia, 'The Director, Public Information deals with enquiries about cases and issues relating to the Court's work from media throughout Australia and internationally. These predominantly relate to the timely provision of judgments and guidance on how to access court files': Federal Court of Australia, *Annual Report 2015–2016* (2016). In South Australia, 'The Media and Communications Office [of the Courts Administration Authority] has corporate responsibility for media liaison and community based activities that are intended to improve public understanding of the role and work of the courts': Courts Administration Authority of South Australia, *For Media* <<http://www.courts.sa.gov.au/ForMedia/Pages/default.aspx>>.

⁹² Parker, above n 1, 164.

⁹³ See, eg, through the organisation of regular conferences including AIJA Public Information Officers' Conference *Social Media and the Courts* (13–14 June 2013, Sydney) and *The Implications of Social Change on the Courts* (23–24 October 2014, Melbourne); AIJA Court and Legal Industry Media Officers' Conference, 19–20 November 2015, Adelaide; AIJA Court Media Officers' Conference, 4–5 August 2016, Brisbane; AIJA Court Media Officers' Conference, 31 August – 1 September 2017; see Reinhardt, above n 26 (summarising the 2016 conference).

⁹⁴ I 22, Interview Transcript.

what the court regards as important or, alternatively, should not be reported. It also indicates that strategies implemented by courts as institutions still depend on communication from individual judicial officers, whether in producing the decisions which go on the websites, meeting with members of the public on open days or other events, or even speaking to the public through public or social media.

V INDIVIDUAL JUDICIAL OFFICERS' PUBLIC ENGAGEMENT AND COMMUNICATION

The importance of effective communication about specific judicial decisions, as well as about the work of the court more generally, as a route for the judiciary to enhance public confidence is reflected in some interviewees' comments. These are direct accounts of how judicial officers might try to communicate to the public in their work. They reflect the challenge of remaining impartial while also trying to satisfy a perceived duty to provide a public explanation of the work of the court.

They identify a range of strategies available to individual judicial officers to communicate directly with some public audiences, either in relation to specific cases or more generally about the role of judges and the work of the courts. Most traditional is through delivering decisions orally in courts open to the public or through written judgments which are publicly available. Presentations by judicial officers to schools, community groups or professional associations are another form of public communication. More controversially, judicial officers can make statements individually through conventional or social media.⁹⁵

A Writing and Delivering Decisions

The usual method of judicial communication with the public is making statements in open court in relation to specific cases, and oral or written statements of reasons. For example, Martin CJ supports judicial education programmes which teach judicial officers to 'writ[e] decisions which communicate effectively to a variety of audiences including the public ... in a structured, clear and concise way.'⁹⁶ Chief Justice Martin believes that such programmes maintain or increase public confidence

⁹⁵ The Council of Chief Justices of Australia and New Zealand, above n 3, ch 9; see Justice Beech-Jones, above n 2, for a discussion of the shift from limited public comment by judges under the *Kilmuir Rules* to recent controversies where judicial officers and tribunal members made public comments; see also Margaret McMurdo, 'Should Judges Speak Out?' (Paper presented at the Judicial Conference of Australia Colloquium, Uluru, April 2001) <<http://jca.asn.au/wp-content/uploads/2013/11/mcmurdo.pdf>>.

⁹⁶ Chief Justice Wayne Martin, 'Judicial Education' in *Australian Courts: Serving Democracy and its Publics* (Australasian Institute of Judicial Administration, 2013) 81, 85.

because they ‘have a direct impact on how the judiciary interacts with and responds to the community’.⁹⁷

Several interviewees note that possible attention from the public or the media can affect how judicial officers craft the language in their remarks and decisions:

In my case it affects me only from the point of view as where in a general list I just hear what I’ve got to hear and give a sentence straight away. If I’m aware that it may be going to attract media attention, doesn’t change what I’m going to do but it does change how I phrase it and if I don’t believe I can just do it off the cuff like I would normally do, I’d come off the bench for ten minutes, put down some points to make sure that I cover those areas and I probably, in decisions for that, cover areas that I wouldn’t normally, that I think might be going to be made public so that in an attempt to get the public to understand or what was before me, umm, but in terms of what I do I don’t pay too much attention.⁹⁸

This comment suggests a broad understanding of who the audience is for court decisions.⁹⁹ This interviewee is aware of speaking to a wider public audience, as well as specific defendants in court. These wider audiences may get information from various sources — the media, the internet, blogs, even people texting or tweeting from within the courtroom — so it is especially important that the court communicate accurately and completely. This magistrate is very clear that anticipating that a decision may attract media and public interest affects only the manner of delivering the decision, not the outcome.

The comment below also identifies the need for clarity in written judgments:

Change in language and, and perhaps, umm, time because more time has to be given. I think reasons can be longer because they need to be, because of, because of that problem and I also think that there is a, a change in the style of writing. It’s simpler, language is simpler and less complex as a whole than it used to be in judgments. I’m hoping that’s the case.¹⁰⁰

This judicial officer suggests simpler language is needed to effectively communicate a decision. This may improve communication with the parties, assist public understanding of a written judgment, and enhance journalists’ understanding of cases and their capacity to report on them.

⁹⁷ Ibid; see, eg, High Court of Australia, *2017 Judgment Summaries* (21 June 2017) <<http://www.hcourt.gov.au/publications/judgment-summaries/2017-judgment-summaries>>.

⁹⁸ I 17, Interview Transcript.

⁹⁹ See Ryan C Black et al, ‘The Influence of Public Sentiment on Supreme Court Opinion Clarity’ (2016) 50 *Law & Society Review* 703, 703–4 (arguing that ‘when justices [of the United States Supreme Court] anticipate public opposition to their decisions, they write clearer opinions’).

¹⁰⁰ I 38, Interview Transcript.

Some judicial officers remark on the need for ‘care’ or to be ‘careful’ in delivering a decision or writing a judgment, perhaps to limit criticism:

I think people [judicial officers] now are probably quite careful and guarded about what they say. Umm, I don’t think that’s necessarily a negative thing, that you’re guarded and you don’t let fly with your own personal views which I know has happened in the past.¹⁰¹

I think that as a group we’re more mindful of the fact that things — that care needs to be taken in the way in which matters are expressed and, and the sensitivity with which the reasons are given.¹⁰²

This is not necessarily a recent reaction, as a respondent to the 2007 National Survey comments that he writes ‘more comprehensive and time consuming reasons’ due to ‘increased public, media [and] political scrutiny’.¹⁰³

These comments show how perceptions of public concern influence individual judges’ understanding of their role, ensuring their decisions are communicated in an informative and clear way.¹⁰⁴ By suggesting that ‘personal views’ need guarding and more control, Interviewee 35 implicitly distinguishes them from an impersonal law. Interviewee 38 goes further and highlights the importance of sensitivity when giving reasons, perhaps acknowledging the emotionally dense nature of the proceedings and the need to avert emotional outbursts or distress among victims or defendants when hearing the decision.¹⁰⁵ This discussion of the manner of communication contrasts the public as personal and emotional, with the judiciary as impartial, impersonal and emotionless.

The desire to be guarded might be a reaction to past controversies, to avoid criticism, whether warranted or undeserved. Being careful may also reflect a more positive goal of emphasising the impartiality and detachment of the judicial role. Others interviewed took the view that they do not even know if a journalist is in the room, suggesting that this would make no difference to their communication. In contrast, one interviewee claims that judicial officers may deliberately write in such a way as to get the attention of the media:

There are some members of the judiciary who would be accused of playing to the media. To, umm, you know fashioning sentencing remarks you know, to have a few catchy phrases in there or you know to give the media the grab that they’re

¹⁰¹ I 35, Interview Transcript.

¹⁰² I 38, Interview Transcript.

¹⁰³ NSAJ07 1133.

¹⁰⁴ Thomas, above n 2, 31–33; Davies, above n 7, 97–8.

¹⁰⁵ This kind of concern is reflected in the *Conduct Guide*’s guidance on avoiding causing hurt: The Council of Chief Justices of Australia and New Zealand, above n 3, 21 [4.8].

looking for so umm I think the media plays a significant role in relation to what we do and the way we do it.¹⁰⁶

This could suggest a fairly proactive approach to soliciting the media's attention; rather than just waiting to see what the media selects, some effort is made to shape what might be reported and how. Framing this as something a judicial officer would be 'accused of' implies that this interviewee does not approve of such a strategy, perhaps regarding it as inappropriately attention seeking.

While a desire to enhance public confidence may affect the style or nature of language adopted when judicial officers communicate decisions, interviewees are quite firm in asserting that there is no change in the substance or content of decisions in response to perceived media attention or public pressure. According to one magistrate quoted above: 'media attention doesn't change what I'm going to do' (I 19). Another interviewee, also quoted above, expresses a similar view about the judiciary more generally: 'I don't think that judges are become, are, umm, politicising their judgments to avoid the [local newspaper's] condemnation'.¹⁰⁷

This judge appears to indicate that judicial decisions are not changing in substance to reflect press condemnation that is perceived as political.

Another judicial officer expresses a similar view and gives a more detailed explanation, articulating a very specific view of the role of the judiciary:

I think public opinion ought to drive the politicians who then set the laws and the plain fact of the matter is at the moment with [the sentencing act] which I have to apply — there are certain things in that, for example, which says imprisonment is absolutely a penalty of last resort. Now that is a law fixed by the politicians elected by the people and if, you know, public opinion starts, umm, starts changing a bit and people are anti-bikies or anti — the laws will change in due course. For our part we simply apply what's there, umm, I don't think magistrates respond to, and judicial officers generally, respond to public opinion.¹⁰⁸

In this comment, the judicial officer adopts a formalistic view of the judicial role and separation of powers: 'we simply apply' the law and do not 'respond to public opinion'. Public attitudes and opinion can be a force for social change but are to be directed at the legislature, not the courts.

Another interviewee points out the limited nature of the judicial role, and the different roles of the executive government and the legislature, more bluntly:

¹⁰⁶ I 35, Interview Transcript.

¹⁰⁷ I 38, Interview Transcript.

¹⁰⁸ I 30, Interview Transcript.

I don't think we should be responsive to community expectation. I think we should just be imposing the law and it's up to the government to make sure the law reflects community expectations, if that's important to them.¹⁰⁹

On this view of the judicial role, the only legitimate basis for responding to public expectations is by applying the law as enacted by a democratically elected legislature and administered by the executive under Australia's constitutional principles of government. This emphasis on the separation of powers and the distinct nature of judicial power is echoed in other judicial commentary. For example, Keane J argues that judicial 'professionalism ... is the basis for our claim to legitimacy',¹¹⁰ making decisions based on 'the rational application of predetermined laws to facts found on evidence adduced by the litigants in open court.'¹¹¹

B Engagement and Communication Outside the Courtroom

In addition to communicating with the public through judgments or other explanations in court, judicial officers may be active in or make presentations directly to professional or community groups.¹¹²

In the National Surveys, judicial officers were asked whether, since their appointment, they had or had not been a member of or engaged in community, professional and/or social associations (including business interests). Over one-half of magistrates and two-thirds of judges responded that they had been a member of or engaged in these associations. Survey respondents who indicated that they were a member of or engaged in an association were then asked to indicate the types of associations they were involved in. Almost all respondents who answered yes to the first question provided these further details, which were then categorised by research staff according to common responses and themes. The most common kinds of associations were professional associations, such as bar associations, law societies, and judicial associations, followed by organisations related to work as a judicial officer, such as in relation to victims of crime or Indigenous justice. While these associations are important audiences for the judiciary to engage with, they are likely to entail a familiar kind of legal knowledge and communication. Judicial officers involved in these organisations are not necessarily directly interacting with people outside the legal sphere, unless that occurs through the association's activities, such as where a law society might inform the public about the court system. In addition, similar though slightly fewer numbers of judicial officers were engaged in a variety of sporting, social, or health and welfare associations. The diversity of these associations suggests the many different publics with which a judicial officer might engage or communicate.

¹⁰⁹ I 34, Interview Transcript.

¹¹⁰ Justice Keane, above n 2, 314.

¹¹¹ Ibid 307; see also Justice Kenny, above n 2, 216–7.

¹¹² The Council of Chief Justices of Australia and New Zealand, above n 3, 31 [6.5], 33–4 [6.11]; see also Thomas, above n 2, 110–25 [7.1]–[7.27].

A further issue raised in the surveys was whether the respondent had been a board member of any of these associations since his or her appointment as a judicial officer. Of those who indicated membership in an association of some kind, about half of the magistrates and about two-thirds of the judges had undertaken board responsibilities.

Membership or engagement with these associations is likely to involve direct interaction with a variety of members of the community. Judicial involvement in these kinds of activities, and the people with whom the judiciary engages in those contexts, were explained more fully in the interviews. An interviewee states,

judges have become more involved I think as you know members of non-profit boards and so on, obviously not a profit making organisations but you know chairs of school councils or universities and councils and so on and that inevitably brings them a little bit closer into the public and the public gaze and involvement in public affairs and so on and I don't think that's a bad thing but it is — but what we've got to learn are the new dynamics, the new etiquette about how to run that process and what's acceptable and what's not and where to draw the line.¹¹³

While this judge may approve of greater judicial involvement with the public, it is also important to maintain certain boundaries, to affirm a judicial distance and to know when and how to limit dealings with the public. Useful engagement can also occur much more informally, outside of specific roles or presentations:

you know judges were very much I think separated from the community but judges are no longer separated from the community. You know lots of people are very surprised — you know when I — I meet people socially and maybe they asked me what I do and I always told them what I do, I never say oh I'm in the law or something ambiguous, I tell them I'm a judge and they're amazed you know because I don't think they expect, people in the community expect to see judges, you know, at a footy game or, you know, at a party, and most people are very interested in the work that judges do.¹¹⁴

The stereotype of judges being out of touch may be apparent in the surprise expressed when a judge is seen to be participating in ordinary activities. This judge notes that, in his experience, the response is generally one of interest rather than the extreme disrespect experienced in social media described by some judges.

Activities of individual judicial officers engaging directly with the public can be part of a wider court communication strategy.

I think just generally the community engagement that the court's doing is a, the court's a lot more active, umm, I mean there's been individual magistrates who are, who've always been active, there's some, always been some great people who are reaching out into the community, umm, but again it's been a bit ad hoc

¹¹³ I 11, Interview Transcript.

¹¹⁴ I 06, Interview Transcript.

and I think as an institution it's kind of a bit more recognised now that that's part of what we do, umm, so it, there's more of it.¹¹⁵

Another possible avenue of judicial engagement with the public is through public speeches. A recent review of judicial speeches indicates that presentations are given largely to judicial or legal audiences at conferences, bar or law society functions, law schools or as an invited lecture or launch of a law book or journal.¹¹⁶ While these may be formally open to a more general public, the audiences generally will be primarily legal or judicial and will not entail communication and expression tailored for a wider and legally uninformed public.

C Making Statements via Media

Concern about negative public or media statements, and the failure of Attorneys-General to respond to criticisms in the ways that some judicial officers would like, has led to an expectation that judicial officers individually and collectively should respond to criticism. However, others point out that '[t]here is little scope for judges to reach out individually to the broader community.'¹¹⁷ This is reinforced by clear statements in ethical guides limiting judicial participation in public debates.¹¹⁸

¹¹⁵ I 16, Interview Transcript.

¹¹⁶ The authors reviewed the presentations listed under each Justice of the High Court of Australia: High Court of Australia, *Speeches by Current Justices* <<http://www.hcourt.gov.au/publications/speeches/speeches-by-current-justices>>; The authors also reviewed the presentations listed under each former Justice of the High Court of Australia: High Court of Australia, *Speeches by Former Justices* <<http://www.hcourt.gov.au/publications/speeches/speeches-by-former-justices>>; see also Federal Court of Australia, *Annual Report 2016–17*, 167–88 <http://www.fedcourt.gov.au/___data/assets/pdf_le/0013/46210/Annual-Report-2016-17-v2.pdf>.

¹¹⁷ Justice Keane, above n 2, 311; see also Lee, above n 17, 291–2.

¹¹⁸ This norm is implied in media releases by the Judicial Conference of Australia, which occasionally describes personal criticism of judicial officers as unfair, in part, because the judicial officer cannot respond. See, eg, Judicial Conference of Australia, *Media Release by the Hon Justice Steven Rares: Personalised Campaign against District Court Judge Should Cease* (26 February 2016) <http://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_36-Personalised-attack-on-judge-26-Feb-2016.pdf>; Judicial Conference of Australia, *Media Release by the Justice Robert Beech-Jones: JCA Condemns Attack on Justice Kerr* (17 May 2017) <http://www.jca.asn.au/wp-content/uploads/2013/10/P18_01_48-Media-release-JCA-Condemns-Attack-on-Justice-Kerr-May-2017.pdf>. See Justice Beech-Jones, 'The Dogs Bark but the Caravan Rolls On', above n 2, 2 (tracing the norm from the Kilmuir Rules to its evolution into the Australian *Guide to Judicial Conduct* [5.6]). In England and Wales, several judicial officers (mostly magistrates) have been disciplined, including through removal from office, for inappropriate interactions with the media. See, eg, Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mrs Amanda Cornick JP* (14 October 2014) ('wrote to a national newspaper and spoke on a radio programme phone-in, detailing a particular case that had been before her, which could have easily identified the defendant'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Abid*

Any moves for a greater judicial public engagement must confront the ambiguous and limited judicial role in direct public communication outside the courtroom. The leading sources of ethical guidance for the Australian judiciary, the *Guide to Judicial Conduct*¹¹⁹ and Thomas' *Judicial Ethics in Australia*,¹²⁰ both express the general view advising caution for individual judicial officers and emphasising the role of the Chief Justice or other head of jurisdiction to speak publicly for the court.¹²¹

Some interviewees also agree that public communication, while accepted as necessary, is a distinct role for the head of jurisdiction:

I think the big difference has been, umm, an acceptance of having to engage with the public and explain the court processes rather than simply feel unfairly criticised and beleaguered so your Heads of Jurisdiction doing interviews, umm, and talking about the court and the work, the work of the court, has been a big change.¹²²

Other judicial officers have identified particular concerns about the propriety or limits of judicial officers speaking directly to the media or the public:

Sharif (29 July 2014) (making 'comments . . . in the press about the police and the justice system'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Richard Page JP* (9 March 2016) (for 'comments on national television [that] would have caused a reasonable person to conclude he was biased and prejudiced against single sex adopters'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Mr Abul Hussain JP* (3 February 2016) (resigned 'following an investigation into an allegation that he had posted racist and anti-Semitic comments on social media'); Judicial Conduct Investigations Office, *Statement from the Judicial Conduct Investigations Office: Recorder Jason Dunn-Shaw* (11 April 2017) (investigated 'for using a pseudonym to post comments (some of which were abusive) on a newspaper website about a case in which he had been a judge and another in which he had been a barrister. In his own name he also used publically [sic] available social media sites to post material or not remove material which was not compatible with the dignity of judicial office or suggested a lack of impartiality on matters of public controversy'); see Judicial Conduct Investigations Office, *Disciplinary Statements* (2017) <<https://judicialconduct.judiciary.gov.uk/disciplinary-statements/2017/>>.

¹¹⁹ The Council of Chief Justices of Australia and New Zealand, above n 3.

¹²⁰ Above n 2.

¹²¹ The Council of Chief Justices of Australia and New Zealand, above n 3, 25–6 [5.7.1]; Chapter 9, which was added to the 3rd edition of the *Guide to Judicial Conduct*, advises particular caution in judicial use of social media even for private or personal communication; see also Thomas, above n 2, 134–5 [7.40]; see also Chief Justice Marilyn Warren, 'Judges Don't Spin' (Speech delivered at the Melbourne Press Club Luncheon, Melbourne, 16 April 2010) <<http://www.supremecourt.vic.gov.au/contact-us/speeches/judges-dont-spin>> 10.

¹²² I 15, Interview Transcript.

I think it's pretty dangerous for us to be making comments about what we consider the community expectations to be — I think that's more of a political thing than for us, other than, you know the prevalence of a particular type of offending which really isn't much to do with community expectation.¹²³

Another magistrate comments:

In doing that it's somewhat peculiar in that it's not so much changing to what people's — they think people, the system thinks people's [sic] expectations are but it's trying to influence expectations so it can continue in its way and have community accept it for what it is rather than adjust its practices to meet community expectations.¹²⁴

These two comments emphasise the distinction between a) the courts making statements about what community expectations are or should be, a role for which they are not constitutionally or practically suited; and b) the ability of the courts through communication to inform public expectations, so that there is a better understanding of the role of the courts, and so to reducing illegitimate pressure on the court to 'adjust its practices to meet community expectations'.

In part because of this concern about the propriety of individual judicial officers speaking to the media, especially in relation to a particular case or controversy, some judicial officers have chosen to communicate with the media through professional associations. For example, one of the explicit objectives of the Judicial Conference of Australia is '[i]nforming the community about the proper role of the judiciary and the significance of an independent judiciary'.¹²⁵ To meet this goal, the Judicial Conference of Australia has commissioned and published reports¹²⁶ as well as issuing press releases commenting on various controversies involving the judiciary.¹²⁷

The role of the Judicial Conference of Australia is somewhat distinctive, as it responds very directly to specific criticisms. In contrast, most of the views expressed above about judicial communication with (or through) the media, either from individual judicial officers or heads of jurisdiction, are framed more in terms of general public information.

¹²³ I 34, Interview Transcript.

¹²⁴ I 25, Interview Transcript.

¹²⁵ Judicial Conference of Australia, *About Us* (2017) <<http://www.jca.asn.au/about-us/>>. According to its website, the JCA 'is the representative body of the Australian judiciary', comprising about 700 members, drawn from serving and retired magistrates, judges, masters and judicial registrars.

¹²⁶ See Judicial Conference of Australia, *Reports & Publications* (2017) <<http://www.jca.asn.au/reports-and-publications/>>.

¹²⁷ Judicial Conference of Australia, *Media Statements* (19 May 2017) <<http://www.jca.asn.au/media/>>. See, eg, above nn 21, 30, 50, 70.

VI CONCLUSION

Public confidence is seen as essential to the effective functioning and even the legitimacy of judicial authority. Judicial officers express a variety of views about public opinion in relation to courts and the judiciary. Some express concern about harsh public criticism, and possible loss of public confidence. Others recognise that a wide range of public comment on institutions of government is an essential aspect of a robust democracy in a changing media context; unwarranted criticism, or even personal attack, may be an unavoidable consequence. These varied views are reflected in the different ways courts and individual judicial officers do, or do not, communicate with different publics, especially in response to criticism which is perceived as unjustified.

At the same time, the interviews suggest an overall judicial perception that public attitudes rely on information. An absence of accurate information or worse, wide circulation of inaccurate claims, may negatively affect public confidence. The remedy for this problem is perceived by judicial officers to be more and more accurate information. They believe that providing accessible, reasoned information about specific judicial decisions, and about the work of the court generally, is an important route for the judiciary to enhance public confidence.

The challenge, as understood by the judiciary, is how to communicate the ways courts work and the central values and processes of the judicial system that do, or should, matter to the public. They believe that such communication can resist unjustified or personal attacks, respond appropriately to justified criticism and enable informed public debate.

These views reflect the fundamental commitment of the judiciary and the legal system to impartiality, rationality and the evaluation of evidence as core values. While this commitment may seem quaint or even archaic in the current ‘post-truth’ era,¹²⁸ these judicial and legal values are central to the legitimacy of the courts as a key democratic institution. Courts and the judiciary must develop ways to communicate effectively to diverse publics via varied media, if they are to engage effectively with the new public spheres where opinions and attitudes are formed and disseminated.

VII APPENDIX: RESEARCH METHODS

This article draws on data developed through extensive national studies as part of the Magistrates Research Project and the Judicial Research Project of Flinders

¹²⁸ See, eg, Oxford Dictionaries, *Word of the Year 2016* (2017) Oxford University Press <<https://en.oxforddictionaries.com/word-of-the-year/word-of-the-year-2016>>.

University.¹²⁹ Data from two particular phases of the research are used in this article: interviews of judicial officers and the national surveys.

A National Interviews

The 38 interviewees include judicial officers from all levels of courts in every state and territory and CBD and regional locations (but not Commonwealth courts). Interviews ranged in length from 25 minutes to one hour 33 minutes; the average length of interview time was 53 minutes (median 51 minutes). Nineteen of the interviewees are men and nineteen are women. Seventeen of the interviewees are magistrates (ten women, seven men); the others are judges (nine women, twelve men). Interviews were audio-recorded, then transcribed within the Project to maximise accuracy and confidentiality. A second staff member checked the transcripts against the audio files. Two interviewees did not consent to the interview being recorded. Detailed notes were taken by the interviewer during these interviews and elaborated on and typed up by the interviewer immediately after the interview. All interviews have been anonymised and all identifying information removed.

The material used in this article generally came when interviewees were asked about awareness of public attitudes and confidence and media in relation to the courts, as part of a general question about possible changes in expectations for the judiciary.

After careful initial readings of the interview transcripts, categories or themes ('codes') were developed and entered into NVIVO 10 for analysis of perceptions of judicial and court engagement with various publics/audiences. As an additional check, to ensure all relevant parts of the transcripts were identified, keyword searches were undertaken across transcripts for words such as 'public', 'community', 'media', 'internet' etc. All identified text was then carefully re-read and compared against other text to locate additional emergent subthemes and patterns, as reflected in the structure and analysis in this article.¹³⁰

¹²⁹ Funding for the research on which this paper is based includes: a 2001 University-Industry Research Collaborative Grant with Flinders University and the Association of Australian Magistrates ('AAM') and financial support from the AIJA; an Australian Research Council ('ARC') Linkage Project Grant (LP0210306) with AAM and all magistrates courts; and three ARC Discovery Project Grants (DP0665198, DP1096888, DP150103663). We are grateful to Rhiannon Davies, Colleen deLaine, and Rae Wood for their contributions to this paper and to other research and administrative assistants over the course of the Judicial Research Project. All phases of this research involving human subjects have been approved by the Flinders University Social and Behavioural Research Ethics Committee. Further information about these Projects is available on the Judicial Research Project website: Flinders University, Judicial Research Project <<http://www.flinders.edu.au/law/judicialresearch>>.

¹³⁰ See Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 941–2; Anselm Strauss and Juliet Corbin,

B *National Surveys*

Two of the authors developed, pilot-tested, and administered the National Survey of Australian Judges to all 566 judges throughout Australia in March 2007 with a response rate of 55 per cent. Similarly, the 2007 National Survey of Australian Magistrates was sent to all 457 state and territory magistrates throughout Australia, with a response rate of 53 per cent. The respondents are generally representative of the judiciary as a whole, in terms of gender, age and time on the bench. The two 2007 surveys are substantially the same, with some variation in questions to reflect the different work in the different levels of court.¹³¹ Surveys were sent out to every judge and magistrate rather than to a random sample. The surveys used a mix of closed and open-ended questions to cover a range of topics relating to current position, career background and education, everyday work, job satisfaction and demographic information.

The data from the surveys and the interviews are not cross-linked. Surveys were anonymous; there was no identification or tracking of survey booklets or respondents. It is impossible to know who did or did not respond, so the interviewees were not and could not be cross-referenced in any way with the survey participants, who remained anonymous. It is not possible for the researchers to know if any of the interviewees responded to either of the surveys, though it is clear that only some interviewees would have been in judicial office at the time of the surveys. Any interviewee first appointed to the judiciary after 2007 would not have received a survey.

Basics of Qualitative Research: Grounded Theory Procedures and Techniques (SAGE Publications, 1990) 75–95; David Silverman, *Interpreting Qualitative Data* (SAGE Publications, 5th ed, 2014).

¹³¹ Both 2007 surveys are based on the 2002 National Survey of Australian Magistrates.

NEURODIVERGENT WOMEN IN ‘CLOUDED JUDGMENT’ UNCONSCIONABILITY CASES — AN INTERSECTIONAL FEMINIST PERSPECTIVE

ABSTRACT

Feminist legal scholars have discussed the impact of gender and class stereotypes on the judgments in *Louth v Diprose*. However, a significant aspect of Ms Louth’s identity is missing from these discussions: her neurodivergence (or mental illness). This article analyses the stereotypical treatment of women through the lenses of gender and neurodivergence in ‘clouded judgment’ unconscionability cases. This analysis is focused on the comparison of the use of stereotypes in *Louth v Diprose* and *Williams v Maalouf*. Each case allows vastly different outcomes for the neurodivergent female parties, but both cases reinforce prejudicial stereotypes. The article concludes with a discussion of how a myopic focus on a singular category of identity can hinder the creation of decisions that are more mindful of intersectional realities.

I INTRODUCTION

Despite the rise of feminist jurisprudence, equitable doctrines have rarely been examined under the feminist lens.¹ Even more troubling, the small amount of existing Australian feminist equity scholarship tends to treat gender and other social categorisations as mutually exclusive categories of analysis.² In other

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¹ Margaret Davies, *Asking the Law Question* (Lawbook, 4th ed, 2017) 223; Charles E Rounds Jr, ‘The Common Law is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism’ (2009) 43 *University of Richmond Law Review* 1185, 1186.

² See, eg, Lisa Zhou, ‘Fiduciary Law, Non-Economic Interests and Amici Curiae’ (2008) 32 *Melbourne University Law Review* 1158; Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing, 2001); Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (Cavendish Publishing, 1996); Lisa Sarmas, ‘A Step in the Wrong Direction: The Emergence of Gender “Neutrality” in the Equitable Presumption of Advancement’ (1994) 19 *Melbourne University Law Review* 758; Dianne Otto, ‘A Barren Future?’

words, equity has escaped analysis through an intersectional lens.³ Only Sarmas has attempted to address the women at the intersections in Australian equity. Her article 'Storytelling and the Law: A Case Study of *Louth v Diprose*'⁴ presents a persuasive analysis of how the official court stories in *Louth v Diprose*⁵ relied on stereotypes surrounding gender and class. This article does not seek to repeat Sarmas' analysis, but rather extends this intersectional approach to neurodivergent women.⁶

The intersection of stereotypes involving mentally ill or neurodivergent women in equitable doctrines remains uncharted territory. In addition to gendered oppression, neurodivergent women also face the oppressions linked with being placed on either

Equity's Conscience and Women's Inequality' (1992) 18 *Melbourne University Law Review* 808; Regina Graycar, 'Telling Tales: Legal Stories About Violence Against Women' (1996) 7 *Australian Feminist Law Journal* 79.

³ Intersectionality theory originates from Crenshaw's work on the need for intersectional analysis of gender and race in discrimination law: Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' [1989] *University of Chicago Legal Forum* 139, 139–40.

⁴ Lisa Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*' (1994) 19 *Melbourne University Law Review* 701. As noted by Graycar, this is 'one of the most compelling discussions yet published of any Australian High Court decision.': Graycar, above n 2, 302; see also Lisa Sarmas, 'A Response to Peter Heerey' (1998) 3 *Newcastle Law Review* 82, 91.

⁵ (1992) 175 CLR 651.

⁶ 'Neurodivergence' describes people with a mental or cognitive illness, disability or disorder. The term comes from the neurodiversity movement, which rejects the pathologisation of neurological differences, instead advocating for neurodivergence to be viewed as a form of human diversity. The neurodiversity model allows neurodivergence to be recognised as a social category rather than a purely medical issue which is separate from personhood. However, stereotypes and myths surrounding neurodivergence are based on the prevailing medical model of 'mental illness.' For this reason, the terms 'disabled,' 'mental illness' and 'neurodivergent' will be used interchangeably in this article. The author prefers Walker's broad definition of neurodivergence: 'Neurodivergent ... means having a brain that functions in ways that diverge significantly from the dominant societal standards of "normal." ... Neurodivergence (the state of being neurodivergent) can be largely or entirely genetic and innate, or it can be largely or entirely produced by brain-altering experience, or some combination of the two ...': Nick Walker, 'Neurodiversity: Some Basic Terms & Definitions' on *Neurocosmopolitanism* (27 September 2014) <<http://neurocosmopolitanism.com/neurodiversity-some-basic-terms-definitions/>>; see Judy Singer, 'Why Can't You Be Normal for Once in Your Life? From a "Problem with No Name" to the Emergence of a New Category of Difference' in Marian Corker and Sally French (eds), *Disability Discourse* (Open University Press, 1999) 64; Katherine Runswick-Cole, "'Us" and "Them": the Limits and Possibilities of a "Politics of Neurodiversity" in Neoliberal Times' (2014) 29 *Disability & Society* 1117, 1123; see also Brigit McWade, Damian Milton and Peter Beresford, 'Mad Studies and Neurodiversity: a Dialogue' (2015) 30 *Disability & Society* 305, 306; Thomas Armstrong, 'Your Brain is a Rain Forest' (April/May 2010) *ODE Magazine* 37.

side of the sane/insane dichotomy, and stigmatisation of ‘mentally ill’ knowledge. Unfortunately, the voices of neurodivergent women are heard or understood far less often than those of neurotypical women in equity.⁷ It is often said that equity is not past the age of childbearing,⁸ but its progeny were certainly born in times of archaic discrimination against women and neurodivergent people.⁹ This is most clearly evident in the reliance on stereotypes in ‘clouded judgment’ unconscionability cases.¹⁰

This article seeks to begin the process of addressing the intersectional oppression of neurodivergent women in unconscionability cases where emotional dependence is recognised as a ‘special disadvantage.’ Firstly, this article briefly compares feminist and disability theories, and discusses models of intersectionality. Secondly, the characterisation of gender and neurodivergence as a ‘special disadvantage’ in unconscionability law is explored. Thirdly, the article discusses the heavy reliance on stereotypes of neurodivergent women in *Louth v Diprose*¹¹ and *Williams v Maalouf*¹² These cases present vastly different treatments of neurodivergent women, but both reinforce dangerous stereotypes. Lastly, the importance of a multifaceted intersectional analysis will be reiterated, with a focus on Bartlett’s reimagined feminist judgment of *Louth v Diprose*.¹³

II BACKGROUND TO FEMINIST AND DISABILITY THEORIES

The intersection of gender and disability is a significant blind spot in feminist equity scholarship. A possible explanation for this is that disability has been so entwined with medicine that it is seldom given priority by social justice advocates and scholars. Despite inconsistencies between the two theoretical approaches, both feminist and disability theories can inform an intersectional analysis of stereotyping neurodivergent women in unconscionability cases.

⁷ The word ‘neurotypical’ describes someone who is not neurodivergent.

⁸ See *Eves v Eves* [1975] 1 All ER 768, 771; *Cowcher v Cowcher* [1972] 1 All ER 943; *Muschinski v Dodds* (1985) 160 CLR 583, 615; Justice Michael Kirby, ‘Equity’s Australian Isolationism’ (2008) 8 *Queensland University of Technology Law and Justice Journal* 444, 451–3; P W Young, ‘Perhaps Equity is Beyond Childbearing’ (2003) 77 *Australian Law Journal* 224; R Bailey-Harris, ‘Equity Still Childbearing in Australia?’ (1997) 113 *Law Quarterly Review* 227.

⁹ Otto, above n 2, 809.

¹⁰ The term ‘clouded judgment’ is taken from Dilan Thampapillai, ‘What Becomes of the Broken-Hearted? Unconscionable Conduct, Emotional Dependence, and the “Clouded Judgment” Cases’ (2016) 34 *Law in Context* 76.

¹¹ (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

¹² [2005] VSC 346 (1 September 2005).

¹³ (1992) 175 CLR 621; Francesca Bartlett, ‘Louth v Diprose — Judgment’ in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 196.

Feminist and disability theories deal with similar oppressions and face similar problems, but with very different forms of identities. Feminist theory unites women under one homogenous identity: *women*. On the other hand, the disabled identity is fragmented. As noted by Wendall, '[s]ocial oppression may be the only thing the disabled have in common, our struggles with our bodies are extremely diverse'.¹⁴ Disabled women occupy a precarious place in feminist theory, as they often defy the expectations of the body and social relationships that are usually connected to women by feminist scholars.¹⁵

In parallel to the feminist notion that society is structured to prioritise masculinity, disability theorists argue that society is structured for people who have 'no weaknesses'.¹⁶ Hence, disability theorists prefer social models to medical models of disability.¹⁷ Disabled people deviate from the ideal 'abled' norm, and are viewed as needing to be fixed or cured by medicine. This means that disability is viewed as an error rather than a consequence of human diversity.

Both strands of critical theories illuminate how power relations determine dominant knowledge; as noted by Wendall, '[l]ike women's particular knowledge, which comes from access to experiences most men do not have, disabled people's knowledge is dismissed as trivial, complaining, mundane (or bizarre), *less than* that of the dominant group'.¹⁸

A Mental 'Illness', Mental 'Disability' or 'Neurodivergence'?

Some scholars and activists have called for the recognition of neurodivergence as a social category on par with race, class, gender, sexuality and other social categorisations.¹⁹ The notions of neurodivergence and neurodiversity reject the pathologisation of mental illnesses, disorders and disabilities. Contrasting the traditional medical model and neurodiversity model in two recent articles published in the Melbourne University Law Review highlights the differences in emphasis between the two approaches.

¹⁴ Susan Wendall, 'Toward a Feminist Theory of Disability' (1989) 4 *Hypatia* 104, 108.

¹⁵ Anita Silvers, 'Reprising Women's Disability: Feminist Identity Strategy and Disability Rights' (1998) 13 *Berkeley Women's Law Journal* 81, 86.

¹⁶ Wendall, above n 14, 104.

¹⁷ Despite the medical origins of the word, disability theorists and advocates have retained the terminology of *disability* but attributed a different meaning: 'When disability is redefined as a social/political category, people with a variety of conditions are identified as *people with disabilities* or *disabled people*, a group bound by common social and political experience.' Simi Linton, *Claiming Disability: Knowledge and Identity* (New York University Press, 1998) 12 (emphasis in original) quoted in Margaret Price, *Mad at School: Rhetorics of Mental Disability and Academic Life* (University of Michigan Press, 2011) 4; see also Silvers, above n 15, 82.

¹⁸ Wendall, above n 14, 120 (emphasis in original).

¹⁹ Singer, above n 6, 64.

The medical approach to mental illness was used in Ulbrick, Flynn and Tyson's distinction between 'cognitive impairment' and 'mental illness':

Cognitive impairment is the broad term comprising a range of disabilities such as, but not limited to, intellectual disability, acquired/traumatic brain injury, foetal alcohol spectrum disorder, neurological disorders, autism spectrum disorder and dementia ... In this article, we consider mental illness (eg bipolar, schizophrenia, depression) and cognitive impairment to be distinct from each other, with disability (forming a part of the personhood) considered separate to an illness (typically episodic) treatable with medication. This distinction is important to make because mental illnesses and cognitive impairments have different implications in terms of service provision.²⁰

Conversely, Arnold, Easteal, Easteal and Rice reject the medical construction of mental illness, instead characterising these conditions as examples of cognitive diversity ('diverse ways of thinking') and neurodiversity ('diverse neurologies').²¹ In their discussion of Attention Deficit Hyperactivity Disorder ('ADHD'), they characterise mental 'illness' as a difference rather than disability:

Humans are seen as having innate psychological heterogeneity, with individual differences in cognitive abilities that are a legacy of our evolutionary past. In this [neurodiversity] model it is not meaningful to think of 'normal' cognitive ability or to measure cognitive ability by a single yardstick.

In this model, ADHD, as a disorder, is seen as resulting from an interaction between a particular component of this neurodiversity — an innate cognitive style — and the social and organisational environment.²²

It is important that 'neurotypes' are addressed as a social category in intersectional critical legal theory. Neurodivergent people often 'come into contact with the legal system in either its punitive or protective capacities'.²³ The politics of neurodiversity call for the 'rights of neurodivergent individuals [to] be met, as they would be for any

²⁰ Madeline Ulbrick, Asher Flynn and Danielle Tyson, 'The Abolition of Defensive Homicide: A Step Towards Populist Punitivism at the Expense of Mentally Impaired Offenders' (2016) 40 *Melbourne University Law Review* 324, 326 n 4.

²¹ Bruce Arnold et al, 'It Just Doesn't Add Up: ADHD/ADD, The Workplace and Discrimination' (2010) 34 *Melbourne University Law Review* 359, 361.

²² *Ibid* 369–70.

²³ Isabel Karpin and Karen O'Connell, 'Stigmatising the 'Normal': The Legal Regulation of Behaviour as a Disability' (2015) 38 *University of New South Wales Law Journal* 1461, 1462. Karpin and O'Connell do not use the term neurodivergent, but refer to '[p]eople who exhibit challenging behaviour and who do not comply with social values and conventions': this description clearly fits neurodivergent people.

other minority group.’²⁴ Instead of creating a neurotypical/neurodivergent dichotomy akin to sane/insane, the neurodiversity movement seeks to complicate understandings of disabled identities. Characterising mental illnesses, disorders and disabilities as normal forms of neurodiversity does not reject the category of disability, but rather subscribes to the *social model* of disability.

B *Models of Intersectionality*

In the broadest sense, ‘intersectionality’ theorises that social inquiries must be organised in order to encompass ‘multiple dimensions of social life and categories of analysis.’²⁵ The term ‘intersectionality’ was first used by Crenshaw in 1989 in her article ‘Demarginalizing the Intersection of Race and Sex’,²⁶ which argued that discrimination laws had not contemplated the intersection of discrimination on both bases of gender and race. She argued that like feminist and anti-racist politics, anti-discrimination law was built on a ‘single-axis’ framework.

Intersectionality has developed into a theory and methodological approach that spreads across a wide variety of categories of analysis, such as race, class, sexuality, disability and Indigenous status.²⁷ Following intersectionality, oppressive institutions should be examined in an interconnected manner, and a person’s social characteristics may mean that they are subject to multiple sources of oppression.

Building on Crenshaw’s work, Ehrenreich created the term ‘hybrid intersectionality’ to describe the intersectional to refer to the intersection of privilege with an axis of subordination.²⁸ The hybrid intersectionality model also allows for the analysis of the privileges and oppressions which are associated with different disabilities,

²⁴ Runswick-Cole, above n 6, 1123; see also Steve Graby, ‘Neurodiversity: Bridging the Gap Between the Disabled People’s Movement and the Mental Health System Survivor Movement?’ in Helen Spandler, Jill Anderson and Bob Sapey (eds) *Madness, Distress and the Politics of Disablement* (University of Chicago Press, 2015) 231, 241 (citations omitted).

²⁵ Leslie McCall, ‘The Complexity of Intersectionality’ (2005) 30 *Signs: Journal of Women in Culture and Society* 1771, 1772 quoted in Julia Mansour, ‘Consolidation of Australian Anti-Discrimination Laws — An Intersectional Perspective’ (2012) 21 *Griffith Law Review* 533, 536.

²⁶ Crenshaw, above n 3.

²⁷ Mansour, above n 25, 536; The unique methodology of intersectionality has been aptly summarised by Carbado: ‘Intersectionality reflects a commitment neither to subjects nor to identities per se but, rather, to marking and mapping the production and contingency of both.’ Devon W Carbado, ‘Colorblind Intersectionality’ (2013) 38 *Signs: Journal of Women in Culture and Society* 811, 815.

²⁸ Nancy Ehrenreich, ‘Subordination and Symbiosis: Mechanisms of Support between Subordinating Systems’ (2002) 71 *University of Missouri–Kansas City Law Review* 251, 257.

and intersections of multiple forms of disability.²⁹ This model of intersectionality is particularly relevant to disability.³⁰

III INTERSECTIONALITY — AN IDEAL APPROACH?

The recent shift towards intersectional theory has seen the ‘collapse of the category “woman” as a core unit of feminist engagement and critique’.³¹ Despite the complexity that it brings to feminist theory, intersectionality has been criticised for its broad-brush approach to multifaceted oppression. In some ways, intersectionality often ‘claims the obvious’ — that all aspects of identity are related.³²

Intersectionality has also been criticised for ignoring the differences within identity categorisations that result in true diversity of human experience.³³ This criticism is especially relevant to the categories of disability and neurodivergence, which are characterised by highly diverse experiences and identities. As noted by Conaghan, an intersectional approach ‘cannot unpick or unravel the many ways in which inequality is produced and sustained’.³⁴

These problems may arise because intersectionality is often discussed in terms of mapping and topographical terms, involving grids, coordinates, crossings, and planes.³⁵ This often disguises the imprecision of the intersectional ‘mapping’ process, and completely obscures forms of oppression that do not neatly fit within the ‘grid.’ Individual experiences of inequality are far more complex than points on a ‘map’ of intersections.³⁶ Focusing on intersections encourages ignorance of the social and legal contexts of those experiences.³⁷ A map is only able to provide a surface-level representation of inequality, and tells a one-dimensional story of the wide-ranging experiences of a particular group. Conaghan suggests that ‘[w]e need a language to

²⁹ See Wendall, above n 14, 118.

³⁰ See David L Hosking, ‘Critical Disability Theory’ (Paper presented at the 4th Biennial Disability Studies Conference at Lancaster University, United Kingdom, 2–4 September 2008) 14 <http://www.lancaster.ac.uk/fass/events/disabilityconference_archive/2008/papers/hosking2008.pdf>.

³¹ Joanne Conaghan, ‘Intersectionality and the Feminist Project in Law’ in Emily Grabham et al (eds), *Intersectionality and Beyond: Law, Power and the Politics of Location* (Routledge, 2009) 21, 21.

³² Maria Carbin and Sara Edenheim, ‘The Intersectional Turn in Feminist Theory: A Dream of Common Language?’ (2013) 20 *European Journal of Women’s Studies* 233, 245.

³³ Nancy Levit, ‘Theorising the Connections Among Systems of Subordination’ (2002) 71 *University of Missouri–Kansas City Law Review* 227, 227, as cited in Suzanne B Goldberg, ‘Intersectionality in Theory and Practice’.

³⁴ Conaghan, above n 31 in Grabham et al (eds) above n 31, 22.

³⁵ *Ibid* 25.

³⁶ *Ibid* 26.

³⁷ *Ibid*.

“relate and connect” diverse experiences of inequality with the structures, processes, practices and institutions in which they occur.”³⁸ This cannot be achieved with just an intersectional analysis.

By using an intersectionality framework, this article is limited to the crude delimitations of ‘woman’ and ‘neurodivergence’ as categorisations of identity. This approach does not enquire into how those identities are formed, or the diversity of their experiences. It is acknowledged that applying intersectionality to neurodivergent women may lead to universalistic treatment. However, in this case, intersectionality is applied in an effort to shed light on the legal treatment of a group that has previously been neglected in equitable jurisprudence. While intersectionality provides an imperfect framework, it can often provide valuable insights into the experiences of groups that sit on the margins of academic literature.

IV NEURODIVERGENCE AS ‘SPECIAL DISADVANTAGE’

Equity recognises that a party can have a ‘special disadvantage’ that can be unconscionably abused, contrary to the equitable principles of fairness and justice.³⁹ The High Court has allowed claimants to rely on a range of ‘disadvantages that may be characterised as *structural*’,⁴⁰ including poverty, age, sickness, sex, infirmity of body or mind, lack of education and unfamiliarity with the English language.⁴¹ In many cases, intersecting disadvantages have been considered collectively as elements of a ‘special disadvantage.’⁴²

Following the current medical model of mental illness, neurodivergence could be considered to be ‘sickness’ or ‘infirmity of mind’ amounting to a special disadvantage. Indeed, the High Court has previously recognised ‘feeble-mindedness’ as a source of special disadvantage.⁴³ The High Court has also allowed relief for a plaintiff that the trial judge described as ‘markedly dull-witted and stupid.’⁴⁴ If we

³⁸ Ibid 41.

³⁹ See *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447, 462 (‘Amadio’); *Blomley v Ryan* (1956) 99 CLR 362; *Bridgewater v Leahy* (1998) 194 CLR 457; *Louth v Diprose* (1992) 175 CLR 621.

⁴⁰ Otto, above n 2, 815.

⁴¹ *Blomley v Ryan* (1956) 99 CLR 362, 405 (Fullagar J); *Wilton v Farnsworth* (1948) 76 CLR 646, 654 (Rich J); *Amadio* (1983) 151 CLR 447, 464 (Mason J).

⁴² See, eg, *Amadio* (1983) 151 CLR 447, 462; *Blomley v Ryan* (1956) 99 CLR 362, 405; *Bridgewater v Leahy* (1998) 194 CLR 457, 477.

⁴³ In *Blomley v Ryan* (1956) 99 CLR 362, the plaintiff was described in this manner because he was an intoxicated alcoholic. However, the term ‘feeble-minded’ is an outdated term for mental disability.

⁴⁴ *Wilton v Farnsworth* (1948) 76 CLR 646, 649 (Latham CJ).

were to ignore the ableist descriptions of these disabilities,⁴⁵ the unconscionability doctrine might appear to address the oppression faced by neurodivergent people.

V EMOTIONAL DEPENDENCE IN ‘CLOUDED JUDGMENT’ UNCONSCIONABILITY CASES

The problematic treatment of neurodivergent women in unconscionability doctrine is most obvious in ‘clouded judgment’ cases. Judicial considerations of emotional dependency in these cases inevitably ‘lack consistency and coherency.’⁴⁶ Rather than using social categorisations as indicators of social inequality, clouded judgment cases allow these aspects of identity to receive stereotypical treatment.

Clouded judgment cases require that one party be cast as ‘bad’ and the other as ‘good.’⁴⁷ This is largely a symptom of the dichotomies that underpin equity’s liberal roots.⁴⁸ These dichotomies reflect the opposition between the ‘self’ and the ‘other’ in a culture designed from the dominant masculine, neurotypical viewpoint. Placing parties on either side of the good/bad dichotomy only serves to reinforce the prejudicial, simplistic stereotypes that are at the heart of liberalism. A more nuanced approach would allow the identification of different ‘shades’ of relationships and identities instead of ‘oppositions’ and ‘divisions.’⁴⁹

No test could quantify the limitless causes or indicators of emotional dependence.⁵⁰ Clouded judgment cases require the ‘courts to employ prejudicial stereotypes in order to rationalise the factual matrix of particular ‘emotional’ relationships.’⁵¹ Emotional dependence in unconscionability cases promotes the use of stereotypes that are ‘congruent with prejudice’ rather than stereotyping that is ‘safe and legally relevant’.⁵² Unfortunately, both ‘good’ and ‘bad’ stereotypes ignore the individual characteristics, contexts and experiences of social groups.

⁴⁵ The term ‘ableist’ refers to discrimination in favour of people who do not have disabilities (or ‘abled’ people).

⁴⁶ Samantha Hepburn, ‘Equity and Infatuation’ (1993) 18 *Alternative Law Journal* 208, 209.

⁴⁷ Otto previously recognised this pattern in Australian unconscionability cases involving women: Otto, above n 2, 324.

⁴⁸ Liberal ‘male rationality’ divides the world into dichotomies of what is good and what is bad or less. Examples of these dichotomies include objective/subjective, light/shadow, man/woman, and society/nature: Ann C Scales, ‘The Emergence of Feminist Jurisprudence: An Essay’ (1986) 95 *Yale Law Journal* 1373, 1382–3.

⁴⁹ Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3, 27.

⁵⁰ Richard Haigh and Samantha Hepburn, ‘The Bank Manager Always Rings Twice: Stereotyping in Equity after Garcia’ (2000) 26 *Monash University Law Review* 275, 309.

⁵¹ *Ibid* 301.

⁵² *Ibid* 311–12.

A Stereotyping Neurodivergent Women

Recognising that gender, neurodivergence or other social categorisations impact on an individual's circumstances and identity allows legal facts and decisions to be placed in a social context.⁵³ Overlooking these social characteristics 'in the name of a hollow liberal individualism merely serves to reinforce existing structural inequalities'.⁵⁴ Emotional dependence is not linked to any social categories which could underpin a special disadvantage. In unconscionability cases, neurodivergent women are typecast as ignorant victims, or their neurodivergence is questioned or erased. Justice and fairness can only be promoted if these stereotypes are confronted.⁵⁵

Read together, *Louth v Diprose*⁵⁶ and *Williams v Maalouf*⁵⁷ present extremely different representations of neurodivergent women. In the first case, Ms Louth is the 'bad' woman — manipulative and seductive.⁵⁸ In contrast, Ms Williams is the 'good' woman, who was exploited for acting with her heart instead of her head. Clouded judgment unconscionability cases are just one example of how equity reinforces stereotypes rather than addressing structural inequalities.⁵⁹ Some of these stereotypes and assumptions are clear and deliberate, but others are less obvious.

VI *LOUTH V DIPROSE*

Throughout the litigation of *Louth v Diprose*,⁶⁰ the trial and appellate majority judges accepted a version of the facts that most accorded with the plaintiff's story. The parties met in 1981 when both of their marriages had broken down. After a brief sexual tryst, Mr Diprose and Ms Louth became friends. In 1982, Ms Louth moved to Adelaide to be with her sister, and her brother-in-law Mr Volkhardt. She moved into their house and paid low rent. In 1983, Mr Diprose visited Ms Louth. He later moved to Adelaide. He sent her a collection of poems expressing his feelings for her.⁶¹

⁵³ Merely attributing social characteristics to parties is not stereotyping: Sarmas, 'A Response to Peter Heerey', above n 4, 91.

⁵⁴ *Ibid.*

⁵⁵ Jody Armour, 'Stereotypes and Prejudice: Helping Legal Decisionmakers Break the Prejudice Habit' (1995) 83 *California Law Review* 733, 772 quoted in Haigh and Hepburn, above n 50, 281.

⁵⁶ (1992) 175 CLR 621.

⁵⁷ [2005] VSC 346 (1 September 2005).

⁵⁸ Otto, above n 2, 824.

⁵⁹ See Claire de Than, 'Equitable Remedies: Cypher Wives, Weak Women and Equity's Special Tenderness' in Susan Scott-Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish Publishing, 2001) 197, 197; Otto, above n 2.

⁶⁰ (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

⁶¹ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 439–40 (King CJ); see Sarmas, 'Story-telling and the Law: A Case Study of *Louth v Diprose*', above n 4, 716.

At some stage, Ms Louth's brother in law contacted Mr Diprose to tell him that she 'did not wish to see him.'⁶² Later in the year, Ms Louth telephoned Mr Diprose. They had lunch and she told him that she was depressed. Up until June 1985, Mr Diprose visited and telephoned Ms Louth regularly. The parties had vastly different personal circumstances. Mr Diprose was a solicitor, and owned a range of assets. On the other hand, Ms Louth lived off the Supporting Mothers Pension and had a history of mental illness and suicide attempts.

In 1985, Ms Louth's sister and Mr Volkhardt separated. It was suggested to Ms Louth that she would need to move out at some point. The majority accepted that she told Mr Diprose that she would have to move out of the house quickly, and would kill herself if she had to do so.⁶³ The minority judgments found that there was no urgent need for her to move out, giving weight to a conversation with Mr Volkhardt which would have prevented Mr Diprose from believing that there was any suggestion that Ms Louth needed to move out immediately.⁶⁴

Mr Diprose purchased a house for Ms Louth in her name, and the relationship between the parties continued as it had before. In mid-1988, Mr Diprose was 'without accommodation'⁶⁵ between the vacation of his rented home and possession of a house he purchased. During this time, he and his son stayed with Ms Louth. However, she 'became irked by [his] continued presence in the house ... A quarrel occurred'.⁶⁶ As stated by King CJ, 'the scales fell from his eyes [and] he bitterly regretted the transfer of the house'.⁶⁷ Mr Diprose commenced legal proceedings for recovery of the house. The trial judge rejected Mr Diprose's evidence supporting his primary claim, that the house was not an outright gift as he has stipulated that Ms Louth would retransfer the house to him at a later date. However, he was successful on the basis of a peripheral claim for unconscionability.

The trial judge, King CJ, ordered Ms Louth to transfer the house back to Mr Diprose, on the basis that she had unconscionably exploited his special disadvantage; his emotional dependence on her.⁶⁸ He found that her discussion of suicide and leaving the house was an attempt to manipulate him by manufacturing a false atmosphere of crisis.⁶⁹ Appeals to the Full Court of the Supreme Court of South Australia,⁷⁰ and

⁶² *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440 (King CJ).

⁶³ *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 465–6 (Legoe J).

⁶⁴ *Ibid* 480 (Matheson J); *Louth v Diprose* (1992) 175 CLR 621, 652 (Toohey J).

⁶⁵ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 442 (King CJ).

⁶⁶ *Ibid* 442.

⁶⁷ *Ibid* 443.

⁶⁸ *Ibid* 448.

⁶⁹ *Ibid*.

⁷⁰ *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 475 (Legoe J), (Matheson J dissenting).

the High Court were dismissed.⁷¹ Matheson and Toohey JJ's minority judgments did not question the findings of fact, but gave more weight to evidence concerning the conversation with Mr Volkhardt, and Mr Diprose's knowledge of Ms Louth's history with depression.

Ms Louth's vulnerability was downplayed in both the trial and majority appellate judgments. While Mr Diprose was cast as a trustworthy, lovesick, generous man of modest means, Ms Louth was portrayed as a manipulative, gold-digging 'damned whore.'⁷² The trial and majority appellate judgments paid little attention to the fact that Ms Louth was neurodivergent, a single mother, and a rape survivor.⁷³ The minority judgments did put more weight on these aspects of the evidence. Unfortunately, the minority judgments painted her as a victim of tragic personal circumstances, rather than structural inequality and Mr Diprose's conduct.⁷⁴

The use of colourful language in the trial judgment disguises the boundaries between facts and the judge's prejudices.⁷⁵ The stereotypes that underpin the judgments remain concealed. Despite the large number of unsupported assertions made by the trial judge, on appeal his findings were upheld as 'findings of fact.'⁷⁶ One of the reasons that Ms Louth's challenges to King CJ's stereotype-laden judgment failed was the courts' adherence to the notion that the trial judge is best placed to establish the facts.⁷⁷

Feminist legal scholars have already addressed the impact of gendered stereotypes in the judgments.⁷⁸ For this reason, this article will focus on how the trial and appellate

⁷¹ *Louth v Diprose* (1992) 175 CLR 621, 626 (Mason CJ), 633 (Brennan J), 639 (Deane J), 643 (Dawson, Gaudron and McHugh JJ), (Toohey J dissenting).

⁷² Sarma uses the phrase 'damned whore' to describe the stereotypical treatment of Ms Louth in Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 719 citing Anne Summers, *Damned Whores and God's Police: The Colonisation of Women in Australia* (NewSouth, 3rd ed, 2016).

⁷³ Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 714.

⁷⁴ *Ibid* 719.

⁷⁵ Bibi Sangha and Bob Moles, 'Gendered Stereotypes and Unconscionability — Can We Trust the Judges to Get It Right' (1997) 1 *Flinders Journal of Law Reform* 145, 175.

⁷⁶ *Ibid* 179; for example, King CJ described Mr Diprose as a 'strange romantic character' and stated that '[w]hen the scales fell from his eyes he bitterly regretted the transfer of the house': *Diprose v Louth [No 1]* (1990) 54 SASR 438, 443, 447.

⁷⁷ In both appeals the judges approved the statement that 'the advantage possessed by the trial judge of seeing the parties and estimating their characters and capacities is immeasurable': *Wilton v Farnworth* (1948) 76 CLR 646, 654 (Rich J) quoted in *Diprose v Louth [No 2]* (1990) 54 SASR 450, 453 (Jacobs ACJ), 466 (Legoe J); cited in *Louth v Diprose* (1992) 175 CLR 621, 633 (Deane J), 641 (Dawson, Gummow, McHugh JJ).

⁷⁸ Otto, above n 2; Sarma, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4.

judgments revert to the stereotypes of mentally ill women. There are three key issues which highlight the significance of stereotypes in this case: the finding that Ms Louth manufactured an atmosphere of crisis, the treatment of evidence suggesting violence in the relationship, and the dismissal of Ms Louth's evidence and credibility as a witness.

A '*Manufacturing an Atmosphere of Crisis*'

The emphasis on deceit in *Louth v Diprose*⁷⁹ has been influential on the unconscionability doctrine.⁸⁰ At all stages of litigation, the trial and majority judgments cast Ms Louth as a manipulative woman who deliberately created a false situation of crisis to obtain the gift from Mr Diprose. For example, at trial King CJ stated:

I am satisfied that she *deliberately manufactured the atmosphere of crisis* in order to influence the plaintiff to provide the money for the house. I am satisfied, moreover, that she *played upon his love and concern for her by the suicide threats* in relation to the house. She then refused offers of assistance short of full ownership of the house knowing that his emotional dependence upon her was such as to lead inexorably to the gratification of her unexpressed wish to have him buy the house for her. I am satisfied that it was a *process of manipulation* to which he was utterly vulnerable by reason of his infatuation.⁸¹

This view was reiterated in most of the High Court judgments.⁸² For example, Deane J found that Ms Louth:

deliberately used that love or infatuation and her own deceit to create a situation in which she could unconscientiously manipulate the respondent to part with a large proportion of his property.⁸³

Dawson, Gaudron and McHugh JJ's joint judgment acknowledged that Mr Diprose's case involved a 'substantial evidentiary burden,'⁸⁴ but upheld King CJ's decision. They acknowledged that the different experiences of judges mean that different

⁷⁹ (1992) 175 CLR 621.

⁸⁰ Most recently, in *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 293, 439 [161] ('*Kakavas*') the High Court clarified that the unconscionability doctrine can only be applied if the defendant's conduct involves 'victimisation' or 'exploitation' with a 'predatory state of mind.' *Louth v Diprose* (1992) 175 CLR 621 preceded *Kakavas* (2013) 250 CLR 293, however the majority judgments certainly positioned Ms Louth's conduct as exploitation as opposed to mere indifference. See Thampapillai, above n 10, 82–4; *Mackintosh v Johnson* (2013) 37 VR 301; *Xu v Lin* (2005) 12 BPR 23 131.

⁸¹ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448 (emphasis added).

⁸² *Louth v Diprose* (1992) 175 CLR 621, 624–6 (Mason CJ); 630–2 (Brennan J); 637 (Deane J); 642 (Dawson, Gaudron and McHugh JJ).

⁸³ *Louth v Diprose* (1992) 175 CLR 621, 638.

⁸⁴ *Ibid* 639.

judges may make different assessments of character and evidence; however, they viewed this as a reason why they *should not* interfere with King CJ's findings.⁸⁵

The majority appellate judges merely reinforced the view that legal processes establish the truth of events,⁸⁶ without interrogating the problematic methods King CJ used to assess the characters of Ms Louth and Mr Diprose, and the stereotypes that underpinned his decision. As Sangha and Moles observe, King CJ's 'findings of fact' are better described as 'attributions and assertions'.⁸⁷ Once the courts decided that these 'facts' could not be altered or interfered with, there was no chance that Ms Louth's appeal could succeed.⁸⁸ Further, the majority appellate judgments do not account for the fact that the judicial processes of fact-finding and decision-making occur simultaneously.⁸⁹ The facts established by King CJ were not independent of his conclusion.

At all levels, the courts reinforced prejudicial stereotypes that legitimised discrimination.⁹⁰ This stereotypical treatment served a purpose: to provide Mr Diprose with relief. Mere infatuation would not have been enough to find that Ms Louth's receipt and retention of the gift was unconscionable — she had to exploit him.⁹¹ As stated by Haigh and Hepburn: 'The court could not disregard Diprose's manner as consistent with that of an educated male solicitor and so targeted Louth as the cause of this aberrant behavior'.⁹² Stereotypes assisted in the manipulation of the facts to fit within the confines of the unconscionability doctrine.

In order for Ms Louth's identity to fit within this narrative, her mental illness could not be viewed as legitimate. Historically, mentally ill people have been characterised as irrational actors, and denied status as full legal subjects.⁹³ To ensure that Ms Louth could be cast as a rational individual who could take advantage of Mr Diprose, her neurodivergence had to be concealed. Delegitimising her suicide attempts and depression allowed her discussions of suicide with Mr Diprose to be portrayed as a key part of a process of calculated manipulation.

⁸⁵ Ibid 640.

⁸⁶ Carol Smart, *Feminism and the Power of Law* (Routledge, 1989), 10–11 quoted in Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002), 65–6.

⁸⁷ Sangha and Moles, above n 75, 179.

⁸⁸ Ibid.

⁸⁹ Kim Lane Scheppele, 'Facing Facts in Legal Interpretation' (1990) 30 *Representations* 42, 60 quoted in Graycar and Morgan, above n 78, 67.

⁹⁰ Haigh and Hepburn, above n 50, 308.

⁹¹ Justice Deane reinforced this purpose of the unconscionability doctrine: 'The intervention of equity is not merely to relieve the plaintiff from the consequences of his own foolishness. It is to prevent his victimisation': *Louth v Diprose* (1992) 175 CLR 621, 640, 638.

⁹² Haigh and Hepburn, above n 50, 300.

⁹³ Steven T Yannoulidis, 'Mental Illness, Rationality, and Criminal Responsibility (Tropes of Insanity and Related Defences)' (2003) 25 *Sydney Law Review* 189, 210–11.

The characterisation of Ms Louth as a manipulative liar who manufactured suicide attempts to acquire a gift rests on the notion that her mental illness does not exist, or is not as severe as she makes it out to be.⁹⁴ This story results from the privileging of neurotypical and abled knowledge in legal discourse and society. Disabled people have been consistently stereotyped as ‘deficient, pitiable, wicked or malign, dangerous or valueless’⁹⁵ or ‘needy and inferior.’⁹⁶ However, people with mental disabilities are generally more feared and stigmatised.⁹⁷

Mentally ill people are frequently stereotyped as ‘erratic, deviant, morally weak, unattractive, sexually uncontrollable, emotionally unstable, lazy, superstitious, ignorant, and demonstrate a primitive morality.’⁹⁸ The portrayal of Ms Louth is not just assisted by these stereotypes of mental illness, but also by the stereotypical treatment of women as liars.⁹⁹ These intersecting stereotypes are not only reinforced by the characterisation of Ms Louth as manipulative, but also the court’s treatment of her evidence.

Mythologies surrounding mental illness serve to cast neurodivergent people as the ‘other,’ creating a schism between the ‘sane’ and the ‘insane.’¹⁰⁰ Some of these myths attribute internal weakness; ‘if mentally ill people would only try harder, they would get well.’¹⁰¹ Others stereotype complex, diverse disabilities as characterised by bizarre, observable ‘mad’ behaviour.¹⁰² These myths underpin the courts’ treatment

⁹⁴ The trial judge found that Ms Louth ‘was a calculating witness who was prepared to tailor her evidence in order to advance her case. In particular, I found her evidence as to the circumstances leading to the house transaction quite unimpressive’. Further, he held that Ms Louth ‘played on his love and concern by [making] the suicide threats ... [i]t was a process of manipulation to which he was utterly vulnerable by reason of his infatuation ... I disbelieve the defendant’s evidence that she thought the plaintiff was a wealthy man.’ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448.

⁹⁵ Hosking, above n 30, 14.

⁹⁶ Jane Byeff Korn, ‘Crazy (Mental Illness Under the ADA)’ (2003) 36 *University of Michigan Journal of Law Reform* 585, 586.

⁹⁷ *Ibid* 587.

⁹⁸ Michael L Perlin, ‘Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, Us and Them’ (1998) 31 *Loyola of Los Angeles Law Review* 775, 785.

⁹⁹ See Lynn Hecht Schafran, ‘Credibility in the Courts: Why Is There a Gender Gap?’ (1995) *Best of the American Bar Association Sections: General Practice, Solo & Small Firm Division* 40, 40 quoted in Amy D Ronner, ‘The Cassandra Curse: The Stereotype of the Female Liar Resurfaces in *Jones v Clinton*’ (1997) 31 *University of California, Davis Law Review* 123, 125, 130.

¹⁰⁰ Perlin, above n 98, 787.

¹⁰¹ Korn, above n 96, 605. Perlin, above n 98, 787.

¹⁰² Michael L Perlin, ‘“Infinity Goes Up on Trial”: Sanism, Pretextuality, and the Representation of Defendants with Mental Disabilities’ 16 (2016) *Queensland University of Technology Law Review* 106, 113; Perlin, above n 98, 786.

of Ms Louth. The failure of the court to treat her psychiatric condition as a *real* disability reinforces the stereotype that 'disability is always physical and visible.'¹⁰³

As Ms Louth's presentation did not accord with common mythologies surrounding mental illness, the judges could only see one other explanation for her discussions of suicide — calculated manipulation. As noted by Hepburn, 'not only is she presumed to be emotionally balanced and unaffected, she is actually considered to have abused the other party *because* of this presumption.'¹⁰⁴ The trial and majority judgments appear to have little regard for evidence concerning Ms Louth's mental condition and Mr Diprose's knowledge of her disability. Any evidence suggesting that Ms Louth's comments to Mr Diprose were a genuine expression of her suicidal thoughts was ignored or downplayed by the judges.

At each level of litigation, the judges mentioned Ms Louth's shoplifting charge and suicide attempts,¹⁰⁵ but did not discuss any expert evidence regarding her condition.¹⁰⁶ The majority judgments made little of the fact that Mr Diprose acted as her solicitor in the shoplifting matter, and was therefore privy to the contents of reports documenting her psychiatric condition. Instead, the judgments relied on prejudicial stereotypes of gender and mental illness — a methodology that is contrary to the aims of neutrality and impartiality.¹⁰⁷

The failure to attribute Ms Louth's expressions of suicidal thoughts to her disability demonstrates how judges often fail to comprehend the nature of psychiatric disability.¹⁰⁸ They were unable to relate to Ms Louth's sense of insecurity,¹⁰⁹ and the

¹⁰³ Grace James, 'An Unquiet Mind in the Workplace: Mental Illness and the Disability Discrimination Act 1995' (2004) 24 *Legal Studies* 516, 536; It is arguable that similar stereotypes of mental illness influenced the judgment of *Kakavas*, where the High Court held that a plaintiff with a gambling addiction 'was able to make rational decisions to refrain from gambling altogether had he chosen to do so. He was certainly able to choose to refrain from gambling with Crown': *Kakavas* (2013) 250 CLR 392, 432 [135]. *Kakavas* was not a claim based on emotional dependence, and the mentally ill plaintiff was male. The stereotypes that underpin this important unconscionability case fall outside the scope of this article. See Kate Seear, 'Making Addiction, Making Gender: A Feminist Performativity Analysis of *Kakavas v Crown Melbourne Limited*' (2015) 41 *Australian Feminist Law Journal* 65.

¹⁰⁴ Hepburn, above n 46, 211 (emphasis in the original).

¹⁰⁵ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440; *Diprose v Louth [No 2]* (1990) 54 SASR 450, 458, 481; *Louth v Diprose* (1992) 175 CLR 621, 642 (Dawson, Gaudron and McHugh JJ).

¹⁰⁶ Without access to the transcript of the trial judgment, it is unclear whether evidence of this kind was ever considered.

¹⁰⁷ See Haigh and Hepburn, above n 50, 301.

¹⁰⁸ 'Judges interpret disability as static, unchanging and consistent across situations and noncontextual': Susan Stefan, 'Remarks at the Mental Disability Law Symposium 3 (15 November, 1997) 7 as quoted in Perlin, above n 98, 786 n 52.

¹⁰⁹ Sangha and Moles, above n 75, 179.

reality of being depressed and suicidal. This shows how stereotypes can render neurodivergence as invisible in case law. *Louth v Diprose*¹¹⁰ is a stark example of how the power of law can be used to disqualify alternative accounts from people who sit outside of dominant male, neurotypical knowledge.¹¹¹

B A Violent Relationship?

Sarmas has previously addressed how the transcript of the trial suggests that Mr Diprose's conduct towards Ms Louth could be characterised as sexual harassment, and verbal and physical abuse.¹¹² This must be understood in the context of structural inequality, and the reality that women diagnosed with mental illnesses face higher risks of sexual exploitation.¹¹³ The trial judge trivialised the importance of the violent incident to the case, finding that it was a peripheral matter.¹¹⁴ This incident of physical violence was not directly relevant to the application of the unconscionability doctrine, 'but it cases the relationship between the parties in an altogether different light.'¹¹⁵ Downplaying the relevance of this evidence allows the characterisation of Mr Diprose as a 'lovesick fool' to remain plausible, rather than transforming the story into Mr Diprose physically, financially and emotionally dominating the life of a mentally ill woman.

This alternative story would be inconsistent with the claim that Mr Diprose suffered a 'special disadvantage', and prevent his unconscionability claim from succeeding. It is ironic that equity moved to protect Mr Diprose against 'idiosyncratic vulnerabilities which are openly created' when the law failed to protect Ms Louth from being assaulted and sexually harassed by Mr Diprose.¹¹⁶ The High Court's treatment of the accusations of violence against Ms Louth is illustrative of how 'violence against disabled women and girls continues in a culture of silence, denial and apathy.'¹¹⁷ The stereotype of the manipulative, 'crazy' woman disguises the reality; women diagnosed with a mental illness frequently experience victimisation.¹¹⁸

¹¹⁰ (1992) 175 CLR 621.

¹¹¹ See Smart, above n 86, 10–11, quoted in Graycar and Morgan, above n 86, 65–6.

¹¹² Sarmas, 'A Response to Peter Heerey', above n 4, 84–5.

¹¹³ Lauren Mzock and Zlatka Russinova, 'Intersectional Stigma and Acceptance Process of Women with Mental Illness' (2015) 38 *Women & Therapy* 14, 16.

¹¹⁴ Trial transcript, 169 (King CJ), as quoted in Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 716; See *Diprose v Louth [No 1]* (1990) 54 SASR 438, 442 (King CJ); *Diprose v Louth [No 2]* (1990) 54 SASR 450, 460 (Legoe J); *Louth v Diprose* (1992) 175 CLR 621, 647 (Toohey J).

¹¹⁵ Thampapillai, above n 10, 86.

¹¹⁶ Hepburn, above n 46, 210.

¹¹⁷ Leanne Dowse, Carolyn Frohmader and Helen Meekosha, 'Intersectionality: Disabled Women' in Patricia Easteal (ed), *Women and the Law in Australia* (Lexisnexis Butterworths, 2010) 249, 252.

¹¹⁸ Mzock and Russinova, above n 113, 16.

Sarmas has dismissed both the majority and minority High Court judgments as stereotypes or 'stock stories'.¹¹⁹ The story of the majority pits the 'damned whore' against the 'strange romantic character'¹²⁰ or 'lovestruck knight in shining armour'.¹²¹ In contrast, the minority judgment stereotypes Ms Louth as the 'pitiful victim' and Mr Diprose as a 'benign romantic suitor'.¹²² Both sets of stories rely on dangerous stereotypes that conceal the potentially violent nature of the relationship.

C Treatment of Ms Louth's Evidence

At the trial and appellate levels, the judges mainly focused on Mr Diprose's evidence.¹²³ This meant that the courts found emotional dependence in a situation where only one party has argued that such a relationship existed. The trial judge found that Mr Diprose had provided false evidence on his primary claim,¹²⁴ but accepted his evidence whenever it conflicted with that of Ms Louth;¹²⁵ 'Mary [Louth] is not believed by the judge at all, even where her evidence accords with the truth.'¹²⁶

There have been various discussions about how the gendered assumptions about Ms Louth's character contributed to the judiciary side-lining her evidence. Hidden from view are the assumptions the judges made about Ms Louth on the basis of her neurodivergence. Much of Ms Louth's evidence was ignored because King CJ described her evidence in the following terms:

I formed the impression that [Ms Louth] was a calculating witness who was prepared to tailor her evidence in order to advance her case. In particular I found her evidence as to the circumstances leading to the transaction quite unimpressive.¹²⁷

In contrast, King CJ made the following comments about Mr Diprose's evidence:

I found much of his evidence as to the general relationship of the parties and the circumstances in which the subject of the house transaction arose convincing, but

¹¹⁹ Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 718.

¹²⁰ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 443.

¹²¹ Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 719.

¹²² *Ibid.*

¹²³ Even the minority judgments rely on the evidence of Mr Volkhardt instead of that of Ms Louth. For example, Toohey J stated that it was 'necessary to put to one side the evidence of [Ms Louth] herself [because King CJ] found her testimony to be 'quite unimpressive': *Louth v Diprose* (1992) 175 CLR 621, 652.

¹²⁴ *Diprose v Louth [No 2]* (1990) 54 SASR 450, 480 (Matheson J).

¹²⁵ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 448 (King CJ).

¹²⁶ Sangha and Moles, above n 75, 157.

¹²⁷ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 444.

his demeanour was not such as to persuade me to accept evidence which I consider to be improbable or which is in conflict with other convincing evidence.¹²⁸

If the High Court had attempted to justify the Supreme Court's treatment of the evidence, this could have revealed how stereotypes influenced the treatment of Ms Louth's evidence. The failure of the High Court to find any injustice in the construction of the facts highlights the inadequacy of appellate courts in correcting errors made at the trial level.¹²⁹

The fact-finding process itself results in systemic bias as the trial judge can only assess the demeanour of the witnesses.¹³⁰ Overemphasising the importance of assessing how a witness speaks or dresses privileges those who can appear to be neurotypical in stressful, unfamiliar circumstances. Assessment of the 'look and sound' of witnesses can unfairly influence whether judges 'hear' neurodivergent witnesses, who often behave, speak or dress differently to the expectations of neurotypical people.¹³¹ This systemic bias was evident in *Louth v Diprose*.¹³² While it is unknown how Ms Louth dressed, her manner of giving evidence is reproduced in the transcript.¹³³

Contrasting the manners in which Mr Diprose and Ms Louth provided evidence illuminates how the fact-finding process privileges neurotypical knowledge. Sangha and Moles have commented on how Mr Diprose's mastery of legal discourse increased the likelihood that his evidence would be accepted.¹³⁴ Mr Diprose's evidence showcases his attention to detail. He remembers dates of telephone conversations and meetings that occurred up to nine years before.¹³⁵ He even remembers the date of one of the two occasions which he and Ms Louth had sexual intercourse.¹³⁶ It is interesting that the court did not find Mr Diprose's remarkable memory to be an indication that *he* was the one who was tailoring evidence and acting in a calculated manner.

In contrast, Ms Louth's evidence was 'muddled' in regards to the timeline of events.¹³⁷ This aspect of the evidence highlights a disconnection between her actual evidence and the finding that she was 'calculating' or 'tailoring' her evidence. Sangha and Moles observed that:

¹²⁸ Ibid 443.

¹²⁹ See Sangha and Moles, above n 75, 146.

¹³⁰ Ibid 149.

¹³¹ Ibid 150.

¹³² (1992) 175 CLR 621.

¹³³ Sangha and Moles, above n 75.

¹³⁴ Ibid 163.

¹³⁵ Ibid.

¹³⁶ Ibid 164.

¹³⁷ Ibid.

Mary was in some ways an unruly witness, not always answering the questions, or restricting her answer to the precise point being asked. On our reading of the transcript, we would suggest that this was not because Mary was being 'manipulative', but because she often did not understand the question.¹³⁸

This explanation is plausible, but ignores the fact that evidence and court procedures consistently privilege neurotypical people. During the time period in question, Ms Louth suffered from mental health issues that greatly affected her day-to-day life. This time period was not only marked by unstable living arrangements and personal problems, but also suicide attempts.¹³⁹

Despite the evidence of Ms Louth's mental condition, her evidence was compared to Mr Diprose's evidence in a manner that focused on attention to detail and memory. Depression and emotional distress can greatly impact on cognitive functioning and memory.¹⁴⁰ There is no acknowledgement that her mental condition could have affected her ability to remember sequences of events as she has been stereotyped as a calculating manipulator.¹⁴¹ If the judiciary were to stay true to this stereotype, they could not address the effect of her mental condition on her oral evidence.

It is also possible that Ms Louth was perceived to be less credible as she was compared against the male 'genderlect' standard.¹⁴² Indicators of credibility are inherently gendered.¹⁴³ It is possible that Ms Louth did not conform the more credible male genderlect as her evidence was emotional, and at times inconsistent. On the other hand, Mr Diprose's evidence adhered to the more masculine indicators of credibility: factual, rational, and consistent. Thus, the judiciary's consideration of Ms Louth's evidence was marred by stereotypes surrounding both gender and neurodivergence.

¹³⁸ Ibid 168.

¹³⁹ *Diprose v Louth [No 1]* (1990) 54 SASR 438, 440.

¹⁴⁰ MP Austin et al, 'Cognitive Function in Major Depression' (1992) 25(1) *Journal of Affective Disorder* 21; Diana Byrd Burt, Mary Jo Zembler and George Niederehe, 'Depression and Memory Impairment: A Meta-Analysis of the Association, its Pattern and Specificity' (1995) 117 *Psychological Bulletin* 285.

¹⁴¹ Ms Louth was consistently imprecise about dates: Sangha and Moles, above n 75, 166.

¹⁴² The term 'genderlect' describes the differences between men and women in terms of their communication styles. As noted by Easteal, 'it is the masculine genderlect that prevails in the adversarial court system 'with its gladiatorial, combative features' Patricia Easteal, 'Setting the Stage: The "Iceberg" Jigsaw Puzzle' in Easteal (ed) above n 117 1, 17 quoting Regina Graycar and Jenny Morgan, *The Hidden Gender of the Law* (Federation Press, 1990) 410.

¹⁴³ Easteal, above n 117, 17.

VII *WILLIAMS V MAALOUF*

The more recent case of *Williams v Maalouf* involved a neurodivergent plaintiff seeking equitable relief of a gift provided to a male defendant and his partner.¹⁴⁴ The plaintiff, Ms Williams, became extremely depressed after experiencing an ‘abnormal grief reaction’ to the death of her mother.¹⁴⁵ Ms Williams was also an ovarian cancer survivor, and had strong Christian beliefs.¹⁴⁶ She formed an intense attachment to a co-worker, Ms Jeremic, who had recently been diagnosed with cancer.¹⁴⁷ She had known Ms Jeremic for many years, but their relationship only became close after Ms Williams’ mother passed away in January 2003.¹⁴⁸ Ms Williams cared for Ms Jeremic, believing that God had sent her ‘a sufferer’.¹⁴⁹ In July 2003, she gifted \$200 000 to Ms Jeremic and her partner for them to purchase a house that they could live in while Ms Jeremic was recovering from cancer.¹⁵⁰ Upon Ms Jeremic’s death, her partner sought to retain the gift.¹⁵¹

Ms Williams alleged that at the time of giving Ms Jeremic and the defendant the gift, she was suffering from a special disadvantage: ‘she was an elderly woman who was mentally impaired due to depression and clinical distress and, in addition, that she was emotionally dependent on Ms Jeremic.’¹⁵² She argued that at the time the gift was made, the defendant knew or ought to have known that she was suffering from these special disabilities, and thus the receipt of the gift was unconscionable.¹⁵³ Ms Williams also alleged that the money was a conditional gift, and the defendant and Ms Jeremic breached the conditions attached to the gift.¹⁵⁴ The conditional gift argument was unsuccessful, but Hargrave J found that the defendant’s receipt and retention of the gift was unconscionable, and that Ms Williams’ emotional dependence on Ms Jeremic was the basis of special disadvantage.¹⁵⁵

On the surface, it appears that Ms Williams was treated far more favourably than Ms Louth. However, the judgment reinforces prejudicial stereotypes surrounding neurodivergent women. Considered together, *Williams v Maalouf*¹⁵⁶ and *Louth v*

¹⁴⁴ *Williams v Maalouf* [2005] VSC 346 (1 September 2005).

¹⁴⁵ *Ibid* [151].

¹⁴⁶ *Ibid* [77].

¹⁴⁷ *Ibid* [137].

¹⁴⁸ *Ibid* [30].

¹⁴⁹ *Ibid* [70].

¹⁵⁰ *Ibid* [1].

¹⁵¹ *Ibid* [82].

¹⁵² *Ibid* [13].

¹⁵³ *Ibid* [14].

¹⁵⁴ *Ibid* [4].

¹⁵⁵ *Ibid* [189].

¹⁵⁶ [2005] VSC 346 (1 September 2005).

*Diprose*¹⁵⁷ present vastly different problems in terms of the employment of stereotypes. The most problematic aspects of the *Williams v Maalouf* judgment include: the characterisation of Ms Williams' special disability, treatment of her evidence, reversion to stereotypes about disability and care, and findings of the defendant's knowledge of Ms Williams' special disadvantage.

A Characterisation of 'Special Disadvantage'

Justice Hargrave considered a psychiatrist's evidence that Ms Williams was depressed and temporarily had below average intelligence due to emotional distress.¹⁵⁸ Interestingly, he did not use this evidence to find that Ms Williams' 'special disadvantage' was a mental disability. Emotional dependence is discussed as the sole source of special disadvantage.¹⁵⁹ He made this finding despite the fact that the medical evidence suggested that the emotional dependence was a result of Ms Williams' depression and 'abnormal grief reaction.'¹⁶⁰ The reasons behind this finding are not discussed in the judgment, but it does seem to reflect that depression is a mental *illness*, foreign to the social category of disability. By characterising Ms Williams' 'special disadvantage' as 'emotional dependence,' the court characterises her as a poor, generous victim rather than addressing the structural inequality faced by neurodivergent people.

B Treatment of Ms Williams' Evidence

The Court's treatment of Ms Williams' evidence contrasts starkly with the treatment of Ms Louth's evidence. Hargrave J noted that:

Much of her evidence was affected by emotion. She had great difficulty concentrating on the subject matter of many questions and often provided confused and irrelevant responses. She sometimes exaggerated. There were occasions where the plaintiff's recollection is contradicted by objective or other credible evidence. However, from her demeanour as a witness, I am satisfied that the plaintiff did not tell any deliberate untruth in the course of her evidence and, unless specifically mentioned in these Reasons, I accept her evidence.¹⁶¹

Many of these statements evidence a comparison of Ms Williams' demeanour to that expected of a neurotypical witness. Hargrave J also devoted two pages of the judgment to the consideration of whether Ms Williams was 'faking bad' to the psychiatrist in testing.¹⁶² This reflects stereotypes of mental illness as not being real.

¹⁵⁷ (1992) 175 CLR 621; *Diprose v Louth [No 1]* (1990) 54 SASR 438; *Diprose v Louth [No 2]* (1990) 54 SASR 450.

¹⁵⁸ *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [141]–[161].

¹⁵⁹ *Ibid* [184].

¹⁶⁰ *Ibid* [151].

¹⁶¹ *Ibid* [31].

¹⁶² *Ibid* [154]–[161].

Once again, the court has faced the challenge of placing a party on one side of the sane/insane dichotomy.

C Stereotypes Surrounding Disabled Women and Care

Frequently, women face the problem of being stereotyped as caregivers, limiting their ability to properly participate in the public sphere. The dichotomy of cared-for/care-giver also affects the legal treatment of disabled and neurodivergent women,¹⁶³ but the stereotype is reversed. As noted by Dowse, Frohmader and Meekosha, '[d]isabled women are all too often stereotyped as people in need of personal assistance and support' and seldom as people who care for others.¹⁶⁴

The dichotomisation of care and care-giving provides a further explanation for why the court could only see Ms Williams as a non-disabled care-giver. The story told throughout the judgment is that Ms Williams was emotionally dependent on Ms Jeremic by *caring* for her. For example, Hargrave J found that Ms Jeremic's welfare 'dominated' Ms Williams' life:

[From when Ms Williams was informed of Ms Jeremic's illness] until the making of the gift and for a time thereafter, the plaintiff visited Ms Jeremic on a daily basis and devoted her time, energy and resources towards the welfare of Ms Jeremic. During this period, the only time which the plaintiff spent away from Ms Jeremic was whilst she was at work, asleep or performing activities directed at the welfare of Ms Jeremic, such as preparing food for her and purchasing medication and other items for her.

The plaintiff said in evidence that she prepared all the food for Ms Jeremic during this period. This often involved her cooking late into the evening after having worked and spending the earlier part of the evening visiting Ms Jeremic and attending to her needs. During these visits, as well as providing emotional support for Ms Jeremic, the plaintiff attended to cooking and cleaning the Sturrock Street flat.¹⁶⁵

This extract clearly characterises Ms Williams as the caregiver, and Ms Jeremic as the person who was cared for. Is it possible that Ms Jeremic was also caring for Ms Williams? The fact that Ms Williams often engaged in tearful discussions with Ms Jeremic about her grief points towards the existence of an alternative story of a neurodivergent woman who was engaging in a mutually beneficial caring relationship with Ms Jeremic.¹⁶⁶ The evidence left open the possibility that Ms Williams

¹⁶³ Dowse, Frohmader and Meekosha, above n 117, 260.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [61].

¹⁶⁶ *Ibid* [75].

was not only 'emotionally depending' on Ms Jeremic by caring for her, but was also receiving some form of emotional care and support from Ms Jeremic.¹⁶⁷

D Defendant's Knowledge of Special Disadvantage

The Queensland Supreme Court considered the relevance of knowledge of a psychiatric condition in *Lee v Chai*.¹⁶⁸ In that case, Mr Lee alleged that Ms Chai unconscionably received a gift from him, by exploiting his emotional dependence on her. The court considered the defendant's knowledge of Mr Lee's personality disorder, as it was argued that this psychiatric condition was related to his emotional dependence on Ms Chai.¹⁶⁹ Medical experts were 'uncertain' as to whether the personality disorder impacted on Mr Lee's ability to exercise free will in making decisions.¹⁷⁰ The judge found that the expert medical reports '[did] not provide an adequate basis for me positively to conclude that Mr Lee's mental condition seriously affected his ability to make a judgment as to his own best interest.'¹⁷¹ The judge considered whether Ms Chai could have been aware of Mr Lee's psychiatric condition, rather than his emotional dependence on her. This involved considering evidence regarding Ms Chai's knowledge of Mr Lee's alcohol abuse, opulent dress and use of psychiatric medication.¹⁷²

In *Williams v Maalouf*¹⁷³, Hargrave J considered the defendant's knowledge of Ms Williams' emotional dependence rather than of her psychiatric condition. He outlined a list of facts and circumstances that he found were evident to Ms Jeremic and the defendant, proving that they were aware of her emotional dependence.¹⁷⁴ However, many of these facts could have also have pointed towards their knowledge of her depression. For example, '[t]he plaintiff was suffering an extreme grief reaction to the death of her mother, such that she would often break into tears when discussing this matter with the defendant and Ms Jeremic,' and '[t]he plaintiff developed a sudden and intense attachment to Ms Jeremic immediately upon learning of her diagnosis with ovarian cancer.'¹⁷⁵

The judgment does not discuss whether Ms Jeremic or the defendant knew that Ms Williams was seeing a doctor about depression and anxiety, and was prescribed

¹⁶⁷ In a more subtle manner, this dichotomy is also reflected in the judgments in *Louth v Diprose* (1992) 175 CLR 621. The judiciary's erasure of Ms Louth's disability sits beside their acceptance of her role as a mother.

¹⁶⁸ [2013] QSC 136 (3 May 2013).

¹⁶⁹ *Ibid* [176].

¹⁷⁰ *Ibid* [230].

¹⁷¹ *Ibid* [232].

¹⁷² *Ibid* [236]–[243].

¹⁷³ [2005] VSC 346 (1 September 2005) [188].

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* [189].

an anti-depressant drug shortly after providing the gift.¹⁷⁶ Significantly, Dr Kennedy's evidence indicated that Ms Williams:

was depressed and emotionally dependent on Ms Jeremic whom the plaintiff saw as providing her with a replacement for her deceased mother. The plaintiff was also affected by lowered cognitive functioning, related to her depressive reaction to her mother's death.¹⁷⁷

By formulating her special disadvantage as emotional dependence, Hargrave J excluded the possibility that her depression was also a disability. Erasing Ms Williams' depression from the construction of the special disadvantage changes the focus of the narrative of the judgment. While her depression is discussed, she is characterised as an elderly, generous, Christian woman who was having an 'extreme grief reaction.'¹⁷⁸ This treatment minimises the effect that depression had on her behaviour and decisions.

Characterising Ms Williams as a neurodivergent woman in difficult circumstances may not have changed the results of the case. However, the judgment missed an opportunity to explore the link between mental illness and emotional dependence in constructing 'special disadvantage.' The case could have challenged the frequently held belief that mentally ill women do not have capacity to enter into any transactions by finding that the exploitation made the transaction unconscionable.¹⁷⁹ Instead, the judgment revolves around a stereotypical story of a poor, old, grieving woman who followed her heart instead of her head.¹⁸⁰

¹⁷⁶ Ibid [138].

¹⁷⁷ Ibid [151].

¹⁷⁸ Ibid [189].

¹⁷⁹ At some points, the judgment almost achieved this. However, Ms Williams' actions were constantly linked with the effects of grief rather than depression. See, eg, *Williams v Maalouf* [2005] VSC 346 (1 September 2005) [186].

¹⁸⁰ 'In the plaintiff's own words, at the time of deciding to make the gift, and at the time of making it, her 'head was not working' and she acted spontaneously 'out of my chest, out of my heart': ibid [186]. In *Diprose v Louth [No 2]* (1990) 54 SASR 450, 451–2, Jacobs ACJ used similar language: 'in some respect this is but one more case in the annals of human relationships in which an infatuated but unrequited suitor has lavished gifts upon the subject of his infatuation, well knowing what he was doing and intending to do it, but in a sense allowing his heart to rule his head.'

VIII IMPORTANCE OF MULTIFACETED INTERSECTIONAL ANALYSIS

Recently, Bartlett reimagined the case of *Louth and Diprose*,¹⁸¹ creating an alternative feminist version of the High Court judgment.¹⁸² The judgment shows how emphasising different events and interpreting the established 'facts' slightly differently can result in an entirely different outcome.¹⁸³ From a narrow gender standpoint, this alternative judgment is certainly a step forward. Bartlett's judgment diffuses the effect of gender stereotypes by focusing on the requirements for a successful action in unconscionability. However, the judgment demonstrates how a myopic focus on gender can hinder the plight of women facing intersectional oppression.

Bartlett does make some attempts to legitimise Ms Louth's mental illness. For example, Bartlett notes that 'Ms Louth made at least one serious attempt on her life after gaining ownership of the house.'¹⁸⁴ Importantly, Mr Diprose's knowledge of these circumstances as her friend and solicitor is acknowledged.¹⁸⁵ But this is where Bartlett's attention to Ms Louth's neurodivergence ends.

Although Bartlett may have avoided the gendered stereotypes linked with liberalised dichotomies, aspects of Bartlett's reimagined judgment echo the real minority judgment characterisations of Ms Louth as a victim:

It was never in contention that Ms. Louth was in an emotionally fragile state throughout her acquaintance with Mr. Diprose in South Australia, as least partially due to a number of traumatic events in her past including a brutal rape. She had attempted suicide after her marriage ended, and again shortly after having two surgical operations to remove a cancerous appendix and a complete hysterectomy.¹⁸⁶

Just like the stereotypical characterisation of Ms Louth as a 'damned whore,' a 'victim' story only serves to reinforce dominant stereotypes.¹⁸⁷ Like the minority

¹⁸¹ *Louth v Diprose* (1992) 175 CLR 621.

¹⁸² Heather Douglas et al 'Introduction: Righting Australian Law' in Heather Douglas et al (eds), *Australian Feminist Judgments: Righting and Rewriting Law* (Hart Publishing, 2014) 1, 8; see also Heather Roberts and Laura Sweeney, 'Review Essay: Why (Re)Write Judgments?' *Australian Feminist Judgments: Righting and Rewriting Law* (2015) 37 *Sydney Law Review* 457, 458.

¹⁸³ See Richard Delgado, 'Story-Telling for Opportunists and Others: A Plea for Narrative' in Richard Delgado (ed), *Critical Race Theory: The Cutting Edge* (Temple University Press, 1995) 68–9 as quoted in Graycar and Morgan, above n 78, 67.

¹⁸⁴ Bartlett, above n 13, 199 (emphasis in original).

¹⁸⁵ *Ibid.*

¹⁸⁶ *Ibid.*

¹⁸⁷ Sarmas, 'Storytelling and the Law: A Case Study of *Louth v Diprose*', above n 4, 720.

High Court judgments,¹⁸⁸ Bartlett's reimagined judgments reinforce stereotypes about 'crazy' women and victimhood.¹⁸⁹

In Bartlett's judgment, the words 'emotionally fragile' not only reinforce toxic stereotypes about women and emotions,¹⁹⁰ but also skirt around the difference between ordinary emotions and depression. In the absence of any medical evidence, Bartlett has presented Ms Louth's difficult circumstances as if they are causatively linked with her suicide attempts. Ms Louth has not just experienced a temporary period of mere emotional instability or sadness. Depressed individuals frequently attempt to take their lives in the absence of other external circumstances. Often, it is the dark experience of depression that causes suicide, not an inability to deal with difficult circumstances, life events, or victimhood. Bartlett's reimagined judgment not only relies on the denial of Ms Louth's neurodivergence, but also is complicit in eliminating this aspect of her identity.

This alternative judgment shows how a narrow focus on a single social category can generate ignorance of other intersecting categories of identity. The judgment views the facts 'through the lens of women's experience' but essentialises that experience in a way that is ignorant of the intersectional realities of the experiences of neurodivergent women. This article has only focused on two prongs of Ms Louth's oppression, in an effort to extend the intersectional analysis of this case. However, it is also acknowledged that by focusing only on Ms Louth's gender and neurodivergence, the role of other social categorisations, such as class, are ignored.

'Neurodivergence' is an emerging social category. Unlike the more traditional categories of gender and class, neurodivergence has made infrequent appearances in critical legal scholarship. This article seeks to serve as a reminder that scholars must refrain from falling-back on well-worn categories of analysis, such as gender, and be open to exploring new categories of identity and oppression.

¹⁸⁸ Ibid 719.

¹⁸⁹ Later, Bartlett more accurately describes Ms Louth as being in a 'depressive state,' but does not nullify the prejudicial characterisation of Ms Louth earlier in the judgment: Bartlett, above n 13, 205.

¹⁹⁰ Women are frequently stereotyped as more 'emotionally fragile' than men. As noted by Fivush and Buckner: 'Related to stereotypes of women being more emotional than men overall, women are also perceived to have less control over their emotional life than do men': Robyn Fivush and Janine P Buckner, 'Gender, Sadness, and Depression: The Development of Emotional Focus Through Gendered Discourse' in Agneta Fischer (ed), *Gender and Emotion: Social Psychological Perspectives* (Cambridge University Press, 2000) 232, 234 (citations omitted).

IX CONCLUSION

The judgments of *Louth v Diprose*¹⁹¹ and *Williams v Maalouf*¹⁹² are both laden with stereotypes and misrepresentations of neurodivergent women. The presentations of Ms Louth and Ms Williams are not nuanced portrayals or different points on a spectrum. Rather, the cases reinforce the dichotomy of 'good' and 'bad' women.¹⁹³

Otto characterises the 'good' women as 'silent, compliant and [willing to] stand behind their man.'¹⁹⁴ This may be true of unconscionability cases involving neurotypical women such as *Amadio*¹⁹⁵ and *Yerkey v Jones*.¹⁹⁶ However, *Williams v Maalouf*¹⁹⁷ relies on a different stereotype of the 'good' neurodivergent woman. Ms Williams was so affected by grief and depression that she made an imprudent gift to a sick coworker — she was *too generous*. Thus, the stereotype of the 'good' woman in the unconscionability doctrine is not restricted to the role of women in their relationships with men. In *Williams v Maalouf*,¹⁹⁸ the stereotype of the altruistic woman was extended to a non-romantic relationship.

On the other hand, 'bad' women such as Ms Louth are 'characterised as relatively autonomous, and as having questionable relationships with men whom they exploit'.¹⁹⁹ In the case of neurodivergent women, implementing this stereotype also relies on the denial of the existence of their mental condition. In order for Ms Louth to be cast as the manipulator, the impact of her mental condition on her behaviour and circumstances needed to be minimised. Ms Louth's suicide attempts are twisted into manipulative actions by a 'sane' woman, while Ms Williams' generosity is just 'mad' enough to warrant protection. In order to move away from 'good' and 'bad' stereotypes in the unconscionability doctrine, judges must be conscious of personal and systemic bias, and be open to emerging or intersecting social categorisations.

¹⁹¹ (1992) 175 CLR 621.

¹⁹² [2005] VSC 346.

¹⁹³ See Otto, above n 2, 823.

¹⁹⁴ *Ibid.*

¹⁹⁵ (1983) 151 CLR 447.

¹⁹⁶ (1940) 63 CLR 649.

¹⁹⁷ [2005] VSC 346.

¹⁹⁸ *Ibid.*

¹⁹⁹ Otto, above n 2, 824.

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ENABLING PROFESSIONAL DEVELOPMENT FOR SESSIONAL COLLEAGUES IN LAW: REFLECTIONS FROM THE *SMART CASUAL* ONLINE INITIATIVE¹

ABSTRACT

The numbers of sessional staff teaching in law schools continue to grow, yet little has been done to provide for their professional development. This is particularly critical because these colleagues are likely to be less able to attend face-to-face development sessions or to participate in informal ‘corridor’ discussions. This article analyses what amounts to best practice in professional development of sessional colleagues in an online environment, including: the need to adopt a peer-to-peer tone; appeal to a range of teacher experience; draw on contemporary scholarly approaches to teaching and learning issues; and provide recognition of digital literacy, internationalisation, diversity, gender and Indigenous issues. These insights are drawn from the experience of developing modules as part of the Australian Government funded *Smart Casual: Promoting Excellence in Sessional Teaching in Law* project. The article draws on feedback from sessional staff focus groups and an autoethnography of the authors of the modules to reflect on the complexity of the task of developing professional

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¹ The authors of this article are all members of a national Australian project to develop online law specific professional development materials for sessional colleagues, funded by the former Australian Government Office for Learning and Teaching. The project was funded in two stages, the first a pilot phase of three modules, the second a fuller scale development of a suite of nine modules. Steel and Galloway were part of the Expert Advisory Group in the pilot phase and became full team members for the second phase. The views in this project do not necessarily reflect the views of the Australian Government Office for Learning and Teaching. This project has received ethics clearance 6866 from the Flinders University Social and Behavioural Research Ethics Committee.

development materials that neither patronise nor alienate their target audiences and the implications this reflection has on the importance of collegiality in the law school environment.

I INTRODUCTION

Recent years have seen an explosion in the number of adjunct or sessional colleagues² in higher education and in law schools. Estimates put the number of sessional colleagues in Australian universities at between 40–60% of all teachers.³ There is no regulatory stipulation restricting the use of sessional colleagues in Australian law schools. As a result the level of employment of sessional colleagues within law schools may be even higher than the 40–60% seen across the sector generally. Cowley's 2009 survey of Australian law schools suggested that up to 50% of courses were then taught by sessional colleagues,⁴ a percentage likely to have risen substantially since then. Australia's 40 law schools range in size, with annual enrolments from 65 to over 1000.⁵ Even in larger law schools with a strong cohort of

² As we see our non-permanent fellow teachers as colleagues, in this article we describe them as such. We use the term 'sessional' to describe paid university instructors who are not in tenured or permanent positions, staff who can range from recent graduates to full-time practitioners and retired judges: Mary Heath et al, 'Beginning to Address "The Elephant in the Classroom": Sessional Law Teachers' Unmet Professional Development Needs' (2015) 38 *University of New South Wales Law Journal* 240; Jill Cowley, 'Being Casual About Our Teachers. Understanding More About Sessional Teachers in Law' (Research Paper No 48, University of New South Wales Faculty of Law, 4 November 2010) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1702630>. We describe these colleagues as 'sessional' on the basis of their employment contracts — casual or fixed term, teaching session by teaching session — and to avoid the negative implications of terms such as 'casual': Jill Cowley, 'Confronting the Reality of Casualisation in Australia: Recognising Difference and Embracing Sessional Staff in Law Schools' (2010) 10 *Queensland University of Technology Law and Justice Journal* 27, 29. We use sessional instead of adjunct because adjunct extends to honorary, guest or expert lecturers. The focus of this paper and our project is on colleagues who are, through their employment, expected to be professional tertiary educators.

³ D Davis, B Perrott and L J Perry, 'Insights into the Working Experience of Casual Academics and Their Immediate Supervisors' (2014) 40 *Australian Bulletin of Labour* 46, 47–8; Alisa Percy et al, 'The RED (Recognition, Enhancement, Development) Report: The Contribution of Sessional Teachers to Higher Education' (Report, Australian Learning and Teaching Council, June 2008) <<http://www.olt.gov.au/resource-red-report-sessional-teachers-unsw-2008>>.

⁴ Cowley, 'Being Casual About Our Teachers', above n 2, 25.

⁵ 38 accredited law schools are members of the Council of Australian Law Deans, and two are not: Council of Australian Law Deans, *Australia's Law Schools* (November 2013) Studying Law in Australia <<https://cald.asn.au/slia/australias-law-schools/>>; Top Education Institute, School of Law (2018) <<https://www.top.edu.au/home/school-of-law>>; Legal Profession Admission Board, *Diploma in Law Course* (16 August 2018) <<http://www.lpab.justice.nsw.gov.au/Pages/diploma-law-course/diploma-law-course.aspx>>. While the US has five times as many law schools

permanent research-based colleagues, a decision to teach in small classes can result in very high levels of reliance on sessional colleagues.⁶ One large Australian law school had 75 sessional academics in 2014, teaching over 50% of the classes.⁷

Consequently, professional development for sessional colleagues is of fundamental importance to the teaching of law degrees. With funding from the former Australian Government Office for Learning and Teaching, the *Smart Casual: Promoting Excellence in Sessional Teaching in Law* project (*Smart Casual*) sought to address this priority by developing online, law-specific professional development modules. This article draws on feedback from sessional colleagues who trialled the modules and an autoethnography of the authors to reflect on the complexity of the task of developing professional development materials and the implications of this reflection on collegiality in the law school environment.⁸

II BEST PRACTICE IN HIGHER EDUCATION PROFESSIONAL DEVELOPMENT FOR SESSIONAL COLLEAGUES

Effective professional development is not a one-off, orienteering program, but instead should be an ‘ecological’ approach that is evoked by engagement with other colleagues.⁹ Based on their research into the needs of sessional colleagues in Canadian universities, Webb, Wong and Hubball suggest that the professional development of sessional colleagues requires the existence of ‘a flexible community of practice’ and ‘a scholarly approach to teaching and learning’.¹⁰ Communities of practice, as defined by Wenger and others,¹¹ revolve around a shared concern or

(207 ABA approved in 2017, see American Bar Association, *ABA Approved Law Schools by Year* <https://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html>), the US has 13 times the population (318 million: 23.6 million in 2014). For law school enrolments see, eg, Edmund Tadros, “‘Massive’ Pool of Law Graduates Divides Industry”, *The Australian Financial Review* (Sydney), 9 October 2014; Wes Ward, ‘New Law Degree Surpasses Expectations’ (Media Release, 24 February 2016) <<http://news.csu.edu.au/latest-news/charles-sturt-university/csu-students/new-law-degree-surpasses-expectations>>.

⁶ Cowley, ‘Being Casual About Our Teachers’, above n 2, 11, 23.

⁷ Rachel Hews, Jennifer Yule and Justine Van Winden, ‘Sessional Academic Success: The QUT Law School Experience’ (2014) 7 *Journal of the Australasian Law Teachers Association* 15, 15.

⁸ The responses in the autoethnography, where referenced in this article, are identified by the anonymised code ‘Author A’, ‘Author B’ etc.

⁹ Peter Knight et al, ‘Enhancing Part-Time Teaching in Higher Education: A Challenge for Institutional Policy and Practice’ (2007) 61 *Higher Education Quarterly* 420.

¹⁰ Andrea S Webb, Tracy J Wong and Harry T Hubball, ‘Professional Development for Adjunct Teaching Faculty in a Research-Intensive University: Engagement in Scholarly Approaches to Teaching and Learning’ (2013) 25 *International Journal of Teaching and Learning in Higher Education* 231, 232.

¹¹ Etienne Wenger, ‘Communities of Practice and Social Learning Systems’ (2000) 7 *Organization* 225, 229; Bernadette Mercieca, ‘What Is a Community of Practice?’ in Jacquie McDonald and Aileen Cater-Steel (eds), *Communities of Practice — Facilitating Social Learning in Higher Education* (Springer, 2017) 3, 9–12.

interest (domain), a sense of mutual trust and connection (community) and the development through shared experiences of particular practices and identities (practice). Such communities are unlikely to develop in atomistic ‘training’ courses, where participants come together for a single event and are subject to instruction. On the other hand, deleterious effects on teaching practice can emerge if communities develop practices based on folk wisdom without a scholarly basis. Any program of professional development therefore needs to provide for multiple opportunities to meet in an environment that promotes reflection and communication around evidence or theoretically based ideas.

Webb, Wong and Hubball also emphasise the need for localised development programs, a point repeated by Hamilton, Fox, and McEwan.¹² One example of a local program supporting sessional colleagues at the Queensland University of Technology (‘QUT’) Law School is outlined by Hews, Yule and Van Winden (‘the QUT trial’).¹³ This program appointed one permanent and two sessional colleagues to liaise with other sessional colleagues, supported by an online frequently asked questions (‘FAQ’) website. The program was primarily aimed at building a sense of connectedness for sessional colleagues and answering administrative queries. A number of social events were organised. However, there did not appear to be much focus on professional development, and interestingly feedback from sessional colleagues indicated that this was what they most wanted included in the initiative,¹⁴ similar to the arguments of Webb, Wong and Hubball.¹⁵

Importantly, the QUT trial highlighted a lack of success in getting sessional colleagues to attend face-to-face meetings. The organisers noted:

It is thought that these challenges arose primarily due to the large numbers of sessional academics working remotely from the university. ... Further, attending on-campus events when not otherwise attending campus on a given day is often time-consuming and difficult.¹⁶

One response to these issues is to develop online professional development materials,¹⁷ something we have undertaken through the *Smart Casual* project. The modules are intended to provide an accessible set of practical, yet scholarly, materials around which individual law schools can build localised communities of practice

¹² Webb, Wong and Hubball, above n 10; Jillian Hamilton, Michelle Fox and Mitchell McEwan, ‘Sessional Academic Success: A Distributed Framework for Academic Support and Development’ (2013) 10(3) *Journal of University Teaching & Learning Practice* 1.

¹³ Hews, Yule and Van Winden, above n 7.

¹⁴ *Ibid* 22.

¹⁵ Webb, Wong and Hubball, above n 10.

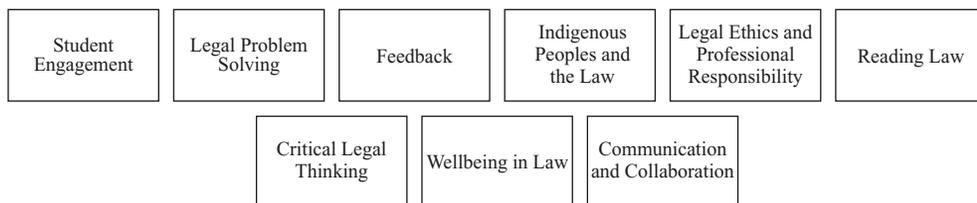
¹⁶ Hews, Yule and Van Winden, above n 7, 23.

¹⁷ The advantages of online development opportunities for sessional staff are considered in Danielle Hitch, Paige Mahoney and Susie Macfarlane, ‘Professional Development for Sessional Staff in Higher Education: A Review of the Current Evidence’ (2018)

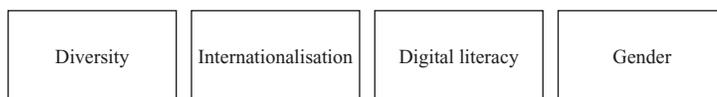
on professional development. While primarily written with Australian colleagues in mind, much of the content is of relevance internationally.

III THE *SMART CASUAL* PROJECT AND MODULES

Smart Casual contains nine modules to date:



Four strategic themes critical to law and law teaching are also explicitly woven into each module:



The online modules can be accessed freely by law teaching colleagues worldwide.¹⁸

As senior legal educators, we had heard from sessional colleagues that they found it difficult to access development support. We resolved to address this problem, but realised that we had a limited understanding of what was required.

We therefore began our project with an empirical analysis of sessional law teachers' needs. This involved surveying sessional staff in three law schools and a national survey of law school leaders (Associate Deans). This identified a series of priorities which we grouped into nine topics.¹⁹

A pilot set of three modules (Student Engagement, Feedback and Legal Problem Solving) were developed, trialled and published in 2014. A further five modules were subsequently developed and the first three updated in light of our experience. Part of the second phase was to also embed four themes through the modules (Diversity, Internationalisation, Digital Literacy, and Gender). These four areas we felt were

Higher Education, Research and Development 285, 295–6. Their article provides a valuable review of studies into sessional colleagues' experiences but does not place those findings into larger theoretical framings.

¹⁸ Smart Casual, *About* <<https://smartlawteacher.org>>; Smart Casual, *Background to the Project* <<http://www.lawteachnetwork.org/smartcasual.html>>.

¹⁹ For the methodology and a detailed discussion of the results of this research see Heath et al, above n 2.

important and relevant to all of the more practically focussed modules, but worked best as perspectives on issues rather than modules in their own right.²⁰

In both phases, research into the underlying academic literature for each topic was undertaken by the *Smart Casual* team. Position papers were then drafted and circulated to a national Advisory Board of expert legal educators. Following feedback and refinement, draft modules were created. These modules were then sent to the Advisory Board, before being further refined and tested with focus groups of sessional law teachers. After another process of refinement, final versions were released online.

As we incorporated the broader themes we also became increasingly aware of our own limitations. Consequently, we engaged expert consultants to provide background papers on the themes and how to embed them within the modules. While eight of the modules were written as a group with interwoven themes, we recognised that the Indigenous Peoples and the Law module had to be developed from an Indigenous perspective. As a result that module is solely authored by Ambelin Kwaymullina.

The drafting of the *Smart Casual* modules highlighted a number of critical questions about how best to encourage law colleagues' understanding of teaching and learning issues. This raises issues of:

- (i) Whether it is acceptable to make value judgements about pedagogical approaches or theoretical positions on learning in structuring a set of modules which are intended to have relevance to all Australian law schools;
- (ii) To what extent it is appropriate to see the exercise as one of training or a peer-to-peer discussion;
- (iii) How to produce a set of resources that can be of use to sessional teachers with a range of experience;
- (iv) How to recognise the breadth and complexity of modern scholarly research into teaching and learning issues, in a concise format primarily aimed at practical tips for success;
- (v) How to support teaching that includes within the substantive content, encouragement of digital literacy and internationalisation, and responds appropriately to the need for better recognition, inclusion and respect for diversity, gender and Indigenous peoples' perspectives.

²⁰ For a discussion of the initial consultation and development of the first three modules see *ibid.* For the approach taken in developing the balance of the modules and themes see Heath et al, “*Smart Casual*”: Towards Excellence in Sessional Teaching in Law’ (Report, University of Adelaide, Flinders University and University of Western Australia, 2014) <<https://smartlawteacher.org/other-publications/>>.

Our responses to these questions were ultimately to develop the modules so that they:

- (i) Were development materials written specifically for Australian sessional teachers in law;
- (ii) Provided a nascent sense of a community of practice by incorporating video vignettes from actual sessional colleagues;
- (iii) Did not dictate or promote particular pedagogical approaches (which may be set by law schools). Instead they draw on successful teaching techniques within a range of pedagogies as illustrations;
- (iv) Recognised the role of affect in teaching and conveyed the joys of teaching. The modules aim to be engaging, motivating and encouraging as well as instructive;
- (v) Encouraged discussion and reflection rather than determine choices — the modules are based on a respectful peer-to-peer approach recognising that participants may have relevant experience and alternative philosophies on teaching. Rather than stating propositions, the modules encourage reflection through open questions and allow teachers to navigate their own route through the material;
- (vi) Sought to avoid oversimplifying complex issues but at the same time recognised the time constraints of sessional colleagues. They aim to avoid overwhelming new teachers but also provide advanced advice for experienced teachers, using a trunk and branches approach to the module layout. Experienced colleagues can follow links to further reading, and novice users can concentrate on core issues;
- (vii) Had a blend of fundamental concepts and practical examples, ideas to consider and practical techniques to use in the participant's next class. Different participants will value these elements differently;
- (viii) Embedded scholarly research into teaching throughout the module with clear links to alert participants to its existence, while avoiding language that is overly scholarly;
- (ix) Aimed to break down mono-cultural tendencies in legal education through recognition of diversity in the modules, particularly through diversity in the interviewed sessional teachers and in assessing the needs of students;
- (x) Were positioned and contextualised as part of a larger whole with underlying themes permeating all modules and an introductory presentation linking the themes to the modules.

The modules are intended to satisfy some, but not all, of the principles of best practice academic development. They are designed to be time-efficient and available

on an ‘as-needs’ basis, so sessional colleagues can use them as and when required. However, we recognise that in isolation the resources will not engage sessional teachers in collaborative endeavour nor in the collegial discussions which are important in developing teaching expertise. Consequently, we have also developed supporting resources for law schools using the modules and have trialled half-day workshops based on individual modules.²¹ Initiatives such as these can help ensure sessional staff can access support from continuing and experienced colleagues.²²

The modules were drafted in Microsoft PowerPoint and converted to Articulate Storyline.²³ We chose this combination of technologies both for ease of development,²⁴ and also because, although we wanted to have the ability to be non-linear in our approach, there remained an inescapable linear logic to most topics. Each module begins with a series of core concept slides and then provides multiple topics building on those ideas. Users can work through the topics sequentially, or use a menu on the side to skip to slides of interest.

IV METHODOLOGY

In this article we reflect on why we designed the modules in the ways summarised above. The questions raised and challenges we faced are analysed through a range of methodologies. We complement an analysis of the relevant literature with auto-ethnography in which we provide our narrated reflections on the questions raised²⁵ in the context of developing the resources. Autoethnography places the researcher at the centre of the research, with the focus on the self in a social-cultural context. It:

reviews personal experience reflexively ... and from this analyses and distils key issues about that autobiography from an ethnographic stance, i.e. what the

²¹ For initial ideas of how such programs can be developed see, eg, Catherine F Brooks, ‘Toward ‘Hybridised’ Faculty Development for the Twenty-First Century: Blending Online Communities of Practice and Face-to-Face Meetings in Instructional and Professional Support Programmes’ (2010) 47 *Innovations in Education and Teaching International* 261; Norman Vaughan and D Randy Garrison, ‘How Blended Learning Can Support a Faculty Development Community of Inquiry’ (2006) 10(4) *Journal of Asynchronous Learning Networks* 139.

²² Research into the extent this happens is lacking: Hitch, Mahoney and Macfarlane, above n 17, 296.

²³ Articulate Storyline is an e-learning tool which enables the construction of interactive content.

²⁴ We recognised the limitations of the technology, but also our own limitations as educational designers and chose to emphasize the content over the design.

²⁵ Carolyn Ellis and Arthur P Bochner, ‘Autoethnography, Personal Narrative, Reflexivity: Researcher as Subject’ in Norman K Denzin and Yvonne S Lincoln (eds), *The Handbook of Qualitative Research* (Sage, 2nd ed, 2000) 733 (this seminal chapter is not in later editions); Carolyn Ellis and Arthur P Bochner (eds), *Composing Ethnography: Alternative Forms of Qualitative Writing* (AltaMira Press, 1996).

personal experiences say to the reader about culture, values, relations and society in relation to the topic of research interest.²⁶

In foregrounding the experience of the researcher in the research process, it can sometimes raise issues of selective memory and the subordination of facts for emotional responses.

For this research, we independently answered a series of questions posed by one author, which asked us to reflect on the development process. Those questions largely mirrored the questions raised in the following sections of this paper. By co-authoring the resulting analysis, we retained control over the use of any of our responses and had the opportunity to edit out any individual responses which might have been thought to be misleading impressions of the participant's position.

In addition, with ethics approval obtained from the Social and Behavioural Research Ethics Committee, Flinders University (Project 6866),²⁷ we have drawn on the feedback and experience of sessional colleagues who contributed to the *Smart Casual* resources either by way of evaluation — questionnaire and focus group — or video interviews. Focus group participants were volunteers recruited via email for both the pilot phase (SC 1, 2014 n = 28) and second phase (SC 2, 2016 n = 33) and were anonymously recruited from law schools in New South Wales, Queensland, South Australia and Western Australia where team members taught. Each participant reviewed three modules of their choice and was then interviewed in a focus group by an independent facilitator using semi-structured questions. Those unable to attend were emailed a questionnaire of the focus group questions. Focus group transcripts and questionnaire answers were anonymised. Participants brought a broad mix of experience, age, gender, and geographic influences to their comments, but the anonymous nature of the transcripts prevented any demographic analysis of responses.²⁸

While the law schools involved differ in pedagogical approaches, size and location, they could not be said to be fully representative of the diverse tapestry of legal education in Australia. However, we found a wide range of approaches and experiences among sessional colleagues. These differed from school to school and indeed within schools. The responses are therefore thick qualitative accounts of lived experience.

²⁶ Louis Cohen, Lawrence Manion and Keith Morrison, *Research Methods in Education* (Routledge, 2018) 298.

²⁷ Institutional ethics approval for the use of this data was obtained in accordance with the National Health and Medical Research Council of Australia, National Statement on Ethical Conduct in Human Research (2007). In this article, feedback from each set of participants is identified by a separate group number: thus 'Smart Casual 1 trial feedback group 1'; 'Smart Casual 2 trial feedback group 2'. The groups are collations of responses by State. The membership differs from 2014 to 2016.

²⁸ Given the small numbers involved this is likely to have been inappropriate in any event.

In adopting this multi-faceted research methodology, we provide a ‘profession of stories’;²⁹ the scholarly stories of researchers, our own stories of experience and practice, and the shared stories of our sessional colleagues. Because of this multi-faceted approach, this article is not structured in a standard literature review, data analysis, or discussion format; instead, it moves back and forth between the three to capture the conflicting dimensions we discovered.

This article discusses the modules in detail, but space constraints prevent us from providing multiple illustrations. We encourage readers to access the modules as they read this article.³⁰

V PEDAGOGIC POSITIONS

Gibbs and Coffey’s landmark article on training university teachers demonstrated that there was a link between training and good teaching at university level.³¹ Exactly what form that training should take in law schools has not been the subject of detailed study. In the US context, articles by Popper³² and Lander³³ merely suggest the importance of a mentor. Research in other areas of higher education suggests that ongoing, collaborative practices that encourage reflection are required.³⁴

A significant amount of the literature on professional development of academic colleagues takes for granted that they are not teaching as they should.³⁵ There is also a view that professional development programs can have ‘positive’ effects ‘provid[ing] a kind of “alternative culture” that counter-balance[s] the negative influences of

²⁹ Michael Dyson, ‘My Story in a Profession of Stories: Auto Ethnography — an Empowering Methodology for Educators’ (2007) 32(1) *Australian Journal of Teacher Education* 36 <<http://ro.ecu.edu.au/ajte/vol32/iss1/3>>.

³⁰ Smart Casual, *The Smart Casual Professional Development Modules* <<http://smartlawteacher.org/modules>>.

³¹ Graham Gibbs and Martin Coffey, ‘The Impact of Training of University Teachers on Their Teaching Skills, Their Approach to Teaching and the Approach to Learning of Their Students’ (2004) 5 *Active Learning in Higher Education* 87.

³² Andrew F Popper, ‘The Uneasy Integration of Adjunct Teachers into American Legal Education’ (1997) 47 *Journal of Legal Education* 83, 84–6.

³³ David A Lander, ‘Are Adjuncts a Benefit or a Detriment’ (2007) 33 *University of Dayton Law Review* 285, 293.

³⁴ Fran Beaton and Amanda Gilbert (eds), *Developing Effective Part-Time Teachers in Higher Education: New Approaches to Professional Development* (Routledge, 2012).

³⁵ See, eg, Marie-Anne Mundy et al, ‘Setting the Standard for Faculty Professional Development in Higher Education’ (2012) 5 *Journal of Academic and Business Ethics*; Nick James, “‘How Dare You Tell Me How to Teach!’: Resistance to Educationalism within Australian Law Schools’ (2013) 36 *University of New South Wales Law Journal* 779; Kate Galloway and Peter Jones, ‘Guarding Our Identities: The Dilemma of Transformation in the Legal Academy’ (2014) 14(1) *Queensland University of Technology Law Review* 15.

the culture of teachers' departments'.³⁶ The assumption is also generally that there are clear best practices that colleagues can be expected to adopt. However, these assumptions are often tied to particular theoretical teaching constructs — such as constructivism³⁷ — or particular teaching modalities — such as online or 'flipped' classrooms,³⁸ and are not automatically generalisable to other contexts. Similarly, it has been argued that professional development approaches are on a spectrum from 'domesticating' to 'emancipating'. Domesticating approaches aim to bring colleagues into an approach to teaching that is in line with institutional practices (or, we could add, in line with theoretical approaches), and emancipatory approaches would encourage critique of existing practices in an institution.³⁹

Smart Casual is intended to be of use to sessional colleagues across a range of teaching environments, and remain applicable within a range of predetermined departmental approaches to pedagogy. Sessional colleagues are unlikely to have much say over the pedagogical approach adopted in a law school or law subject, though they may well be able to develop approaches to teaching within those parameters. Consequently, a professional development program ought not to offer suggestions that might undermine what they are expected to do in a particular institution. At the same time, the fact that the *Smart Casual* resources are addressing colleagues across a range of institutional approaches inevitably means that as they describe what we consider to be best practice, they will be in many ways emancipatory. Even within the confines of a set curriculum and pedagogy there is likely to be room for improvement and innovation.

We are aware that all teachers approach the various options in teaching with their own belief system. As Errington states:

Central to a teacher's belief system are likely to be dispositions regarding teaching and learning. These encompass held beliefs about what teachers believe they should be teaching, what learners should be learning, and the respective roles of teachers and learners in pursuing both. The criteria for educational choices is likely to extend well beyond the singular pursuit of learning objectives to envelop a much broader range of beliefs, such as, views about learners and learning, perceptions of 'worthwhile' knowledge, and the organization of learning. ... In determining what is considered 'worthwhile', it follows that teachers who subscribe to one set of viewpoints are likely to act in a manner different from

³⁶ Gibbs and Coffey, above n 31, 98.

³⁷ A number of these theories are set out in Michael Hunter Schwartz, 'Teaching Law By Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching' (2001) 38 *San Diego Law Review* 347.

³⁸ See, eg, Patricia D Wolf, 'Best Practices in the Training of Faculty to Teach Online' (2006) 17(2) *Journal of Computing in Higher Education* 47.

³⁹ Ray Land, 'Agency, Context and Change in Academic Development' (2001) 6 *International Journal for Academic Development* 4, 4, 7–9; Sue Clegg, 'Problematizing Ourselves: Continuing Professional Development in Higher Education' (2003) 8 *International Journal for Academic Development* 37, 38.

those adopting some other perspective. ... What is clear is that the primacy effect of teacher beliefs will be likely to induce teachers to put beliefs into practice. Whether teachers act in an implicit way to held beliefs, or from a more informed, articulate stand, they will express what constitutes worthwhile teaching and learning for them anyway.⁴⁰

It follows that any professional development program must recognise the potentially divergent views of its participants. We believe that the main divergences the *Smart Casual* modules face are sessional colleagues' views as to the appropriate relative weight to place on knowledge acquisition versus independent thought,⁴¹ the emphasis on black-letter law or contextual approaches,⁴² the role of colleagues in supporting student wellbeing, approaches to diversity and inclusion, questions of privilege and power, and the appropriateness of inculcating values⁴³ — or not.⁴⁴

All of these complex and overlapping considerations informed our approach to developing the modules. It is certainly also true that as academics with a strong interest in assisting colleagues to be the best teachers they can be, we have strongly held opinions as to what is 'good' and 'bad' teaching. However, the process of drafting, editing and reviewing the modules has itself led us to a new appreciation of the diversity of viewpoints. As one author put it:

It is inevitable that we have adopted pedagogical approaches and theoretical positions in developing the models. However, it is also inevitable, given the diversity within the project team and the contribution each team member made to the development of all the modules, that it will not be a single approach — rather we have each brought aspects of our own pedagogy to the collective table. It might be expected that a user will choose to adopt aspects of the modules that resonate most strongly with them.⁴⁵

⁴⁰ Edward Errington, 'The Impact of Teacher Beliefs on Flexible Learning Innovation: Some Practices and Possibilities for Academic Developers' (2004) 41 *Innovations in Education and Teaching International* 39, 40–1.

⁴¹ Mary M Kennedy, 'Choosing a Goal for Professional Education' in W Robert Houston, Martin Haberman, and John Sikula (eds) *Handbook of Research on Teacher Education: A Project of the Association of Teacher Educators* (Macmillan, 1990) 795.

⁴² Alex Steel, *Good Practice Guide (Bachelor of Laws): Law in Broader Contexts* (2013) Legal Education Associate Deans' Network <<http://lawteachnetwork.org/resources/gpg-broadercontexts.pdf>>.

⁴³ Fiona Cownie, 'Exploring Values in Legal Education' [2011] (2) *Web Journal of Current Legal Issues* <<http://www.bailii.org/uk/other/journals/WebJCLI/2011/issue2/cownie2.html>>.

⁴⁴ Stanley Fish, *Save the World on Your Own Time* (Oxford University Press, 2008); of course, such a rejection of values is a set of values in itself that is arguably less honest.

⁴⁵ Author A.

The representative nature of those involved has also helped to avoid partisan approaches to ‘best practice’:

I think that having six co-authors, an expert review panel, theme experts, and an overview of the literature has meant that we have largely identified where there is an alternative view point, or where an approach is not a universal one. We have done this, I think, in as brief a way as possible without engaging deeply into alternative approaches. ... I do think also that the breadth of experience across the project team and our extended networks means that we are likely to (but not necessarily definitely) have a grasp of the landscape and how the issue is approached nationally.⁴⁶

The project’s philosophy is summed up in this statement from one of the authors:

It is not possible to stand entirely outside a pedagogical or theoretical approach. Inevitably we are adopting a position. The attempt to create something of relevance to all law schools is certain to fall short of the mark (as well as being perceived to do so). However, the alternative is to offer nothing in a space where we know many colleagues are seeking support and have not been able to find what they are looking for. The audience for these modules is made up of educated people who want to build up their skill levels. I trust that they will make their own assessments of what to use, how it fits into the context in which they teach, and what they will discard. I am sure most are working in an environment like my own, where there is no uniformly accepted theoretical or pedagogical stance.⁴⁷

In all of this we must recognise that to be entirely neutral is mythical — even for external professional developers.⁴⁸ This is even less possible for us as the authors of the *Smart Casual* modules, as we are teachers ourselves and see all issues through the lenses of our own experiences. We instead imagine the relationship between ourselves and the module users would most resemble the critical friend/seeker model proposed by Rathbun and Turner:

The developer enables the teacher to look at his or her actions from an unfamiliar vantage point and interprets his or her behavior in new ways. Underlying this model is the notion of what it means to be a ‘true friend’: mutual respect, forgiveness of faults, tolerance for idiosyncrasies, shared commitment to teaching well, and respect for scholarly critique. Friendship neutralizes inequalities in the relationship. Critical friends may also engage in reciprocal critique.⁴⁹

⁴⁶ Author G.

⁴⁷ Author H.

⁴⁸ Gail Rathbun and Nancy Turner, ‘Authenticity in Academic Development: The Myth of Neutrality’ (2012) 17 *International Journal for Academic Development* 231.

⁴⁹ *Ibid* 234: they place this relationship in contrast with doctor/patient, seller/purchase, counsellor/counseled, researcher/subject, co-inquirer and challenger/defender models.

Importantly, we have attempted to engage in evidence-based suggestions, with most propositions or teaching tips in the modules having their own citation from the literature. Participants can thus easily go to a source to further test the assumptions or propositions in the module. The addition of links to further resources received positive comment — as did the inclusion of a brief description of the nature and utility of the resources (rather than just a link).⁵⁰

Further, beyond beliefs as to what it is appropriate to teach, are a range of beliefs and values that are displayed as part of teaching. As Cownie points out, ‘[I]aw teachers, like others in the academy, need to be aware not only of the values inherent within the subject-matter of their discipline. They also need to pay attention to the pedagogic values, which permeate every moment of the teaching process.’⁵¹ These include the degree of enthusiasm shown, levels of affect, personal behaviour, respect for students and levels of formality.

Overlooking the affect in teaching can lead to counter-productive dryness in online materials. The use of interviews with sessional colleagues was one way to alleviate this. As one module trial participant put it:

there was a sense for me that these modules, while very useful, didn’t really encourage teachers and students to ‘have fun’ with the material and talk about what is easy about the law, or what is exciting about the prospect of ambiguity or uncertainty — *however these issues were drawn out well in some of the videos.*⁵²

There are also issues of preserving the autonomy of students, who are to be informed but not indoctrinated. As Lawton has noted in the US social justice context:

we must also recognize that the choice to support social justice is a value judgment, reflecting the morality of those performing the work. This choice is particularly important in the context of legal education, where our students likely (and rightly) have alternative views of morality than those of us who have accepted the responsibility of educating them.⁵³

For the modules this meant that we aimed to encourage sessional colleagues to be respectful of student diversity in moral outlook, while at the same time recognising the diversity of moral and pedagogical outlooks of sessional colleagues themselves. The use of a peer-to-peer tone and focus on self-reflection — which work towards answers rather than directly imposing them — is thus also intended

⁵⁰ *Smart Casual* 1, trial feedback group 3, 2014.

⁵¹ Cownie, above n 43. For a discussion in one context see Mary Heath, ‘Encounters with the Volcano: Strategies for Emotional Management in Teaching the Law of Rape’ (2005) 39(2) *The Law Teacher* 129.

⁵² *Smart Casual* 2, trial feedback group 3, 2016 (emphasis added).

⁵³ Julie D Lawton, ‘The Imposition of Social Justice Morality in Legal Education’ (2016) 4 *Indiana Journal of Law and Society Equality* 57, 58.

to allow participants to disagree with the modules' propositions. The intention of the modules is to raise issues and prompt reflection, not to determine choices. One author commented:

the emphasis on a peer-to-peer approach to the modules should mean that we are reflective and respectful about the adoption or rejection of those practices by the participant. It is important though to recognise that sessional colleagues operate in a learning environment that is not set by them and so the modules should not be trashing approaches that colleagues might be required to adopt. I'd hope that the modules nudge towards what the literature demonstrates is evidence based best practice but accept other practices might be appropriate or required.⁵⁴

Focus group participants appreciated this approach, even if they disagreed with aspects of the module:

It was giving us insights into how we think about the law and how we teach thinking. It was talking about metacognition, which is how we think about our thinking. I thought that was really, really important. There were a lot of insights for me. Putting the law into its broader context and considering different perspectives.⁵⁵

One of the slides said, 'you don't have to agree. Your values need not cloud your analysis of what the law actually holds.' There's a difference between 'what does the law say' and 'do I agree with it?' It was actually quite good that [the module] articulated [that] you could read things in different ways.⁵⁶

But then I saw every so often there would be the germ of something interesting and I realise oh I've thought about that and just glossed over it or I've done something very crude to deal with that and this is starting to ask those questions. And it ... often ... didn't take you much further or didn't sort of ... deliver on the problem of trying to help you solve it but just the fact that it was framed and they'd made a go of it made it interesting enough to think about it.⁵⁷

Others would have preferred a more directed approach:

but then often times there were too many questions, there were no answers, and there were no links to what is the policy about having a go at students who haven't prepared in tutes?⁵⁸

where there is an extensive list of questions, just give the answers.⁵⁹

⁵⁴ Author A.

⁵⁵ *Smart Casual 2*, trial feedback group 4, 2016.

⁵⁶ *Smart Casual 2*, trial feedback group 4, 2016.

⁵⁷ *Smart Casual 2*, trial feedback group 1, 2016.

⁵⁸ *Smart Casual 2*, trial feedback group 4, 2016.

⁵⁹ *Smart Casual 2*, trial feedback group 4, 2016.

It's fine to say, 'do you want to do this in your class?' or 'what about ethics?' I love those questions. That's great, and I think about them anyway, especially at night time not going to sleep, but what about 'here are some suggestions'? That's the point of it. This is not a soulsearching exercise.⁶⁰

These reactions caused us to modify the modules to offer more suggestions, for example. Yet, to us, they also reinforced the need for the modules to be the beginning of a collegial discussion. Ultimately, the modules are not conceived as an endpoint for professional development, but rather as a start. How to achieve that conversation is discussed below.

VI TEACHER-TRAINING OR PEER-TO-PEER DISCUSSION

A fundamental question we faced in drafting the modules was the appropriate tone. Outside of the law school context, a large proportion of the academic development literature emerges from secondary school-based approaches and describes programs as 'training'.⁶¹ Such approaches, however, tend to assume a knowledge or experience deficit in the audience; we took the view that this was inappropriate for legal sessional colleagues. Even new sessional staff are full colleagues and come with their own experiences of learning and teaching, which may be greater than permanent, tenured staff. Consequently, it was important to find ways to encourage reflection through a peer-to-peer dialogue, and with no expectation of change.

Despite this intention, the tone of the first iteration of the modules in the pilot project was still 'largely instructional — "you should", "do ..."'.⁶² Following feedback from the Expert Reference Panel we made a conscious switch to a more collegiate 'sharing, not training' model. It marked an explicit decision to conceive of the modules as germinators of communities of practice. This collegiate, community-building role for the modules was appreciated by pilot focus groups. There was a definite sense that the modules offered an opening to a sense of community amongst the sessional colleagues. They felt the modules helped close the gap they experienced when they were unable to discuss their teaching with colleagues.⁶³ Ideally though, a law school would provide and support that conversation around the modules.

One key feature of the modules is the interspersing of short video interviews of sessional colleagues. This is intended to shift focus away from the inevitably authoritative text of the modules and provide a nascent sense of a community of practice. There was widespread support from the *Smart Casual* focus groups for the use of the videos.

⁶⁰ *Smart Casual 2*, trial feedback group 4, 2016.

⁶¹ See Gibbs and Coffey, above n 31; Mary M Kennedy 'How Does Professional Development Improve Teaching?' (2016) 86 *Review of Educational Research* 945.

⁶² Author N.

⁶³ *Smart Casual 1*, trial feedback group 4, 2014.

Focus group reactions to the initial three pilot project modules emphasised support for the use of videos of current sessional colleagues. There was a strong sense that this turned the modules into peer-based discussions, with the interviewed colleagues demonstrating different perspectives to the participant's own, and offering views that were at times dissonant with those foregrounded in the modules. The following comments are representative:

It was really good the videos were coming from people at our level. It was really nice to hear some of the tips about what people do and the tricks they use. For me it was almost reassuring to see some of the things I do echoed in their comments.⁶⁴

It was nice the videos weren't a lecture. You weren't just being talked at; it was like they were trying to engage with you a bit.⁶⁵

I can't talk about the videos highly enough, I thought that the different perspectives, that the way they engaged with us, that the tips they gave us were fantastic.⁶⁶

The second set of modules sought to build on that impact by emphasising, through the choice of interviewees, the diversity of sessional colleagues and the environments in which they teach. This was recognised by some focus group participants:

I feel like the videos were quite obviously ... trying for the diversity and gender balance, which was really good.⁶⁷

Some suggested that the modules could go further with the videos:

I don't mind the talking heads because it's a classic educational approach. But it could vary a bit I agree I mean maybe what you could do is have one of those things where it's actually in a real live classroom.⁶⁸

Others suggested the people in the videos could be better identified as sessional colleagues by providing a biography and more context to the video clips.⁶⁹ Both the classroom and biographical interviews have merit, but are separate projects in their own right. We were conscious of wanting to provide our volunteer interviewees some level of anonymity and to avoid identifying individuals with law schools or particular teaching environments. Decontextualising the clips was intended to make the interviewees' insights more universal, but that came at the cost of requiring the viewer to imagine a context, hopefully one that was relevant to that viewer.

⁶⁴ *Smart Casual* 1, trial feedback group 3, 2014.

⁶⁵ *Smart Casual* 1, trial feedback group 3, 2014.

⁶⁶ *Smart Casual* 1, trial feedback group 3, 2014.

⁶⁷ *Smart Casual* 2, trial feedback group 4, 2016.

⁶⁸ *Smart Casual* 2, trial feedback group 1, 2016.

⁶⁹ *Smart Casual* 2, trial feedback group 1, 2016.

A particular issue in pitching the tone of the modules was how to prompt reactions from participants without giving the impression of lecturing. The modules attempt to achieve this through a series of questions that prompt reflection. However, they also include ‘toolbox’ sections incorporating practical suggestions and strategies for dealing with a range of issues that might arise in law teaching.

This was positively received by the focus groups. Comments included:

I really liked the way the module invited teachers to self-reflect. If you can’t self-reflect as a teacher you are going to run into a lot of troubles. But sometimes you don’t really know how. I liked the questions that asked ‘how do you think this is relevant to you?’, ‘what do you think you could change?’⁷⁰

It was good to have questions. Like you said, ***, I did think about some things I could improve. I thought I should sit back and question ...⁷¹

So it wasn’t just how would you get your students to do it but how would you actually demonstrate it in your teaching? And I really liked that, I thought that was a very well designed module in that way. So that was really useful for me because it got me thinking about: do I do those things? Oh, I do some of them, maybe I could do some of them better.⁷²

I really think the emphasis on process, and thinking of teaching more as a process, and being reflective and critical on the process itself with identifying problems, coming up with a range of solutions, being prepared to think of them more as a toolkit that you might draw on depending on the specific situation, rather than there being a single answer, is important.⁷³

In consciously switching to a collegiate model, some underlying issues surfaced. In the following paragraphs we set out our reactions to that change. One issue was the need to change writing styles to be less didactic:

part of the drafting process required a conscious shifting of voice from ‘legal research’ to one that was far less prescriptive and much more playful and from a written to an oral ‘discourse register’. This made it far easier to draft modules in a way that encouraged self-reflection, acknowledged uncertainty and might stimulate conversations between sessional staff members.⁷⁴

This conscious need to change voice was also linked to the initial impulse to demonstrate the intellectual research base that underlay the modules:

⁷⁰ *Smart Casual* 1, trial feedback group 3, 2014.

⁷¹ *Smart Casual* 2, trial feedback group 4, 2016.

⁷² *Smart Casual* 2, trial feedback group 1, 2016.

⁷³ *Smart Casual* 1, trial feedback group 3, 2014.

⁷⁴ Author I.

First, I was immersed in the intellectual aspects of the module, attempting to distill and translate from academic articles to a more diagrammatic and abbreviated representation. My first imperative related more to sequencing and breaking down some of the more complex ideas into bites. In doing so I was probably working on a more didactic approach, defaulting to a lecture mode of designing PowerPoint. This was clear to the reviewer, who would immediately pick up the variations in tone throughout the draft module.⁷⁵

There were also significant constraints imposed on a peer-to-peer approach by the summary nature of the modules:

The hardest thing was the necessity to keep text to a minimum in the format which meant that you really only had a binary choice between conclusive statements and rhetorical questions. If you used too many statements you were ‘telling’ the participants. But if you asked too many questions ‘how have you experienced this issue?’, etc. you ended up haranguing the participants. ... What I found quite useful was the slightly discordant tone the videos set. I might want to make a particular point, but the video clip had a sessional peer seeing it slightly differently. That for me helped to soften the authoritative tone, and also I think encouraged a critical reading of the module’s claims.⁷⁶

Getting the peer tone right was also difficult partly because while we were trying to write as if we were talking to peers, addressing the range of potential audiences was a challenge:

My in-person peers are a very diverse crew. There isn’t any one size fits all approach to conceptualising one’s peers. I also think that though we try to think about the diversity of our peers as people, in terms of work roles, in terms of institutional settings, inevitably there are aspects that we miss or that we are blind to. And that sometimes our own struggles with colleagues who are resistant to scholarship of teaching and learning, or to changes in methods, show in what we write.⁷⁷

I’m conscious that I interpret the literature against my own preferred approach to teaching and so discount aspects of the literature I don’t find to have been a realistic reflection of my own experience. I have to realise that the same is true for sessional colleagues, so I have to be careful to only propose approaches that might work in some circumstances rather than assume my ideas are the only way or the best way.⁷⁸

Despite our best efforts, the tone used in the initial drafts of some modules provoked negative reactions:

⁷⁵ Author G.

⁷⁶ Author A.

⁷⁷ Author H.

⁷⁸ Author A.

I did find — and this might be an age thing — I did find some of it a little bit patronising.⁷⁹

the treatment just rubbed me up the wrong way [in] that it was sort of excessively formalistic. There was a germ of something interesting in there but wrapped around with sort of pseudo-academic sort of trappings.⁸⁰

And you sort of were taught to suck eggs and most of us if we're teaching in the law faculty obviously have the credentials to be able to do that. So I think I found it a little bit off-putting sometimes to be sort [of] told: this is how you do this, this is how you do that.⁸¹

The final versions attempt to address these concerns. Getting the tone right remains an ongoing issue and one we suspect differs from context to context, and from participant to participant.

VII APPROPRIATENESS OF COVERAGE

Designing professional development materials to support improvement in teaching and engage sessional colleagues is a complex process. The *Smart Casual* project was designed to develop materials through surveys and research into potential relevant topic areas, testing of trial modules with sessional colleague volunteers, and refinement into a final version. Given the wide potential audience for the resources and the deliberate intention not to be didactic or lesson/task oriented, part of the complexity of the iterative process was determining the appropriate coverage of modules. To maintain user interest, the assumptions underlying the drafting of the modules were: that to maintain user interest, the modules could not be too text heavy, should use graphics and diagrams where possible and encourage reflection by raising questions that may not have clear answers.⁸² To ensure their relevance, the modules targeted specific issues that arise in teaching environments both online and offline. Having colleagues in videos reinforced the relevance of these issues by showing how they had been dealt with by peers.⁸³

⁷⁹ *Smart Casual* 2, trial feedback group 3, 2016.

⁸⁰ *Smart Casual* 2, trial feedback group 1, 2016.

⁸¹ *Smart Casual* 2, trial feedback group 1, 2016.

⁸² We set ourselves a working rule of a maximum of 50 slides per module.

⁸³ There are synergies in our approach and that of Keller's ARCS-V model, though we were not aware of the model at the time we began the project: John M Keller, 'Motivation, Learning, and Technology: Applying the ARCS-V Motivation Model' (2016) 3(2) *Participatory Educational Research Journal* 1 <http://www.perjournal.com/archieve/issue_3_2/1-per_16-06_volume_3_issue_2_page_1_15.pdf>.

One of the drivers and principal aims behind both the pilot and the full project was to develop discipline-specific resources.⁸⁴ An advantage of a discipline-based approach is the ability to provide more specific, detailed examples that would be familiar to the participants:

It was really pleasing to open the modules and think ‘oh, someone is really concerned about me and what I’m doing.’ Normally you get things that are vague and generic and just about ‘teaching’, not teaching law. Which is very very different.⁸⁵

This was much more law focused [compared with prior generic training] which made it much more helpful for filling in the gaps I hadn’t already received from that sort of [generic] training.⁸⁶

And compared to someone who is going in to tak[e] 8-hour [science] labs once a week, the requirements on us are very different. It makes it hard to generalise that for instance how to handle a problem situation; ‘oh, but my problem is a chemical spill’.⁸⁷

While a discipline-based approach allowed for coverage of more relevant topics, the difficulty remained that the modules were to be viewed by a range of sessional colleagues, from first-time teachers to very experienced teachers. This raised real dilemmas. A first-time teacher could well be overwhelmed by a complex theoretical reflection on teaching practice and only want to know how to deal with a concrete problem. An experienced teacher might well have strategies to deal with common problems but be looking to be challenged and stretched in terms of their overall teaching practice. Striking the right balance was challenging:

By using a peer-to-peer model, and incorporating some video vignettes of more experienced practitioners and teachers, we tried to avoid being seen as trying to tell users, particularly those who may have been teaching for many years, how to teach. Rather the modules are about highlighting issues that a sessional teacher might face and sharing ideas on how to deal with them. Through the use of prompts and questions, it is intended that more experienced teachers will be encouraged to reflect on their own teaching and identify things that they might change — or not.

However, we anticipate that the majority of our users will be less experienced. For these users we have in places been very explicit in modelling best practice

⁸⁴ For a full discussion of the justification for the discipline-based approach see Heath et al, above n 2.

⁸⁵ *Smart Casual* 1, trial feedback group 3, 2014.

⁸⁶ *Smart Casual* 1, trial feedback group 3, 2014.

⁸⁷ *Smart Casual* 1, trial feedback group 3, 2014.

— whether it be suggesting specific classroom activities, words or body language that may be used in particular circumstances, or how feedback can be given.⁸⁸

The modules, therefore, contain concise propositions and possible approaches, but also encourage further exploration through questions and links to further reading. When the modules were trialled, participants tended to agree that providing additional materials was of benefit even if they had not followed those links initially. The modules provided tips and strategies for dealing with a range of teaching issues. Some more experienced sessional colleagues who trialled the modules reported in the focus groups that they had already attempted some of the methods suggested and found the modules reinforcing, reassuring and validating. Importantly, this approach proved helpful to both novice and experienced colleagues. Focus group participants commented:

I went through each of them before I'd taken any classes ... and I think that kind of calmed me down a little bit, just gave me a little bit of reassurance.⁸⁹

this is my second year of teaching. And it just made me feel some of the concerns and worries I had, I wasn't so dumb. Actually they're general things. And if I'm worried about these things I'm probably on the right track because other people are worried about them too.⁹⁰

The first [module on engagement] was really good for reinforcement... because it shows what were some good aims... it was useful to say 'that's on the right track'.⁹¹

So if you were just starting they'd be enormously useful. But if you've been teaching for a while they're useful, they make you think but they're not anywhere near as useful as they would be for someone starting out.⁹²

some of those 'what is communication' and things would have been very useful when I first started teaching to define what it was that was expected. After doing it for years, you go, 'I already know'. So, I guess it depends where it's pitched.⁹³

It was validating ... that gives you more confidence.⁹⁴

⁸⁸ Author N.

⁸⁹ *Smart Casual 1*, trial feedback group 3, 2014.

⁹⁰ *Smart Casual 2*, trial feedback group 1, 2016.

⁹¹ *Smart Casual 1*, trial feedback group 3, 2014.

⁹² *Smart Casual 2*, trial feedback group 1, 2016.

⁹³ *Smart Casual 2*, trial feedback group 3, 2016.

⁹⁴ *Smart Casual 1*, trial feedback group 3, 2014 [more experienced sessional teacher].

I think examples are always great. If you don't like it, just skip over it. It's user-friendly, and you can skip over it. In a way, it's not prescriptive, but this doesn't tend to be prescriptive. I think hints are great.⁹⁵

in fact after reading them last night I used at least two techniques from the Reading Law and Ethics modules in my *** class today!⁹⁶

Many sessional colleagues spoke about the capacity of the modules to trigger wider conversations with fellow tutors, mentors, supervisors and friends who were also teaching. However, as expected, more experienced colleagues wanted more:

Some of us that have been teaching a little bit longer we want something a bit more trouble shooting, a bit juicier.⁹⁷

The endorsement of the intention to provide modules that could become ongoing references influenced the writing of the second phase modules. However, the amount of information needed to create baseline understandings for users varied across modules. Some topic areas such as 'wellbeing', aimed to inform sessional colleagues of issues rather than provide detailed solutions. The modules that were more skills based, such as 'legal critical thinking', required a more detailed theoretical approach. However, finding the right level of complexity at which to pitch the modules was difficult.

Problems of inappropriate depth were addressed through a number of design features. Authors noted:

[It] required tough decisions about where to start and finish. It helped that we had rejected a linear approach and so people using the modules can chart their own way through the material. We also used a hierarchy of text and hyperlinks that should allow people to choose the depth to which they follow a topic.⁹⁸

there were problems with the modules being too long and too dense for some topics and in those cases hopefully the participants can still see a framework skeleton that allows them to initially skim and then use the module as an ongoing reference point — and the links to further materials is important in creating that sense.⁹⁹

But it was clear to us as authors that there were different ways of getting to the right level:

⁹⁵ *Smart Casual 2*, trial feedback group 1, 2016.

⁹⁶ *Smart Casual 2*, trial feedback group 3, 2016.

⁹⁷ *Smart Casual 1*, trial feedback group 3, 2014.

⁹⁸ Author I.

⁹⁹ Author A.

I think at this stage, and given the purpose of the project, the modules need to be foundational ... but that the provision of links to scholarly materials is a way to engage even the more experienced teacher.¹⁰⁰

staff are so different that everyone will find something they can learn here. I know I have learned a lot from others on the team. It needs not to be overwhelming, but there need to be plenty of invitations to reflect, consider and stretch.¹⁰¹

the module had to be of use to experienced teachers, and I found that as I wrote it I also learned a lot I hadn't known. ... The bigger problem for me was how to avoid the module becoming overwhelming for a new teacher. The trick there was hopefully to emphasise simple tips to do something in each area so that for each topic there was something simple a teacher could try in the next class without much preparation.¹⁰²

Feedback from the focus groups suggested that the modules are, for the most part, appropriately pitched:

But I think it's useful also when you've had a little bit of exposure so you're not either full of confidence or totally full of fear. You're sort of feeling your way. And this helps you along that path.¹⁰³

I found [the module on engagement] reassuring, because the techniques that I was using were definitely reinforced.¹⁰⁴

VIII SCHOLARSHIP OF LEARNING AND TEACHING

One of the factors that complicated the level of detail embedded in the modules was the question of how much underlying scholarship should be apparent. Webb, Wong and Hubball have noted the importance of a scholarly approach to the professional development of sessional colleagues, an approach 'informed by the research literature, methodological rigor, and evidence-based approaches for best educational practice.'¹⁰⁵ However, they recognise that '[a]djunct teaching faculty have often been removed from higher education environments for some time and ... may be unaware of contemporary approaches to teaching and learning in a research-intensive

¹⁰⁰ Author G.

¹⁰¹ Author H.

¹⁰² Author A.

¹⁰³ *Smart Casual 2*, trial feedback group 1, 2016.

¹⁰⁴ *Smart Casual 1*, trial feedback group 3, 2014.

¹⁰⁵ Webb, Wong and Hubball, above n 10, 233.

university,¹⁰⁶ often resorting to the traditional, didactic teaching methods.¹⁰⁷ Further, a research-based pedagogy takes time,¹⁰⁸ which is often a limited commodity for sessional colleagues whose focuses may not be directed solely on teaching. Sessional colleagues may be working in an environment where scholarship of teaching and learning is not perceived to be as valuable as ‘primary, in-discipline research’,¹⁰⁹ and are unlikely to be paid to engage in pedagogical research.

Therefore, while conscious that the *Smart Casual* modules were not intended to be research resources, it was critical that the content of each module was evidence-based and firmly grounded in the scholarship of teaching and learning in law. As one author put it:

It’s really critical for sessional colleagues to appreciate that teaching isn’t something for amateurs, but that it is a professional activity that requires reflection and reading to really achieve skill in. Particularly for new teachers that understanding can help them to realise that they aren’t expected to begin as experts, and also that there is a lot of research that can help them to become better teachers.¹¹⁰

Indeed, sessional teachers who trialled and provided feedback on the first three draft modules recognised the importance of the modules incorporating ‘comment and critique about which techniques work best in which contexts and clear indications of which strategies have research evidence based support as opposed to anecdotal support’.¹¹¹

We therefore undertook a literature review and wrote a position paper on each of the module topics. Valuable feedback on these papers was received from members of the *Smart Casual* Expert Review Group with a particular interest, and/or expertise, in that topic. One author noted:

The formal exercise of conducting a literature review forced me to read widely, link academic and higher education professional knowledge, and look for relevant and practical SoTL [Scholarship of Teaching and Learning] material inside and outside Law. My aim was to draw on this work (and show enough of the background knowledge) and offer access to research in the relevant areas for

¹⁰⁶ Ibid 232.

¹⁰⁷ Ibid 231; Pete Boyd and Kim Harris, ‘Becoming a University Lecturer in Teacher Education: Expert School Teachers Reconstructing Their Pedagogy and Identity’ (2010) 36 *Professional Development in Education* 9.

¹⁰⁸ Webb, Wong and Hubball, above n 10, 233.

¹⁰⁹ Mark MacLean and Gary Poole, ‘An Introduction to Ethical Considerations for Novices to Research in Teaching and Learning in Canada’ (2010) 1(2) *Canadian Journal for the Scholarship of Teaching and Learning* Article 7, 3.

¹¹⁰ Author A.

¹¹¹ *Smart Casual* 1, trial feedback group 3, 2014.

those who might be interested, but to do so without swamping sessional staff with unnecessary detail.¹¹²

The challenge was to strike an appropriate balance between direct engagement with scholarly content, and distillation or synthesis of content, while at the same time being mindful that the modules needed to be user-friendly, relatively short, and appealing to a broad-range of sessional teachers, including those who may not appreciate the importance of scholarship or how to implement it in their teaching. We reflected:

I don't know what is the 'appropriate amount' — I vacillated in my thinking. On the one hand I would imagine a sessional teacher who just needed the tools to do a job, and who might become alienated if the module was filled with quotes from the literature and references. On the other hand, I know that my own experience as a sessional was enhanced through engagement with the literature, and that I appreciated receiving training that was always fully grounded in the scholarship.¹¹³

even where it is possible, having a grasp on what is best practice and being able to implement it are different. I know that major changes in my teaching have taken long periods to implement, and my own thinking and action on some of the themes has been lifelong. Sessional colleagues are no different. ... we cannot hold out to precariously employed people who are not paid to spend time reading it that they should be doing this research and reading and acting on it when many of our well paid and tenured colleagues will not.¹¹⁴

Accordingly, aside from the inclusion of references throughout and relevant resources at the end — that sessional teachers can link to if they are interested and have the time — the scholarship (or at least the depth of scholarship) underpinning the module content was not explicit in the topic modules. In recognition of this, and to emphasise the importance of an evidence-based approach to teaching, a separate 'mini-module' on the importance of the scholarship of teaching and learning was developed and referenced at the end of each module, which included links directing users to appropriate resources.

I think it is important to offer guidance and support at the level of research evidence-based tips — things people can realistically try out, aim for or nudge themselves toward. ... I think that it is important to make sure that sessional staff know there are bodies of research underpinning some of what we do in class ... And that those who want more are empowered to go out and find it for themselves.¹¹⁵

112 Author I.

113 Author G.

114 Author H.

115 Author H.

Text these days is layered — through the use of hyperlinks, for example — that engages the reader in realms beyond linear progression. That our modules are online allows for discrete and discreet opportunities for the reader to branch off into their own investigation.¹¹⁶

providing links to further reading did provide hopefully easy avenues for sessional colleagues to access the research efficiently.¹¹⁷

Participants in the trial of the draft modules considered the links to additional resources very useful. In particular, participants might derive additional benefits from revisiting the modules as they become more relevant to their current teaching needs. For example, participants can replay the feedback module when marking is approaching, or as their teaching experience unfolds and they further reflect on the content.

I looked at a couple of the additional readings and I found them to be really good overviews of the information; they actually matched up with what you were saying on the slides and videos.¹¹⁸

I thought the links to the videos to give examples and the links to some of the articles and so forth were really quite good if you were the type of person that — okay, on this area, I'm struggling a bit or I want more information — you could have it. But if you were quite fine about that area, you could easily just skip over it and not have to go into all the detail.¹¹⁹

I thought the external references at the end were a good level as well. They weren't over the top. I was really interested in the critical thinking one because that's what my area of research is, anyway. So, I was interested in what articles they provided for that, and I thought they were a good level. I thought they weren't too confusing, which can happen, and they weren't too basic. I thought it was good.¹²⁰

IX DIVERSITY, CROSS-CULTURAL RESPECT AND INDIGENOUS VOICES

Reflecting on the approach taken in the *Smart Casual* pilot it became clear that while from a sessional colleague's time-poor perspective targeted modules such as 'increasing engagement in class' were what they were looking for, there are larger issues that pervade legal education. These issues of Indigenous inclusion and awareness, diversity, gender, internationalisation and digital literacy needed to be addressed across the suite of *Smart Casual* modules.

¹¹⁶ Author G.

¹¹⁷ Author A.

¹¹⁸ *Smart Casual* 1, trial feedback group 3, 2014.

¹¹⁹ *Smart Casual* 2, trial feedback group 3, 2016.

¹²⁰ *Smart Casual* 2, trial feedback group 3, 2016.

Law and legal education have been slow to embrace diversity¹²¹ despite the increasing diversity of the student cohort¹²² and the diversity of the wider community. This tends to generate a self-reinforcing cycle of exclusionary practices into which law graduates, including law teachers, are enculturated.¹²³ Colleagues may come to their teaching without having experienced inclusive teaching, and/or having been educated within a tradition which erases difference rather than welcoming it. Legal education is also set to dramatically change in line with globalisation and the digital revolution, and law teachers and students need to be prepared.

Our proposed solution was to incorporate these overarching issues as themes that could be woven into the more practically oriented modules. While we appreciated that this would be a very difficult task, it proved to be more challenging than imagined. Digital literacy and aspects of internationalisation are predominantly skills and content-based — but are both very wide-ranging in their impact and likely to involve curriculum changes or technologies that might not be in a sessional teacher's control.

Recognising diversity (including gender diversity) and embedding Indigenous perspectives into the modules was very complex because of the lived experiences involved. Indigenous peoples, students and colleagues cannot be essentialised into single voices or backgrounds, and we felt inadequate and ill-placed to attempt to describe those experiences. International students are often only defined as 'not local', but beyond that negative definition these students may come from a range of backgrounds and cultures and have many issues shared with 'local' students.¹²⁴

As we grappled with these complexities it became evident that almost every point being made in the modules could be reconsidered through the lenses of the themes. For example, a discussion of encouraging student contributions to class discussion takes on different perspectives when viewed through alternate lenses of computer mediated communication, students who are the first in their family to attend university, transgender students, students from educational systems that discourage critique

¹²¹ Angela Melville, 'Barriers to Entry into Law School: An Examination of Socio-Economic and Indigenous Disadvantage' (2014) 24 *Legal Education Review* 44; Marcelle Burns, 'Towards Growing Indigenous Culturally Competent Legal Professionals in Australia' (2013) 12(1) *International Education Journal: Comparative Perspectives* 226; Margaret Thornton, 'The Demise of Diversity in Legal Education: Globalisation and the New Knowledge Economy' (2001) 8 *International Journal of the Legal Profession* 37.

¹²² Elizabeth Stevens et al, 'Equity, Diversity and Student Engagement in a Law School — A Case Study Approach' (2006) 16 *Legal Education Review* 1; Melville, above n 121.

¹²³ See generally Australian Law Reform Commission, *Equality Before the Law: Women's Equality*, Report No 69 (1994); Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991).

¹²⁴ Colin Picker et al, 'Comparative Perspectives on Teaching Foreign Students in Law: Pedagogical, Substantive, Logistical and Conceptual Challenges' (2016) 26 *Legal Education Review* 161.

of teachers, students from regional and remote areas and Indigenous students. Each of these lenses are themselves simplifications of a range of experiences and overlook personal characteristics. Additionally, many students are dealing with combinations of these situations. There was a significant danger in a summary slide-based module presentation that all these nuances would be removed. In the end our approach was reduced to including a diverse range of sessional staff in the embedded videos and highlighting the relevance of, and making reference to, themes at appropriate points in the modules.

While the feedback from the focus groups was divided, participants largely did not consider that all themes were embedded successfully and adequately across all the modules. Divergence of opinion was possibly based on the particular modules reviewed:

The themes are well integrated and they are obvious enough to be recognised as important influences on the material but not so much that they become token additions which is sometimes the case with particularly gender diversity themes in some training materials.¹²⁵

I can't say I noticed a lot of those themes, if any at all.¹²⁶

The Communication and Collaboration one had a lot of digital literacy. I think there was *** talking about how he uses Twitter to engage with his students. So, I think that maybe some of the modules hit the mark more than others.¹²⁷

Yeah. One of the slides or pages was called working with diversity, and there was a reasonable amount of focus on diversity, I felt.¹²⁸

I noticed the international one on the communication module, which was useful. It was there. ... It was there, but it wasn't something that I needed right now. I didn't notice much on — what do they mean by digital literacy in this context?¹²⁹

To overcome the relative invisibility of the themes, a new introductory module was developed to provide a theme-based context for staff prior to beginning the modules.¹³⁰ This introductory module takes participants through short outlines of the scope of the themes and asks that the modules be read with the themes in mind.

¹²⁵ *Smart Casual 2*, trial feedback group 1, 2016.

¹²⁶ *Smart Casual 2*, trial feedback group 3, 2016.

¹²⁷ *Smart Casual 2*, trial feedback group 4, 2016.

¹²⁸ *Smart Casual 2*, trial feedback group 4, 2016.

¹²⁹ *Smart Casual 2*, trial feedback group 3, 2016.

¹³⁰ Smart Casual, *The Smart Casual Professional Development Modules* <<https://smartlawteacher.org/modules/>>.

But dealing with the themes more deeply remains a challenge, as one trial participant noted:

Just how relevant [the themes] are to the substance of the law was in my view not sufficiently developed if the intention is for these issues — rather than direct teaching tips — to be the take-home message.¹³¹

The *Smart Casual* project team received feedback on the Indigenous perspectives position paper from the *Smart Casual* expert theme consultant. The project team recognised the limitations of presenting Indigenous issues as a pervasive theme rather than a critical topic deserving of a stand-alone module. Recognising also the plethora of issues involved in the project team — none of whom are Indigenous — purporting to provide an authoritative voice on Indigenous issues,¹³² we invited an Indigenous colleague, Ambelin Kwaymullina, into the project to develop a separate module on fundamental background knowledge of Indigenous issues. This module does not attempt to provide cultural competency training — a project being undertaken elsewhere.¹³³ Instead it offers a set of materials that provide sessional colleagues with a baseline awareness of Indigenous issues that may arise in teaching law. The *Smart Casual* project has only increased our awareness of the complexities of creating professional development materials in this area.

X HOW THE MODULES SHOULD BE USED

The ‘wicked problem’ of sessional colleagues not being easily able to attend face-to-face development sessions and the risk of online modules that were not adequately supported or contextualised influenced decisions about the most effective ways to implement and use modules. Initially, we considered that a virtual community of practice¹³⁴ could be created through a combination of reflective questions and a national Facebook page would be ideal. Although there was some support in theory for a Facebook group, much of the feedback from the focus groups indicated that Facebook may not be an appropriate solution, or was a platform they did not use:

The idea in there of having a Facebook page where you could be... part of a community of sessional teachers, where you could dip in and have those resources available... and even just communicate with other people. I know sometimes

¹³¹ *Smart Casual 2*, trial feedback group 3, 2016.

¹³² Allan Ardill, ‘Non-Indigenous Lawyers Writing About Indigenous People: Colonisation in Practice’ (2012) 37 *Alternative Law Journal* 107, 108, citing Linda Alcoff, ‘The Problem of Speaking for Others’ (1991) 20 *Cultural Critique* 5.

¹³³ Australian Government, *Indigenous Cultural Competency for Legal Academics Programme* (21 January 2016) Office for Learning and Teaching <<http://www.olt.gov.au/project-indigenous-cultural-competency-legal-academics-programme-2014>>.

¹³⁴ See, eg, Anne Bourhis, Line Dubé and Réal Jacob, ‘The Success of Virtual Communities of Practice: The Leadership Factor’ (2005) 3 *Electronic Journal of Knowledge Management* 23 <<http://www.ejkm.com/volume3/issue1/p23>>.

being a sessional teacher is very isolating. We're generally not on campus a lot... I've got that support but I know there's a lot of people that don't. Having that Facebook sort of outlet where you could ask someone a general question, and even seek reassurance ... I like that idea. That would be really useful.¹³⁵

I suppose the benefit of the Facebook group or the discussion board is you can crowdsource an answer and get a few different perspectives and then put them together or select the one you think best fits your scenario. So, one-on-one isn't necessarily — that can be helpful if you've got a senior mentor who can say, 'this is how I've dealt with this before'. Sometimes you want other sessional staff who are around your age or around your level of experience or whatever, and I appreciate that can be quite difficult to do because you don't want to have a weekly meeting and talk about all the problems.¹³⁶

Someone has to monitor it. Someone needs to monitor it and answer the questions.¹³⁷

I wonder if there's a bit of a thing — I'm not a big Facebook user — but whether people view that as something they do socially and it's not really something they'll do if they're having problems with their tutorials.¹³⁸

It can actually be quite good. If you want to use it as, 'I had this issue tonight. What do I do?' Those sorts of generic things that you don't really need to approach your supervisor. It's just getting some ideas. That would be pretty good. Also to post up get-together or whatever it might be. So, if people wanted to use it in that sense, it would be quite good, particularly for someone like me. I'm out of my office ... so I'm basically stuck at home.¹³⁹

I don't use Facebook for professional things. I barely use Facebook at all. And I just yeah so that sort of turned me off a little bit as well whatever however they want to do it but just yeah.¹⁴⁰

My entire life is about why Facebook is evil.¹⁴¹

Focus group feedback reinforced the view that it remains essential to build collegiality around teaching and not to rely solely on online solutions. As Gray¹⁴² points

¹³⁵ *Smart Casual* 1, trial feedback group 3, 2014.

¹³⁶ *Smart Casual* 2, trial feedback group 4, 2016.

¹³⁷ *Smart Casual* 2, trial feedback group 4, 2016.

¹³⁸ *Smart Casual* 2, trial feedback group 4, 2016.

¹³⁹ *Smart Casual* 2, trial feedback group 3, 2016.

¹⁴⁰ *Smart Casual* 2, trial feedback group 1, 2016.

¹⁴¹ *Smart Casual* 2, trial feedback group 1, 2016.

¹⁴² Bette Gray, 'Informal Learning in an Online Community of Practice' (2004) 19(1) *Journal of Distance Education* 20; see also Bourhis, Dubé and Jacob, above n 134.

out, virtual communities of practice require skilled leadership, and a shared sense of community — something very difficult to establish outside pre-existing institutional or group settings.

Overwhelmingly, the focus group participants were very supportive of the approach adopted in *Smart Casual* but what was also very clear was that after undertaking the modules sessional colleagues then wanted more. They wanted to discuss their reactions, they wanted to go further with aspects raised and to seek out permanent staff or other sessional colleagues for advice. More experienced sessional colleagues wanted to ‘talk back’ to the modules and explain how their personal approaches were better or an alternative. No-one saw it as a waste of their time. All wanted more:

I’d go even further than that and say I’m here on campus from two till four. If you wanted to catch up with me and have a chat, let me know. I’ll meet you at wherever. You can’t discount the importance of just looking at someone, I think.¹⁴³

You need some way of getting feedback from people who have experience ... but have got a view that you can really take on.¹⁴⁴

To us, these reactions validate our belief that the modules are merely the beginning of a conversation, of the development of a community of practice. Practically, this is the task of the law schools who employ sessional colleagues.

XI BEST PRACTICE

The *Smart Casual* project sought to develop a suite of online modules to assist sessional colleagues with their professional development. Modules were developed in light of the scholarship of learning and teaching and through feedback from experts and sessional colleagues. The final modules reflect that process and have significantly developed from their original conception. Our experience suggests that there are a number of factors that contribute to successful professional development modules:

- (i) For modules to have broader impact, they cannot dictate or promote particular pedagogical approaches. Such decisions are the prerogative of a law school. The modules can, and should, draw on successful teaching techniques within those pedagogies as illustrations.
- (ii) If the modules are targeted towards sessional colleagues, they should not include curriculum design suggestions, only teaching techniques.

¹⁴³ *Smart Casual 2*, trial feedback group 4, 2016.

¹⁴⁴ *Smart Casual 2*, trial feedback group 4, 2016.

- (iii) Where possible, the modules should recognise the role of affect in teaching and try to convey the joys of teaching. The modules can be motivating and encouraging as well as instructive.
- (iv) Module design should encourage discussion and reflection, not determine choices. The modules should be based on a respectful peer-to-peer approach recognising that participants may have relevant experience and alternative philosophies on teaching. Care should be taken to avoid any patronising or lecturing tones.
- (v) Modules should not oversimplify complex issues but at the same time must recognise the time constraints of sessional colleagues. They should aim to avoid overwhelming new teachers but should still be designed to provide advanced advice for experienced colleagues. One way to achieve this is to design the module using a ‘trunk and branches’ approach. Experienced colleagues can follow links to further reading, and novice colleagues can concentrate on core issues.
- (vi) There should be a blend of fundamental concepts and practical examples; ideas to consider and practical techniques to use in the participant’s next class. Different participants will value these elements differently.
- (vii) It is important to embed the scholarly research of teaching throughout the module with clear links to alert participants to its existence. The module should, however, try to avoid language that is overly scholarly.
- (viii) The modules should not seek to be a complete solution. They should be used as part of a broader collegial discussion. These discussions are ideally organised by individual law schools, and can generate communities of practice.
- (ix) Giving sessional colleagues their own voice in the modules is important to promote the peer-to-peer tone — further development could include giving students their own voice as well.
- (x) It is critical to break down the mono-cultural tendencies in legal education through recognition of diversity in the modules — whether in terms of colleagues, students and/or clients.
- (xi) The modules should be positioned and contextualised as part of a larger whole with underlying themes permeating all modules.

Despite our best efforts, a number of issues remain, requiring further research:

- (i) Both our own technical limitations and the difficulty of finding a suitable technology were issues. Finding a platform that is easily accessed and does not quickly become obsolete is also difficult.

- (ii) Overcoming the isolated nature of sessional work remains difficult. The *Smart Casual* modules are a first step towards providing support, but collegial discussion remains critical. Online social media platforms may not be effective if a community has not already been developed, and schools may need to individually devise support mechanisms.
- (iii) There is a possibly irreducible problem in properly conveying the nuances of broader themes for legal education that are not tied to substantive law or skills. Properly conveying the importance of developing respect for diversity, gender and Indigenous perspectives is difficult to do in a disembodied, online and summary format. These themes require exploration through longer-term personal discovery and interaction with those experiencing them. Such themes might best be seen as forms of experiential professional development.

XII CONCLUSION

It seems clear that higher education and future generations of students will fundamentally rely on sessional colleagues to bear a high proportion of the teaching load. In that environment, relevant collegial professional development that meets the needs of sessional colleagues is essential. That support must be flexible and accessible, and thus at least partially online. While some of that support can quite appropriately be generic in content, some of it needs to be discipline-specific. We have argued that law is one discipline where discipline-specific professional development for teaching is highly desirable, if not essential. The *Smart Casual* project represents a groundbreaking initiative to provide a freely available set of resources to help law schools support the teaching of their sessional staff. The initiative has itself raised a number of significant questions about what is appropriate in supporting sessional colleagues, and to a large extent those questions are not easily answered. Fundamentally, they are the questions we all confront in making choices in our own teaching. However, it is abundantly clear that sessional colleagues want and appreciate support in developing their teaching.

TRENDS IN PROSECUTIONS FOR CHILD SEXUAL ABUSE IN SOUTH AUSTRALIA 1992–2012

ABSTRACT

This study, commissioned by the Royal Commission into Institutional Responses to Child Sexual Abuse, examined the prosecution of child sexual abuse offences in South Australia between 1992 and 2012. This included offences that were reported when the complainant was still a child, as well as reports that were delayed into adulthood. Overall, 84.5% of reports were made by complainants while they were still children, and most of these were made within three months of the offence. Male complainants were more likely than females to delay reporting into adulthood.

The highest reporting levels by both child and adult complainants of child sexual abuse offences occurred around the time when major public inquiries into child protection were occurring, and the issue was receiving considerable media attention. The rate of reporting by adult complainants was also affected by the removal of a three-year statutory limitation period for indictable sex offences in 2003. Despite a sharp increase in the level of reporting by children during the early 2000s, particularly around the time of the Layton Inquiry, there was only a very small increase in prosecutions. Rates of substantiation of child sexual abuse by Families SA, the child protection statutory authority, also fell at a time when reports to police were increasing substantially. In contrast, there has been an upward trend in arrest for adult reports.

Overall, just over 40% of reports to police of child sexual abuse resulted in arrest and charges being laid. This is slightly higher for child reports than for adult reports. South Australia has had a high rate of matters being discontinued quite late in the prosecution process — at or just before the hearing — particularly in the Magistrates Court. We therefore need to understand better how police and prosecutors exercise their discretion in determining whether a case will proceed.

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I INTRODUCTION

Few issues of political or social concern have been the subject of as many public inquiries as child abuse in recent years. The Royal Commission into Institutional Responses to Child Sexual Abuse ('the Royal Commission') has now completed its work after five years of intensive examination of a range of institutions working with children.¹ Other inquiries over several decades have examined the child protection and criminal justice response to the sexual, and also physical, abuse of children. In South Australia, the Layton Inquiry into child protection reported in 2003² and the Mullighan Inquiry into the abuse of children in state care delivered its Final Report in 2008.³

One of the major concerns raised by these inquiries has been the lack of reporting of complaints of child sexual abuse to police or child protection authorities, as well as the way that complaints are dealt with in the criminal justice system. The rate of attrition as matters drop out from the criminal justice process following a report to the police has also been the subject of considerable research, discussion, and concern. It was the subject of much discussion and comment in the Final Report of the Royal Commission.⁴

Data from South Australia are illustrative of the levels of attrition. Hood and Boltje reported in 1998 on the progress of 500 cases that had been referred to the

¹ Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017).

² Robyn Layton 'Our Best Investment: A State Plan to Protect and Advance the Interests of Children' (Child Protection Review, Government of South Australia, 2003) ('Layton Inquiry'). This was a major review of child protection policy and practice to provide an overall framework for child protection in South Australia.

³ South Australia, Commission of Inquiry into Children in State Care, *Children in State Care Commission of Inquiry: Allegations of Sexual Abuse and Death from Criminal Conduct* (2008) ('Mullighan Inquiry'). The Mullighan Inquiry began in November 2004 to investigate allegations of sexual abuse of children in State care and of criminal conduct resulting in the death of children in State care; at page xi it is stated that 242 people were children in State care at the time of the alleged abuse, and they 'made a total of 826 allegations against 922 alleged perpetrators'. See also the further inquiry conducted by Mullighan QC: South Australia, Commission of Inquiry into Children on APY Lands, *Children on Anangu Pitjantjatjara Yankunytjatjara (APY) Lands Commission of Inquiry: A Report into Sexual Abuse* (2008).

⁴ The Royal Commission report stated, for example, that 'the criminal justice system is often seen as not being effective in responding to crimes of sexual violence, including adult sexual assault and child sexual abuse, both institutional and non-institutional': Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) 620. The Royal Commission identified lower reporting rates, higher attrition rates, lower charging and prosecution rates, fewer guilty pleas and fewer convictions as features of the criminal justice system's treatment of these crimes.

hospital-based Child Protection Services in Adelaide.⁵ This unit provided a specialist medical and psychosocial evaluation service for the state child protection system.⁶ Two-thirds (66%) of the cases in the sample were sexual abuse cases.⁷ Of the referrals, 356 were assessed by the service and 230 (64.6% of those assessed) were substantiated by clinicians.⁸ Of the 230, the police investigated 144 and agreed with the assessment that there had been abuse in 135 cases.⁹ Prosecution occurred in 63 cases and there were 39 convictions.¹⁰ That is, less than half of the cases substantiated by both the hospital and the police proceeded to a prosecution. The conviction rate was only 17% of the cases substantiated by the clinicians.¹¹

Wundersitz analysed reports of sexual offences against persons under 18 years of age made to the South Australia Police between July 2000 and June 2001.¹² She found that of 952 reports examined, 346 (36%) led to the arrest of a suspect.¹³ In another 17% of cases, the complainant requested no further action.¹⁴ The 346 sexual offence incident reports did not lead to the arrest of an equivalent number of suspects because, in some situations, one person was arrested for several incidents, while in others the same incident led to the arrest of more than one suspect. Taking account of this, 356 'incident apprehensions' were tracked. Wundersitz reported some difficulty in tracking the cases thereafter, but of the cases in which an arrest was made, a quarter apparently did not proceed further; another 11% were dealt with in the Youth Court.¹⁵ Of the 200 cases that proceeded to courts other than the Youth Court, 43% resulted in at least one guilty finding (although not necessarily in relation to the reported incident), 35% resulted in not guilty outcomes, while the remaining 22% had some or all charges unfinalised.¹⁶

⁵ Mary Hood and Christopher Boltje, 'The Progress of 500 Referrals from the Child Protection Response System to the Criminal Court' (1998) 31 *Australian and New Zealand Journal of Criminology* 182.

⁶ *Ibid* 186.

⁷ *Ibid*.

⁸ *Ibid*.

⁹ *Ibid* 187.

¹⁰ *Ibid* 188, 193.

¹¹ *Ibid* 190.

¹² Joy Wundersitz, 'Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court' (Paper presented at the Conference on Evaluation in Crime and Justice: Trends and Methods, Australian Bureau of Statistics, Canberra, 24–25 March 2003).

¹³ *Ibid* 4.

¹⁴ *Ibid* 3.

¹⁵ *Ibid* 4–5.

¹⁶ *Ibid* 7.

The relatively small proportion of cases going to trial or resulting in convictions in South Australia has parallels in other jurisdictions.¹⁷ In a study reported in 2002, Parkinson et al examined the process of attrition in relation to 183 child sexual abuse cases that were referred to two child protection units in Sydney in the late 1980s.¹⁸ Of the 183 cases examined, the name of the offender was known in 117 cases, 45 cases reached trial, and 32 resulted in a conviction.¹⁹ Research conducted by the New South Wales Bureau of Crime Statistics and Research in the 2000s indicated that only 15% of reported child sexual ‘offence’ incidents result in the commencement of criminal proceedings, and only about 8% of those reported incidents result in a conviction.²⁰

A case may not proceed because the complainant is unwilling to cooperate in a criminal prosecution after initially reporting the abuse, or they may subsequently withdraw the complaint. In child sexual abuse cases, non-offending parents may make the decision for the child not to proceed, or to withdraw the complaint.²¹ Withdrawal of complaint or requests for no further action are also major reasons for attrition in relation to reported rapes.²² Wundersitz found that in South Australia, complainants ‘requesting no further action’ was the main reason child sexual abuse cases were cleared without the apprehension of a suspect.²³

There are many reasons for the attrition of cases even where the complainant is willing to testify.²⁴ Evidence suggests that prosecutorial decisions in a case are influenced by an array of factors. Prosecutors need to assess how well the witness

¹⁷ Kathy Daly and Brigitte Bouhours, ‘Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries’ (2010) 39 *Crime and Justice* 565; Lisa Bunting, ‘Sexual Offences against Children: An Exploration of Attrition in the Northern Ireland Criminal Justice System’ (2008) 32 *Child Abuse & Neglect* 1109.

¹⁸ Patrick N Parkinson et al, ‘The Process of Attrition in Child Sexual Assault Cases: A Case Flow Analysis of Criminal Investigations and Prosecutions’ (2002) 35 *Australian and New Zealand Journal of Criminology* 347.

¹⁹ *Ibid* 347.

²⁰ Jacqueline Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (Crime and Justice Bulletin, NSW Bureau of Crime Statistics and Research, 2006) 4.

²¹ Larissa S Christensen, Stefanie J Sharman and Martine B Powell, ‘Identifying the Characteristics of Child Sexual Abuse Cases Associated with the Child or Child’s Parent Withdrawing the Complaint’ (2016) 57 *Child Abuse & Neglect* 53.

²² Liz Kelly, Jo Lovett and Linda Regan, ‘A Gap or a Chasm? Attrition in Reported Rape Cases’ (Home Office Research Study No 293, United Kingdom Home Office, February 2005).

²³ Wundersitz, above n 12, 3.

²⁴ Christine Eastwood, Sally Kift and Rachel Grace, ‘Attrition in Child Sexual Assault Cases: Why Lord Chief Justice Hale Got it Wrong’ (2006) 16 *Journal of Judicial Administration* 81.

will cope with cross-examination,²⁵ and consider factors such as the extent of any delay between the prosecution and the alleged abuse, which may impact upon the likelihood of a conviction.²⁶

Parkinson et al reported on a sub-cohort of 84 children and their families. Among this sub-cohort, the offender was identifiable in 67 cases.²⁷ In 13 cases the offender pleaded guilty, and in 12 the offender was found guilty at trial.²⁸ The children and their families were interviewed in detail to determine why many cases did not proceed to criminal investigation and prosecution, and why other cases dropped out of the criminal justice system.²⁹ Parkinson et al found that some of the reasons for not proceeding to trial included that: ‘the offence was not reported to police; parents wished to protect children, the perpetrator or other family members; evidence was not strong enough to warrant proceeding; the child was too young; the offender threatened the family; or the child was too distressed.’³⁰

Once a matter involving a sexual offence against a child proceeds to court, the guilty plea rate and the conviction rate are generally lower than for other offences. This can be observed in a number of jurisdictions. Most recently the Royal Commission reported that the conviction rate for child sexual assault matters in New South Wales for the period 2012–2016 (60%) was lower than for assault (70%) and robbery (73%), but higher than for adult sexual assault (50%). The Royal Commission’s explanation for the differences in conviction rates was that sexual offences are generally ‘word against word’ but that adult sexual offences also call into question the issue of consent which is not relevant for child sexual offences.³¹

There is little information available, however, on the outcomes of child sexual offence abuse matters in South Australia. Therefore, the purpose of this article is to focus on police and court statistics in relation to child sexual abuse complaints over a 20-year period in that State. It draws on a study commissioned and funded by the Royal Commission, which assisted in obtaining the data.

²⁵ Emelie Ernberg, Inga Tidefors and Sara Landström, ‘Prosecutors’ Reflections on Sexually Abused Preschoolers and their Ability to Stand Trial’ (2016) 57 *Child Abuse & Neglect* 21.

²⁶ Kathleen D Brewer, Daryl M Rowe and Devon D Brewer, ‘Factors Related to Prosecution of Child Sexual Abuse Cases’ (1997) 6 *Journal of Child Sexual Abuse* 91; Jeffrey W Spears and Cassia C Spohn, ‘The Genuine Victim and Prosecutors’ Charging Decisions in Sexual Assault Cases’ (1996) 20 *American Journal of Criminal Justice* 183; Andrea J Sedlak et al, ‘Child Maltreatment and the Justice System: Predictors of Court Involvement’ (2005) 15 *Research on Social Work Practice* 389.

²⁷ Parkinson et al, above n 18, 356.

²⁸ Ibid 355.

²⁹ Ibid.

³⁰ Ibid 347.

³¹ Royal Commission into Institutional Responses to Child Sexual Abuse, above n 4, 622.

II METHOD

The data were derived from police and court statistics from 1992–2012, obtained from the Office of Crime Statistics and Research ('OCSAR') in South Australia. The data comprise two police datasets and a court dataset. The research received ethics approval from the Human Research Ethics Committee at the University of Sydney.³²

The data extraction was designed to draw out all sexual offences against children in the relevant period, matching the two police datasets using a master Police Identification Number ('PIN').³³ The police record complainant and offence data on police incident reports; they record data on the arrest, and on the suspect or 'offender' on police apprehension reports. A given 'incident' always involves a single complainant, but a given complainant may be associated with multiple incidents.³⁴ The court dataset is based on cases that were heard and finalised in the courts in the relevant years.³⁵ It does not include cases that were still in the court process at the time the data were extracted (post-2012).

The data were checked through discussions with the data custodians in South Australia before, during, and after analysis of the police and court data. The main criteria

³² Approval to collect the South Australian data was obtained from the Attorney-General of South Australia. OCSAR provided the data in accordance with a Notice to Produce issued by the Royal Commission.

³³ Victims and offence data are recorded by Police on Police Incident Reports, while data in relation to the apprehension (via arrest or report) of accused offenders are recorded by Police on Police Apprehension Reports. The PIN for victims of sexual offences and pornography/censorship offences (JANCO '13' and '57') dating between 1/1/1991 and 31/12/2012 were extracted from the Police victim/offence dataset. These PINs were the 'master PINs' used to match back to the victim/offence dataset to extract the entire victimisation history from 1991 to 2012 for these particular victims. The same method was repeated for the Police Apprehension dataset to obtain the 'master PINs' for accused offenders. These PINs were used to match back to the apprehension dataset to extract the entire offending history from 1991 to 2012 for these particular offenders. The data for 1991 were excluded because of missing matching data.

³⁴ According to OCSAR:

When police identify a person suspected of having committed an offence and they have sufficient information to proceed against that individual by way of an apprehension, an apprehension report is filed, detailing the offences alleged against the suspect ... The same individual may be apprehended more than once during the year, and therefore be the subject of more than one apprehension report. Moreover, each apprehension report may contain more than one offence or multiple counts of the same offence.

Office of Crime Statistics and Research, 'Apprehensions Profile: South Australia' (Apprehensions Profile Report, Government of South Australia Attorney-General's Department, 2014) 1.

³⁵ Persons in the Magistrates Court who were committed for trial and for sentence are included in the counts for the higher courts in both New South Wales and South Australia, since these are non-finalised appearances in the Magistrates Court.

for inclusion were that the offence must be a *sexual offence* against a *child*. This meant excluding entries where the offences were other than sexual offences or the complainant was aged 18 or older at the time of the offence. No analysis was done on the Indigenous status of the complainant or suspect because 78% of records had missing data on Indigenous status.

‘Child sexual abuse’ was defined broadly to include all offences relating to child sexual abuse. The definition of ‘child’ refers to persons under the age of 18, though the age of consent for a number of offences is 16. There are a very large number of offences that may be charged, depending on the year in which the alleged offences occurred, as they are charged under the relevant provisions at that time. Offence type was coded to create four main categories:

- sexual assault defined as sexual intercourse/penetration;
- indecent assault;
- act of indecency/aggravated act of indecency; and
- child pornography/grooming for pornography and other sexual offences.

These categories align with the definitions and categories of sexual offences used by OCSAR. The use of these generic categories is a broad indicator of the seriousness of the offence.

A Data Limitations and Considerations

There are several limitations or complexities in comparing police and court data over time, and in comparing reports made in childhood and those delayed until adulthood.

First, there have been a number of legislative changes to the definitions of offences and the associated penalties.³⁶ These changes relate to the expansion of the definition of sexual intercourse or penetration, the decriminalisation of homosexual sexual acts, the specific inclusion of persons in a position of trust or authority in relation to a child, and the inclusion and expansion of child pornography offences. The focus of the analyses in this article is on sexual assault and indecent assault, because these were the most common offences (overall, 45.7% of reports to police concerned sexual assault and 41.1% involved indecent assault).³⁷ Pornography offences were excluded from the analyses in this article because there were few reports of such

³⁶ Hayley Boxall, Adam M Tomison and Shann Hulme, ‘Historical Review of Sexual Offence and Child Sexual Abuse Legislation in Australia: 1799–2013’ (Research Report, Australian Institute of Criminology, 2014) 56–57; Boxall, Tomison and Hulme provide detailed explanations of the changes since the 1950s and especially since the 1980s, in the relevant legislation in all States and Territories.

³⁷ See Table 1.

offences until the production, dissemination, and possession of child pornography was specifically criminalised in 2004.³⁸

Second, these changes have particular implications for historic offences that are charged in relation to the offences as defined at the time of the offence, not at the time that the offence is reported.

Third, an important change in South Australia concerns the mid-2003 abolition of the statutory limitation period for indictable sex offences.³⁹

Fourth, ideally it would be possible to track cases from reporting to police, through the investigation and prosecution process, to court, and then to finalisation at court via conviction and sentencing. While South Australia has the advantage of a unique PIN for every individual who comes into contact with the criminal justice system (as a complainant, as a person of interest, or as an accused), this is not sufficient to allow tracking across the police, court and corrections systems. As Wundersitz explained, ‘a single incident report may lead to the apprehension of multiple offenders, or conversely, multiple incident reports may be “resolved” by one apprehension’.⁴⁰ Furthermore, ‘a single apprehension report may contain charges arising from a number of incidents, some of which are extraneous to the ones targeted for the study’, and ‘charges arising from the one apprehension report may also be split among different court files, and take different paths through the court system’.⁴¹ For this reason, the police and court data have been analysed separately, exploring within the police data the factors associated with greater or lesser likelihood of the matter proceeding to court, and within the court data the likelihood of a plea, conviction, and the type of sentence.

III ANALYSES

The analyses reported in this article were based on all available information from 1992 to 2012. The large-scale OCSAR databases of police and court data are treated as a population rather than as a sample for several reasons: first, we are examining and describing the full set of observations in these databases and are not generalising beyond them so there is no need for inferential statistics; secondly, when dealing with large datasets such as these, inferential statistics can yield statistically significant results even with very small effects — associations or differences which are trivial from

³⁸ *Criminal Law Consolidation (Child Pornography) Amendment Act 2004* (SA).

³⁹ *Criminal Law Consolidation Act 1953* (SA) s 72A, as inserted by *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003* (SA).

⁴⁰ Joy Wundersitz, ‘Child Victimisations: Tracking from Incident Report to Finalisation in Court: Some Methodological Issues’ (Paper presented at the Conference on Child Sexual Abuse: Justice Response or Alternative Resolution, Adelaide, 1–2 May 2003) 2.

⁴¹ *Ibid* 2.

a practical or policy-making point of view. Effect sizes based on odds ratios ('OR') that are two or greater (or .5 or less) are provided as a guide when considering whether two percentages could be regarded as different from each other. As an example, the OR for the comparison of 60% and 40% is 2.25 $((60/40)/(40/60) = 2.25)$.

The police data explore: the trends in the number of reports; the likelihood of a reported incident leading to the arrest of a suspect, in association with whether the complainant was a child or an adult at the time of the report; the type of offence (particularly sexual assault and indecent assault); and the relationship between the complainant and the suspect. The focus of the court data was on the trends over years, the conviction rate, and sentencing by courts. In both sets of analyses, the overall focus is on attrition and the factors affecting it.

IV RESULTS

The characteristics of reports to police of sexual offences against children are presented in Table 1. This includes reports that were made while the complainant was a child under 18 years of age, or that were delayed into adulthood (18 years or older). Most sexual offences against children were reported while the complainant was a child (84.3% overall), and within three months of the offence (11,726, 54.0%). Overall, the majority of complainants were female (84.5%). Male complainants were more likely to delay their report until adulthood than female complainants, and in particular for more than 20 years.⁴² One in five male complainants of sexual assault (345, 19.7%) and indecent assault (425, 19.0%) took more than 20 years to report; for female complainants, the figures were 8.3% ($n = 673$) for sexual assault and 6.5% ($n = 437$) for indecent assault.

Adolescents aged 14–17 years at the time of the incident were the most prevalent complainant age group overall (36.8%) and more likely to report the alleged offence before they were 18 than as adults.⁴³ Nearly half (47.7%) of the complainants in reported incidents of child sexual assault were in this age group. More than one-third (7,742, 35.5%) of the complainants were under 10; boys were more likely than girls to be in the two age groups under 10 (47.9% compared with 32.1%).⁴⁴

Extra-familial persons known to the child were the most common suspects (40.8%), with little difference between incidents reported in childhood and those reported in adulthood. Incidents involving parents and guardians, and particularly persons in authority, were much more likely to be reported in adulthood than childhood.⁴⁵ Conversely, those incidents involving someone unknown to the child were more

⁴² OR = 2.59.

⁴³ OR for adolescents aged 14–17 years versus the other age groups in order = 2.19, 2.36, 2.19 and 8.86.

⁴⁴ OR = 1.9.

⁴⁵ OR = 9.7.

likely to be reported in childhood.⁴⁶ Siblings and boyfriends/girlfriends were involved in a small number of incidents — 3.4% and 4.9% respectively. Overall, 19.7% of persons of interest were under 18 and a further 9.5% were under 20; they were mostly persons known to the child.

Table 1: Characteristics of sexual offence incidents against children in South Australia 1992–2012

	Reported in childhood	Reported in adulthood	Total N = 21 125	
	%	%	<i>n</i>	%
Gender of complainant ¹				
Female	82.2	64.1	17 845	84.5
Male	17.8	35.9	3280	15.5
Age of complainant				
5 years and under	15.3	18.8	3339	15.8
6-9 years	18.8	25.0	4168	19.7
10-13 years	26.1	32.3	5717	27.1
14-17 years	39.5	22.2	7784	36.8
Combination of ages	0.3	1.7	117	0.6
Offence type				
Sexual assault ^a	43.4	58.3	9655	45.7
Indecent assault	41.7	37.9	8683	41.1
Acts of indecency	14.9	3.8	2787	13.2
Complainant–suspect relationship ²				
Parent/guardian ^b	13.1	23.9	2619	15.0
Sibling	3.1	4.8	596	3.4
Other family member	9.4	13.8	1777	10.2
Member of household	1.2	0.8	152	0.9
Boyfriend/girlfriend	5.6	1.8	857	4.9
Other known person	41.8	36.0	7122	40.8
Person in authority ^b	1.8	15.2	720	4.1
Not known to complainant ^b	17.1	2.5	2535	14.5
Not recorded/not stated	7.2	1.2	1077	6.2
¹ In 1.7% of incidents, there were both male and female complainants.				
² The relationship data includes incidents from 1995–2012 only and sexual assault and indecent assault because of the amount of missing data prior to 1995.				
^a and ^b indicate significant differences within (a) offence type and (b) relationship.				

⁴⁶ OR = 8.04.

Figure 1: Number of child sexual offence incidents reported in childhood and adulthood and overall total by year of report

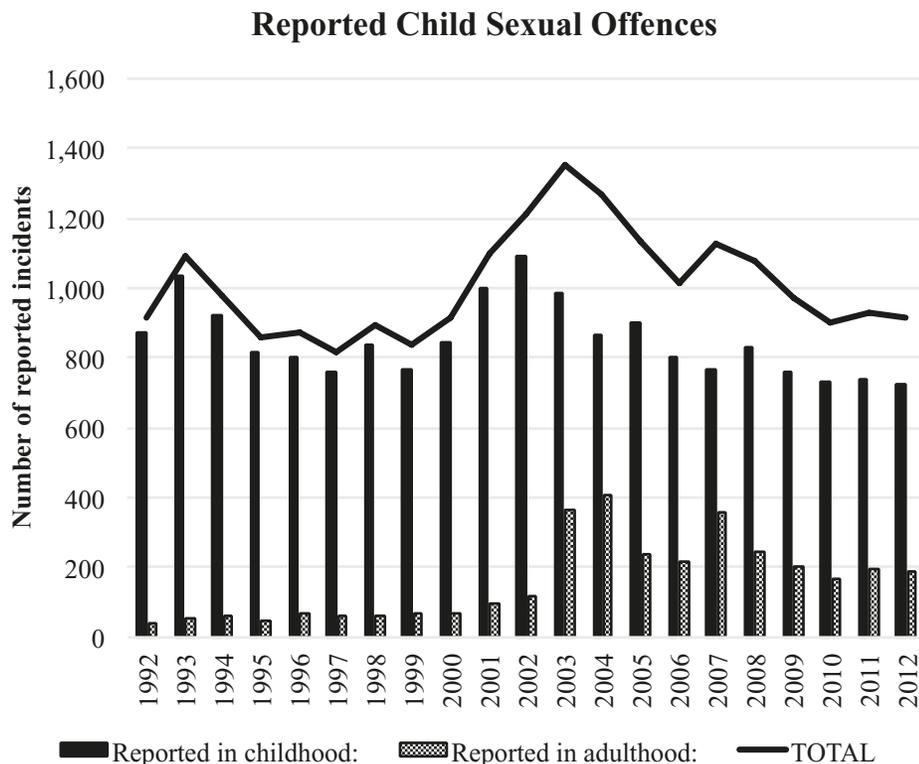


Figure 1 shows the numbers of incidents reported in childhood and adulthood for the period 1992–2012, together with the total number of reports each year. There is significant variation in the number of reports, with a marked increase in both the number and proportion of reports made in adulthood from 2003. The peaks in adult reports coincide with the Mullighan Inquiry, during which 792 complainants reported their sexual abuse as children.⁴⁷ The vast majority of those complainants (84%) were adults when they reported abuse that occurred decades earlier, in some cases dating back to the 1940s.⁴⁸ The peak in 2004 and the higher numbers beyond are also likely to be associated with the abolition of the statutory limitation period in June 2003. The abolition of the time limit resulted in a backlog of cases that could then be prosecuted, and this is evident in the figures below (see figures 4a and 4b).

⁴⁷ Mullighan Inquiry, above n 3, 24.

⁴⁸ Ibid.

B Cases Proceeding to Prosecution

Just over 40% of incident reports resulted in the arrest/report of a suspect. About one in five incident reports (19.1%) were ‘cleared with no further action or no offence being revealed’ (including reports in which there was insufficient evidence to proceed). A further one in three (37.6%) were ‘not cleared, with no legal action possible or little or no prospect of proceeding’; this included 108 cases where the suspect had died and four where the complainant had died.⁴⁹

Figures 2a and 2b, concerning reports made in childhood, show that the number of incidents in which legal action commenced for childhood reports of sexual or indecent assault fairly closely followed the pattern of the number of reported incidents per year for much of this period. There was, however, an elevated level of reporting in the early 2000s, coinciding with the Layton Inquiry into child protection. There is much more variation in the numbers reported (ranging from 263 in 1997 to 442 in 2003) than in the numbers involving an arrest (ranging from a high of 213 in 1994 to a low of 142 in 2004). It seems, then, that despite a sharp increase in the level of reporting by children during the early 2000s, there was only a very small increase in arrests.

C Investigations by the Child Protection Department

At much the same time as reports to the police of child sexual abuse were rising, particularly in the early 2000s, rates of substantiation by the child protection department were falling (see figure 3). The declining number of substantiated reports of child sexual abuse until 2007–08⁵⁰ is in stark contrast to the peak numbers of child reports of sexual assaults and indecent assaults reported to South Australia Police between 2001 and 2004–05. The number of substantiated reports involving boys fell to a low of 13 in 2009–10⁵¹ and to 63 for girls in 2007–08.⁵² The number of substantiated reports involving boys increased substantially from 13 in 2009–10⁵³ to 85 in 2014–15.⁵⁴

⁴⁹ The ‘not cleared’ rate is consistent with Wundersitz’s finding for similar earlier data in 2003 (34.4%): see Wundersitz, above n 40, 6.

⁵⁰ Australian Institute of Health and Welfare, ‘Child Protection Australia 2007–08’ (Child Welfare Series No 45, Australian Institute of Health and Welfare, 21 January 2009) 70.

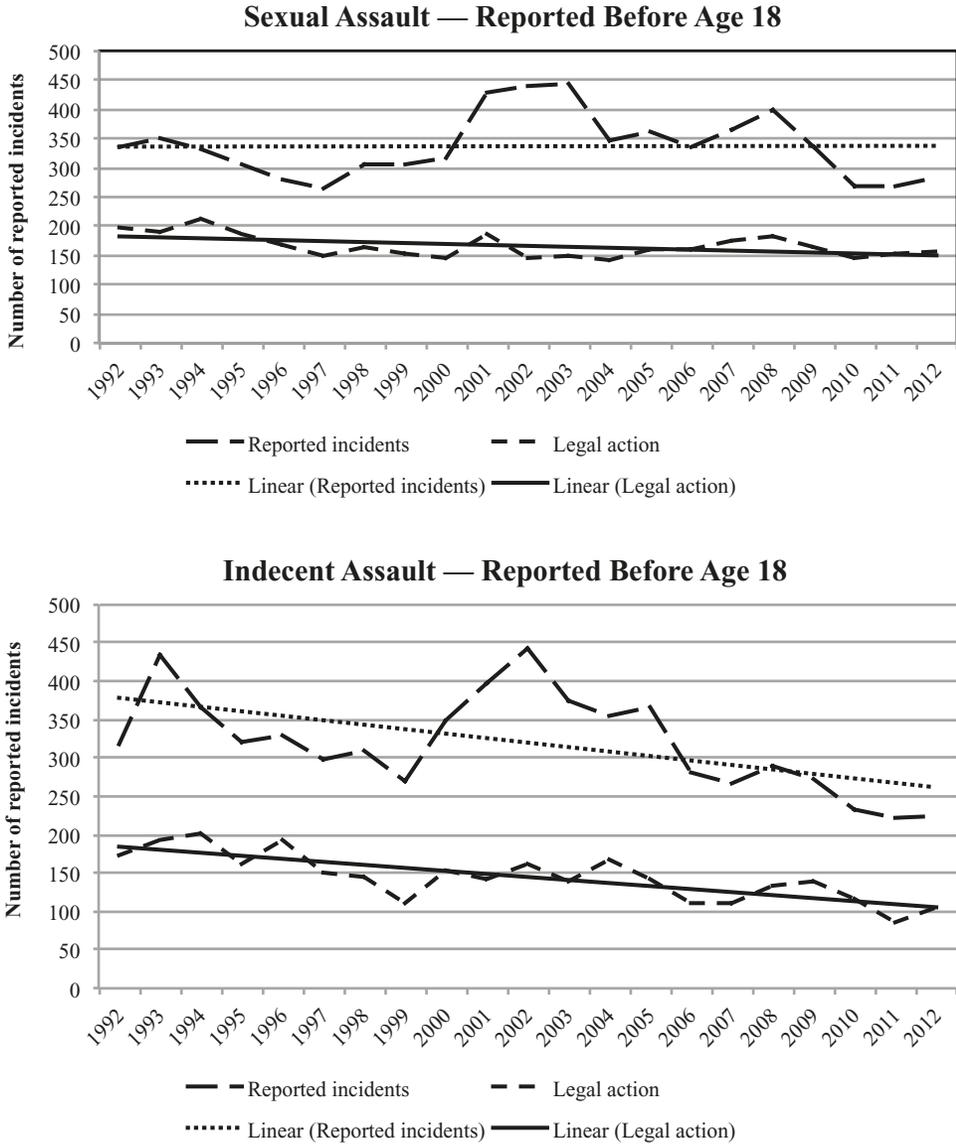
⁵¹ Australian Institute of Health and Welfare, ‘Child Protection Australia 2009–10’ (Child Welfare Series No 51, January 2011) 69.

⁵² Australian Institute of Health and Welfare, ‘Child Protection Australia 2007–08’ (Child Welfare Series No 45 Australian Institute of Health and Welfare, 21 January 2009) 70.

⁵³ Australian Institute of Health and Welfare, above n 51, 69.

⁵⁴ Australian Institute of Health and Welfare, ‘Child Protection Australia 2014–15’ (Child Welfare Series No 63, 21 April 2016) 75.

Figures 2a and 2b: Number of incidents of (a) child sexual assault and (b) indecent assault reported as a child and number in which the person of interest was proceeded against

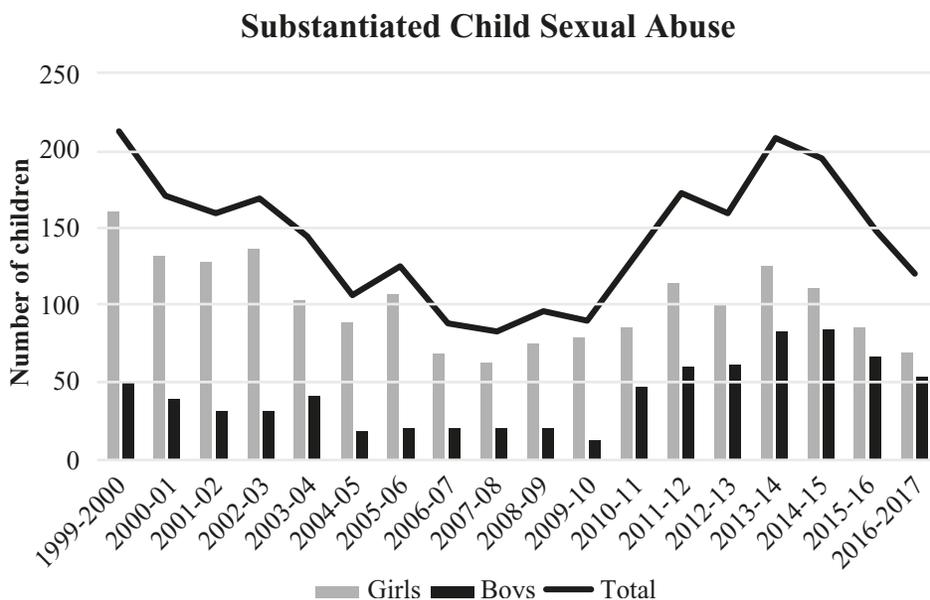


* Linear refers to the linear trend line of best fit.

D Child Sexual Offences Reported in Adulthood

Figures 4a and 4b show, respectively, the number of adult reports of child sexual assault and indecent assault, together with the number of cases in which proceedings were taken against the suspect or alleged offender by arrest or report. Again, the

Figure 3: Number of children in substantiated sexual abuse reports made to the South Australian statutory child protection authority



spikes in the number ‘proceeded against’ in 2004 and 2007 are likely to reflect the abolition of the statutory limitation period in 2003 and the Mullighan Inquiry dealing with historical matters up to and including 2007.⁵⁵

The trend lines and the pattern of the two lines are generally quite similar for both types of offence, with the number of cases involving arrest following the pattern of the overall number of reported incidents. However, in the periods where the numbers of reported incidents were highest (between 2003 and 2008), the gap increased substantially between the number of reported incidents and the number of suspects apprehended at the time of these spikes.

*E The Probability of Arrest for Sexual Offences Reported in
Childhood and Adulthood*

Figures 5a and 5b show the percentage of child and adult reports in which the suspect was arrested (arrest rate) for sexual assault and indecent assault. As figure 5a shows, sexual assault incidents reported during childhood were more likely to result in an arrest than those reported in adulthood until 2000; in the period 2000–09, there was little difference between adult and child reports. There was a similar pattern for

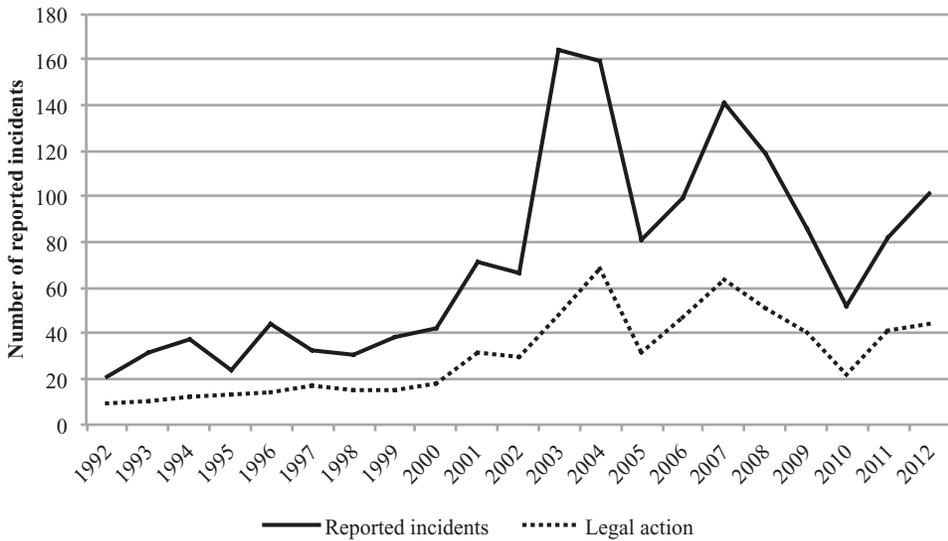
⁵⁵ See *Criminal Law Consolidation Act 1953 (SA)* s 72A, as inserted by *Criminal Law Consolidation (Abolition of Time Limit for Prosecution of Certain Sexual Offences) Amendment Act 2003 (SA)*; Mullighan Inquiry, above n 3.

indecent assaults except that there were several years where the arrest rate for adult reports was higher than for child reports and there was greater fluctuation in the adult reports of indecent assault (see figure 5b).

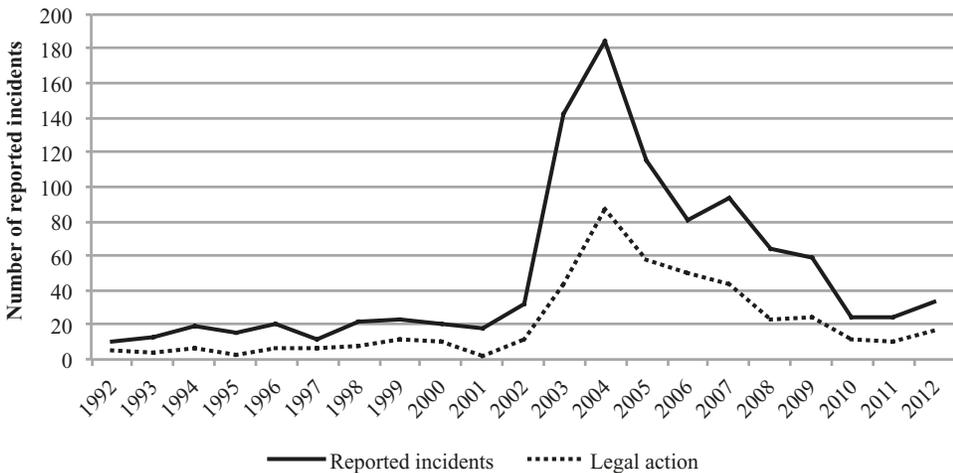
Sexual assault incidents reported in childhood and which involved a person in authority, a parent or guardian, or another family member (but not a sibling) were

Figures 4a and 4b: Number of incidents of (a) sexual assault and (b) indecent assault reported as an adult and number in which the person of interest was proceeded against

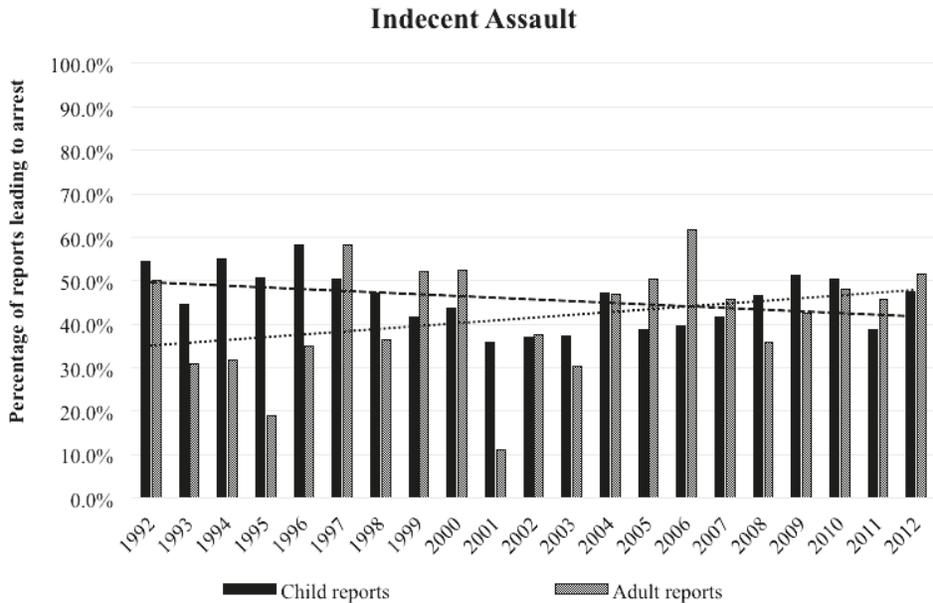
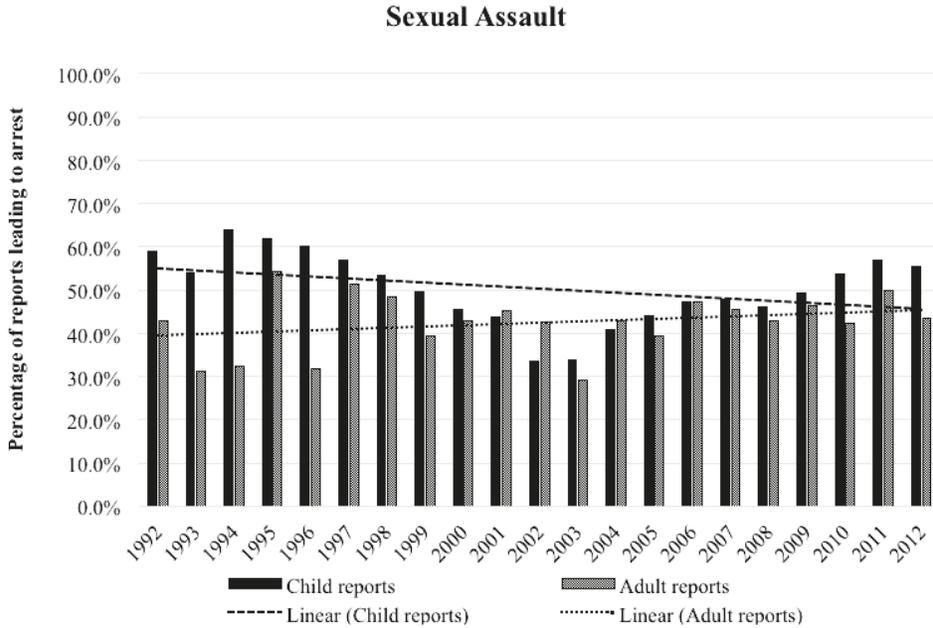
Sexual Assault — Reported in Adulthood



Indecent Assault — Reported in Adulthood



Figures 5a and 5b: Percentage of incidents of (a) sexual assault and (b) indecent assault reported as a child and as an adult in which the suspect was arrested (arrest rate)



the most likely to lead to arrest (between 57% and 63% of incidents). The highest percentages for adult reports occurred for indecent assault involving a person in authority (52%) and sexual assault involving a parent or guardian or another family member (48%).

F Court Data

Arrest or apprehension is the first part of the prosecution process; however, this does not mean that all the matters in which a person was apprehended or arrested proceeded to court. Sexual offences against a child in South Australia may be prosecuted in the higher courts (Supreme Court and District Court), the Magistrates Court or the Youth Court, depending on the age of the defendant, the seriousness of the charges, and the severity of the possible penalties.

A total of 7,488 persons⁵⁶ were prosecuted on at least one sexual charge against a child in finalised matters in the four courts over the period 1992–2012. The mean number of sexual charges per finalised appearance was 3.4 (Standard Deviation = 4.4) with a median of 2. Most persons had a finalised appearance in the Magistrates Court (45.4%) excluding committals, or the District Court (38%). A relatively small number of cases were dealt with in the Youth Court (12.5%) or the Supreme Court (4.1%).

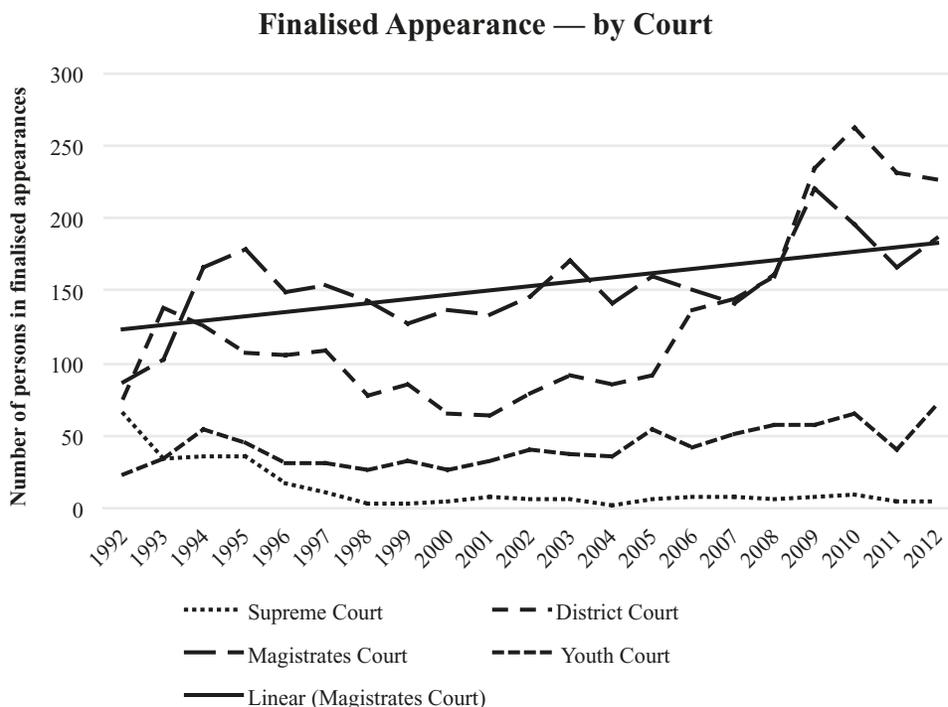
Figure 6 shows the number of persons with finalised appearances in each court by year. The most marked trend was the sharp increase in the numbers of persons appearing before the District Courts, with a low of 64 in 2001 and a tripling of numbers over five years from 91 in 2005 to 263 in 2010. In contrast, the numbers in Magistrates Courts fluctuated but show a relatively flat trend prior to a spike in 2009. The upward trend in the District Court probably reflects an increase in the numbers of adult complainants after 2004, with some lag time before matters reached the courts following the Mullighan Inquiry and the abolition of the statute of limitations.

G Court Outcomes

Just over 2,000 persons ($n = 2,073$) with finalised charges over the period 1992–2012 proceeded to trial in the higher courts and 367 persons proceeded to sentence after pleading guilty. Just over half (57.4%) were convicted of at least one offence by being found guilty at trial (73.3% of persons who went to trial) or pleading guilty and proceeding to sentence; 15.4% were acquitted or had all charges dismissed at trial. A substantial number of persons (895, 26.7%) in the higher courts had all

⁵⁶ Persons are defined here as ‘persons in finalised appearances’. In 4.1% of finalisation dates, there was more than one case ID indicating that cases were heard together, with more than one defendant. Since South Australia has a unique PIN for each person in contact with the criminal justice system, the number of distinct persons was 5,394; 72.7% had only one finalisation date, 19.7% had two and the remaining 7.6% had three or more. This excludes 428 young persons whose matters were dealt with by way of a family conference.

Figure 6: Number of persons in finalised appearances charged with at least one sexual offence against a child, by year



charges dismissed prior to or without a hearing. The ‘conviction rate’⁵⁷ for sexual assault was relatively steady over the period 1992–2012, ranging between 45% and 62%, with a mean of 52%. Indecent assault followed a similar pattern, with a mean of 48%.⁵⁸

Table 2 shows the outcomes for persons with finalised charges in the Magistrates Court and Youth Court. In the Magistrates Court, 889 persons (31.3%) were found or pleaded guilty to at least one charge; 148 persons had proven offences but no conviction recorded.⁵⁹ A small proportion of persons were acquitted (3.6%). A very high proportion of persons (65.1%) had all charges withdrawn prior to a hearing, most commonly when there was no evidence tendered by the prosecution.

⁵⁷ The conviction rate includes those with a proven offence with no conviction recorded; a number of persons in this category received a penalty, mostly a supervision order or conditional release.

⁵⁸ Since 2008, the conviction rate for child pornography has been high, ranging between 82% and 97%.

⁵⁹ Committals in the Magistrates Court for trial or for sentence are not included in this count.

Table 2: Outcome for persons with finalised charges of sexual offence against a child in the Magistrates Court and Youth Court in South Australia

	Magistrates Court		Youth Court	
	Number of persons	%	Number of persons	%
Convicted of at least one charge	741	26.1	86	9.7
Proven offence but with no conviction recorded	148	5.2	263	29.6
Not guilty/all other charges dismissed at court	101	3.6	29	3.3
All charges dismissed prior to hearing*	1850	65.1	512	57.5
Total	2840	100.0	890	100.0
Guilty/proven/convicted**	889	31.1	349	39.2

* Most commonly, the Crown made applications for no further proceedings, and with no evidence tendered and no hearing. Includes 10 persons who died.

** Persons may plead guilty or be found guilty at a hearing or trial; proven refers to young persons with a proven offence; convicted is an umbrella term including those convicted but with no conviction recorded.

In the Youth Court, 349 (39.2%) young defendants had a proven offence; for 263 of those young persons (75.4%), no conviction was recorded. Likewise, a high proportion of young persons (57.5%) had all charges dismissed without a hearing. Nine young people were committed for trial to a higher court.

Comparison of the major offence on which a person was convicted with that with which they were charged indicates that about 60% of defendants in the higher courts were convicted on the same major charge (or one with the same maximum penalty — 63% in the Supreme Court, 58% in the District Court). The corresponding figures in the lower courts were 76% for the Magistrates Court and 68% for the Youth Court.

To explore the possibility that withdrawn cases might ‘appear’ in subsequent years or in another court (excluding committals), further analysis was conducted in relation to cases in which all charges were withdrawn or dismissed across the four courts. Few persons with the same PIN had further charges laid in relation to sexual offences against a child within three years of their charges being withdrawn or dismissed. Most of these cases were heard in the Magistrates Court for both the earlier and later finalised appearances (56%), and the conviction rate for the subsequent appearance was also 25% for any sexual offence against a child. The subsequent conviction rate was higher for the District Court (55.1%) for the lesser number of cases in which the earlier appearance in any court had resulted in all charges being withdrawn or dismissed.

H Sentences

Table 3 shows the principal or most severe penalty for the 2,761 persons whose matters were finalised in the higher courts, Magistrates Court and Youth Court in South Australia over the period 1992–2012. Imprisonment was the most common

Table 3: The principal penalty (number of persons) by court 1992–2012

	Higher courts		Magistrates Court		Youth Court		Total
	<i>n</i>	%	<i>n</i>	%	<i>n</i>	%	<i>n</i>
Imprisonment	883	56.1	135	15.4	11	3.6	1029
Supervision order/detention	2	0.1	–	–	–	–	2
Suspended sentence	571	36.3	369	42.0	62	20.1	1002
Community service order	7	0.4	24	2.7	6	1.9	37
Supervision order/conditional release	82	5.2	183	20.8	205	66.6	470
Bond with/without supervision	15	1.0	17	1.9	2	0.6	34
Fine	11	0.7	147	16.7	17	5.5	175
Other	4	0.3	3	0.3	5	1.6	12
Number of persons (offenders)	1575	100	878	100	308	100	2761

principal penalty in the higher courts (56.1%), but much less common in the Magistrates Court. In the Magistrates Court, a suspended sentence (42.0%) was much more common than a supervision order or conditional release (20.8%) or a custodial sentence (15.4%).⁶⁰ In the Youth Court, by far the most common penalty was a supervision order (66.6%). One in five young offenders (20.1%) received a suspended sentence, and a very small proportion, 3.6%, received the most serious or punitive penalty, a detention order.

V DISCUSSION

The three main findings of this study concern the response to major inquiries and media attention in relation to the number of reported child sexual offences, the difference between child reports and adult reports and their respective prosecutions, and the high withdrawal rate of charges for child sexual offences.

The peaks in reporting numbers coincided with or closely followed the Layton and Mullighan Inquiries into aspects of child protection, which reported in 2003 and 2008 respectively. This was the case also in New South Wales in relation to the Wood Royal Commission Paedophile Inquiry.⁶¹ Such inquiries attract considerable

⁶⁰ OR = 3.97 and 2.76 respectively.

⁶¹ Commonwealth, Royal Commission into the New South Wales Police Service, *Final Report Volume IV* (1997) ('Wood Royal Commission Paedophile Inquiry'). See Judith Cashmore et al, 'The Impact of Delayed Reporting on the Prosecution and Outcomes of Child Sexual Abuse Cases' (Report for the Royal Commission into Institutional Responses to Child Sexual Abuse, August 2016) 201–3.

media attention and increasing public awareness. One of the consequences of this attention is that they tend to generate a greater number of complaints than the 'average' year.⁶² Media attention may give complainants 'permission' to report, born out of a cognisance that they are not alone. While some people report matters only to an organisation in which the abuse occurred (such as a Church), and make it clear that they do not want to go to the police, others either go to the police themselves or give permission for their details to be passed on to the police.

Typically, it is not the function of these inquiries to investigate individual criminal culpability or even to generate reports to the police. Nonetheless, this may well be a by-product of such inquiries. In the wake of the Parliamentary Inquiry in Victoria, Victoria Police set up a specialist group to deal with historic child sexual abuse complaints, known as the SANO Task Force.⁶³ The recent Royal Commission has generated a large amount of work for other bodies. As at 20 December 2017, at the completion of its work, the Royal Commission made 2,575 referrals to authorities, including the police.⁶⁴ An increase in the figures is to be expected in the years following the Royal Commission's work.

The second main finding concerns the difference between child reports and adult reports and prosecutions. Nearly 85% of reports to South Australia Police were made while the complainant was still a child but the upsurge in the overall numbers was due to the increase in reports made by adults who were then able to report with some expectation of action following the abolition of the statute of limitations for indictable offences in mid-2003. There was also an upward trend in arrests following adult reports for both sexual assault and indecent assault, reflecting both the abolition of the limitation period and the activity of the Mullighan Inquiry. There was no such increase in prosecutions for child reports.

While a spike in child reports in South Australia did not lead to an increase in prosecutions, the pattern was different in relation to adult reports. There was quite a substantial increase in prosecutions from 2003–08 where the complainant was an adult at the time of reporting, probably reflecting the work of the Paedophile Task Force which was established by South Australia Police to investigate historic

⁶² See Margaret Leland Smith, Andres F Rengifo and Brenda K Vollman, 'Trajectories of Abuse and Disclosure: Child Sexual Abuse by Catholic Priests' (2008) 35 *Criminal Justice and Behavior* 570, 590–1; Patrick Parkinson, Kim Oates, and Amanda Jayakody, 'Breaking the Long Silence: Reports of Child Sexual Abuse in the Anglican Church of Australia' (2010) 6 *Ecclesiology* 183.

⁶³ See Victoria Police, *Royal Commission into Institutional Response to Child Abuse* (5 July 2016) <http://www.police.vic.gov.au/content.asp?Document_ID=39881>.

⁶⁴ See *Royal Commission into Institutional Responses to Child Sexual Abuse*, <<https://www.childabuseroyalcommission.gov.au>>; see also Commonwealth, *Royal Commission into Institutional Responses to Child Sexual Abuse, Final Report Volume 17* (2017), 98.

complaints.⁶⁵ Even so, there remains a proportionately large gap between reports and prosecutions in those years in comparison with the years in which there were far fewer reports. By 2012, the level of adult reporting had returned to its levels in the early 2000s, and the gap between reported incidents and legal action when the complainant was an adult, had narrowed substantially. In contrast, the spike in child reports in the early 2000s did not lead to an increase in the number of arrests — in fact, the arrest rate dropped during this period. A possible explanation for the flat line of prosecutions despite the spike in reports is that there was a change in the nature and quality of the reports, or a proportionately smaller number of children or parents prepared to go through the prosecution process. However, it is difficult to see why a substantial change in patterns would occur from one year to the next.

Another possible explanation concerns resource constraints which may also explain the decline in substantiations by the child protection department. Not every report to a statutory child protection department is investigated, and in some cases the investigation may be quite limited. Resourcing issues may therefore affect substantiation rates. This is one possible explanation for the difference in substantiation rates between jurisdictions. For example, the rate of substantiated sexual abuse for the period 2008–13 was 0.4 per 1,000 children in South Australia, and the rate in New South Wales was four times that at 1.6 per 1,000.⁶⁶

The third main finding concerns the high withdrawal rate of charges in South Australia at or just before court hearings. Analysis of the process of attrition in child sexual abuse cases has generally focused upon evidential reasons why child sexual abuse cases have not proceeded to court. That is, the complainant (or a parent on the child's behalf) has declined to give evidence, or their testimony is deemed not to be sufficiently probative, or there are concerns about the child's capacity to withstand cross-examination. Another important factor to consider in analysing the process of attrition in sexual assault cases is when and why prosecutorial discretion is exercised to withdraw charges, and by whom it is exercised. The South Australian findings indicate marked differences between South Australia and New South Wales, the only two states with specific state agencies to analyse police and court data. In New South Wales, discretion is exercised by the police not to lay charges in the

⁶⁵ Malcolm Hyde, 'South Australia Police Annual Report 2002–2003' (South Australia Police 2003) 33.

⁶⁶ Rates per 1,000 children for the period 2008–14 are based on: Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, (Child Welfare Series No 47, 21 January 2010); Australian Institute of Health and Welfare, 'Child Protection Australia 2009–10' (Child Welfare Series No 51, 21 January 2011); Australian Institute of Health and Welfare, 'Child Protection Australia 2010–11' (Child Welfare Series No 53, 20 January 2012); Australian Institute of Health and Welfare, 'Child Protection Australia 2011–12' (Child Welfare Series No 55, 8 March 2013); Australian Institute of Health and Welfare, 'Child Protection Australia 2012–13' (Child Welfare Series No 58, 25 July 2014); Australian Institute of Health and Welfare, 'Child Protection Australia 2013–14' (Child Welfare Series No 61, 8 May 2015); Australian Institute of Health and Welfare, 'Child Protection Australia 2014–15' (Child Welfare Series No 63, 21 April 2016).

great majority of cases involving reports by child complainants, and in the majority of cases involving reports by adult complainants.⁶⁷ Police in South Australia have been much more likely than their counterparts in New South Wales to lay charges, especially in relation to child complainants, but those charges are much more likely to be withdrawn once the case goes to the prosecution team. One reason for this may be the late assessment of the quality of the evidence and the willingness and capacity of the complainant to proceed, as well as possible overcharging.

The higher proportion of such matters withdrawn by the prosecution in South Australia compared with other states was the subject of a special report by OCSAR in 2004, made in response to information published by the Australian Bureau of Statistics ('ABS') based on 2001–02 higher court matters.⁶⁸ The OCSAR report analysed 80 cases where the South Australian Office of Director of Public Prosecutions ('ODPP') queried the classification or method of finalisation in the ABS 2001–02 report; in half the cases withdrawn by the prosecution, fresh information was laid. The OCSAR report, like the ABS report, dealt with all offences, not just child sexual offences. The OCSAR report concluded that, apart from counting rule errors, the higher rate in South Australia could reflect differences in the application of the 'reasonable prospect of conviction' test in deciding whether to prosecute a criminal offence and whether the ODPP or police prosecutors handle matters prior to committal.⁶⁹

The finding that fresh charges were laid in 40 of the 80 cases initially withdrawn by the prosecution suggests that, in South Australia, the ODPP may withdraw charges and lay new ones to start a new prosecution rather than change the charges, as is the case in New South Wales. If this were the case, it would inflate the number of finalised appearances and substantially increase the cases that are withdrawn or that have all charges dismissed, reducing the calculated conviction rate. However, our analysis of the cases in which all charges were withdrawn or dismissed in South Australia over the period 1992–2012 does not support this hypothesis. While 37% of cases before courts in that period were withdrawn or dismissed, relatively few persons with the same PIN had further charges laid in relation to sexual offences against a child within three years of their charges being withdrawn or dismissed.

An OCSAR follow-up review of the withdrawal rates for all offences in the higher courts of South Australia in January 2013 confirmed that the rate is higher than for Australia as a whole, and has been 'steadily increasing' since 2004–05.⁷⁰ For example, in 2010–11, 29.1% of defendants in South Australian higher courts had their matters withdrawn compared with 13.5% for Australia as a whole. The

⁶⁷ Cashmore et al, above n 61.

⁶⁸ Nichole Hunter and Carol Castle, 'Explanations for the High Proportion of South Australian Matters Classified by the ABS as Withdrawn in 2001/02' (Technical Paper, Office of Crime Statistics and Research, January 2004).

⁶⁹ *Ibid* 17.

⁷⁰ 'Higher Court Withdrawal Rates' (Briefing Paper, South Australian Office of Crime Statistics and Research, 2013) 1.

withdrawal rate for sexual assault and related offences was higher than for other offences (32.2% in South Australia and 20.0% for Australia).

The review examined the reasons for cases being withdrawn via a white certificate⁷¹ or nolle prosequi in ODPP briefs and reported that the main reasons were the complainant not proceeding (not being willing or able to do so), poor or insufficient evidence, and the complainant being assessed as incapable of providing adequate testimony. The OCSAR review indicated that acceptance of a plea to a lesser charge was apparent in a very small percentage of cases. The percentage of white certificates was substantially higher in the circuit courts (though the number of circuit court matters was much smaller) than in the Adelaide courts, probably reflecting differences when the prosecution is initially run by South Australia Police prosecutors rather than ODPP solicitors. In South Australia, the Committal Unit within the ODPP assesses all major indictable offences in the metropolitan area prior to committal, while South Australia Police performs this role in regional areas. The ODPP annual reports indicate that matters where the ODPP is not involved prior to committal are more likely to be withdrawn by way of a white paper, which is rarely used, if at all, in other states. In the 2016–17 annual report, the Director of Public Prosecutions has indicated significant changes in practice, with the establishment of a specialist team for child and vulnerable witnesses, ‘to reduce the number of matters that necessitate a major indictable prosecution and to improve the briefs in those that do’.⁷² This is partly in response to the ‘high proportion of the matters withdrawn after matters have been committed for trial that involve complainants changing their mind about wanting to participate in the criminal process’⁷³ as well as the point at which the ODPP take responsibility for a major indictable matter.⁷⁴

⁷¹ Hunter and Castle, above n 68, 6 explain white certificates as follows: ‘The ODPP defines a “white paper” or “white certificate” as “where the director declines to prosecute any charge and files prior to arraignment, a notice pursuant to the *Criminal Law Consolidation Act* section 276”. According to the ODPP, this commonly occurs where the committal process is conducted in the country and there is no ODPP involvement prior to committal. In such instances, once assessed by the ODPP following committal, the ODPP may decide that the complaint or information should be more appropriately heard in the Magistrates Court (as a summary or minor indictable offence) or should not proceed at all. A “white paper” is then lodged with the court.’

⁷² Adam Kimber, ‘2016–17 Annual Report’ (Office of the Director of Public Prosecutions, 3 October 2017, 14.

⁷³ Ibid 15.

⁷⁴ Ibid 14: ‘The most significant change is that my Office will no longer take responsibility for a major indictable matter until the police investigation is more advanced than is the case today. This change creates the opportunity for better identification of matters that should be the subject of a major indictable prosecution, and those that should not. To do this, a specialist team will be created.’

VI CONCLUSION

One of the (perhaps unintended) consequences of major public inquiries concerning child protection issues is that more reports than usual are made to the police, to statutory child protection authorities, and to the institutions where the abuse occurred. While there may be a legitimate community expectation that all reports of child sexual abuse will be properly investigated, and that where the complainant is willing to testify and can give a credible account of the abuse, the prosecution will proceed, in reality, resource constraints may limit the response of the authorities.

The different patterns in the exercise of the discretion to lay charges or to withdraw them across Australian states require further research to understand better how the discretion to prosecute is exercised in different categories of case. Research on prosecutorial discretion by police and courts, funded by the Australian Research Council, is now underway.

JUSTICE AND THE VULNERABLE: EXTENDING THE DUTY TO PREVENT SERIOUS CRIMES AGAINST CHILDREN TO THE PROTECTION OF AGRICULTURAL AND RESEARCH ANIMALS

ABSTRACT

Commencing in 2004, the United Kingdom, South Australia, and New Zealand have each introduced new laws to protect children from serious harm within the home. Members of a household in these jurisdictions living with a child can now be held accountable for neglecting to seek help or take preventative action if the child is killed or seriously injured. The new duty to protect children from serious crime within the home recognises the special vulnerability of victims within a closed environment. In New Zealand, the duty specifically extends to staff of institutions where children reside. In the same period, legislation has been expanded to protect animals from acts of negligence, as well as overt cruelty. In practice, however, many of the protections introduced do not apply to animals used in agriculture and research. Legal protection for farm animals has been further eroded by the introduction of so called ‘ag-gag’ laws. Historically, the recognition of the special vulnerability of children and animals caused their legal protections to develop in tandem. This article examines the case for extending the duty to prevent serious violent crimes against children in the home, to animals in laboratories, abattoirs and on farms. It concludes that effective protection of animals requires the imposition of a new legislative duty to prevent their unlawful serious harm.

I INTRODUCTION

The Royal Society for the Prevention of Cruelty to Animals (‘RSPCA’) (Australia) has proposed the reform of Australian state laws protecting animals from cruelty.¹ The suggested reform would impose a mandatory duty on

* Associate Professor, Faculty of Law, University of Hong Kong. The author wishes to extend her sincere gratitude to the two anonymous reviewers for the Adelaide Law Review who provided many helpful comments on this paper.

¹ Royal Society for the Prevention of Cruelty to Animals (Australia), *Act to Protect Animals by Reporting Animal Cruelty: Frequently Asked Questions* (8 September 2014) <http://www.rspca.org.au/sites/default/files/website/media-centre/Press-releases/RSPCA_Australia-Act_to_Protect_Animals_by_reporting_animal_cruelty-FAQs.pdf>.

responsible professional persons, or persons who manage animals, to report animal cruelty by others. The proposal is based on the duty to report child abuse that is imposed on child care professionals in all Australian states. It is built on the premise that animals, like children, are more vulnerable to crime than other victims of crime and require special protective measures under the law. The purpose of this article is to set the RSPCA proposal in context and to critically assess its ability to provide more effective protection against cruelty to animals. This article will critically examine how animals could be better protected within the current legislative regime, and despite the existence of codes of practice for livestock production and scientific research which undermine the effectiveness of the regime.

Part II of this article considers the historical development of legal protections for animals and children in the United Kingdom ('UK') and United States of America ('USA'). Likening the protective needs of children to animals has a long legislative history. Many of the same arguments used to secure legal protections for animals in the mid-19th century were used to assist children in the latter part of that century.² In both the UK and USA, where animal and child protection laws were first developed, the same individuals were often behind both sets of reforms.³ Part II of this article highlights the use made by reformists of society's growing concern for both children and animals in advancing their cause.

Part III of this article examines the development of, and limits to, the duty of care to animals. In recent years, a growing body of animal welfare science, combined with increasing ethical concern for the treatment of animals, has resulted in widespread reforms to legislation protecting domestic animals.⁴ In Australia, and other parts of the common law world, modern animal protection laws not only prohibit cruelty, but require that animals are provided with a minimum standard of welfare. Those who own, or have charge of animals, even on a temporary basis, are required to provide their animals with a reasonable standard of care. Part III of this article notes that while legislative protections for many animals have been improved by the imposition of a duty of care, current laws are still deficient as they do not require persons who witness others committing acts of cruelty to intervene to assist the animals concerned. Further, in Australia, codes of practice for farm and laboratory animal use have been enacted. These codes carve out protection from cruelty prosecutions

² Susan Jane Pearson, *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America* (University of Chicago Press, 2011) 21–5.

³ John E B Myers, *Child Protection in America: Past Present and Future* (Oxford University Press, 2006) 30–3; Robert Dingwall and John M Eekelaar, 'Families and the State: An Historical Perspective on the Public Regulation of Private Conduct' (1988) 10 *Law and Policy* 341, 350.

⁴ Joy M Verrinder, Nicki McGrath and Clive J C Phillips, 'Science, Animal Ethics and the Law' in Deborah Cao and Steven White (eds), *Animal Law and Welfare — International Perspectives* (Springer International Publishing, 2016) 64.

for widely practiced animal husbandry and experimental procedures.⁵ In the USA, customary husbandry practices are also exempted from cruelty actions.⁶ Accordingly, on farms and in laboratories, culpability for criminal actions against animals is effectively restricted to cases of gratuitous cruelty or gross negligence.

Compounding these problems is the introduction of so called ‘ag-gag’ laws in 10 states in the USA and three in Australia. The term ‘ag-gag’ was coined by journalist Mark Bittman to describe laws which criminalise the unauthorised recording and distribution of images or audio recordings depicting animal use on farms.⁷ ‘Ag-gag’ laws erode the limited legal protections provided to farm animals by undermining public transparency of their use and stifling the capacity of undercover investigations to expose crimes which might otherwise have gone undetected by law enforcement authorities.

Part IV of this article examines the development of, and limits to, the common law duty to assist children and other vulnerable persons where they are in danger of serious harm from others. While public freedoms to report animal abuse are being legislatively curtailed by ‘ag-gag’ laws, legally enforceable duties to report child abuse are on the increase. Since 2004, three common law jurisdictions have enacted legislation requiring persons with frequent residential contact with children and vulnerable adults, who are at risk of serious harm, to take action to protect those individuals. Reporting the abuse, or risk of abuse, to police and other authorities is actively encouraged, and failure to assist the victim may have serious criminal consequences for the people concerned. Such vulnerable victim protection laws are now in force in the UK,⁸ South Australia⁹ and New Zealand.¹⁰ The Law Reform Commission of Hong Kong is also considering similar legislation.¹¹ The need to impose a duty to protect vulnerable children has also been recognised in Victoria,

⁵ Steven White, ‘Regulation of Animal Welfare in Australia and the Emergent Commonwealth: Entrenching the Traditional Approach of the States and Territories or Laying the Ground for Reform?’ (2007) 35 *Federal Law Review* 347.

⁶ David J Wolfson and Mariann Sullivan, ‘Foxes in the Hen House: Animals, Agribusiness and the Law’ in Cass R Sunstein and Martha C Nussbaum (eds), *Animal Rights: Current Debates and New Directions* (Oxford University Press, 2004) 212.

⁷ Garrett M Broad, ‘Animal Production, Ag-Gag Laws, and the Social Production of Ignorance: Exploring the Role of Storytelling’ (2016) 10 *Environmental Communication* 43, 49; Mark Bittman, ‘Who Protects the Animals?’, *The New York Times* (New York) 27 April 2011.

⁸ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5(4).

⁹ *Criminal Law Consolidation Act 1935* (SA) s 14.

¹⁰ *Crimes Act 1961* (NZ) s 195A.

¹¹ Law Reform Commission of Hong Kong, *Causing or Allowing the Death of a Child* (25 April 2018) < http://www.hkreform.gov.hk/en/projects/death_child.htm>.

where a 2015 amendment to the *Crimes Act 1958* criminalised the failure of persons with authority, working within organisations, to protect children from sexual abuse.¹²

Part V examines the case for extending the duty to prevent crimes against children in the private home to animals confined in farms, abattoirs and laboratories, in light of increasing protection legislation recognising the special vulnerability of children to unlawful harm. This part explores the circumstances in which a person with knowledge of animal cruelty should have a duty to intervene to protect an animal in danger of serious harm or death. The article considers the capacity of the common law to impose such a duty. On the basis that the imposition of a new duty would require legislative intervention, the article examines existing statutory offences requiring bystanders to intervene to assist others.

In Part VI, the article examines the RSPCA (Australia) proposal and evaluates its practical ability to improve animal protection. It is argued that while a duty to report animal cruelty is a laudable idea, effective animal protection would more likely be achieved if the law were to impose a wider duty to intervene to assist the animals concerned.

In Part VII, the article imagines the scope and nature of a new duty to intervene to protect animals from the threat of serious injury or death. The appropriate intensity of criminalisation for such an offence is explored and the requirements which should be placed on those who have the capacity and opportunity to intervene is considered.

Part VIII weighs the practical effect the proposed new duty would have on undercover investigations of illegal harm to animals. It concludes that where threats to animals do not require immediate action, undercover investigations could continue without breaching the proposed duty.

In the concluding Part IX, the article recommends the adoption of legislation which would protect animals from unlawful death and serious harm, in laboratories, abattoirs and on farms. The article suggests using the legislative protection afforded to children, in their places of residence, as a statutory model for animals.

II THE DEVELOPMENT OF LEGAL PROTECTION FOR CHILDREN AND ANIMALS

Legislative protection for both children and animals arose from a general movement towards social justice which gathered pace in the 19th century.¹³ The establishment of such protection arose in the context of a wider social reform movement, which could

¹² *Crimes Act 1958* (Vic) s 490. Organisations under a duty to protect children include churches, religious bodies, education and care services, schools, hostels, hospitals, government agencies, sports groups, youth organisations and charities.

¹³ Mike Radford, *Animal Welfare Law in Britain* (Oxford University Press, 2001) 48.

be traced back to earlier anti-slavery and anti-child labor campaigns.¹⁴ Many of the individuals involved in spearheading the new laws were concerned with society's failure to protect both animals and children.¹⁵ They recognised and capitalised on the parallel moral claims of the two vulnerable groups in calling for laws to protect them.

In 1822, Richard Martin, MP for Galway in the British House of Commons, was responsible for the drafting and passage of the world's first animal cruelty legislation, the *Cruel Treatment of Cattle Act 1822*, 3 Geo 4, c 71.¹⁶ In the absence of a metropolitan police force, which was founded seven years later, Martin enforced the law himself, patrolling the livestock markets and bringing prosecutions to court.¹⁷ He soon recognised the necessity to hire others to assist him and, in 1824, he and other social reformists established the Society for the Prevention of Cruelty to Animals (which later became the RSPCA).¹⁸

In 1866, in New York, humanitarian Henry Bergh, who had visited London and seen the work of the RSPCA, sought, and was granted, a wide charter from the New York legislature which permitted the establishment of the American Society for the Prevention of Cruelty to Animals ('ASPCA'). While the protection of animals was Bergh's chief area of concern, public and private pressure began to be placed on him to assist children in need of a similar champion. In 1874, acting on the Society's behalf, Bergh petitioned the New York courts for a writ of habeas corpus for 10-year-old Mary Ellen Wilson. The writ sought to remove her from the care of her adoptive mother who had subjected the child to savage beatings and neglect, since her adoption at 18 months of age.¹⁹ The case resulted in the convictions of the adoptive mother for assault and battery. A few months later, Bergh called a public meeting to establish the New York Society for the Prevention of Cruelty to Children, the first society of its kind in the world.²⁰

At the same time, active steps were being taken to provide legal protection to children in the UK, beginning in Liverpool. While section 37 of the *Poor Law Amendment Act 1868*, 31 and 32 Vict, c 122, had made it an offence for a parent to deny his child

¹⁴ Dingwall and Eekelaar, above n 3, 351.

¹⁵ James Turner, *Reckoning with the Beast: Animals, Pain, and Humanity in the Victorian Mind* (John Hopkins University Press, 1980) 37; Harriet Ritvo, *The Animal Estate: The English and other Creatures in the Victorian Age* (Harvard University Press, 1987) 133; Elizabeth W LeBow and Debbie J Cherney, 'The Role of Animal Welfare Legislation in Shaping Child Protection in the United States' (2015) 2 *International Journal of Education and Social Science* 35, 40.

¹⁶ As well as cattle, the Act protected equines and sheep.

¹⁷ Radford, above n 13, 40.

¹⁸ Ritvo, above n 15, 145.

¹⁹ Lela B Costin, 'Unravelling the Mary Ellen Legend: Origins of the "Cruelty" Movement' (1991) 65 *Social Service Review* 203, 206–7; Myers, 'Child Protection in America: Past, Present and Future,' above n 3, 27–33.

²⁰ John E B Myers, 'A Short History of Child Protection in America' (2008) 42 *Family Law Quarterly* 449, 452.

the basic necessities of life, there was no law prohibiting other forms of cruelty.²¹ In 1881, Reverend George Staite wrote to his local newspaper complaining that while the law in the UK criminalised cruelty to animals, children remained without protection.²² The same year, banker and merchant Thomas Agnew visited New York and noted the action taken there and in other large American cities to protect children. On his return to Liverpool he sought support for the cause from his local member of Parliament, Samuel Smith.²³ A few weeks later, at a meeting of the RSPCA to seek funding for a dogs' home, the urgent need to provide formal support for children was also discussed and, in 1883, the Liverpool Society for the Prevention of Cruelty to Children was established.²⁴ By 1889, 31 societies were established across England, Wales and Scotland and the *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44, was passed. Well drafted in some respects, the new law allowed not only for the punishment of cruelty, but for the prevention of it. Section 1 of the *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44 relevantly provided:

Any person over sixteen years of age who, having the custody, control, or charge of a child, being a boy under the age of fourteen years, or being a girl under the age of sixteen years, wilfully ill-treats, neglects, abandons, or exposes such child, or causes or procures such child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause such child unnecessary suffering, or injury to its health, shall be guilty of a misdemeanour ...

By the early 20th century, most states in the USA had laws criminalising abandonment, desertion, or failure to support children but it took many years before legal intervention to prevent child abuse became the rule, rather than a necessary reaction in the most abhorrent of cases.²⁵ Until the mid-20th century, societal attitudes towards children in the USA, as in the UK, widely held children to be the property of their parents.²⁶ Legal intervention was viewed as a last resort.²⁷ However in 1962 the *Journal of the American Medical Association* published a study by Dr C Henry Kempe

²¹ Rachel Taylor and Laura Hoyano, 'Criminal Child Maltreatment: The Case for Reform' [2012] *Criminal Law Review* 871, 874.

²² National Society for the Prevention of Cruelty to Children, *A Pocket history of the NSPCC* (2nd ed, 2008) 4.

²³ Jean Heywood, *Children in Care: The Development of the Service for the Deprived Child* (Routledge and Keegan, 1959) 101.

²⁴ Dingwall and Eekelaar, above n 3.

²⁵ Stephen J Pfohl, 'The "Discovery" of Child Abuse' (1977) 24 *Social Problems* 310, 312.

²⁶ See Steven Mintz and Susan Kellogg, *Domestic Revolutions: A Social History of American Family Life* (Free Press, 1988) 231.

²⁷ See Suzanne Barnard, 'Taking Animal Abuse Seriously: A Human Services Perspective' in Phil Arkow and Frank R Ascione (eds), *Child Abuse, Domestic Violence and Animal Abuse: Linking the Circles of Compassion for Prevention and Intervention* (Purdue University Press, 1999) 101–2.

et al entitled 'The Battered Child Syndrome'.²⁸ The study identified child abuse as a medical pathology and legislation began to be drafted to protect children. Child protection laws were proposed by the National Centre on Child Abuse and Neglect, in 1963, and by the American Medical Association, in 1965.²⁹ By 1967, every state in the USA with child abuse legislation had passed a law to require mandatory reporting of child abuse by doctors.³⁰

Alongside the state's reluctance to intervene in what was seen as a private family matter,³¹ the slower introduction of laws to protect children, in both the USA and the UK, in part resulted from the fact that child abuse then (as today), usually took place in private.³² By way of contrast animal abuse in the 19th century was a very public matter.³³ Livestock were kept on open farms, driven to market along public roads and sold and slaughtered in public markets. It is not surprising that many of the RSPCA's early prosecutions related to offences committed at Smithfield Market in London.³⁴

In the case of both children and animals, it was a growing recognition of the need for laws recognising the inherent vulnerability of both that was the impetus for law reform. Today those vulnerabilities continue to be recognised in attempts to improve their legal protection.

In regard to both children and domesticated animals, inherent vulnerabilities arise from their need to be provided with appropriate food, shelter and protection from injury. However, for certain animals, the social and legal constructs which support their use for human benefit serve to escalate their vulnerable status.³⁵ For agricultural and research animals, confinement in closed environments, where only certain persons have the capacity and opportunity to assist them, increases their inherent vulnerability. For these animals, balancing effective legal protections against human needs presents a particular challenge. Agricultural and research animals are commodities bred for human use, and their lives are expendable and replaceable. As such, more so than any other animals, laboratory and agricultural animals are vulnerable

²⁸ C Henry Kempe et al, 'The Battered Child Syndrome' (1962) 181 *Journal of the American Medical Association* 17.

²⁹ Barnard, above n 27, 102.

³⁰ Monrad G Paulsen, 'Child Abuse Reporting Laws: the Shape of the Legislation' (1967) 67 *Columbia Law Review* 1, 6.

³¹ Pearson, above n 2, 102–3.

³² Dingwall and Eekelaar, above n 3, 352.

³³ Radford, above n 13, 49.

³⁴ See, eg, Richard D Ryder, *Animal Revolution: Changing Attitudes towards Speciesism* (Berg Publishers, 2nd ed, 2000) 87.

³⁵ Ani B Satz, 'Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property' (2009) 16 *Animal Law* 65, 79; Jane Johnson, 'Vulnerable Subjects? The Case of Non-Human Animals in Experimentation' (2013) 10 *Journal of Bioethical Inquiry* 497.

in an inherent, situational and pathogenic sense.³⁶ The need to provide them with effective legal protection from harm is obvious.

III THE DEVELOPMENT (AND LIMITS) OF THE POSITIVE DUTY OF CARE TOWARDS ANIMALS

While legislation protecting animals from cruelty has been in place since the early 19th century, in recent years there has been a move across the common law jurisdictions from baseline protection against unnecessary suffering (cruelty), to the requirement that animals are provided with an enforceable minimum standard of care.

This has been a critical step in improving legislative protection for animals. 19th century British lawmakers had considered that matters of how a person ought to act generally fell outside of their remit. Justifying the failure of the first draft in 1837 of the penal code of India to criminalise omissions, Lord Macaulay opined: ‘the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the office of furnishing men with motives for doing positive good’.³⁷

Nearly two centuries later, the UK,³⁸ and common law countries including Australia, New Zealand and the USA,³⁹ legislated to not only protect domestic animals from cruelty but also require that anyone who has care of them must provide them with an objectively reasonable standard of care (positive welfare). Positive welfare laws reflect a growing concern that legislation should reflect advances in animal welfare science. With an improved understanding of animals’ behavioural needs has come

³⁶ Johnson, above n 35, 499.

³⁷ Lord Macaulay, *Speeches and Poems, with the Report and Notes on the Indian Penal Code* (Hurd and Houghton, 1867) vol 2, 408.

³⁸ Including the: *Animal Welfare Act 2006* (UK) c 45; *Animal Health and Welfare (Scotland) Act 2006* (Scot) asp 11; *Welfare of Animals Act (Northern Ireland) 2011* (NI) c 16.

³⁹ See 7 USC § 2131 (Supp 1967) (as amended in 1970, 1976, 1985, 1990, 2002, 2007, 2008 and 2013); *Animal Welfare Act 1999* (NZ); *Animal Welfare Act 1992* (ACT); *Prevention of Cruelty to Animals Act 1979* (NSW); *Animal Welfare Act 1999* (NT); *Animal Care and Protection Act 2001* (Qld); *Animal Welfare Act 1985* (SA); *Animal Welfare Act 1993* (Tas); *Prevention of Cruelty to Animals Act 1986* (Vic); *Animal Welfare Act 2002* (WA); *Animal Protection Law 1998* (Taiwan). Note that in Australia, Tasmania, the Northern Territory, the Australian Capital Territory, and Queensland explicitly include a general duty of care towards animals in their legislation. Whilst the other Australian states’ legislation does not provide a general duty of care, they do include specific welfare related offences such as failure to provide adequate exercise or shelter. See also *Council Directive 98/58/EC of 20 July 1998 Concerning the Protection of Animals Kept for Farming Purposes* [1998] OJ L 221/23, which provides for a duty of care towards all animals kept for farming purposes in the European Union.

increasing recognition of the need to formulate policies and laws that promote good welfare, as well as protect animals from overt harm.⁴⁰

The objective standard of care for animals originated in the UK, with the passing of the *Agriculture (Miscellaneous Provisions) Act* in 1968. Three years earlier, in response to unprecedented community concern about farming practices, the British government had set up a committee chaired by Professor F W Rogers Brambell ('the Brambell Committee'), to inquire into the welfare of animals in intensive husbandry systems.⁴¹ In the drive to increase food security for Britain after the Second World War, farmers were increasingly adopting intensive farming methods.⁴² Public concern about the welfare of farm animals came to the fore after the 1964 publication of Ruth Harrison's book *Animal Machines: The New Factory Farming Industry* which was serialised in a leading British newspaper.⁴³ The Brambell Committee's report resulted in the passing of the *Agriculture (Miscellaneous Provisions) Act 1968* which allowed for the setting of minimum standards for animal welfare and authorised state veterinarians, police and RSPCA inspectors to enter private land and examine farm animals for welfare breaches.⁴⁴ The Act was the first legislation in the world to provide for a minimum standard of care for animals, under its regulations.⁴⁵

Duty of care laws do, however, have their limits. They do not go so far as to require persons who witness first hand animal cruelty, or neglect by others in control of animals, to intervene to assist the animal concerned. This is no longer the case in child protection law. New laws introduced in the UK, South Australia, Victoria and New Zealand have extended the circle of liability for child abuse to criminalise not only those who inflict harm, but also those persons close to the child, who have capacity and opportunity to intervene to assist the child, but who fail, unreasonably, to do so. Neither anti-cruelty laws, nor welfare laws, currently provide the same protection to animals.

The *Animal Welfare Act 2006* (UK) c 45 is an illustrative example. The Act imposes liability not only for acts or omissions that cause cruelty,⁴⁶ but also for failing to provide an animal with a reasonable standard of care.⁴⁷ Liability for failing to provide reasonable care is imposed on owners and other persons with responsibility for

⁴⁰ David Fraser, 'Animal Ethics and Animal Welfare Science: Bridging the Two Cultures' (1999) 65 *Applied Animal Behaviour Science* 171, 177.

⁴¹ Radford, above n 13, 169.

⁴² Clive J C Phillips, *The Animal Trade* (CAB International, 2015) 20.

⁴³ David Fraser, 'Ruth Harrison — A Tribute' in Ruth Harrison, *Animal Machines: The New Factory Farming Industry* (CAB International, 2nd ed, 1964) 18.

⁴⁴ *Agriculture (Miscellaneous Provisions) Act 1968* (UK) c 34, s 6.

⁴⁵ Mike Radford, 'Partial Protection: Animal Welfare and the Law' in Robert Garner (ed) *Animal Rights* (Palgrave Macmillan, 1996) 73.

⁴⁶ *Animal Welfare Act 2006* (UK) c 45, s 4.

⁴⁷ *Ibid* s 9.

animals, even where they are responsible only on a temporary basis.⁴⁸ However, the Act does not require that persons who witness cruelty to animals they are not responsible for, or neglect of such animals by others, take any action to protect the animals concerned from serious harm. There is no general duty to report an offence, or take steps to assist an animal in harm's way, even where it would be relatively easy to do so.

Similarly, the *Animal Welfare Act 1985* (SA) imposes liability for cruelty on any person whose actions or omissions cause harm to animals, and liability for neglect on those who own or otherwise have the custody and control of them.⁴⁹ The law does not, however, impose any duty on those who are not legally responsible for animals to intervene to protect them from cruelty or neglect by others.⁵⁰

Finally, it would be incomplete not to acknowledge the broad limitations placed on duty of care laws by the widespread implementation of codes of practice for livestock production and scientific research. Such codes have undermined the effectiveness of duty of care legislation introduced in Australia, where compliance with codes exempts users from prosecution for actions which would otherwise be defined as animal cruelty. The injustices inherent in allowing codes to legalise the use of farm and laboratory animals, in ways that would be prohibited for companion animals, have been widely acknowledged and lamented by others.⁵¹ Such concerns will not be addressed further here. The purpose of this article is to examine how animals could be better protected *within* the current legislative regime, and *despite* the existence of the codes. Accordingly, the article offers a framework for extending criminal culpability for failing to protect animals from the harms which currently fall outside the protection of codes, namely, gratuitous cruelty and gross negligence.

IV LIMITS ON LIABILITY FOR OMISSIONS IN OFFENCES AGAINST THE PERSON

Criminal liability for omissions is notably unusual in the common law jurisdictions. Most crimes are founded on liability for positive acts rather than omissions. In this regard, little has changed since the publication of *A History of the Criminal Law of England* (1883), in which Sir James Fitzjames Stephen stated the common law position of the time: 'A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth

⁴⁸ Ibid s 3.

⁴⁹ *Animal Welfare Act 1985* (SA) s 13.

⁵⁰ Ibid.

⁵¹ Christine Parker and Josephine De Costa, 'Misleading the Ethical Consumer: The Regulation of Free-Range Egg Labelling' (2016) 39 *Melbourne University Law Review* 895; Arnja Dale, 'Animal Welfare Codes and Regulations — The Devil in Disguise?' in Peter Sankoff and Steven White (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009).

of the pond, are no doubt, shameful cowards, but they can hardly be said to have killed the child'.⁵²

The early common law judges took the view that the criminal law should not intervene in the actions of the individual, unless or until such intervention became necessary to prevent harm.⁵³ However, in the case of special relationships between the parties, the courts have proved more willing to impose liability for omissions leading to death or serious injury. In *R v Gibbins*,⁵⁴ the father and common law wife of a seven-year-old girl were held liable by the English Court of Criminal Appeal for her murder after they failed to provide her with food. In *R v Russell*,⁵⁵ the Supreme Court of Victoria found a father who had stood by and watched his wife drown their two young children, and then herself, liable for the children's manslaughter, on the basis that he had a duty to take reasonable steps to save them.

Extending the duty beyond parent and child, the English courts have recognised and enforced a duty of care between adults, where the defendant has voluntarily assumed a duty of care towards another person, then failed to meet that duty. In *R v Stone*,⁵⁶ the defendants, a man with disabilities and of low intelligence, and his female partner, allowed the man's adult sister to come to live with them. Despite her developing serious medical problems, including anorexia, they failed to seek assistance for her and were held liable by the English Court of Appeal for her manslaughter. More recently, in *R v Barrass*,⁵⁷ a man was held liable for the manslaughter of his adult sister who suffered from learning difficulties and physical problems. The pair had shared a home since their mother died, and the sister who had lain on the floor for two weeks after falling down, died from lack of medical assistance.

In the Australian case of *R v Taktak*,⁵⁸ the defendant had procured a 15-year-old female prostitute and heroin user to attend the party of a friend. On being called to collect the girl, the defendant found her unconscious in the foyer of a building. He took her back to his flat and tried to revive her, but did not immediately call a doctor. The girl died. The Court of Criminal Appeal for New South Wales quashed the defendant's conviction for manslaughter. However, Yeldham J, with whose reasons Loveday J agreed, stated that a duty of care arises where a person voluntarily assumes care for another, so secluding a helpless person as to prevent others from rendering aid.⁵⁹

⁵² Sir James Fitzjames Stephen, *A History of the Criminal Law of England* (Macmillan, 1883) vol 3, 10.

⁵³ Sally Kift, 'Criminal Liability and the Bad Samaritan: Failure to Rescue Provisions in the Criminal Law: Part II' (1997) 1 *Macarthur Law Review* 258, 259.

⁵⁴ (1918) 13 Cr App R 134.

⁵⁵ [1933] VLR 59.

⁵⁶ [1977] QB 354.

⁵⁷ [2012] 1 Cr App R (S) 80.

⁵⁸ (1988) 14 NSWLR 226.

⁵⁹ *Ibid* 245, 250.

In each of these cases, the common law recognised a special relationship between the parties, whether that of parent/guardian and child or a duty voluntarily assumed between adults in a situation where one necessarily relied on the other for aid. In such cases, liability for the most serious offences against the person — murder, manslaughter, wounding and causing grievous bodily harm — can be founded, in the right circumstances, on an omission.

Despite sustained criticism from some legal scholars,⁶⁰ the UK Law Commission has resisted calls to propose legislation setting out the circumstances which would give rise to such liability.⁶¹ In the UK, the question of when to impose liability for omissions, in relation to offences against the person, largely remains a matter for the common law. Exceptionally, the *Children and Young Persons Act 1933*, 23 & 24 Geo 5, c 12 (the successor to the original *Prevention of Cruelty to, and Protection of, Children Act 1889*, 52 & 53 Vict, c 44) criminalises the neglect of children by their parents or guardians with up to 10 years' imprisonment.⁶² The *Mental Capacity Act 2005* (UK) c 9 makes it an offence, carrying a maximum penalty of five years' imprisonment, for a carer to ill-treat or willfully neglect a person lacking in mental capacity⁶³ and the *Criminal Justice and Courts Act 2015* (UK) c 2 criminalises the neglect or ill treatment of a patient in health or social care.⁶⁴ Both individuals receiving payment for care and institutional care providers can be held accountable for failing to meet their duty of care. A convicted individual is liable to a maximum of five years' imprisonment,⁶⁵ and an institution may be fined and ordered to take steps to remedy the procedures which allowed a breach to occur. The court may also order publicity of the institution's breach to deter further offences.⁶⁶

In the absence of statutory guidance, the Australian courts have developed their own test for gross negligence manslaughter.⁶⁷ However, all states and territories have enacted legislation to protect children from neglect. The most common offences

⁶⁰ Andrew Ashworth, 'Manslaughter by Omission and the Rule of Law' [2015] *Criminal Law Review* 563, 577; Glenys Williams, 'Gross Negligence Manslaughter and Duty of Care in "Drugs" Cases: R v Evans' [2009] *Criminal Law Review* 631, 646–7; Catherine Elliot, 'Liability for Manslaughter by Omission: Don't Let the Baby Drown!' (2010) 74 *Journal of Criminal Law* 163, 178.

⁶¹ UK Law Commission, *A Criminal Code for England and Wales*, Report No 177 (1989) vol 2, 186–8.

⁶² *Children and Young Persons Act 1933*, 23 & 24 Geo 5, c 12, s 1.

⁶³ *Mental Capacity Act 2005* (UK) c 9, s 44.

⁶⁴ *Criminal Justice and Courts Act 2015* (UK) c 2, ss 20–5.

⁶⁵ *Ibid* s 20(2).

⁶⁶ *Ibid* s 23.

⁶⁷ Stanley Yeo, 'Manslaughter Versus Special Homicide Offences: An Australian Perspective' in C M V Clarkson and Sally Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Ashgate Publishing, 2008) 200.

include exposing or abandoning a child,⁶⁸ failing to provide necessities to a child,⁶⁹ child abuse⁷⁰ and failing to protect a child from harm.⁷¹ In 2008, Victoria enacted an offence of child homicide.⁷² Neglect offences which may be applied to other vulnerable persons have also been enacted in most jurisdictions.⁷³

The criminal code of Queensland places a legal duty on parents and other guardians of children under the age of 16, to take reasonable steps to avoid danger to a child's life, health or safety; the duty arises even where the child themselves could have avoided the danger.⁷⁴

In 2004, in an effort to specifically target cases of domestic violence where it is unclear who has caused the injuries to or death of the victim, the UK enacted a new offence of negligently failing to protect a child or vulnerable adult from others. Section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) c 28 imposes a positive duty on members of the same household to assist an abused child or vulnerable adult who is in danger of being killed, or suffering serious physical harm at the hands of another member.⁷⁵ A person is considered to be a 'member' of a particular household, 'even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it.'⁷⁶ The offence carries a maximum penalty of 14 years' imprisonment, if the victim dies, and 10 years, if they suffer serious injury. As to what circumstances present a 'significant' risk of serious physical harm, the UK Court of Appeal has held that the word carries its normal meaning and need not be defined by the judge to a

⁶⁸ *Crimes Act 1900* (ACT) s 41; *Crimes Act 1900* (NSW) s 43; *Criminal Code Act 1983* (NT) s 184; *Criminal Code Act 1899* (Qld) s 326.

⁶⁹ *Criminal Code Act 1983* (NT) ss 149, 153; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 228; *Crimes Act 1900* (NSW) s 43A; *Criminal Code Act 1924* (Tas) ss 145, 177; *Criminal Code Act 1899* (Qld) s 324; *Criminal Code Act Compilation Act 1913* (WA) s 263.

⁷⁰ *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227; *Children, Young Persons and their Families Act 1997* (Tas) s 91; *Children, Youth and Families Act 2005* (Vic) s 493(1)(a); *Children and Community Services Act 2004* (WA) s 101(1).

⁷¹ *Children, Youth and Families Act 2005* (Vic) s 493(1)(b); *Children, Young Persons and their Families Act 1997* (Tas) s 91; *Children and Community Services Act 2004* (WA) s 101(1).

⁷² *Crimes Act 1958* (Vic) ss 5A, 421.

⁷³ *Crimes Act 1900* (NSW) s 44; *Criminal Code Act 1899* (Qld) ss 285, 324; *Criminal Code Act Compilation Act 1913* (WA) s 262; *Criminal Code Act 1924* (Tas) s 144; *Criminal Code Act 1983* (NT) s 149.

⁷⁴ *Criminal Code Act 1899* (Qld) s 286.

⁷⁵ As amended by the *Domestic Violence, Crime and Victims (Amendment) Act 2012* (UK) c 4.

⁷⁶ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5(4).

jury.⁷⁷ Liability for the offence does not arise when the death or serious injury was an accident or could not have been reasonably anticipated or avoided.⁷⁸

In 2005, one year after the UK introduced their new offence, the South Australian *Criminal Law Consolidation Act 1935* (SA) was amended to introduce the crime of ‘criminal liability for neglect where death or serious harm results from unlawful act’.⁷⁹ Until this year, the offence definition was similar to that of the UK, although in South Australia the offence is also applicable to staff members of hospitals and other residential facilities where the victim and the defendant have had close contact and the defendant has voluntarily assumed a duty of care for the victim (such as under an employment contract). Recently, the South Australian law further deviated from the UK model when, on 2 August 2018, the *Criminal Law Consolidation (Children and Vulnerable Adults) Amendment Act 2018* (SA) was assented to. The Act removes the requirement for the harms caused by the crime to be unlawful and serious in nature and raises the maximum penalty, where a victim dies, from 15 years to life imprisonment. In other cases, the maximum penalty has been raised from five to 15 years’ imprisonment.

In 2011, New Zealand also imposed a legal duty on adults to protect children and vulnerable adults with whom they have frequent contact as a result of living in the same residence (specifically including hospitals, institutions and other facilities where children reside). The law imposes a duty to protect the child or vulnerable adult from death, grievous bodily harm or sexual assault under the *Crimes Act 1961* (NZ).⁸⁰ The offence carries a maximum penalty of 10 years’ imprisonment. The New Zealand Law Commission Report responsible for the introduction of the legislation recommended that the maximum penalty for the offence should be reserved for those cases where the offender deliberately closed his or her eyes to the risk of death, or very serious harm, over a prolonged period.⁸¹

In all of the jurisdictions surveyed in the preceding paragraphs, it is important to note that a defendant will avoid conviction for failing to intervene if they take what would be regarded as reasonable steps, in all the circumstances, to protect the child or vulnerable adult from harm. According to the UK Ministry of Justice, examples of such reasonable steps would include: reporting suspicion or knowledge of the risk of abuse to police or other assistance services; seeking the assistance of other persons with authority within the household to minimise the risk; and providing appropriate and timely treatment in response to injuries.⁸² In New Zealand, the Law Commission

⁷⁷ *R v Stephens* [2007] EWCA Crim 1249 (25 May 2007) [31] (Moore-Bick LJ).

⁷⁸ UK Ministry of Justice, Criminal Law and Legal Policy Unit, *Domestic Violence, Crime and Victims Amendment Act 2012* (Circular No 2012/03, UK Ministry of Justice, 29 June 2012) 3 [10].

⁷⁹ *Criminal Law Consolidation Act 1935* (SA) s 14, as inserted by *Criminal Law Consolidation (Criminal Neglect) Amendment Act 2005* (SA) s 4.

⁸⁰ *Crimes Act 1961* (NZ) s 195A, as inserted by *Crimes Amendment Act (No 3) 2011* (NZ) s 7.

⁸¹ New Zealand Law Commission, *Review of Part 8 of the Crimes Act 1961: Crimes against the Person*, Report No 111 (2009) 56.

⁸² UK Ministry of Justice, above n 78, 13.

noted that the duty only required reasonable steps to be taken and the nature of the duty would vary according to the nature and degree of the vulnerability of the victim. Liability would also require that the jury must find the defendant's failure to act was grossly negligent (a major departure from the standard of care expected of a reasonable person in the same circumstances) before they could convict of the offence.⁸³

V EXTENDING TO ANIMALS A SIMILAR DUTY TO PREVENT CRIMES AGAINST THEM

A The Current Legislative Framework

Should the legislature impose a similar duty on those who witness animal cruelty by others to protect them from unlawful harm? This article contends that, in some cases, it should. With the rise of so called 'ag-gag' laws in Australia and the USA, agricultural and laboratory animals are now at an unprecedented risk of crimes against them going unreported. New forms of legislative protection are required to ensure their safety.

In recent years, the introduction of laws which criminalise unauthorised access to farms and laboratories have provided a new threat to animal cruelty safeguards. In Australia, Queensland has passed the *Biosecurity Act 2014* (Qld), which imposes an obligation on the public to prevent biosecurity risks. The Act commenced on 1 July 2016.⁸⁴ The Act exposes those who trespass on farms and cause such a risk, to prosecution for an offence with a maximum penalty of three years' imprisonment.⁸⁵ Biosecurity risks are defined as 'a risk of any adverse effect on a biosecurity consideration caused by, or likely to be caused by — biosecurity matter; or dealing with biosecurity matter or a carrier; or carrying out an activity relating to biosecurity matter or a carrier'.⁸⁶ New South Wales has passed the *Biosecurity Act 2015* (NSW), which also carries a maximum penalty of three years' imprisonment for those who create a biosecurity risk.⁸⁷ While the New South Wales legislature assured concerned parties that the provisions were not intended to stifle investigations of animal welfare,⁸⁸ both Acts are too new for their practical effect to be determined.

While biosecurity laws may be legitimately used to address biosecurity concerns, the 'ag-gag' intention of a new Bill introduced into the New South Wales Parliament in

⁸³ New Zealand Law Commission, above n 81, 60.

⁸⁴ Department of Agriculture and Fisheries, Government of Queensland, *Biosecurity Act 2014* <<https://www.daf.qld.gov.au/business-priorities/biosecurity/about-biosecurity/biosecurity-act-2014>>.

⁸⁵ *Biosecurity Act 2014* (Qld) s 24.

⁸⁶ *Ibid* s 16.

⁸⁷ *Biosecurity Act 2015* (NSW) ss 23, 279.

⁸⁸ New South Wales, *Parliamentary Debates*, Legislative Council, 8 September 2015, 3097–8 (Niall Blair, Minister for Primary Industries).

March 2018 is very clear. The Animal Protection and Crimes Legislation Amendment (Reporting Animal Cruelty and Protection of Animal Enterprises) Bill 2018 (NSW)⁸⁹ seeks to amend the *Prevention of Cruelty to Animals Act 1979* (NSW) by introducing an offence of failing to report the recording of an act of animal cruelty to authorities within one day, and for failing to provide footage within five days.⁹⁰ The Bill would, however, only criminalise a failure to report that a visual recording of animal cruelty had been made, and not a failure to report the abuse itself, begging the question of who the Bill is seeking to protect: the animals, or the industries that utilise them?

While no federal ‘ag-gag’ law has yet been passed, there remains the threat of the Criminal Code Amendment (Animal Protection) Bill 2015 (Cth) which would also require the visual recording of alleged animal cruelty to be reported to law enforcement authorities within 24 hours. Similar to the Bill introduced in New South Wales, the Outline of the federal Bill, in its Explanatory Memorandum,⁹¹ states that the Bill’s first priority is to address animal cruelty and ensure that there is the least possible delay in action to prevent further abuses.⁹² It does not, however, impose any duty to report cruelty, only the recording of it.

Surveillance device control laws, which exist in all Australian states, may also be used to undermine the transparency of animal use on farms. South Australia recently repealed its previous surveillance device legislation and passed the *Surveillance Devices Act 2016* (SA), which criminalises, with a maximum penalty of three years’ imprisonment, the recording and publication of private activities and conversations, unless a court permits publication in the public interest.⁹³ That same year, activists Christopher Delforce and Dorottya Kiss were charged with offences under the *Surveillance Devices Act 2007* (NSW). The prosecution alleged that the pair had been involved in the unauthorised recording and publishing of video footage of piggeries in New South Wales.⁹⁴ While the charges were eventually dismissed, the use of the legislation to prosecute animal activists has led to concern that the South Australian law may be used in the same way.⁹⁵

⁸⁹ Introduced by Robert Borsak, representative of the Shooters, Fishers and Farmers Party, New South Wales Legislative Council.

⁹⁰ Animal Protection and Crimes Legislation Amendment (Reporting Animal Cruelty and Protection of Animal Enterprises) Bill 2018 (NSW) sch 1.

⁹¹ Circulated by authority of Western Australian Senator Dr Chris Back.

⁹² Explanatory Memorandum, Criminal Code Amendment (Animal Protection) Bill 2015 (Cth).

⁹³ *Surveillance Devices Act 2016* (SA) ss 4–6. The Act commenced operation in December 2017.

⁹⁴ Colin Bettles, ‘Animal Activists “Let Off” Charges Under NSW Surveillance Devices Act Due to Technicality’, *FarmOnline National* (online), 8 August 2017 <<https://www.farmonline.com.au/story/4842862/animal-activists-let-off-charges-due-to-technicality/>>.

⁹⁵ Leah MacLennan, ‘Ag-Gag Bill Will Make Exposing Animal Cruelty Harder: Law Society’, *ABC News* (online), 3 December 2015 <<http://www.abc.net.au/news/2015-12-03/ag-gag-bill-surveillance-devices-sa-parliament/6994516>>.

In the USA, ‘ag-gag’ laws have been passed in 10 states: Montana and North Dakota in 1991, Kansas in 1990, Utah, South Carolina, Iowa and Missouri in 2012, Idaho in 2014, North Carolina in 2015 and Arkansas in 2017.⁹⁶ These laws criminalise unauthorised entry onto farms and research facilities and the recording, possession or publication of photographs, video or audio recordings of animals kept there. At the federal level, the *Animal Enterprise Terrorism Act*, 18 USC § 43 (2006) prohibits the communication or transmission of material intended to cause loss or damage to animal enterprises, including farms and laboratories.⁹⁷

The criminalisation of unauthorised access to farms and subsequent undercover investigations of animal conditions has been widely recognised as a serious step backwards in the transparency and accountability of livestock production.⁹⁸ In the USA, such laws have been criticised for being unconstitutional, as they breach the First Amendment right to free speech.⁹⁹ Although to date, only the Utah and aspects of the Idaho law have been struck down by the courts,¹⁰⁰ the negative publicity surrounding the enactment and enforcement of these laws may serve to limit their application. New research suggests that growing publicity about these laws has worked against the interest of the agricultural industries that lobbied for them; a 2016 survey of consumer attitudes to proposed ‘ag-gag’ legislation in the USA found that on being told that local governments were considering the adoption of such

⁹⁶ Idaho Code Ann § 18-7042 (2014) prohibits unauthorised recording inside agricultural facilities and gaining employment by misrepresentation; Utah Code Ann § 76-6-112 (2012) prohibits unauthorised recording inside agricultural facilities and gaining employment with the intent to make such a recording; Iowa Code § 717A.3A (2013) prohibits the entry into a private agricultural facility and gaining employment by misrepresentation; Mo Rev Stat § 578.013 (2012) requires that any image or recording of cruelty made at an agricultural facility must be provided to law enforcement authorities within 24 hours; Kan Stat Ann §§ 47-1825–47-1827 (West 2012) prohibits entry into and unauthorised recording inside agricultural facilities; Mont Code Ann §§ 81-30-101–81-30-105 (2015) prohibits entry into and unauthorised recording inside agricultural facilities with the intent to commit criminal defamation; ND Cent Code § 12.1-21.1 (2013) prohibits entry into and unauthorised recording inside agricultural facilities; NC Gen Stat § 99A-2 (2017) prohibits entry into the non-public area of an employer’s property for the purpose of making secret recordings or removing data or other material and creates a civil cause of action, allowing a business to sue for damages; and ‘Ark Code Ann § 16-118-113 (2017) prohibits entry into and unauthorised recording inside agricultural facilities and creates a civil cause of action, allowing a business to sue for damages.

⁹⁷ *Animal Enterprise Terrorism Act*, 18 USC § 43 (2006).

⁹⁸ John Hopkins Centre for a Livable Future, *Industrial Food Animal Production in America: Examining the Impact of the Pew Commission’s Priority Recommendations* (Report, John Hopkins Bloomberg School of Public Health, 2013) 28–30.

⁹⁹ See Will Potter, ‘ag-gag Laws: Corporate Attempts to Keep Consumers in the Dark’ (2017) 5 *Griffith Journal of Law and Human Dignity* 1, 20–2.

¹⁰⁰ *Animal Legal Defence Fund v Otter*, 118 F Supp 3d 1195 (D Idaho, 2015); *Animal Legal Defence Fund v Herbert* (D Utah, No 2:13-cv-00679-RJS, 7 July 2017); *Animal Legal Defence Fund v Wasden* (9th Cir, No 15-35960, 4 January 2018).

legislation, consumers reported an eroded level of trust in farmers and increased their support for animal welfare regulations.¹⁰¹

Whether the new Australian laws will erode the transparency of industries utilising animals and undermine the public accountability of those responsible for their welfare remains to be seen. However, the effective enforcement of animal protection laws on farms and in laboratories and abattoirs in Australia has long been problematic. Over 500 million farm animals are raised in Australia every year.¹⁰² The Federal Department of Agriculture and Water Resources has responsibility for ensuring the welfare of farm animals used for live export.¹⁰³ In practice, however, enforcement of animal cruelty legislation is a matter for each individual state or territory. It is common for individual state or territory's department of primary industry or agriculture to share responsibility for enforcing legislative protection for animals with that state or territory's branch of the RSPCA. In some states (and territories), responsibility for farm animal and companion animal investigations has been entirely carved up between the parties.¹⁰⁴

In New South Wales, the Department of Primary Industries is not authorised to investigate offences against farm animals. Such investigations are undertaken by the police, the RSPCA or the Animal Welfare League (a charitable organisation authorised by the Minister for Primary Industries for this purpose).¹⁰⁵ In order to ensure that the provisions of the Act are not contravened, authorised investigators have the power to inspect and examine farm animals and any accommodation or shelter provided to them.¹⁰⁶ However, the capacity of these institutions to enforce the law is questionable. The RSPCA is largely funded by the public and, across the entire country, employs less than 100 inspectors.¹⁰⁷ Despite being the largest state inspectorate in Australia, the New South Wales RSPCA has only had 32 inspectors appointed by the Minister under the *Prevention of Cruelty to Animals Act 1979* (NSW) and only 14 of those are located in regional areas.¹⁰⁸

¹⁰¹ J A Robbins et al, 'Awareness of ag-gag Laws Erodes Trust in Farmers and Increases Support for Animal Welfare Regulations' (2016) 61 *Food Policy* 121, 124.

¹⁰² Australian Bureau of Statistics, *Livestock Products Australia* (14 February 2017) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/7215.0>>.

¹⁰³ Peter John Chen, *Animal Welfare in Australia: Politics and Policy* (Sydney University Press, 2016) 127.

¹⁰⁴ See, eg, Deborah Cao, *Animal Law in Australia and New Zealand* (Thomson Reuters, 2010) 171–2, 212–15.

¹⁰⁵ *Prevention of Cruelty to Animals Act 1979* (NSW) ss 24D, 34B.

¹⁰⁶ *Ibid* s 24G.

¹⁰⁷ RSPCA Australia, 'Report on Animal Outcomes from Our Shelters, Care and Adoption Centres 2015–16' (Report, 2016) 15 <<https://www.rspca.org.au/sites/default/files/RSPCA%20Report%20on%20animal%20outcomes%202015-2016.pdf>>.

¹⁰⁸ RSPCA NSW, *Animal Welfare* (2018) <<https://www.rspcansw.org.au/what-we-do/animal-welfare/#1505874101079-1d4874ba-225f>>.

Concerns with the capacity of the RSPCA to enforce the law are not limited to New South Wales. There have been calls for the removal of RSPCA powers to enforce offences against farm animals in South Australia and Western Australia.¹⁰⁹ However, competing concerns regarding possible conflicts of interest arising from placing the watchdog role solely in the hands of government departments responsible for the success of agribusiness have also been recognised.¹¹⁰

Problems with animal protection in abattoirs are also of increasing public concern. Responding to undercover investigations exposing inhumane slaughter practices in abattoirs, the Animal Justice Party in New South Wales introduced a Bill in 2015 which would require mandatory video and audio recording of animal use within abattoirs.¹¹¹ The Greens Party had introduced a similar Bill in 2013.¹¹² Calls have been made for corresponding legislation in other states.¹¹³ While many abattoirs have begun to install closed-circuit television ('CCTV') surveillance voluntarily,¹¹⁴ the New South Wales Government has opposed mandatory surveillance, citing the cost to the industry and lack of data demonstrating necessity.¹¹⁵ The Victorian Government has also expressed resistance to mandatory legislation, relying instead on auditor oversight.¹¹⁶ However, the capacity of the Victorian regulator PrimeSafe to protect animals in abattoirs is questionable. In particular, the authority has failed to prevent the widespread abuse of animals for the second time in three years, at the Riverside Meats abattoir in Echuca in 2016,¹¹⁷ and at the Star Poultry Supply slaughterhouse in the suburb of Keysborough in early 2017 where chickens were boiled alive.¹¹⁸

¹⁰⁹ Chen, *Animal Welfare in Australia: Politics and Policy*, above n 103, 316.

¹¹⁰ Jed Goodfellow, 'Animal Welfare Law Enforcement: To Punish or Persuade?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: Continuing the Dialogue* (Federation Press, 2nd ed, 2013) 204–7; Elizabeth Ellis, 'Bearing the Burden: Shifting Responsibility for the Welfare of the Beast' (2013) 11 *Macquarie Law Journal* 39, 41.

¹¹¹ Prevention of Cruelty to Animals Amendment (Stock Animals) Bill 2015 (NSW).

¹¹² Food Amendment (Recording of Abattoir Operations) Bill 2013 (NSW).

¹¹³ Animals Australia, 'Echuca Horrors Prompt Call for CCTV in all Abattoirs Nationwide' (Press Release, 25 November 2016) <http://www.animalsaustralia.org/media/press_releases.php?release=234>.

¹¹⁴ Terry Sim, *Echuca Abattoir Agrees to CCTV after Cruelty Investigations Launched*, (23 November 2016) *Beef Central* <<https://www.beefcentral.com/news/echuca-abattoir-agrees-to-cctv-after-cruelty-investigations-launched/>>.

¹¹⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 15 February 2018, 39–41 (Niall Blair, Minister for Primary Industries).

¹¹⁶ Victoria, *Parliamentary Debates*, Legislative Council, 7 February 2017, 298–9 (Fiona Patten, Minister for Agriculture).

¹¹⁷ Animals Australia, 'Echuca Horrors Prompt Call for CCTV in all Abattoirs Nationwide' (Press Release, 25 November 2016) <http://www.animalsaustralia.org/media/press_releases.php?release=234>.

¹¹⁸ Pat McGrath, *Chickens Boiled Alive at Star Poultry Supply Abattoir in Melbourne, Secret Footage reveals* (16 November 2017) ABC News <<http://www.abc.net.au/news/2017-11-16/chickens-boiled-alive-inside-melbourne-abattoir/9157186>>.

Current legislative protections for laboratory animals are also of concern. As many as 9.9 million animals are utilised in Australian research each year.¹¹⁹ Most research is funded by the National Health and Medical Research Council ('NHMRC'). In order to receive funding, researchers are required to comply with NHMRC guidance notes and observe the *Australian Code for the Care and Use of Animals for Scientific Purposes* ('*ACCUASP*').¹²⁰ While the *ACCUASP* is not a federal law, the Australian states and territories have given it legislative teeth by incorporating the requirement to observe its principles into their local legislation. In many cases, compliance with the code provides a defence to a charge of animal cruelty.¹²¹ Further, while the code endorses the principle of the '3R[s],'¹²² that researchers should replace, reduce and refine the use of animals in animal research, it has been suggested that the principle of replacement receives very short shrift within the document.¹²³ The code requires research institutions to establish Animal Ethics Committees ('AECs'). These committees authorise and oversee research, and are responsible for ensuring the research institution complies with the code. Under the code, independent inspections of facilities are only required at four yearly intervals,¹²⁴ leaving policing of welfare largely to the institute's AEC and animal welfare officer (where one is appointed).¹²⁵

Problems with the ability of AECs to ensure the welfare of animals in Australia have been explored by others.¹²⁶ Several problems include lack of objectivity, avoidance of dissent amongst committee members and the desire to keep problems identified

¹¹⁹ For example, Humane Research Australia estimates that 9.90 million animals were utilised in Australian research in 2015, 6.99 million in 2014 and 6.60 million in 2013: Humane Research Australia, *Statistics of Animal Use in Australian Research and Teaching* (2016) <<http://www.humanersearch.org.au/statistics/>>.

¹²⁰ National Health and Medical Research Council, *Australian Code for the Care and Use of Animals for Scientific Purposes* (2013).

¹²¹ See, eg *Animal Welfare Act 1992* (ACT) s 20; *Animal Research Act 1985* (NSW) s 47; *Animal Welfare Act 1985* (SA) s 43; *Animal Care and Protection Act 2001* (Qld) s 40; *Animal Welfare Act 1993* (Tas) s 4(c); *Prevention of Cruelty to Animals Act 1986* (Vic) s 11(2).

¹²² A framework for researchers to design experiments promoting more humane animal research. The framework encourages researchers to replace, reduce and refine their use of animals in laboratories: Peter Chen, 'Animal welfare officers in Australian higher education: 3R application, work contexts, and risk perception' (2017) 51 *Laboratory Animals* 636, 636.

¹²³ Paula Gerber, 'Scientific Experimentation on Animals: Are Australia and New Zealand implementing the 3Rs?' in Peter Sankoff, Steven White and Celeste Black (eds), *Animal Law in Australasia: A New Dialogue* (Federation Press, 2009) 212, 224–5.

¹²⁴ National Health and Medical Research Council, above n 120, s 6.1.

¹²⁵ Chen, 'Animal Welfare Officers in Australian Higher Education: 3R Application, Work Contexts, and Risk Perception', above n 122, 637.

¹²⁶ Katrina Sharman, 'Opening The Laboratory Door: National and International Legal Responsibilities for the Use of Animals in Scientific Research — An Australian Perspective' (2006) 2 *Animal Law Journal* 67; Denise Russell, 'Why Animal Ethics

‘in-house’. For example, in a serious case of animal cruelty in 2010, the Ombudsman for the Northern Territory found that conflicts of interest had prevented the Deputy Vice Chancellor of Research at Charles Darwin University from properly exercising his duties as chair of the university’s AEC.¹²⁷

B Under What Circumstances Should a Person Have an Affirmative Duty to Act?

If a duty to protect animals is enacted, under what circumstances should it be applied? Professor Andrew Ashworth suggests the two major questions for those seeking to legitimately criminalise omissions are ‘(i) in what situations should a person be said to have an affirmative duty to act ... ; and (ii) what is the appropriate intensity¹²⁸ of criminalisation?’¹²⁹

Considering the first of these questions, Ashworth observes that most people would draw a moral distinction between a person who pushes a non-swimmer into deep water, realising the likelihood he will drown and a person who observes the victim in the water and realises the danger but walks away. However, as he points out, a difference in the degree of blame does not necessarily exclude the law from criminalising the act of the observer.¹³⁰ Ashworth suggests that in order to determine whether liability for omissions is justifiable under the criminal law, three general principles have particular relevance. These are the principles of urgency, priority of life, and opportunity and capacity. The principle of urgency would suggest that in a situation of emergency, the case for imposing criminal liability, for failing to act, is strongest. Further, the priority of life principle similarly suggests that where a life is at risk, there is a strong argument for imposing a legal duty to act. Finally, the three general principles can be applied together to suggest that, where the situation is urgent and a life is endangered, then a person with the opportunity and capacity to assist should be liable for failing to do so, in a situation where such an intervention is reasonable.¹³¹

Amongst philosophers there is wide support for the existence of a moral duty to rescue those in distress. Jeremy Bentham advocated a duty to rescue (other humans)

Committees Don’t Work’ (2012) 15 *Between the Species* 127; Honor Figgis and Gareth Griffith, ‘Animal Experimentation’ (Background Paper No 3/98, Parliamentary Library, Parliament of New South Wales, 1998).

¹²⁷ The Ombudsman for the Northern Territory, ‘Report of Investigation into the Treatment of Cattle & Horses at Charles Darwin University Mataranka Station’ (Report, Northern Territory Government, 2010) 13.

¹²⁸ Ashworth defines ‘intensity’ as ‘the degree of criminal liability, on a scale from an offence of mere failure to report an event (low intensity) to a serious substantive offence such as manslaughter (high intensity)’: Andrew Ashworth, *Positive Obligations in Criminal Law* (Hart Publishing, 2013) 32.

¹²⁹ *Ibid.* See also Andrew Ashworth, ‘The Scope of Criminal Liability for Omissions’ (1989) 3 *Law Quarterly Review* 424, 432–3.

¹³⁰ Ashworth, ‘The Scope of Criminal Liability for Omissions’, above n 129, 435.

¹³¹ Ashworth, *Positive Obligations in Criminal Law*, above n 128, 41.

where such rescue could be achieved without self-prejudice.¹³² Immanuel Kant famously concluded that, while effecting a rescue is a virtuous act, it is an imperfect duty of beneficence and could not be externally enforced.¹³³ However, extrapolating from Kant's support for a perfect duty to avoid coercion, contemporary writers have argued that as a duty to rescue can be likened to a duty to avoid coercive situations, a duty to rescue can be justifiably compelled by law.¹³⁴ Such a duty need not be imposed in all possible rescue situations: an easy rescue with a high probability of changing the coercive situation may attach a perfect duty, while a more difficult or remote rescue may not.¹³⁵

Samuel Freeman argues that we have a 'perfect moral duty' to give emergency assistance to those in danger of significant injury when:

- (a) we have the clear opportunity and are in a privileged position to give aid;
- (b) we have knowledge of their jeopardy and knowledge of the means necessary to relieve it; (c) we have the ability to directly relieve their distress by immediate and well-circumscribed action; and (d) we can do so at negligible risk, minimal costs and at little inconvenience to ourselves.¹³⁶

A particular issue in the case of animals in laboratories and abattoirs and on farms is the private nature of their holding facilities, due to concerns about public safety and biosecurity. The fact that these animals are not publicly visible effectively restricts the opportunity for public monitoring and outside interventions to assist them.¹³⁷ They are also at much greater risk of unlawful death or serious harm than animals used by humans in other ways. The routine application of potentially painful procedures (in husbandry practices, experimental procedures, and methods of stunning for slaughter) exposes them to a far higher risk of unlawful suffering, where legal boundaries are overstepped, than animals used for any other purpose.

Where animals are being unlawfully treated on farms and in laboratories and abattoirs, those working with them are in the best position to take swift action to relieve their distress. In cases of animal cruelty, swift action will always be the most positive

¹³² Jeremy Bentham, J H Burns J and H L A Hart (eds), *An Introduction to the Principles of Morals and Legislation* (The Athlone Press, 1970) 292–3.

¹³³ Immanuel Kant (1785) *Groundwork of the Metaphysic of Morals*, H J Paton (translator) (Hutchinson University Library, 1966) 86.

¹³⁴ Onora O'Neill, *Faces of Hunger: An Essay on Poverty, Justice and Development* (Allen and Unwin, 1986) 138–43; Michael A Menlowe, 'The Philosophical Foundations of a Duty to Rescue' in Michael A Menlowe and Alexander McCall Smith (eds), *The Duty to Rescue: the Jurisprudence of Aid* (Dartmouth Publishing, 1993) 16.

¹³⁵ Gavin Dingwall and Alisdair A Gillespie, 'Reconsidering the Good Samaritan: A Duty to Rescue?' (2008) 39 *Cambrian Law Review* 26, 32.

¹³⁶ Samuel Freeman, 'Criminal Liability and the Duty to Aid the Distressed' (1994) 142 *University of Pennsylvania Law Review* 1455, 1478.

¹³⁷ Siobhan O'Sullivan, *Animals, Equality and Democracy* (Palgrave Macmillan, 2011) 76, 86.

outcome. Animals do not seek retribution, they seek protection. Where the cruel behaviour is likely to be repeated, it may also be necessary to seek the assistance of others within the facility to minimise the risk of future harm.

As has been observed by Robert Garner, moral obligations to animals are unlikely to be protected by laws where they conflict with human interests.¹³⁸ However, where there is no personal risk or cost to the intervener in taking action to assist an animal in danger of unlawful suffering, it would seem reasonable to impose a duty to protect agricultural and laboratory animals.

C The Capacity of the Common Law to Address the Issue

Is it necessary to enact legislation or could the common law address the issue?

In his notes on the Indian Penal Code, Lord Thomas Macaulay claimed that a legal obligation to assist would only be justified in cases involving a special relationship between the parties. He asserted:

It will hardly be maintained that a surgeon ought to be treated as a murderer for refusing to go from Calcutta to Meerut to perform an operation, although it should be absolutely certain that this surgeon was the only person in India who could perform it, and that if it were not performed, the person who required it would die.¹³⁹

Since then, the common law has not only recognised the voluntary assumption of responsibility for another as an acceptable basis for liability, but has imposed a duty of care when the defendant has created a dangerous situation and failed to rectify it. In *R v Miller*,¹⁴⁰ the House of Lords imposed a conviction for arson on a man who accidentally set fire to a mattress in a building in which he was squatting and failed to put it out. In *R v Evans*,¹⁴¹ the English Court of Appeal imposed liability for gross negligence manslaughter on a woman who helped her half-sister purchase heroin and subsequently failed to seek emergency medical attention when she overdosed.

The Australian attitude has been more conservative. In *Burns v The Queen*,¹⁴² the High Court of Australia quashed the conviction of a woman for manslaughter who, together with her husband, had sold methadone to a drug user at their flat. After ingesting the drugs, the customer showed signs of ill effect and was asked to leave the flat. He was later found deceased in an outside toilet block. At trial, there was

¹³⁸ Robert Garner, *A Theory of Justice for Animals: Animal Rights in a Nonideal World* (Oxford University Press, 2013) 49–50.

¹³⁹ Lord Thomas Macaulay, 'Notes on the Indian Penal Code' in Lady Trevelyan (ed), *Lord Macaulay's Works* (Longmans, Green and Co, 1866) vol 7, 493–4.

¹⁴⁰ [1983] 2 AC 161 ('*Miller*').

¹⁴¹ [2009] 1 WLR 1999.

¹⁴² (2012) 246 CLR 334.

conflicting evidence as to whether the defendant had assisted the deceased to ingest the drug. Chief Justice French observed:

If the deceased had ingested the drug himself and had rebuffed a suggestion that an ambulance be called, there could be no basis to support a finding that Mrs Burns owed a duty to him. On that hypothesis, which cannot be excluded, the deceased had created the danger to himself. While Mrs Burns may well have been under a strong moral duty to take positive steps to dissuade him from leaving until medical assistance could be called, there was, in the circumstances, no legal duty, breach of which would support a finding of criminal negligence.¹⁴³

Considering whether the common law should hold drug suppliers liable for the deaths of their customers, on the basis that they owe them a duty of care, both the plurality opinion and Heydon J asserted that ‘courts must be circumspect in identifying categories of relations that give rise to a previously unrecognised legal obligation to act’.¹⁴⁴

While the merits of the English Court of Appeal’s decision in *R v Evans* have been much debated,¹⁴⁵ it is clear that the circumstances in which a duty of care might exist are not static. However, for the common law to impose a new liability for failing to assist an animal in danger of unlawful injury or death, there would need to be an existing duty to protect it. Currently, criminal liability for animal cruelty attaches only to those who act cruelly towards animals, neglect their own animals, or procure others to do the same. No legislation in the UK or Australia imposes a duty on persons who witness animal cruelty, or neglect by others in control of animals, to take any action to protect the animals concerned from serious harm. There is no duty to prevent cruelty or neglect or to take steps to assist an animal, even where it would be easy to do so, unless the defendant is the animal’s owner, or has otherwise assumed legal responsibility for it. In this context, even if the courts wished to impose liability for failure to assist an animal in danger, there is currently no duty to act which will sustain such liability. As such, developing a duty for third parties to assist animals, under the common law, is not currently possible.

D Existing Statutory Offences Based on Omissions

While statutory offences of omission in common law jurisdictions are comparatively rare, they do exist. Many countries criminalise failure to file a tax return¹⁴⁶ or provide a specimen of breath after a car accident.¹⁴⁷ Similar to the common law duty

¹⁴³ Ibid 334–5 [48].

¹⁴⁴ Ibid 369 [107] (Gummow, Hayne, Crennon, Kiefel and Bell JJ), 376 [128] (Heydon J).

¹⁴⁵ Williams, above n 60; Cyrus Chua and Hin Ting Liu, ‘Joint Enterprise Liability and Omissions’ (2016) 80 *Journal of Criminal Law* 138.

¹⁴⁶ See, eg, *Finance Act 2009* (UK) c 10, s 106, sch 55; *Taxation Administration Act 1953* (Cth) s 8C.

¹⁴⁷ See, eg, *Road Traffic Act 1988* (UK) c 52, s 6(6); *Road Traffic Ordinance* cap 374 (Hong Kong) s 39B.

to rectify a hazardous situation recognised by the House of Lords in *Miller*, is the widely imposed statutory duty to assist others injured in a car accident in which you were involved.¹⁴⁸ Statutory duties are commonly placed on persons working within specified businesses to report possible criminal activity by others. Duties to report money laundering provide an obvious example.¹⁴⁹ Similarly, the duty imposed on childcare professionals to report suspected child abuse has been widely accepted as a justifiable imposition of criminal liability.¹⁵⁰

In all the Australian states there is a mandatory duty on certain professionals to report child abuse. The *Children, Youth and Families Act 2005* (Vic) provides a pertinent example. The Act places a mandatory duty on doctors, nurses, midwives, teachers, school principals and police officers to report suspected physical and sexual abuse, where the child's parents have not protected the child and are unlikely to protect them.¹⁵¹ This Act also requires a person in charge of a registered out of home care service to report suspected child abuse by a foster or other type of carer employed by the service.¹⁵² In October 2014, the *Crimes Act 1958* (Vic) was amended to make it an offence for any adult to fail to report a sexual offence committed against a child under the age of 16.¹⁵³

In Australia, elders are also provided with some limited reporting protection. Residential aged care providers, subsidised by the Australian Government, are obliged under the *Aged Care Act 1997* (Cth) to report unlawful sexual contact with, or unreasonable use of force on, a resident of an aged care home.¹⁵⁴

Unusually, 17 states and territories in the USA have extended the duty to report child abuse beyond professionals, and imposed a duty to report on anyone who becomes aware of the abuse.¹⁵⁵ In some states, the reporting obligation is not limited to child abuse, but extends to a general duty to report all serious crime

¹⁴⁸ See, eg, *Vehicle Code* ch 1 Cal Vehicle Code § 20001 (West 2008) and *Criminal Code* RSC 1985, c. C-46, s 252.

¹⁴⁹ See, eg, *Proceeds of Crime Act 2002* (UK) c 29, ss 330–1.

¹⁵⁰ Ben Mathews, Xing Ju Lee and Rosanna E Norman 'Impact of a New Mandatory Reporting Law on Reporting and Identification of Child Sexual Abuse: A Seven Year Time Trend Analysis' (2016) 56 *Child Abuse and Neglect* 62, 64–5.

¹⁵¹ *Children, Youth and Families Act 2005* (Vic) ss 162, 182, 184.

¹⁵² *Ibid* s 81.

¹⁵³ *Crimes Act 1958* (Vic) s 327.

¹⁵⁴ *Aged Care Act 1997* (Cth) s 63.1AA.

¹⁵⁵ These are Puerto Rico, Delaware, Florida, Idaho, Indiana, Kentucky, Maryland, Mississippi, Nebraska, New Hampshire, New Mexico, North Carolina, Oklahoma, Rhode Island, Tennessee, Texas, and Utah: Child Welfare Information Gateway, 'Mandatory Reporters of Child Abuse and Neglect' (Report, United States Department of Health and Human Services, Children's Bureau, 2016) 2.

to authorities.¹⁵⁶ However, none of these legally-enforceable obligations require citizens to engage in active interventions to prevent crimes from continuing, or to effect a rescue.

In civil law countries the situation is different. Civil legal systems have long recognised a criminally enforceable duty to intervene and assist others. In France there is a duty to assist persons in peril, where there is no serious danger to the intervener.¹⁵⁷ Such ‘ease of rescue’ duties also exist in Austria, Belgium, Denmark, Finland, Germany, Greece, Iceland, Italy, Norway, Portugal, Russia, Spain, Switzerland, The Netherlands, Turkey, and most Latin American countries.¹⁵⁸ Most of these countries penalise the offence with a fine or permit a fine in lieu of imprisonment.¹⁵⁹ Sentences of imprisonment are generally low, although France permits imprisonment for up to five years. This appears to be the result of the French legal system failing to recognise ‘substantive liability for ... commission by omission’.¹⁶⁰ The higher penalty allows courts to impose heavier sentences where the defendant owed the victim a particular duty of care, such as may be owed by a doctor.¹⁶¹ Unusually for a common law jurisdiction, the Northern Territory imposes a penalty of up to seven years’ imprisonment on anyone who callously fails to rescue others in danger of death.¹⁶² In the USA, five states have criminalised a failure to rescue.¹⁶³

VI THE RSPCA (AUSTRALIA) PROPOSAL

The RSPCA (Australia) has recently made a proposal for the reform of Australian state laws to protect animals, based on the mandatory duties of reporting which are imposed on child care professionals in all Australian states.¹⁶⁴ They have suggested a law be introduced which would impose a duty on responsible professional persons or persons who manage animals to report instances of animal cruelty by others to

¹⁵⁶ Steven J Heyman, ‘Foundations of the Duty to Rescue’ (1994) 47 *Vanderbilt Law Review* 673, 689.

¹⁵⁷ *Code pénal* [Penal code] (France) art 223–6.

¹⁵⁸ Alberto Cadoppi, ‘Failure to Rescue and Continental Criminal Law’ in Michael A Menlowe and Alexander McCall Smith (eds), *The Duty to Rescue: the Jurisprudence of Aid* (Dartmouth, 1993) 100–4.

¹⁵⁹ *Ibid* 108.

¹⁶⁰ The phrase ‘commission by omission’ refers to the circumstance where an individual is held liable for a substantive offence because they failed to act: Edward A Tomlinson, ‘The French Experience with Duty to Rescue: A Dubious Case for Criminal Enforcement’ (2000) 20 *New York Law School Journal of International and Comparative Law* 451, 463.

¹⁶¹ Cadoppi, above n 158, 109.

¹⁶² *Criminal Code Act 1983* (NT) s 155.

¹⁶³ Wis Stat Ann § 940.34 (2017); Haw Rev Stat Ann § 663-1.6 (2011); RI Gen Laws § 11-56-1 (2012); Vt Stat Ann § 12.23.519 (2012); Minn Stat Ann § 604A.01(1) (2016).

¹⁶⁴ RSPCA Australia, above n 1, 3.

authorities. Such persons would include veterinarians, vet nurses, livestock managers (including those on farms, feedlots, shearing sheds, saleyards, ports and abattoirs), event organisers (for horse shows, dog shows, agricultural shows, and rodeos), zoo managers and zookeepers, researchers, animal trainers, and animal control officers.

Whether veterinarians should have a duty to report animal cruelty has long been a source of ethical concern within the profession. While it is not a legal requirement for veterinarians to report suspicions of animal cruelty in Australia, the Australian Veterinary Association's policy states that, where a vet suspects animal cruelty, they should report it.¹⁶⁵ In the UK, the Royal College of Veterinary Services ('RCVS') suggests that a report to authorities should be made where the surgeon considers, on reasonable grounds, that an animal shows signs of abuse or is at real or immediate risk of abuse. In such a case, the RCVS takes the view that the public interest in protecting the animal overrides any professional obligation on the vet to maintain client confidentiality.¹⁶⁶

Elsewhere, legislation imposes a mandatory duty to report. Currently 18 states in the USA have laws requiring veterinarians to report suspected animal cruelty violations.¹⁶⁷ In New Zealand, veterinarians are obligated to report to authorities suspected breaches of the *Animal Welfare Act 1999* (NZ) as well as cases of severe cruelty or neglect.¹⁶⁸

The RSPCA's proposal is a laudable attempt to align with community expectations of persons with a professional responsibility for animals with enforceable legislative protection. However, the assumption that simply imposing a mandatory duty to report cruelty to authorities would be effective in assisting farm animals is questionable.

Studies of farm industry workers' attitudes to animal cruelty suggest mandatory reporting laws are not readily complied with. Research conducted in the 1970s in the USA found that farmers and livestock producers 'showed primary concern for the practical and material value of animals in conjunction with a comparative lack of concern for animal welfare and cruelty issues.'¹⁶⁹ An Australian study, conducted

¹⁶⁵ Australian Veterinary Association, *Policy 1.2* (December 2014) <<http://www.ava.com.au/policy/12-animal-abuse>>.

¹⁶⁶ Royal College of Veterinary Surgeons, *Code of Professional Conduct*, (at 22 June 2017) ch 14.

¹⁶⁷ These are Alabama, Arizona, California, Colorado, Illinois, Kansas, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, North Dakota, Oklahoma, Oregon, Virginia, West Virginia and Wisconsin: American Veterinary Medical Association, *Abuse Reporting Requirements by State* (2018) <<https://www.avma.org/KB/Resources/Reference/AnimalWelfare/Pages/Abuse-Reporting-requirements-by-State.aspx>>.

¹⁶⁸ Veterinary Council of New Zealand, *Code of Professional Conduct* (at 2004), cl 3.

¹⁶⁹ Nicola Taylor and Tania D Signal, 'Community Demographics and the Propensity to Report Animal Cruelty' (2006) 9 *Journal of Applied Animal Welfare Science* 201, 207; see also Stephen R Kellert, 'American Attitudes Toward and Knowledge of Animals:

by the Centre for Social Science Research at Central Queensland University, found that propensity to report animal abuse is influenced by gender, employment status and occupation type.¹⁷⁰ Primary industry workers, particularly men, were found to be less likely to report deliberate animal harm than either gender working in any other occupation. The authors of the study concluded that this may be caused by work in primary industries fostering a ‘functional or pragmatic attitude to animals’.¹⁷¹ Another Australian study investigating acceptance of agriculture and environmental management legislation, amongst Australian farmers, found significant resistance to stringent regulatory controls.¹⁷²

Recognising this aversion, some jurisdictions have moved towards a more co-regulatory style of governance within the agricultural industry. This model provides for government and industry to both play a role in ensuring compliance with mandatory animal welfare standards. The model has been widely utilised over the past decade in Australia, where, in exchange for decreased governmental inspection, industries have developed and implemented government-approved quality assurance programs, intended to ensure compliance with mandatory standards.¹⁷³ One recent study in Queensland found that, whilst most livestock saleyard managers support the introduction of mandatory quality assurance reporting across the meat production industry, they are reluctant to report transport operators who brought in unfit animals, or co-workers who treated animals cruelly, to prosecuting authorities.¹⁷⁴ The study identified social pressure or fear of affecting others’ financial livelihoods, through criminal prosecution, as major barriers to improving animal welfare protections in transport and at saleyards.¹⁷⁵

In 2014, the New South Wales Farmers’ Association New England representative James Jackson commented on the RSPCA’s proposal to require mandatory reporting of animal abuse:

these situations often involve quite fragile human situations ... people are in a fragile mental state, and you don’t want people suiciding after an intervention and

an Update’ in M W Fox and L D Mickley (eds), *Advances in Animal Welfare Science 1984/85* (The Humane Society of the United States, 1984) 187.

¹⁷⁰ Taylor and Signal, above n 169.

¹⁷¹ Ibid.

¹⁷² Robyn Bartel and Elaine Barclay, ‘Motivational Postures and Compliance with Environmental Law in Australian Agriculture’ (2011) 27 *Journal of Rural Studies* 153, 156.

¹⁷³ Goodfellow, above n 110, 193.

¹⁷⁴ Rebekah Eyers, *A Regulatory Study of the Australian Animal Welfare Framework for Queensland Saleyard Animals* (PhD Thesis, Griffith University, 2016) 144, 197.

¹⁷⁵ Ibid 223.

people being publicly humiliated ... Ultimately what we want is good outcomes for animals, but we don't want bad outcomes for the people.¹⁷⁶

In light of these concerns, the introduction of a law imposing a mandatory duty to report animal cruelty to authorities seems unlikely to assist farm animals in the way the RSPCA envisages. Imposing a wider duty to intervene to protect the animals concerned would be more effective. It would also be more likely to receive legislative support, as it would allow workers to deal with cruelty concerns in-house, where possible and appropriate.

VII THE SCOPE AND NATURE OF A DUTY TO PROTECT ANIMALS

A Why an Effective Duty to Protect Animals Should Impose a Duty to Intervene

Why would a wider duty to intervene provide any better protection to animals than a simple duty to report abuse? Surely any such duty would be similarly disregarded by an industry resistant to external regulation and eager to protect its own?

Before addressing these concerns, it is first necessary to consider who would be targeted by a legislative duty to protect animals. The RSPCA proposal suggests that a duty to report cruelty should be limited to persons in positions of animal management. Its proposal states that mandatory reporting should not be required of those who work with animals but are not professional animal managers, as they are not required to have an understanding of animal welfare legislation as part of their employment. Instead, the RSPCA suggests such people have a moral obligation to report animal cruelty to their manager.¹⁷⁷

It is submitted here that the RSPCA's distinction is unnecessary. Currently, under the criminal law, an act of cruelty occurs when an animal is caused to suffer unnecessarily (in accordance with the unnecessary suffering test).¹⁷⁸ Objective mens rea applies, as the courts have long held criminal liability for cruelty can be founded on both the deliberate or negligent infliction of unnecessary harm.¹⁷⁹ Ignorance that one's own actions are cruel has never been a permissible defence to the crime. It is therefore contended that the law should impose an objective requirement on individuals working on farms to intervene and assist animals subjected to cruelty by others, on the basis that they can reasonably be expected to recognise cruelty.

Similarly, an objective standard for liability has been proposed under the Animal Protection and Crimes Legislation Amendment (Reporting of Animal Cruelty and

¹⁷⁶ Lucy Barbour, 'Pork Industry Welcome RSPCA's Call for Mandatory Reporting of Animal Cruelty' (25 August 2014) ABC News <<http://www.abc.net.au/news/rural/2014-08-25/pork--supports-rspca-mandatory-reporting-animal-cruelty/5694268>>.

¹⁷⁷ RSPCA Australia, above n 1, 3.

¹⁷⁸ *Ford v Wiley* (1889) 23 QBD 203, 209.

¹⁷⁹ *Ibid* 225.

Protection of Animal Enterprises) Bill 2018 (NSW). The Bill proposes to insert s 6A into the *Prevention of Cruelty to Animals Act 1979* (NSW) which would create an offence if members of the public fail to report to an authority, that they had recorded an act which they knew, or ought reasonably to have known, constituted cruelty. Given that the proposed law assumes members of the public can recognise cruelty when they see it, it hardly seems unreasonable that the law would require less of those working within the industry.

With regard to laboratory animals, it would also be reasonable to expect that those working in laboratories can, and should, recognise acts of animal cruelty by others. Legislation in all states has enforced compliance with the *ACCUASP*. The code imposes a duty on all researchers using live animals to take personal responsibility for their wellbeing, including their housing, husbandry and care.¹⁸⁰ It also places responsibility on facility managers, animal technicians and stock handlers to ensure that steps are taken to safeguard animals' wellbeing by avoiding and minimising harm, including pain and distress, before they are transferred to laboratories for research.¹⁸¹

Society is not only justified in expecting workers in laboratories and agricultural facilities to demonstrate a capacity to recognise animal cruelty, but in requiring them to take action to remedy it. Those working in laboratories and agricultural facilities are in a unique position to be able to take effective action to protect animals in closed environments. It is also reasonable to expect them to do so. However, where unlawful cruelty has occurred, the studies described above suggest agricultural workers may prefer to intervene to protect the animals concerned by taking action in-house, rather than alerting authorities and running the risk of exposing co-workers to prosecution. Where swift action can be taken in-house to assist animals, a pragmatic law would encourage it. While some may choose to turn a blind eye to cruelty altogether, the imposition of a legal duty to intervene to protect animals would expose all concerned to the risk of prosecution if an unaddressed incident subsequently came to light. If, as is the case under section 23 of the *Criminal Justice and Courts Act 2015* (UK) c 2, courts could order the publication of breaches by offending institutions, fear of publicity may well provide sufficient incentive for management to ensure their staff make timely internal reports of cruelty (allowing matters to be dealt with in-house). Fear of consumer backlash is regarded as a significant factor in ensuring compliance with animal welfare standards.¹⁸²

In cases where serious injuries have already been inflicted on an animal, or it is at risk of being unlawfully killed, timely acts of intervention are of significantly more benefit to the animals concerned than reports to authorities, where investigators will

¹⁸⁰ National Health and Medical Research Council, above n 120, 2.4.1.

¹⁸¹ *Ibid* 2.5.2.

¹⁸² See, eg, Louise Floyd, 'How Abolishing (or at Least Reforming) Australia's Live Export Cattle Trade Supports Hong Kong Animal Law Reform and Why it is Desirable for Both Jurisdictions' (2012) 42 *Hong Kong Law Journal* 453, 464.

need time to conduct inspections and, in appropriate cases, secure warrants and seek authority to seize animals.

B If a Duty to Protect Animals Were Imposed, What Would be the Appropriate Intensity of Criminalisation?

It should be recognised here that this article does not advocate the introduction of a law criminalising a failure to protect animals which is equated in terms of severity with the crime of cruelty itself. In Europe, the generally lenient penalties imposed reflect a recognition that culpability is for the omission only — the failure to rescue. The defendant is not to be held accountable for the potentially grave consequences of that failure.¹⁸³

In contrast, s 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) c 28 allows prosecutors charging offenders with criminal neglect of children who have been killed, to also indict them for the alternative offences of murder and manslaughter. Further, even where the defendant is convicted of the lesser charge of neglect, and the child has died, the maximum penalty is a very substantial 14 years imprisonment (which is longer than is served in most manslaughter cases).¹⁸⁴ Section 14 of the *Criminal Law Consolidation Act 1935* (SA) permits a maximum penalty of life imprisonment if the child is killed, but a maximum of 15 years in any other case.

In the case of a duty to protect animals, it is suggested here that penalty provisions should follow the European model and be legislated at a much lower level than is possible for the primary perpetrators of cruelty.

C What Form Would Adequate Fulfilment of a Duty to Protect Animals Take?

It would be extremely difficult for the legislature to prescribe the exact form of a legal duty to protect animals that would ensure adequate fulfilment of that duty. Ideally, it should be left to the courts to determine on a case by case basis. Generally, the duty to rescue offences in Europe require only that the rescuer makes a telephone call to emergency services. The UK Ministry of Justice has expressed a view that reporting of the crime may be sufficient to meet the expectations of the law in relation to section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK).¹⁸⁵ In cases of animal cruelty, where the animal is not in any immediate danger of serious injury, it may be possible for effective protection to be achieved by simply reporting an act of ill treatment, internally or externally.

However, it is crucial to note that the child protection laws in the UK, South Australia and New Zealand are not limited to a duty to report. In some circumstances, acts of

¹⁸³ Cadoppi, above n 158, 96.

¹⁸⁴ Julian V Roberts and Andrew Ashworth 'The Evolution of Sentencing Policy and Practice in England and Wales 2003–2015' (2016) 45 *Crime and Justice* 307, 328.

¹⁸⁵ *Domestic Violence, Crime and Victims Act 2004* (UK) c 28, s 5; UK Ministry of Justice, above n 78, 13.

physical intervention, such as treating the injuries, seeking help from other persons in the household or even removing the child from harm's way, may be required. In situations where there is no physical danger to the intervener, taking action to protect a vulnerable victim may be a reasonable expectation. This would be particularly the case where the situation is urgent and the victim is in danger of death or serious injury if the abuse continues, and the secluded environment in which the abuse is taking place require that those best placed with capacity and opportunity take effective action.¹⁸⁶

Sensible criticisms have been made of section 5 of the *Domestic Violence, Crime and Victims Act 2004* (UK) on the basis that for victims of domestic violence, laws requiring them to intervene against physical aggressors may be unreasonable.¹⁸⁷ The response of the New South Wales Farmers' Association New England representative to the RSPCA proposal would suggest that whistleblowers within the agricultural industry may fear backlash for their actions. Such concerns should be taken into account by a court in considering what constitutes a reasonable response. It would also be necessary for laws to be drafted which provide employment protection for industry whistleblowers.

In terms of possible defences to such a crime, it has been suggested that legislators seeking to reform the law of manslaughter by omission in the UK should take guidance from s 50 of the *Serious Crime Act 2007* (UK) c 27 which 'provides a statutory defence to the inchoate offences of assisting or encouraging a crime'.¹⁸⁸ The defence of acting reasonably is available where the person concerned can prove they knew or believed certain circumstances existed and it was reasonable for them to act/omit to act as they did in those circumstances. In determining whether their act/omission was reasonable, the court will consider the seriousness of the alleged offence, the purpose of the act/omission claimed by the defendant and the authority by which they claimed to act/omitted to act.

VIII THE EFFECTIVENESS OF THE DUTY

It might be claimed that the introduction of a mandatory duty to intervene to assist cruelly treated animals in an institutional setting could be used as a double-edged sword. Those seeking to gather evidence of systematic abuse over a long period may find themselves prosecuted for a failure to intervene. In practice, the introduction of a duty to protect animals would be unlikely to undermine undercover investigations of systematic abuse (although hopefully it would help to reduce the need for them, as continuing cruelty would be less likely to occur). Undercover investigators

¹⁸⁶ Ashworth, *Positive Obligations in Criminal Law*, above n 128, 52–3.

¹⁸⁷ See, eg, Jonathan Herring, 'Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?' [2007] *Criminal Law Review* 923; Julia Tolmie, 'The "Duty to Protect" in New Zealand Criminal Law: Making it Up as We Go Along?' [2010] *New Zealand Law Review* 725.

¹⁸⁸ *Serious Crime Act 2007* (UK) c 27, s 50; Elliot, above n 60, 178.

who witnessed abuse would only need do what is reasonably necessary to protect the animals concerned to avoid the risk of personal liability. Based on existing child protection laws, a reasonable response would include making a report of the offending behaviour to the person in charge of the facility. Making such a report internally would transfer liability for the abuse to the person in charge, hopefully ensuring those in power take swift action to protect the animals concerned.

Where a report is made internally and those in control take insufficient steps to halt the abuse, then evidence of their unreasonable failure to adequately intervene could be documented over a period of time by the complainant and used by authorities to support a wider prosecution of those in the hierarchy of management. In the case of laboratory animal cruelty, the conviction of an entire board of directors, or senior management team of a university, would have a much higher deterrent value for the institution, as a whole, than prosecuting a few employees, which could always be trivialised by senior management as an isolated incident.

In some scenarios, swift action by those who directly witness cruelty may be the only reasonable response. Where an animal is in immediate danger of unlawful death or serious injury, and there is no physical risk to the intervener, a reasonable response would require a physical intervention, along with an attempt to seek the assistance of others, within the institution, to minimise the risk of future harm.

However, in those cases where animal abuse is systematic, but the animals themselves are in no immediate danger of unlawful death or serious injury, the law could recognise the ongoing undercover recording of the abuse as a reasonable step — taken long term — to protect the animals concerned.

IX CONCLUSION

As noted by Barnard,¹⁸⁹ the legal definitions of animal cruelty, including which animals are protected and against what, have never been as well defined as those provided under child abuse laws. The passing of ‘ag-gag’ laws in the USA and Australia have compounded existing difficulties in effectively monitoring animal cruelty on farms and in laboratories. In 1964, when the UK government set up the Brambell Committee to investigate the welfare of animals under newly developed intensive farming methods, it was Ruth Harrison’s photographs of animals on private farms, published in her book *Animal Machines: The New Factory Farming Industry*, and in the British press,¹⁹⁰ which instigated public outcry and set law reform in motion. Today, the actions of Harrison would render her liable to prosecution in the USA and Australia. In an era of decreasing surveillance of animal welfare on farms and in laboratories, effective protection for animals requires lawmakers to rethink the accepted parameters of criminal responsibility.

¹⁸⁹ Barnard, above n 27, 103.

¹⁹⁰ Fraser, ‘Ruth Harrison — A Tribute’, above n 43.

Legislators seeking to provide more effective safeguards for animals should look to the recently-imposed laws regarding the protection of vulnerable children enacted in South Australia, Victoria, New Zealand and the UK. Such laws have recognised the special vulnerability of children in closed environments, a vulnerability shared by agricultural and research animals. Today, as in the past, child protection models have significant relevance for animal welfare advocates.

LINDSAY V THE QUEEN: HOMICIDE AND THE ORDINARY PERSON AT THE JUNCTURE OF RACE AND SEXUALITY

ABSTRACT

Recently, in *Lindsay v The Queen*,¹ the High Court reaffirmed a place in Australian law for the ‘homosexual advance defence’. The case involved the killing of a white man by an Aboriginal man for offering to pay for sex, exposing a number of problems with provocation and the ordinary person test at the intersection of race and sexuality. This article first unpacks the Court’s reasoning to reveal a hidden assumption that the ordinary person is from the outset white and violently homophobic. The article then sketches a history of these incidents of ordinariness — tracing normalised whiteness and homophobia to the colonial era — in order to address the future of the ordinary person and the options for its reform. Unravelling conflicting Indigenous and queer law reform agendas, the article ultimately concludes that provocation in South Australia should be abolished or reformed to exclude the homosexual advance defence. However, because racism and homophobia can manifest in murder trials despite legal change, a broader cultural shift must accompany the reform of provocation. The lessons of history from the frontier can help to show other ways of being ordinary, allowing a pathway for ordinariness itself to be coloured and queered.

I INTRODUCTION: FACTS AND QUEER THEORY

In the early hours one morning in 2011, in a suburb south of Adelaide, an Aboriginal man killed a white man for offering to pay for sex. At his trial two years later, the accused sought to rely on the partial defence of provocation which operates to reduce what would otherwise be murder to manslaughter. The objective limb of the test of provocation centres on what an ‘ordinary person’ would do. The Full Court of the South Australian Supreme Court framed the case as one about sexuality, leading it to conclude that a non-violent homosexual advance, without more, can

* Lawyer, Crown Law, Queensland. The views expressed in this article are entirely my own and not those of Crown Law. Many thanks to Nicholas Carr, Jennifer Roan, Joseph Kapeleris, and the anonymous reviewers for their insightful comments on earlier drafts.

¹ (2015) 255 CLR 272 (*Lindsay*).

never provoke a lethal response from the ordinary person. On appeal, the High Court emphasised the racial dimension of the case and found that the ordinary person — inscribed with the Aboriginality of the accused — is capable of losing self-control and forming an intention to kill when confronted with a gay proposition. This article traces these conflicting narratives of race and sexuality to two revelations about the nature of the ordinary person. That the ordinary person must be placed in the shoes of an Aboriginal person reveals that the ordinary person is always already white. That the ordinary person is liable to kill in defence of their heterosexual honour reveals that the ordinary person is violently homophobic.

By reference to deep-seated ideas about what is normal or ordinary, the ordinary person test draws upon societal norms with long histories, such as norms about gender. Indeed, the ordinary person test arose in Victorian England in tandem with particular norms about gender and violence in that era, which it continues to draw upon and enforce. This article proposes that the ordinariness of being white and violently homophobic has a similar cultural lineage. When the ordinary person test was first crafted in England in 1837,² the Frontier Wars were being waged at the edges of colonial authority across Australia. The following year was marred by the Myall Creek Massacre,³ which stands out as emblematic of the brutal divide between colonists and Indigenous peoples, between ‘us’ and ‘them’. Around the same time, the Molesworth Committee reported to the House of Commons in 1838 that the transport of convicts had led to rampant homosexuality in the Australian colonies.⁴ Ordinary Australians suffer a collective amnesia about the Frontier Wars and the Molesworth Committee’s findings, but the collective shame reverberates today in received ideas of ordinariness.

However, as a construct, the ordinary person is not predetermined by historical forces and can be changed. Options for reform include: eliminating the ordinary person test from provocation, adopting an ordinary Aboriginal person test, removing the homosexual advance defence from the ambit of provocation, and abolishing provocation altogether. This article argues that by one means or another, South Australia must address the homosexual advance defence. Yet each of these options for reform carries the risk of unintended consequences, such as contributing, even if marginally, to the over-representation of Indigenous people in prison. Reform may even fail to achieve the desired outcome of dispelling racist and homophobic narratives from the courtroom. The reason for this is that the ordinariness of being white and violently

² *R v Kirkham* (1837) 7 C & P 115.

³ John Connor, *The Australian Frontier Wars 1788–1838* (UNSW Press, 2002) 102–3.

⁴ Select Committee of the House of Commons on Transportation, United Kingdom, *Report from the Select Committee of the House of Commons on Transportation; Together with a Letter from the Archbishop of Dublin on the Same Subject: and Notes by Sir William Molesworth, Bart, Chairman of the Committee* (1838) 18, 30 (‘Molesworth Committee Report’).

homophobic can manifest in spite of legal change. Therefore, law reform must be accompanied by a wider cultural change. The ordinary must be queered.⁵

Queer theory provides a useful lens through which to explore the limits of ordinariness. Broadly, queer theory sees established sexuality and gender norms — and by extension all norms — as social constructs which have been made, and which, therefore, can be unmade. On this account, there is nothing immutable about being white, a man, or a heterosexual, and this revelation of mutability offers a way to undermine their self-evident ordinariness. However, queer theory's obsession with destabilising norms has given it a reputation for being anti-normative. The problem is that blameworthiness for killing — and the ordinary person test designed to capture that blameworthiness — is by definition normative. The need for a broader cultural shift to solve the problems posed by the ordinary person thus raises interesting questions for queer politics, not least of which is whether queer theory's disdain for normativity lies so at odds with notions of the ordinary, that it is a theoretical impossibility to attempt to queer the ordinary. Drawing upon a branch of queer thought that places the queer inside the norm, this article argues that there is an avenue available for queering and colouring the ordinary from within. To do this, we must normalise the potential for the other in the ordinary. One way to draw out the potential for other ways of being is by recourse to history, by remembering forgotten perspectives from the 'other' side of the frontier and by remembering the homosexual potential of mateship on the frontier.

II A VICTIM AND A DEFENDANT: ANDREW NEGRE AND MICHAEL (SUN SUN) LINDSAY

Andrew Negre stood out in a crowd. He was very tall and striking with long, blond, shiny hair.⁶ He was confident yet easy to get along with, the kind of guy who could walk into a bar full of strangers and leave with friends. He was by all accounts Caucasian. On 31 March 2011, Andrew went with his girlfriend to the Hallett Cove Tavern on the outskirts of Adelaide in South Australia. As the night wore on, she wanted to go home to bed while he wanted to party on. They fought and parted ways. Then Michael Lindsay walked in. Michael went by the name Sun Sun. He had an intellectual disability that made him eager to please and be accepted, and he had a habit of showing off.⁷ As far as labels went, he was an Aboriginal man, though over the coming years, in all the dissecting of what made him tick, his Aboriginality was never given any more depth than a label. Andrew and Sun Sun struck up some

⁵ 'Queer' in this article is used not in the sense of an umbrella term for lesbian, gay, bisexual, trans and/or intersex, but as a mode of being that deviates from the norm. Because queer is anti-normative, it resists the logic of identity constructs. Likewise, 'to queer' is to question the normativity of being an identity as well as to destabilise binaries like 'man' or 'woman', 'gay' or 'straight' and 'black' or 'white', in order to open up a space for queer modes of being.

⁶ *R v Lindsay* (2014) 119 SASR 320, 351 [111].

⁷ *Ibid* 344 [75].

conversation in the tavern and went back to Sun Sun's house, where a small group had gathered, to continue the party.⁸

The group sat around drinking under the back pergola. At one point, the conversation drifted to something about someone being gay. This must have given Andrew the idea to straddle Sun Sun and grind his hips back and forth. Sun Sun reacted with a threat. 'Don't go doing that sort of shit or I'll hit you,' he said. His de facto wife growled and protested, 'he's not gay'. Andrew apologised and laughed it off as a joke and the tension soon dissipated.⁹

As the party stretched into the early hours of the morning, the group moved inside. Andrew grew tired and Sun Sun offered him a spare bed to sleep in. But Andrew did not want to be alone; he wanted Sun Sun to join him. Andrew's desire for company manifested in spite of Sun Sun's earlier threat of violence. Perhaps Andrew was lost in the grip of *jouissance* — 'the paradoxical form of pleasure that may be found in suffering'¹⁰ — or the 'death instinct' that '[s]ex is worth dying for'.¹¹ Whatever drove Andrew, his pleading with Sun Sun culminated in him saying, in front of the others, 'I'll pay you for sex then'. 'What did you say cunt?' Sun Sun said, and Andrew asked again, offering to pay several hundred dollars. Sun Sun punched him twice in the face and he collapsed to the floor. Sun Sun kept punching Andrew in the head, then grabbed a fistful of hair and began slamming his head into the ground. Andrew struggled to get up but Sun Sun asked another man present, Luke Hutchings, to hold him down. With Andrew still offering to pay money, Sun Sun rifled through Andrew's pockets, Andrew's pants somehow coming off in the process. At some point, Sun Sun armed himself with a knife, put on gloves, and stabbed Andrew repeatedly in the arm, chest, and abdomen approximately 25 times.¹² One of the stab wounds completely severed the aorta.¹³ The blood loss would have caused Andrew to lose consciousness within 20 to 30 seconds, and to die minutes later.¹⁴ Apparently in order to defuse the situation, Luke then took the knife off Sun Sun and slit Andrew's throat to show he had already died.¹⁵ A week later, Andrew's body was found dumped in a creek bed nearby.¹⁶

⁸ Ibid 348 [93].

⁹ Ibid 324 [10] (Gray J), 349–50 [103]–[107] (Peek J).

¹⁰ Tim Dean, 'Lacan and Queer Theory' in Jean-Michel Rabaté (ed), *The Cambridge Companion to Lacan* (Cambridge University Press, 2003) 238, 248.

¹¹ Michel Foucault, *The Will to Knowledge: The History of Sexuality Volume 1* (Robert Hurley trans, Penguin Books, 1998) 156 [trans of: *La volonté de savoir* (first published 1976)].

¹² Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 127.

¹³ *R v Lindsay* (2014) 119 SASR 320, 353 n 39.

¹⁴ *Lindsay* (2015) 255 CLR 272, 277 [11] (French CJ, Kiefel, Bell and Keane JJ).

¹⁵ Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 401–2.

¹⁶ *R v Lindsay* (2013) 117 SASR 307, 308 [3].

III THE ORDINARY PERSON

At his first trial in the South Australian Supreme Court in 2013, Sun Sun's primary position was not that Andrew's homosexual advances had provoked him to lose control. Instead, his lawyers argued that the prosecution could not prove beyond a reasonable doubt that Sun Sun had delivered the fatal blow. Nonetheless, given the evidence of the two homosexual advances, the trial judge directed the jury to consider provocation.¹⁷

Provocation operates effectively as a partial defence to murder: it 'reduce[s] what would otherwise be murder to manslaughter'.¹⁸ The idea is that if the victim causes their own demise by saying or doing something that 'stir[s the] blood'¹⁹ of the accused into a homicidal rage, then, as a concession to 'human frailty',²⁰ the killing should be labelled as manslaughter rather than murder. The partial defence succeeds if the jury is satisfied that two things are reasonably possible. First, that the provocative conduct actually caused the accused to lose self-control and kill 'before he has had the opportunity to regain his composure'.²¹ Second, that the provocative conduct — measured in gravity from the perspective of the accused — was capable of causing an ordinary person to lose self-control and form an intention to kill or cause grievous bodily harm.²²

There is an obvious moral dimension to provocation. In labelling the killing as manslaughter rather than murder, provocation assigns less culpability and enlivens a lower sentencing range. Judges sometimes speak of provocation as 'justifying' or 'excusing' the violent reaction.²³ With more nuance, academics have traced the development of provocation from a justificatory model in the Middle Ages — when angry outrage at an insult to honour was seen as virtuous — to the present-day excusatory model. This model provides that anger arising from loss of control is 'entirely beyond the

¹⁷ See *R v Lindsay* (2014) 119 SASR 320, 329 [22].

¹⁸ *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

¹⁹ *Royley's Case* (1611) Cro Jac 296; 79 ER 254.

²⁰ *R v Hayward* (1833) 6 C & P 157, 159 (Tindal CJ) ('in compassion to human infirmity'); *Parker v The Queen* (1963) 111 CLR 610, 627 (Dixon CJ), 652 (Windeyer J); *Johnson v The Queen* (1976) 136 CLR 619, 656 (Gibbs J); *Lindsay* (2015) 255 CLR 272, 284 [28] (French CJ, Kiefel, Bell and Keane JJ).

²¹ *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ). See also *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

²² *Masciantonio v The Queen* (1995) 183 CLR 58, 66 (Brennan, Deane, Dawson and Gaudron JJ); *Lindsay* (2015) 255 CLR 272, 278 [15] (French CJ, Kiefel, Bell and Keane JJ).

²³ *R v McCarthy* [1954] 2 WLR 1044, 1047 (Lord Goddard CJ) ('when we say "excused" we mean enough to reduce the killing to manslaughter'); *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119, 1121 (Lord Simonds LC), quoting with approval the direction given by the trial judge, 'the provocation must be such as would reasonably justify the violence used'.

reach of rational control or moral judgment'²⁴ but 'can in appropriate circumstances be understood, sympathised with, and therefore be partially condoned or excused'.²⁵ Whereas the moral quality of the provocative conduct was central to justification, moral judgment is hidden in the excusatory model. Nowhere in the test of provocation outlined above is the question asked: *should* the accused have responded to the provocation with violence? Instead it asks: *would* the ordinary person have responded with violence? Yet, as Alan Norrie points out, 'justificatory issues retain a subterranean importance: that is, they continue to be there, but are impossible to rationalize within the law's theoretical structure'.²⁶ For Mayo Moran, this plays out in the way that the ordinary person 'seamlessly intertwines the normative and descriptive': characteristics that matter normatively as well as characteristics that simply go to notions of what is ordinary or normal.²⁷ This article posits that normativity arises in questions about what is normal or what may be excused, no less than in questions about what may be justified. Suffice to say for now, lurking somewhere in the ordinary person test is a moral judgment about the blameworthiness of killing.

After four weeks of hearing evidence and nearly two days of deliberation, the jury found Sun Sun guilty of murder by unanimous verdict, and found his co-accused, Luke Hutchings, guilty by majority verdict of the alternative charge of assisting an offender.²⁸ The jury must have come to one of two conclusions: either that Sun Sun was not provoked or that the ordinary person would not have been. There was never any real doubt that Andrew's offer to pay for sex might have subjectively caused Sun Sun to lose control,²⁹ though it was also open to the jury to find that in the time it took Sun Sun to obtain a knife, put on plastic gloves and rifle through Andrew's pockets, the moment of 'suspend[ed] ... reason'³⁰ had passed.³¹ In any event, the real dispute centred on what the ordinary person would have done.

²⁴ Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 78. See also *R v Smith* [2001] 1 AC 146, 159–61 (Lord Hoffmann).

²⁵ Alan Norrie, 'The Coroners and Justice Act 2009 — Partial Defences to Murder (1) Loss of Control' [2010] *Criminal Law Review* 275, 279.

²⁶ Alan Norrie, 'The Structure of Provocation' (2001) 54 *Current Legal Problems* 307, 324.

²⁷ Mayo Moran, *Rethinking the Reasonable Person: An Egalitarian Reconstruction of the Objective Standard* (Oxford University Press, 2003) 2.

²⁸ Tessa Akerman, 'SA Jury Convicts One Man of Murdering Andrew Negre, Finds Second Guilty of Assisting an Offender', *The Advertiser* (online), 15 August 2013 <<http://www.adelaidenow.com.au/news/south-australia/sa-jury-convicts-one-man-of-murdering-andrew-negre-finds-second-guilty-of-assisting-an-offender/news-story/30e8df3c37f76465189f7d2fae6ab121>>.

²⁹ *R v Lindsay* (2014) 119 SASR 320, 378 [228] (Peek J); *Lindsay* (2015) 255 CLR 272, 278 [13] (French CJ, Kiefel, Bell and Keane JJ), 302 [86] (Nettle J).

³⁰ Edward Hyde East, *A Treatise of the Pleas of the Crown* (Butterworth, 1803) vol 1, 238.

³¹ When it is further considered that Sun Sun said, 'I can't let him go, he'll go to the cops', and that he told his sister to stop filming what was going on with her smartphone, it seems quite plausible that he was the 'master of his mind' when he began stabbing Andrew: *R v Lindsay* (2014) 119 SASR 320, 338 [60] (Gray J); Transcript of Proceedings, *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 388–420.

On appeal to the Full Court of the Supreme Court, Sun Sun argued that the trial judge had erred in the directions he gave to the jury about provocation. A majority agreed but found it did not matter. The objective limb could not be satisfied in the circumstances of the case, such that provocation should not have been left to the jury in the first place. Justice Peek — with whom Kourakis CJ agreed — focused on the threshold question of law: was there sufficient evidence on which a reasonable jury could find provocation? This is a question for the judge and not the jury. The rationale for the threshold question is ‘the necessity of applying an overriding or controlling standard for the mitigation allowed by law’.³² This guiding hand of the judge allows the courts to treat the objective test as an ‘instrument of policy’.³³ After all, the purpose of the objective test is to lay down ‘the minimum standard of self-control required by the law’.³⁴ The House of Lords famously wielded this instrument of policy in the case of *Holmes v Director of Public Prosecutions*.³⁵ Viscount Simon held that as a matter of law, words alone, other than in circumstances of a most extreme and exceptional character, cannot amount to provocation.³⁶ In stating the law in this way, the House of Lords was well aware it was raising the bar. Words alone had previously been enough.³⁷ But, as Viscount Simon said, ‘as society advances, [the law] ought to call for a higher measure of self-control in all cases’.³⁸ Back in Australia, Gibbs J applied the same progressivist logic in *Moffa v The Queen*:

The question has to be decided in the light of contemporary conditions and attitudes, for what might be provocative in one age might be regarded with comparative equanimity in another, and a greater measure of self-control is expected as society develops.³⁹

³² *Packett v The King* (1937) 58 CLR 190, 217 (Dixon J), cited with approval in *Parker v The Queen* (1963) 111 CLR 610, 660 (Windeyer J); *Lindsay* (2015) 255 CLR 272, 283 [24] (French CJ, Kiefel, Bell and Keane JJ).

³³ *R v Lindsay* (2014) 119 SASR 320, 380 [234] (Peek J), which Nettle J said was an apt description on appeal: *Lindsay* (2015) 255 CLR 272, 300 [82].

³⁴ *Masciantonio v The Queen* (1995) 183 CLR 58, 66–7 (Brennan, Deane, Dawson and Gaudron JJ). See also *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

³⁵ [1946] AC 588 (*‘Holmes’*).

³⁶ *Ibid* 600 (Lords Macmillan, Porter, Simonds and du Parcq agreeing), reversed in the United Kingdom by the *Homicide Act 1957* (UK) 5 & 6 Eliz 2, c 11, s 3, but largely reintroduced as part of defence of ‘loss of control’ by the *Coroners and Justice Act 2009* (UK) c 25, ss 54–6. *Holmes* was also incorporated into Australian common law and code jurisdictions: see, eg, *Criminal Code Act 1899* (Qld) sch 1, s 304(2); *Moffa v The Queen* (1977) 138 CLR 601, 605 (Barwick CJ), 613 (Gibbs J), 619 (Stephen J), 620 (Mason J).

³⁷ *R v Rothwell* (1871) 12 Cox CC 145, 147 (Blackburn J).

³⁸ *Holmes* [1946] AC 588, 601 (Lords Macmillan, Porter, Simonds and du Parcq agreeing). See also *R v Smith* [2001] 1 AC 146, 173 (Lord Hoffmann).

³⁹ (1977) 138 CLR 601, 616–17. Although his Honour was in dissent, this aspect of his Honour’s reasons was subsequently adopted by the whole court in *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

For Peek J in the South Australian Full Court, the time had come to raise the bar again and to extricate the law from its complicity in legitimising homophobic violence. His Honour said:

There is no doubt that in former times, when acts of homosexuality constituted serious crime and men were accustomed to resort to weapons and violence to defend their honour, a killing under the provocation present here would have been seen as giving rise to a verdict of manslaughter rather than murder. However, times have very much changed ... I have come to the firm view that in 21st century Australia, the evidence taken at its highest in favour of the appellant in the present case was such that no reasonable jury could fail to find that an ordinary man could not have so far lost his self-control as to attack the deceased in the manner that the appellant did. Accordingly, the judge was incorrect in his decision to leave the partial defence of provocation to the jury in this case.⁴⁰

However, at this point, Peek J was required to do some fancy footwork to square his ruling with *Green v The Queen*,⁴¹ which stood as High Court authority that a non-violent homosexual advance *can* provoke an ordinary person into killing their would-be seducer. In that case, Malcolm Green had responded to ‘gentle’ touching⁴² from another man by ‘punch[ing him] about thirty-five times, ram[ming] his head repeatedly against a wall and stab[bing] him ten times with a pair of scissors as he ... rolled off the bed’.⁴³ When police later questioned Malcolm, he said, ‘[y]eah, I killed him, but he did worse to me’.⁴⁴ There are some parallels in the way *Green* and *Lindsay* proceeded through the courts. As with Sun Sun, the jury found Malcolm guilty of murder at first instance. On appeal, the New South Wales Court of Criminal Appeal found that the trial judge had fallen into error, but that no injustice had occurred because provocation was not open on the facts. According to Priestley JA, as a matter of law, ‘amorous physical advances’ could not satisfy the objective test of provocation.⁴⁵ His Honour held, ‘I do not think that the ordinary person could have been induced by the deceased’s conduct so far to lose self-control as to have formed an intent to kill or inflict grievous bodily harm’.⁴⁶ On further appeal, the High Court controversially found that the ordinary person is liable to kill when faced with a

⁴⁰ *R v Lindsay* (2014) 119 SASR 320, 380 [235]–[236]. For obiter prefiguring this conclusion, see *R v Hajistassi* (2010) 107 SASR 67, 90 [105] (Kourakis J).

⁴¹ (1997) 191 CLR 334 (*‘Green’*).

⁴² *Ibid* 360 (McHugh J), quoting Malcolm Green.

⁴³ Bronwyn Statham, ‘The Homosexual Advance Defence: “Yeah, I Killed Him, but He Did Worse to Me” *Green v R*’ (1999) 20 *University of Queensland Law Journal* 301, 303.

⁴⁴ *Green* (1997) 191 CLR 334, 391 (Kirby J), quoting Malcolm Green.

⁴⁵ *R v Green* (Unreported, New South Wales Court of Criminal Appeal, 8 November 1995) 25–6 (Ireland J agreeing). Cf 23–4 (Smart J, dissenting).

⁴⁶ *Ibid* 26 (Priestley JA).

non-violent homosexual advance.⁴⁷ Part of the reason for that conclusion was that the homosexual nature of the provocation was ‘only one factor in the case’.⁴⁸ There was also what Brennan CJ called ‘the sexual abuse factor’.⁴⁹ Malcolm believed that his sisters had been sexually abused by his father. He had never witnessed the abuse or been subject to it himself, but, in the eyes of the High Court, he therefore had a ‘special sensitivity’⁵⁰ to a sexual advance from one adult man to another (rather than, it might be said, a sexual advance from an adult man to a prepubescent girl). According to the High Court, the ordinary person could indeed react the way Malcolm did once invested with his special sensitivity. Faced with the binding authority of *Green*, Peek J latched onto the absence of the ‘sexual abuse factor’ in this case and emphasised that he had arrived at his conclusion ‘purely on a case specific basis’.⁵¹ In seeking to raise the bar and make new law, he disavowed doing so.

On appeal, the High Court confirmed the court’s policy role in setting the boundaries of provocation.⁵² However, it again refused to exercise that power and rule that a non-violent homosexual advance can never amount to provocation in law. Of course, Peek J was bound by *Green*, but the High Court was not. It has ‘undoubted authority’ to overturn its own previous decisions.⁵³ In choosing, without discussion, to maintain the status quo,⁵⁴ the High Court again opted to send the message that ordinary men are liable to react to homosexual overtures with lethal violence. In terms of the moral dimension of provocation, this means both that homosexual advances are ‘provocative’ — opening up questions of whether the retaliation was justified and allowing a space for victim-blaming — and that the ordinary person is ‘provocable’ by homosexual advances — meaning that we can sympathise with and excuse the accused’s homophobia. As Bronwyn Statham said in the wake of *Green*, the High Court ‘condone[d] — it re-inscribe[d] as “justifiable,” as “ordinary” — a reaction of extreme and excessive violence premised upon feelings of hatred, fear, revulsion and

⁴⁷ *Green* (1997) 191 CLR 334, 346 (Brennan CJ), 357 (Toohey J), 369–71 (McHugh J). Cf 383–4 (Gummow J), 415–6 (Kirby J).

⁴⁸ *Ibid* 370 (McHugh J).

⁴⁹ *Ibid* 342.

⁵⁰ *Ibid* 357 (Toohey J), 369 (McHugh J).

⁵¹ *R v Lindsay* (2014) 119 SASR 320, 380 [237], 381 n 122.

⁵² *Lindsay* (2015) 255 CLR 272, 283 [26] (French CJ, Kiefel, Bell and Keane JJ), 300 [82] (Nettle J).

⁵³ *Attwells v Jackson Lalic Lawyers Pty Ltd* (2016) 259 CLR 1, 18 [27] (French CJ, Kiefel, Bell, Gageler and Keane JJ), 45 [131] (Gordon J agreeing). Granted, on appeal the Crown did not seek leave to reopen *Green* (it sought to distinguish *Green*), and the High Court is ordinarily reluctant to depart from authority in the absence of argument on the point: cf *McCloy v New South Wales* (2015) 257 CLR 178, 281 [308] (Gordon J). However, the High Court’s practice of requiring a party to seek leave to reopen authority before considering whether to do so is not an ‘inflexible rule, and much will depend on the nature of and the court’s “interest” in the issue’: D F Jackson, ‘The Lawmaking Role of the High Court’ (1994) 11 *Australian Bar Review* 197, 208.

⁵⁴ For example, Nettle J said simply ‘the law remains now as it was then’: *Lindsay* (2015) 255 CLR 272, 301 [84].

disgust, similarly re-inscribed as “justifiable” and “ordinary.”⁵⁵ Ordinary men, on this view, are likely to “[defend] the vulnerability of heterosexual identity by reacting against both sexual advances on a masculine body and the dishonour of objectification”.⁵⁶ Applied in this way, the function of the ordinary person test in setting societal expectations becomes, in truth, the policing of the heteronormative order, the punishment of those who transgress it, and the rewarding of those who enforce it, as violently as necessary.

As in *Green*, the reason why the High Court declined to take this step is that it saw ‘a larger dimension’ to Andrew’s provocation than simply its homosexual nature.⁵⁷ For one thing, Andrew’s proposition involved the very different, though equally queer (that is, deviant), sexuality of prostitution. Moreover, there was the racial dimension. As four of the judges said in a joint judgment:

it was open to a reasonable jury to consider that an offer of money for sex made by a Caucasian man to an Aboriginal man in the Aboriginal man’s home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.⁵⁸

Likewise, Nettle J, in a separate concurring judgment, said, ‘it is not impossible that a jury could reasonably infer that, because the appellant is Aboriginal, he perceived the deceased’s conduct towards him to be racially based and for that reason especially insulting’.⁵⁹

Sun Sun’s barrister acknowledged that there was no evidence of the racial dimension,⁶⁰ but such evidence would not have been hard to find. Even within the gay community, Gary Lee has noted the prevalence of ‘loaded assumptions that all Black men are “hot sex”, “easy roots”, “good fucks”, “have big dicks”, or that “they can never

⁵⁵ Statham, above n 43, 309.

⁵⁶ Stephen Tomsen and Thomas Crofts, ‘Social and Cultural Meanings of Legal Responses to Homicide among Men: Masculine Honour, Sexual Advances and Accidents’ (2012) 45 *Australian & New Zealand Journal of Criminology* 423, 426.

⁵⁷ *Lindsay* (2015) 255 CLR 272, 300 [81] (Nettle J).

⁵⁸ *Ibid* 287 [37] (French CJ, Kiefel, Bell and Keane JJ), citing Transcript of Proceedings, *Lindsay v The Queen* [2015] HCATrans 52 (11 March 2015) 239–47 (M E Shaw QC).

⁵⁹ *Lindsay* (2015) 255 CLR 272, 300 [81], citing *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

⁶⁰ Transcript of Proceedings, *Lindsay v The Queen* [2015] HCATrans 52 (11 March 2015) 243 (M E Shaw QC). See also *R v Lindsay* (2014) 119 SASR 320, 331 [29] (Gray J) (after noting that Sun Sun was an Aboriginal man, his Honour said that ‘[t]he evidence did not reveal any particular characteristic of Lindsay relevant to the issue of provocation’).

resist a White man”⁶¹. These assumptions are based on seeing Aboriginal men as ‘savages’, rendering them both an object of fetish as well as a disposable resource: ‘The Aborigine is still perceived as a “primitive” in a “degenerative” culture, of not much use except as a cheap resource (including the sex industry) or convenient easy lay’.⁶² Moreover, this is only one aspect of ongoing experiences of colonialism. In a sense, the High Court is suggesting that, as an Aboriginal man in White Australia, Sun Sun has been experiencing racial taunts his entire life. The colonial state has intervened in every aspect of his life: his finances have been controlled by Centrelink and then the Public Trustee;⁶³ since his teenage years his liberty has been regulated by white police, white judges and white gaolers.⁶⁴ The racial hierarchy imposed by Andrew on Sun Sun was simply the latest of a lifetime of such impositions, and their cumulative effect tipped him over the edge. The High Court’s narrative follows that of the Australian classic, *The Chant of Jimmie Blacksmith*.⁶⁵ In Thomas Keneally’s novel, set in the lead up to federation, Jimmie Blacksmith was removed from his family and forced into servitude by whites, which he internalised as an ambition to assimilate.⁶⁶ However, after one too many liberties taken by a white man and one too many racist taunts, Jimmie Blacksmith snapped and went on a murderous rampage across New South Wales. Towards the end of the book, one of Jimmie’s white masters surmised, ‘[a]s inexcusable as Blacksmith’s crimes are, there was almost certainly some white provocation’⁶⁷ The High Court appears to be saying the same here: as inexcusable as Sun Sun’s crime was, there may very well have been some white provocation.

A person’s race is no doubt relevant to their subjective experience of the world, but how does it inform an objective standard? As critical law theorists like Norrie point out, the objective standard is an appeal to the abstract.⁶⁸ Moral justification continues to animate the test in some unarticulated way, yet it is impossible to cast a moral judgment without knowing something about the social and moral context in which the crime occurred. For this reason, a purely objective ordinary person test ‘will not work because it needs to know something about the particularity of

⁶¹ Wendy Dunn/Holland et al, ‘Peopling the Empty Mirror: The Prospects for Lesbian and Gay Aboriginal History’ in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney, 1993) 1, 16.

⁶² *Ibid* 18.

⁶³ *R v Lindsay* (2013) 117 SASR 307, 321 [79] (Sulan J).

⁶⁴ *R v Lindsay* (2014) 119 SASR 320, 342–3 [72] (Gray J).

⁶⁵ Thomas Keneally, *The Chant of Jimmie Blacksmith* (Angus and Robertson, 1972).

⁶⁶ As fictional as Jimmie Blacksmith was, he was based on the very real story of Jimmy Governor: Tony Birch, ‘Tony Birch on “The Chant of Jimmie Blacksmith” by Thomas Keneally for Reading Australia’ (2015) 372 *Australian Book Review* <<https://www.australianbookreview.com.au/reading-australia/thomas-keneally/the-chant-of-jimmie-blacksmith-by-thomas-keneally>>.

⁶⁷ Keneally, above n 65, 174–5.

⁶⁸ Alan Norrie, *Law and the Beautiful Soul* (GlassHouse Press, 2005) 128–9.

the accused if it is to get any kind of handle on judgment'.⁶⁹ Thus, since 1990, the High Court has recognised that the provocative conduct must be contextualised if we are to properly understand how the ordinary person would react.⁷⁰ According to the majority judgment, this is because:

Conduct which might not be insulting or hurtful to one person might be extremely so to another because of that person's age, sex, race, ethnicity, physical features, personal attributes, personal relationships or past history. The provocation must be put into context and it is only by having regard to the attributes or characteristics of the accused that this can be done.⁷¹

However, in contextualising the ordinary person, the courts are careful to avoid hollowing out the objective limb and completely subjectivising the test of provocation.⁷² For most of the accused's attributes, race included, the courts do this by drawing a distinction between the subtly different concepts of the 'provocativeness' of the victim's conduct — which may be contextualised given the underlying moral questions about whether the retaliation was justified — and the 'provocability' of the accused — which must remain subject to a universal standard irrespective of the context.⁷³ On the current test, the accused's race is considered normatively relevant to the provocativeness of the victim's conduct but not to the ordinary person's provocability. Of course, this need not be so. Age is deemed normatively relevant to both aspects of the objective test,⁷⁴ and as we will see, race has been treated the same way in previous articulations of the objective test. In any event, presently race is taken into account to determine the objective gravity of the provocation experienced by the ordinary person (provocativeness) but not the objective power of self-control expected of the ordinary person (provocability). So, having assessed the gravity of the provocation 'from the standpoint of the accused',⁷⁵ the question then becomes whether that degree of provocation could cause a 'truly hypothetical "ordinary

⁶⁹ Ibid 128.

⁷⁰ *Stingel v The Queen* (1990) 171 CLR 312, 325–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁷¹ *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ).

⁷² In Lord Hoffmann's words, 'to hold the line against the complete erosion of the objective element in provocation': *R v Smith* [2001] 1 AC 146, 169. Though for his Lordship, whether the line is to be held is a matter entirely for the jury: at 171.

⁷³ A J Ashworth, 'The Doctrine of Provocation' (1976) 35 *Cambridge Law Journal* 292, 300; Norrie, above n 26, 313, 321, 330–1 (disagreeing with Ashworth about whether the provocativeness/provocability dichotomy aligns neatly with the justification/excuse dichotomy).

⁷⁴ *Director of Public Prosecutions v Camplin* [1978] AC 705, 717–8 (Lord Diplock); *Stingel v The Queen* (1990) 171 CLR 312, 329 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁷⁵ *Lindsay* (2015) 255 CLR 272, 284 [28] (French CJ, Kiefel, Bell and Keane JJ).

person”, without the accused’s attributes, to lose control.⁷⁶ The courts acknowledge that this transition back to the abstract from the particulars of the accused requires the jury to engage in ‘mental gymnastics’⁷⁷ and to draw a division between provocativeness and provocability, which is of ‘too great nicety’ for the real world.⁷⁸ But, however difficult the task, the jury in *Lindsay* was effectively required to conjure into being an ordinary person who then stood in Sun Sun’s shoes and took on his Aboriginality in order to assess the effect of Andrew’s proposition.⁷⁹ Having done that, the ordinary person cast off Sun Sun’s Aboriginality to exercise purely objective, racially-neutral powers of self-control.

That the ordinary person must be made Aboriginal, however, reveals that the ordinary person is not Aboriginal to begin with. The same cannot be said of the construction of the ordinary person in cases involving Anglo-Saxon defendants. Take for example Malcolm Green. As careful as the High Court was to attribute the ordinary person with Malcolm’s special sexual sensitivity, it found no need to attribute his whiteness. Perhaps whiteness is never bestowed on the ordinary person simply because it is never relevant to the gravity of the provocation: as the dominant race, whites are more likely to be impervious to racist insults directed at them.⁸⁰ But the irrelevance of whiteness from the perspective of white institutions and judges only serves to reinforce its invisibility:

whites’ social dominance allows us to relegate our own racial specificity to the realm of the subconscious. Whiteness is the racial norm. In this culture the black person, not the white, is the one who is different ... Once an individual is identified as white, his distinctively racial characteristics need no longer be conceptualized in racial terms; he becomes effectively raceless in the eyes of other

⁷⁶ *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁷⁷ *R v Rongonui* [2000] 2 NZLR 385, 457 [236] (Tipping J). See also at 446 [205] (Thomas J).

⁷⁸ *Director of Public Prosecutions v Camplin* [1978] AC 705, 718 (Lord Diplock).

⁷⁹ The High Court has warned against directing the jury to ‘put themselves, as the embodiment of the ordinary person, in the accused’s shoes’, as jurors may inadvertently ‘substitute himself or herself, with his or her individual strengths and weaknesses, for the hypothetical ordinary person’: *Stingel v The Queen* (1990) 171 CLR 312, 327 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). See also *R v Lindsay* (2014) 119 SASR 320, 366–8 [173]–[178] (Peek J). However, the issue with the direction was with jurors embodying the ordinary person, rather than the ordinary person embodying the accused.

⁸⁰ *Kelly-Country v Aboriginal & Torres Strait Islander Social Justice Commissioner* (2004) 181 FLR 352, 373–4 [92] (Brown FM):

No doubt, if a [white] New Zealander brought a complaint about [a Kiwi joke], he or she would be quickly dismissed as being unduly thin skinned. However, for obvious reasons, a joke about a historically oppressed minority group, which is told by a member of a racially dominant majority, may objectively be more likely to lead to offence.

whites. Whiteness is always a salient personal characteristic, but once identified, it fades almost instantaneously from white consciousness into transparency.⁸¹

The more likely reason that the ordinary person need never be invested with whiteness is that white is the default position in our society. Indeed, as Glanville Williams said in the 1950s, apparently without racial self-consciousness, the opposite of ‘ordinary’ is ‘un-English’.⁸² The ordinary person then is not some opaque, colourless construction waiting to be inscribed with a race. It is always already white, even with the best race-neutral intentions of High Court judges.

Of course, the Full Court’s narrative of sexuality and the High Court’s narrative of race are both oversimplifications. This was not a case of a heterosexual man killing an out and proud gay man. As with so many cases in which the homosexual advance defence is deployed, Andrew may not have been homosexually inclined at all.⁸³ He was at the time living with his female partner and as far as his father was concerned, Andrew was ‘very much a ladies man’.⁸⁴ No doubt, the persistence of Andrew’s advances towards Sun Sun might suggest otherwise.⁸⁵ In an attempt to preserve the narrative of sexuality, Peek J latched onto something other than Andrew’s persistence. His Honour said, ‘[t]he possibility that the suggestions [were not jokes and] were seriously taken might reasonably be strengthened in the mind of the jury’ by the fact that Andrew had long hair.⁸⁶ That is, it would be reasonable for a jury to link homosexuality with long hair. Presumably, that is because if a person is not performing their gender properly in one regard, it is safe to assume they are not performing their gender properly in other ways too.⁸⁷

⁸¹ Barbara Flagg, ‘“Was Blind but Now I See”: White Race Consciousness and the Requirement of Discriminatory Intent’ (1993) 91 *Michigan Law Review* 953, 971 (citations omitted).

⁸² Glanville Williams, ‘Provocation and the Reasonable Man’ (1954) *Criminal Law Review* 740, 746. For a recent example of an assumption made in oral submissions in the High Court that all Australians are British, see Transcript of Proceedings, *Re Canavan; Re Ludlam; Re Waters; Re Roberts; Re Joyce; Re Nash; Re Xenophon* [2017] HCATrans 201 (12 October 2017) 9078–9 (Mr Newlinds SC) (“...all these British people” — which of course is all of us’).

⁸³ See, similarly, Kent Blore, ‘The Homosexual Advance Defence and the Campaign to Abolish it in Queensland: the Activist’s Dilemma and the Politician’s Paradox’ (2012) 12(2) *QUT Law & Justice Journal* 36, 45.

⁸⁴ Tessa Akerman, ‘Family of Murder Victim Andrew Negre Tells Supreme Court of Their Loss Ahead of Sentencing’, *The Advertiser* (online), 11 September 2013 <<http://www.adelaidenow.com.au/news/south-australia/family-of-murder-victim-andrew-negre-tells-supreme-court-of-their-loss-ahead-of-sentencing/news-story/7b871581ef8d9e3d14f730571d19ea49>>.

⁸⁵ *R v Lindsay* (2014) 119 SASR 320, 371 [195] (Peek J).

⁸⁶ *Ibid* 350 [111].

⁸⁷ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, first published 1990, 2006 ed) 184, 190–3. The High Court recently endorsed a view that gender is performative in *AB v Western Australia* (2011) 244 CLR 390. In interpreting the requirement that a person has adopted the ‘lifestyle’ of the gender to which

As to the racial dimensions of the case, the High Court ignored other attributes of Sun Sun, which were arguably of far more significance than his Aboriginality in attempting to understand the offence he took to Andrew's offer. Sun Sun was hit by a car when he was nearly two and again when he was seven years old.⁸⁸ He had an acquired brain injury as a result, and associated with that he had a significant intellectual disability and a behavioural disorder. According to one psychologist, this meant he was unable 'to discriminate the motives of other people in interpersonal relationships'.⁸⁹ A further consequence of his intellectual disability was low self-esteem, making him 'very vulnerable to negative peer group pressure' because he was 'eager to be accepted by a peer group to bolster his self-esteem'.⁹⁰ It might be thought that Sun Sun was therefore more susceptible to the gender and sexuality norms of his peer group. Indeed, one psychologist noted that under peer pressure, Sun Sun's previous criminal 'offending ha[d] become an expression of his masculinity and boldness'.⁹¹ The gravity of the homosexual advance in front of Sun Sun's peer group takes on a whole different light once the ordinary person is imbued with his intellectual disability, the difficulty he faced in reading Andrew's motives, and his vulnerability to any tacit homophobia that might have existed in his peer group on account of his peculiar need to fit in. Given the explanatory force of Sun Sun's intellectual disability, it might be wondered why the High Court emphasised his race instead. Perhaps their Honours were reluctant to consider Sun Sun's intellectual disability because of the difficulty of dissecting its impact on the way the ordinary person 'would view some provocative conduct on the one hand [from] the way he or she would respond emotionally to that conduct on the other';⁹² that is, the difficulty of considering provocativeness and provocablity in isolation. And if the ordinary person is invested with the accused's characteristics that go to loss of control — such as being paranoid, impulsive, short tempered and easily angered — this would do damage to the myth sustaining the ordinary person test and ultimately the entire criminal justice system: 'that all persons are equally responsible for their actions'.⁹³

they seek reassignment under the *Gender Reassignment Act 2000* (WA), French CJ, Gummow, Hayne, Kiefel and Bell JJ said at 403 [28], 'maleness or femaleness ... has both a private and a public dimension. Many lifestyle choices made by a person are observable by other members of society, by reference to how that person lives and conducts himself or herself'.

⁸⁸ *R v Lindsay* (2013) 117 SASR 307, 309 [6]–[7] (Sulan J).

⁸⁹ *Ibid* 309 [8] (Sulan J), paraphrasing Dr Bollard.

⁹⁰ *R v Lindsay* (2014) 119 SASR 320, 344 [75] (Gray J), quoting Mr Balfour.

⁹¹ *Ibid*.

⁹² *Masciantonio v The Queen* (1995) 183 CLR 58, 72–3 (McHugh J), quoting Stanley Yeo, 'Power of Self-Control in Provocation and Automatism' (1992) 14 *Sydney Law Review* 3, 7.

⁹³ *R v Hill* [1986] 1 SCR 313, 343 (Wilson J dissenting). Indeed, it is instructive that the case in which the ordinary person test was finally settled in England involved the question of whether the objective standard should reflect the mental ability of the defendant. In adopting a 'reasonable man' test, Lord Reading CJ said, 'This Court is certainly not inclined to go in the direction of weakening in any degree the law that a person who is not insane is responsible in law for the ordinary consequences of his

In any event, the Full Court focused on sexuality and the High Court focused on race, leaving us with a white and violently homophobic ordinary person. On appeal the first time, to the Full Court of the Supreme Court, Kourakis CJ asked Sun Sun's barrister, '[h]ow does the jury go about formulating the conception of the ordinary person here?'⁹⁴ Defence counsel responded with the High Court's standard question-begging response: 'The ordinary person is simply a person with ordinary powers of self-control'.⁹⁵ But 'how', Kourakis CJ wanted to know, 'do they go about working out what that is?'⁹⁶

As Moran notes, this resort to 'common sense' by defence counsel and the High Court hides more than it reveals.⁹⁷ Her solution is to avoid common sense altogether and focus instead on untangling the normative characteristics of the ordinary person from mere descriptions of ordinariness.⁹⁸ This leads Moran to identify attentiveness to the interests of others as the key norm lying at the heart of the ordinary person.⁹⁹ But there is something of a false dichotomy in that approach. Notions of normalcy or ordinariness cannot be described as anything but normative: our judgment of what is normal, 'our image of the world[,] is always a display of values as well'.¹⁰⁰ Moreover, as will be explored in greater depth in the final section of the article, it is not altogether clear how normative characteristics can be isolated without reference to some calculation of a societal average for what is accepted behaviour; that is, by

acts': *R v Lesbini* [1914] 3 KB 1116, 1120. See also *Luc Thiet Thuan v The Queen* [1997] AC 131, 145 (Lord Goff), in which the Privy Council refused to ascribe brain damage to the ordinary person. For a critique of the abstract responsible individual at the heart of the criminal law, see Ian Dennis, 'The Critical Condition of Criminal Law' (1997) 50 *Current Legal Problems* 213, 237–41; Alan Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (Cambridge University Press, 3rd ed, 2014) ch 1–2.

⁹⁴ *Lindsay* (2015) 255 CLR 272, 296 [69].

⁹⁵ *Ibid*, quoting defence counsel at the appeal before the Full Court of the Supreme Court of South Australia, in turn echoing *Masciantonio v The Queen* (1995) 183 CLR 58, 67 (Brennan, Deane, Dawson and Gaudron JJ) ('the characteristics of the ordinary person are merely those of a person with ordinary powers of self-control'). See also Timothy Macklem, 'Provocation and the Ordinary Person' (1988) 11 *Dalhousie Law Journal* 126, 152, regarding a similar tautology in the objective test in Canada in *R v Hill* [1986] 1 SCR 313.

⁹⁶ *Lindsay* (2015) 255 CLR 272, 296 [69].

⁹⁷ Moran, above n 27, 163.

⁹⁸ *Ibid* 14, 281.

⁹⁹ *Ibid* 257–66, 291–2. Although Moran primarily has in mind the reasonable person in the tort of negligence, she also links the norm of having regard for others to self-control in the context of provocation: at 305. Further, while her focus is the 'reasonable person', her theorisation applies equally to the 'ordinary person' as applied in provocation in Australia.

¹⁰⁰ Georges Canguilhem, *On the Normal and the Pathological* (Carolyn R Fawcett and Robert S Cohen trans, Zone Books, 1991) 179 [trans of: *Le Normal et le Pathologique* (first published 1966)], quoted in Moran, above n 27, 145. For Moran's acknowledgement of the normative quality of ordinariness, see also at 143–4, 155.

reference to some notion of what is normal or ordinary. Attentiveness to others is no doubt commendable, but it is only normative if society deems it so. Norms are not immanent, logical deductions. As François Ewald frames it, '[w]ithin the normative order, values are not defined a priori but instead through an endless process of comparison that is made possible by normalization'.¹⁰¹ Properly seeing norms as intersubjective social constructs, Moran's focus on attentiveness to others looks less like a distillation of a normative characteristic from irrelevant considerations of ordinariness, and more like an attempt to prioritise that value in the calculation of what is acceptable, normal, or ordinary — to normalise attentiveness. In any event, Moran acknowledges that when judges and juries draw upon the ordinary person, they do not differentiate between normative and descriptive attributes.¹⁰² Accordingly, we cannot rely on Moran's theory to sidestep common sense. If we are to understand the ordinary person, we must confront common sense.

The reason why attempts to define the ordinary person often descend into tautologies and assertions that the answer is self-evident, is because the answer is in fact very complex. The origins of the ordinary person test can be traced easily enough to a case heard in the first year of Queen Victoria's reign in 1837,¹⁰³ but ordinariness itself is the product of innumerable discourses taking place in society, each with a history so deep that it can be taken for granted as obvious. Patriarchal and sexist regimes of knowledge are obvious examples of discourses with deep roots in society.¹⁰⁴ Indeed, the modern law of provocation owes much to the 'reconstruction of manliness' in the early Victorian era when England became gripped with a concern 'to reduce violence and "civilize" men in general'.¹⁰⁵ In the process, the ideal of the 'man of honor' gave way to the 'man of dignity',¹⁰⁶ which goes a long way to explaining provocation's transition from a justificatory to an excusatory model. However, while Victorian morality decried male violence, it also condoned the mistreatment and killing of 'bad' women.¹⁰⁷ These norms about gender and violence have fed into the gendered nature of provocation: its excuse of male violence against women but condemnatory silence when it comes to female violence against men. Although gender loomed large in the interaction between Sun Sun and Andrew, it played out through the gender norm of heterosexuality. For that reason, this article leaves the exploration of the larger dimension of gendered ordinariness to others.

Whiteness and violent homophobia are two other discourses with particularly deep roots. They are by no means unique to Australia, though Australia does have a distinct

¹⁰¹ François Ewald, 'Norms, Discipline, and the Law' (1990) 30 *Representations* 138, 152.

¹⁰² Moran, above n 27, 13, 65, 307.

¹⁰³ *R v Kirkham* (1837) 7 C & P 115.

¹⁰⁴ See Moran, above n 27, 151.

¹⁰⁵ Martin J Wiener, *Men of Blood: Violence, Manliness, and Criminal Justice in Victorian England* (Cambridge University Press, 2004) 5.

¹⁰⁶ *Ibid* 6.

¹⁰⁷ *Ibid* 29, 170–6.

historical relationship with these discourses, which may help to explain why ‘in Australia, male panic at [a] homosexual advance and questions of ethnicity have ... been significant’ in the debate about provocation.¹⁰⁸ At the same time that masculinity and violence were being reconfigured in Victorian England, settlers in Australia found an exception to the condemnation of male violence in the ‘large opportunities to unleash their aggressive impulses against non-Europeans’.¹⁰⁹ Victorian morality was also conflicted between its condemnation of male violence and its reprobation of ‘bad’ men who had breached sexual mores, and the newly forged link between masculinity and heterosexuality. This had particular bite in Australia when the moralising gaze of Victorian England turned to homosexuality here. Yet the historical forces that have entrenched whiteness and violent homophobia as ordinary have been repressed in Australia’s collective memory. Shorn of a history, they appear to spring into existence ‘armed and of full stature’ as though they truly are a priori and precede any historical explanation.¹¹⁰ Thus the history of whiteness and violent homophobia needs to be reclaimed if we are to fully understand, and then undermine, their self-evident ordinariness.

IV A HISTORY OF THE ORDINARY PERSON: TWO FOUNDING SECRETS AT THE ROOT OF AUSTRALIAN ORDINARINESS

If Bishop Ullathorne is to be believed, white men have been propositioning Indigenous men in Australia for a very long time. Reflecting on the immorality of the convicts he visited in the early 1800s, he wrote, ‘[t]he naked savage, who wanders through those endless forests, knew of nothing monstrous in crime, except cannibalism, until England schooled him in horrors through her prisoners’.¹¹¹ The Bishop and others repeated those ‘horrors’ in similarly euphemistic terms to the Molesworth Committee in 1837 and 1838. By the time the Committee’s final report was laid before the House of Commons in August 1838, the secret of widespread sodomy in the antipodes had been revealed.¹¹² Sir William Molesworth himself described the social experiment of transporting convicts to Australia as having resulted in ‘Sodom

¹⁰⁸ Norrie, above n 68, 125 n 15. Compare also the very different cultural rationales underlying the homosexual advance defence in Australia and the gay panic defence in the United States, as well as the greater propensity of US States to enact gay hate crime legislation, suggesting a distinct historical relationship with homophobia: Ben Golder, ‘The Homosexual Advance Defence and the Law/Body Nexus: Towards a Poetics of Law Reform’ (2004) 11 *Murdoch University Electronic Journal of Law* [15]; Alan Berman and Shirleene Robinson, *Speaking Out: Stopping Homophobic and Transphobic Abuse in Queensland* (Australian Academic Press, 2010) 208.

¹⁰⁹ Wiener, above n 105, 13.

¹¹⁰ *Re Richard Foreman & Sons Pty Ltd; Uther v Commissioner of Taxation (Cth)* (1947) 74 CLR 508, 530 (Dixon J) (using the metaphor of the birth of Athena in an unrelated context).

¹¹¹ Quoted in Robert Hughes, *The Fatal Shore: A History of the Transportation of Convicts to Australia 1787–1868* (Collins Harvill, 1987) 265.

¹¹² *Molesworth Committee Report*, above n 4, especially 18, 30.

and Gomorrah'.¹¹³ As modern authors have pointed out, the Molesworth Committee had a clear agenda to abolish the system of transporting convicts to Australia.¹¹⁴ In the context of Victorian moral sensibilities, there was an obvious incentive in overstating the evidence that homosexuality was rife among those transported.¹¹⁵ However, there was certainly abundant evidence. Colonial courts heard cases of sodomy,¹¹⁶ convicts wrote contemporaneous accounts of homosexuality in the barracks and in the road gangs,¹¹⁷ and official investigations concluded that homosexuality 'ha[d] [indeed] taken a certain root amongst the convicts'.¹¹⁸

No doubt much of the homosexuality among convicts was situational — among whites there were four times as many men as women in the cities, and 20 times as many in the bush.¹¹⁹ Much of it also reflected the harsh penal conditions in which convicts lived, where sexuality was just another site of power. As noted by Robert Hughes:

If this carceral society of the 1830s was anything like prisons today, we must recognize that many of the sexual episodes [described in contemporaneous accounts] were not lovemaking but acts of sadistic humiliation, in which sexuality was merely the instrument of a deeper violence — the strong breaking the weak down.¹²⁰

Whatever might be said about the voluntariness of homosexuality in early Australia (and there is much to be said),¹²¹ the respectable citizenry of the colonies were

¹¹³ Hughes, above n 111, 494.

¹¹⁴ Michael Sturma, *Vice in a Vicious Society: Crime and Convicts in Mid-Nineteenth Century New South Wales* (University of Queensland Press, 1983) 1, 9 n 3; John Hirst, *Convict Society and its Enemies* (Allen & Unwin, 1983) 26–7.

¹¹⁵ Hirst, above n 114, 200; Babette Smith, *Australia's Birthstain: The Startling Legacy of the Convict Era* (Allen & Unwin, 2008) 212; Kirsty Reid, *Gender, Crime and Empire: Convicts, Settlers and the State in Early Colonial Australia* (Manchester University Press, 2012) 174–5. On the sensationalist use of homosexuality by abolitionists generally, see Reid, above n 115, ch 6.

¹¹⁶ See, eg, *R v Fitzpatrick and Fitzgerald* (Unreported, Maitland Circuit Court, Dickinson J, 11 September 1845), reported in 'Maitland Circuit Court: Murder', *Maitland Mercury*, 13 September 1845, 2; 'Assize Intelligence: Murder', *Sydney Morning Herald*, 15 September 1845, 2. See also Smith, above n 115, 241–3.

¹¹⁷ Thomas Cook, *The Exile's Lamentations* (Library of Australian History, written 1840–1844, first published 1978) 19–20, 68–9.

¹¹⁸ Despatch from CJ La Trobe to Earl Grey, 31 May 1847, enclosure 5, reproduced in Ian Brand, *The Convict Probation System: Van Diemen's Land 1839–1854* (Blubber Head Press, 1990) 159.

¹¹⁹ Hughes, above n 111, 264.

¹²⁰ *Ibid* 269.

¹²¹ See, eg, Garry Wotherspoon, 'A Sodom in the South Pacific — Male Homosexuality in Sydney 1788–1809' in Graeme Aplin (ed), *A Difficult Infant: Sydney before Macquarie* (University of Sydney Press, 1988) 91; Bob Hay, 'A Charge of Something

mortified to be tarred with the same brush. As rumours spread of the evidence given before the Molesworth Committee, 500 men petitioned the New South Wales Legislative Council ‘to do something to counteract the talk about Sodom, Gomorrah and the rising crime rate’.¹²² In July 1838, the Council issued a resolution complaining

that the character of this Colony, in as far as the social and moral condition of its Inhabitants is concerned, has unjustly suffered by the misrepresentations put forth in certain recent publications in the Mother Country; and especially in portions of the Evidence taken before a Committee of the House of Commons.¹²³

The report of the Molesworth Committee was received in the colonies as a rebuke by the motherland, which only served to heighten the colonial ambition ‘to be more English than the English’.¹²⁴ At the time, that meant being more Victorian than the Victorian in the pursuit of moral puritanism. As Babette Smith points out, ‘[t]he formation of Australian masculinity ... gain[s] an extra dimension with [the] knowledge of the extreme homophobic pressure that was brought to bear on men in the mid-nineteenth century’.¹²⁵

Inevitably, the purging of convict shame led to a paradox for the nascent nation: amnesia of its homosexual past and fierce repression of homosexuality long after it forgot its reasons for holding such attitudes. In the words of Robert Hughes:

There could have been no better breeding ground for the ferocious bigotry with which Australians of all classes, long after the abandonment of [the transportation of convicts], perceived the homosexual. And this in turn seemed like an act of cleansing — for homosexuality was one of the mute, stark, subliminal elements of the ‘convict stain’ whose removal, from 1840 onward, so preoccupied Australian nationalists.¹²⁶

The cruel irony of Bishop Ullathorne’s account of lovemaking between convicts and Indigenous men is that convicts were in fact at the battlefront of a war against Indigenous peoples. As the Molesworth Committee reported, convicts were engaged in ‘[t]he extirpation of a great proportion of these Aborigines’.¹²⁷ In the same year that the Molesworth Committee handed down its report, 11 stockmen — all

Unnatural: A Brief History from the Records of Australia’s Earliest Known “Homosexual” Convict’ in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney Press, 1993) 63; Clive Moore, ‘That Abominable Crime: First Steps Towards a Social History of Male Homosexuals in Colonial Queensland, 1859–1900’ in Robert Aldrich (ed), *Gay Perspectives II* (University of Sydney Press, 1993) 115.

¹²² Hughes, above n 111, 496. See also Sturma, above n 114, 27.

¹²³ New South Wales, *Parliamentary Debates*, Legislative Council, 17 July 1838, 38.

¹²⁴ Hughes, above n 111, 497.

¹²⁵ Smith, above n 115, 327.

¹²⁶ Hughes, above n 111, 272.

¹²⁷ *Molesworth Committee Report*, above n 4, 50.

convicts or ex-convicts, and all white save for one of African descent — slaughtered 28 unarmed Aboriginal men, women and children in what would become known as the Myall Creek Massacre.¹²⁸ The stockmen ‘chopped some up and mutilated others, and burned the corpses on a pyre’.¹²⁹ The Myall Creek Massacre was exceptional in the sense that some of the perpetrators were brought to justice and it caused ‘a passing revulsion of public conscience’,¹³⁰ but otherwise it was utterly ‘ordinary’ in the frontier wars. As Fison and Howitt, two pioneer ethnologists, pointed out in 1880, the advance of white settlement was ‘marked by a line of blood’.¹³¹ In recent decades, historians have rediscovered this forgotten war, ‘the war for Australia itself’.¹³² Foremost among these historians is Henry Reynolds, who notes that ‘[c]onflict broke out between invading settlers and resident Aborigines within a few weeks of the foundation of Sydney and was apparent on every frontier for the next 140 years’.¹³³ Indigenous Australians ‘died in disproportionate numbers and the balance of terror tipped decisively in favour of the Europeans as the century progressed’.¹³⁴ The settlers’ stated goal time and time again was ‘extermination’.¹³⁵

Nicholas Clements has recently explored the role of sex in one of the first frontier wars, Tasmania’s Black War between 1824 and 1831. He emphasises the severe gender imbalance among the convicts and how it led not only to homosexuality, but also to a practice of ‘gin raiding’, whereby convicts would ambush Indigenous campsites in order to acquire women for sex.¹³⁶ Often the women were chained up for a day, a week, or longer, raped repeatedly, ‘and then had their throats cut or [were] shot’.¹³⁷ Aboriginal men ‘felt emasculated’ and sought retribution, in response to which convicts formed vigilante groups, and the escalating cycle of violence spiralled into the Black War.¹³⁸ Similar patterns played out across Australia. At the close of the century, a government representative reported widespread kidnapping of Aboriginal women on the new frontier in the Northern Territory.¹³⁹ Long after the frontier wars settled into the more insidious violence of post-war colonisation, sex

¹²⁸ Connor, above n 3, 102–103. See, generally, the collection of articles to mark the 180th anniversary of the Myall Creek Massacre in the 2018 issue of *law&history*: Diane Kirkby, ‘Editor’s Comments’ (2018) 5 *law&history* vii.

¹²⁹ Hughes, above n 111, 277.

¹³⁰ *Ibid* 278.

¹³¹ Henry Reynolds, *Forgotten War* (New South Publishing, 2013) 231.

¹³² *Ibid* 249.

¹³³ *Ibid* 49.

¹³⁴ *Ibid* 134.

¹³⁵ *Ibid* 139–48.

¹³⁶ Nicholas Clements, *The Black War: Fear, Sex and Resistance in Tasmania* (University of Queensland Press, 2014) 20–1, 68–71.

¹³⁷ ‘Aborigines’, *Colonial Times*, 5 April 1836, 117.

¹³⁸ Clements, above n 136, 38.

¹³⁹ *Government Resident’s Report on the Northern Territory for the Year 1898* (Government of South Australia, 1899) 3 <https://aiatsis.gov.au/sites/default/files/catalogue_resources/58826.pdf>.

and reproduction endured as key sites of white oppression. As the experiences of the Stolen Generation make plain, sexual relations between white men and Indigenous women were ‘often [though not always] abusive and exploitative’ and carried the risk of further white interventions into Indigenous family life to claim the mixed-race child in the name of an official policy of ‘absorption’.¹⁴⁰

As with its homosexual past, Australians appear to have been gripped by a collective shame over the frontier wars so ‘unutterable’¹⁴¹ that they entered into ‘a cult of forgetfulness practised on a national scale’.¹⁴² Recovering the suppressed national memory is important for present purposes because the nature of the frontier wars reveals something about the ‘ordinary’ person at the very beginning of the Australian legal system. Assuming Sun Sun’s ancestors were within the territorial limits of South Australia when it was proclaimed on 28 December 1836, they were, by the same stroke of the pen, declared to be British subjects ‘who [we]re to be considered as much under the safeguard of the law as the Colonists themselves’.¹⁴³ Yet, within four years, Governor Gawler — operating ‘on the principles of martial law’ — sent police to carry out summary executions of Aboriginal men in retaliation for crimes.¹⁴⁴ Gawler considered that Indigenous peoples beyond the settled districts belonged to ‘a separate state or nation, not acknowledging, but acting independently of, and in opposition to, British interests and authority’.¹⁴⁵ Their crimes were ‘beyond the reach of the ordinary British law’.¹⁴⁶ His stance echoed Governor Arthur’s imposition of martial law in Tasmania 20 years earlier. According to Arthur’s Solicitor-General, Alfred Stephen, the declaration of martial law placed Indigenous peoples ‘on the footing of open enemies of the King, in a state of actual warfare against him’.¹⁴⁷ In reality, this belligerent status meant that any settlers could kill Indigenous people without fear of prosecution. The attacks and counter-attacks were not treated as crimes among British subjects, equally entitled to protection of life and property. Rather, they were treated as acts of war, where the battle lines were drawn between ‘them’ and ‘us’. ‘We’ were white and ‘they’ were an inferior race destined for extinction according to the laws of social Darwinism. Indigenous people stood outside of the nascent Australian legal system and were not constituent units of it. They were inherently extra-ordinary

¹⁴⁰ Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (April 1997) 32, 272.

¹⁴¹ *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 104 (Deane and Gaudron JJ).

¹⁴² W E H Stanner, *After the Dreaming: Black and White Australians — An Anthropologist’s View*, *Boyer Lecture Series* (Australian Broadcasting Commission, 1969) 25.

¹⁴³ ‘Proclamation’, *South Australian Gazette and Colonial Register*, 3 June 1837, 1. See also Robert Foster and Amanda Nettelbeck, *Out of the Silence: The History and Memory of South Australia’s Frontier Wars* (Wakefield Press, 2012) 21.

¹⁴⁴ ‘Proceedings of the Council. Tuesday, September 15’, *South Australian Register*, 19 September 1840, 4 (Governor George Lawler).

¹⁴⁵ *Ibid* (Advocate-General William Smillie).

¹⁴⁶ *Ibid* (Governor George Lawler).

¹⁴⁷ Despatch from Alfred Stephen to George Arthur, 3 February 1830, quoted in Reynolds, above n 131, 61.

rather than ordinary. Indeed, in 1837, the Western Australian Advocate-General, George Moore, described Indigenous people as ‘an extraordinary race’, by which he meant ‘beyond the possibility of understanding’.¹⁴⁸

It can be seen then that, from the outset, the ‘ordinary’ Australian was white. The Australian project was one of ‘extermination’ and later ‘absorption’, until not only the ordinary but even the average person was white. This legacy of the ordinary person persisted even after Aboriginal people were brought within the reach of settler law, at first only ‘when the aggression was made on a white man’¹⁴⁹ and later over inter se violence as settler law completed its claims over territory.¹⁵⁰ Even as settler law made the Aboriginal person a legitimate subject of prosecution, it denied other aspects of juristic personality such as the capacity to give evidence or sit on a jury.¹⁵¹ In 1836, as the New South Wales Supreme Court ruled that it had jurisdiction over Aboriginal defendants, the colonists asked rhetorically, ‘will black Natives be allowed to sit on the jury’,¹⁵² that bastion of the ordinary person.¹⁵³

Before moving on, a third thread should be picked up from Bishop Ullathorne’s recount of the horrors of the antipodes. It should be noted that the sexual innocence the Bishop attributed to the ‘naked savage’ wiped away their sexuality. Under the colonial gaze, the ‘naked savage’ became ‘pure’ and untainted by the sexual perversions of Europe.¹⁵⁴ Not only that, the colonial gaze came to be internalised by Indigenous people themselves. Indeed, ‘[o]ne of the most significant powers of

¹⁴⁸ Heather Douglas and Mark Finnane, *Indigenous Crime and Settler Law: White Sovereignty after Empire* (Palgrave Macmillan, 2012) 22, 34.

¹⁴⁹ *R v Murrell and Bummaree* (Unreported, Supreme Court of New South Wales, Dowling ACJ, 13 May 1836), reported in ‘Law Intelligence: Supreme Court — Criminal Side: Friday, May 13’, *The Sydney Herald*, 16 May 1836, 3.

¹⁵⁰ Lisa Ford, *Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia 1788–1836* (Harvard University Press, 2010) 2, 12, 183, 210.

¹⁵¹ On Aboriginal witnesses, see Douglas and Finnane, above n 148, 55–9. On the whiteness of juries, see at 75–6. In that connection, for the absence of a right of Indigenous defendants to be judged by a jury of their Indigenous peers, see *R v Walker* [1989] 2 Qd R 79, 85–6 (McPherson J, Andrews CJ and Demack J agreeing).

¹⁵² ‘Jack Congo Murrell — The Black Native’, *The Sydney Herald*, 5 May 1836, 2.

¹⁵³ *Lindsay* (2015) 255 CLR 272, 300–1 [83] (Nettle J).

¹⁵⁴ Andrea Smith, ‘Queer Theory and Native Studies: The Heteronormativity of Settler Colonialism’ in Qwo-Li Driskill et al (eds), *Queer Indigenous Studies: Critical Interventions in Theory, Politics and Literature* (University of Arizona Press, 2011) 43. For a contemporaneous example, see Cornelius Moynihan, *The Feast of the Bunya* (Gordon and Gotch, first published 1901, 1985 ed) 100 n 62 (‘In their ignorance Europeans have mistaken the meaning of the Booballai, which in reality is a moral lesson to the novices, meant particularly to deter them from those unnatural offences, all too prevalent among civilised races’). Cf the anthropological findings of homoerotic practices collected in Dunn/Holland et al, above n 61, 31–41.

colonisation is that it replicates itself within the culture it colonises'.¹⁵⁵ In Australia, that phenomenon has been 'so pervasive that Aboriginal people participate in the coloniser's work, refuting the possibility that non-heterosexuality is culturally authentic'.¹⁵⁶ This is not to deny that there may have been continuities between some Indigenous sexual norms and the norms of their colonisers, nor to claim that Indigenous people lacked agency in the process. It is simply to point out the possibility that for Indigenous people, heteronormativity and homophobia may have colonial, not pre-colonial, origins.

It can be seen that from the inception of the present political and legal structure of Australia, the ordinary Australian was overwhelmingly male, white and defensively heterosexual. Received ideas of ordinariness in Australia today are the product of this history. As *Lindsay* reveals, a little over 175 years since the Molesworth Committee and the Myall Creek Massacre, these phantoms of history continue to haunt the law.

V THE FUTURE OF THE ORDINARY PERSON

Just as ordinariness has a history, so too does the test designed to capture it: the ordinary person test. Even though provocation has been deployed as a partial defence since the Middle Ages,¹⁵⁷ it was not until the mid-19th century that the ordinary person first graced courtrooms. A related construct, 'the reasonable man ... was born during the reign of Victoria',¹⁵⁸ and appeared in a provocation case in *R v Kirkham*¹⁵⁹ in 1837, the year before the Molesworth Committee Report and the Myall Creek Massacre. In summing up, Coleridge J told the jury that the law 'considers man to be a rational being and requires that he should exercise a reasonable control over his passions'.¹⁶⁰ In 1869, Keating J incorporated that direction into a test in *R v Welsh*, telling the jury that the provocative conduct must be such that the 'violence of passion' it caused would be 'likely to be aroused ... in the breast of a reasonable man'.¹⁶¹ Although Keating J's test had not yet been embraced as a definitive statement of the law, when a draft English Code was produced in 1879, provocation was included with an objective element. In the process, the 'reasonable man' was transcribed as

¹⁵⁵ Troy-Anthony Baylis, 'I Can See Queerly Now' in Meg Hale (ed), *Blak Wave* (Next Wave Festival, 2014) 31, 32.

¹⁵⁶ *Ibid.*

¹⁵⁷ See *Watts v Brains* (1600) Cro Eliz 779; 78 ER 1009; *Royley's Case* (1611) Cro Jac 296; 79 ER 254; *Maddy's Case* (1672) T Raym 212; 83 ER 112; 1 Vent 158; 86 ER 108; *R v Mawgridge* (1707) Kelyng J 119; 84 ER 1107.

¹⁵⁸ *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service* [2014] PTSR 1081, 1083 [1] (Lord Reed JSC).

¹⁵⁹ (1837) 7 C & P 115.

¹⁶⁰ *Ibid* 119 (Coleridge J). As to this being the first appearance of the reasonable man test in provocation, see Williams, above n 82, 741; Bernard Brown, 'The "Ordinary Man" in Provocation: Anglo-Saxon Attitudes and "Unreasonable Non-Englishmen"' (1964) 13 *International and Comparative Law Quarterly* 203, 203.

¹⁶¹ *R v Welsh* (1869) 11 Cox CC 336, 338 (Keating J).

the ‘ordinary person’.¹⁶² While the Code was never enacted in England, it served as inspiration for legislation in the colonies. The ordinary person arrived in New South Wales in 1883, Queensland in 1899, Western Australia in 1902 and Tasmania in 1924.¹⁶³ At common law, a reasonable man test was finally adopted as the law of England in 1914 in *R v Lesbini*.¹⁶⁴

Ultimately, the ordinary person was invented by judges and is constantly being reinvented every time a judge or juror conjures it up as an ‘anthropomorphic image’ of the objective standard.¹⁶⁵ The ordinary person is a legal fiction and like all social constructs, it is not created and recreated in a vacuum.¹⁶⁶ The ordinary person is constructed by a society, a society with a history and one with a relationship to that history. But as a construct, the ordinary person is not immutable or predetermined by historical forces. It can be changed, if not by judges, then by Parliament, and if not by Parliament, then by jurors.

In Australia, South Australia is now the only jurisdiction not to have reformed the law of provocation. It retains provocation courtesy of the common law.¹⁶⁷ The only fetter imposed by legislation is that the defendant may be required to give notice that he or she intends to adduce evidence of provocation.¹⁶⁸ Attempts at reform have, however, been made. In 2013, Tammy Franks MLC of the Greens introduced a Bill in the Legislative Council which provided that ‘conduct of a sexual nature by a person does not constitute provocation merely because the person was the same sex as the defendant’.¹⁶⁹ The Legislative Review Committee reviewed the Bill and found there was no need for it on the basis that the decision of the Full Court of the Supreme

¹⁶² Criminal Code Bill Commission, *Report of the Royal Commission Appointed to Consider the Law Relating to Indictable Offences*, C 2345 (1879) 100–101, cl 176.

¹⁶³ *Criminal Law Amendment Act 1883* (NSW) s 370; *Criminal Code Act 1899* (Qld) sch 1, s 268; *Criminal Code Act 1924* (Tas) sch 1, s 160; *Criminal Code Act 1902* (WA) sch 1, s 243.

¹⁶⁴ *R v Lesbini* [1914] 3 KB 1116–20 (Lord Reading CJ).

¹⁶⁵ *R v Smith* [2001] 1 AC 146, 172 (Lord Hoffman).

¹⁶⁶ *R v Jeffrey* [1967] VR 467, 478 (Barry J) (‘a mythical ordinary person’); *Masciantonio v The Queen* (1995) 183 CLR 58, 73 (McHugh J) (‘notion of an ordinary person is a pure fiction’); *Green* (1997) 191 CLR 334, 407 (Kirby J) (‘[t]he ordinary person is a fiction’); *R v Smith* [2001] 1 AC 146, 157 (Lord Hoffman), speaking of the effect of *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119; *Healthcare at Home Ltd v Common Services Agency for the Scottish Health Service* [2014] PTSR 1081, 1084 [2] (Lord Reed).

¹⁶⁷ *R v R* (1981) 28 SASR 321, 340 (Zelling J).

¹⁶⁸ *Criminal Procedure Act 1921* (SA) s 134(1)(c).

¹⁶⁹ *Criminal Law Consolidation (Provocation) Amendment Bill 2013* (SA) cl 3. See also South Australia, *Parliamentary Debates*, Legislative Council, 1 May 2013, 3804–7 (Tammy Franks); Kellie Toole, ‘South Australia and the Defence of Provocation’ (2013) 38 *Alternative Law Journal* 270, 270–1.

Court in *R v Lindsay* had solved the problem.¹⁷⁰ When the High Court resurrected the homosexual advance defence in *Lindsay*, Tammy Franks reintroduced her Bill,¹⁷¹ only for the Legislative Review Committee to again recommend against change, this time on the basis that the High Court had revealed that there was no problem in the first place.¹⁷² Running in parallel, the South Australian Law Reform Institute came to the opposite conclusion in the first stage of its review of provocation released in April 2017. It concluded that the homosexual advance defence is clearly discriminatory and warrants reform, but declined to give the details of the changes it will recommend until it has conducted a wider review of all aspects of the law of provocation in the second stage of its inquiry.¹⁷³ The stage two report is expected imminently and, in anticipation of its recommendations, former premier Jay Weatherill publicly committed to abolishing the homosexual advance defence.¹⁷⁴ In the lead up to the 2018 State election, candidates from both sides of politics matched his commitment.¹⁷⁵ If South Australia does opt to reform provocation, it has a number of options open to it. Even if law reform efforts pick up speed and overtake the publication

¹⁷⁰ Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee into the Partial Defence of Provocation* (December 2014) 40 [8.1]. See also South Australia, *Parliamentary Debates*, Legislative Council, 3 December 2014, 1920–2 (Gerry Kandelaars); South Australia, *Parliamentary Debates*, Legislative Assembly, 3 December 2014, 3157–8 (Annabel Digance). These abortive efforts to reform provocation were noted by the High Court in *Lindsay* (2015) 255 CLR 272, 282–3 n 66.

¹⁷¹ *Criminal Law Consolidation (Provocation) Amendment Bill 2015* (SA) cl 3. See also South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 705–6 (Tammy Franks).

¹⁷² Legislative Review Committee, Parliament of South Australia, *Report of the Legislative Review Committee on its Review of the Report of the Legislative Review Committee into the Partial Defence of Provocation* (2017) 7–8, 10. See also the interim report and related Hansard, in which the Committee resolved to await the outcome of Sun Sun’s retrial: Legislative Review Committee, Parliament of South Australia, *Interim Report of the Review of the Report of the Legislative Review Committee into the Partial Defence of Provocation* (2016) 17. See also South Australia, *Parliamentary Debates*, Legislative Council, 13 May 2015, 703–5 (Gerry Kandelaars), 9 March 2016, 3302–3 (Gerry Kandelaars); South Australia, *Parliamentary Debates*, Legislative Assembly, 13 April 2016, 5124–5 (Lee Odenwalder).

¹⁷³ South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (2017) 8 (recommendation 1), 38 [5.5.3], 40 [5.5.11], 43 [5.6.10] (recommendation 3). See also the South Australian Law Reform Institute’s review of discriminatory laws that led to the review of provocation: South Australian Law Reform Institute, *Audit Paper: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (September 2015) 107–114 [342]–[358].

¹⁷⁴ Legislative Review Committee (2017), above n 172, 8, 21.

¹⁷⁵ Bension Siebert, ‘Adelaide Candidates Unite Against “Gay Panic” Defence’, *In Daily* (online), 9 January 2018 <<https://indaily.com.au/news/2018/01/09/adelaide-candidates-unite-gay-panic-defence/>>.

of this article, the full breadth of options discussed below will remain relevant in assessing the effectiveness of any reform adopted.

The first option is to do nothing and simply rely on the march of progress and the inevitable dissipation of racism and homophobia in the community that is sure to come with it. According to this logic, eventually the ordinary person will no longer be homophobic or white, not as a matter of law but as a matter of fact. Indeed, when it comes to homophobia, it might be argued that the South Australian community has already reached that point. At Sun Sun's retrial in 2016, the jury did consider provocation but again found him guilty of murder,¹⁷⁶ suggesting the jurors were impervious to any homophobic narratives that may have been run. However, it is impossible to unscramble the jury's verdict to see how the ordinariness of being white interacted with the ordinariness of being homophobic. The larger point is that the law continued to allow a space for narratives to be run in defence of homophobia, holding out the potential of success in another case before another jury. It is worth remembering that the defence strategy has succeeded in relatively recent years in other jurisdictions before they reformed their provocation laws.¹⁷⁷ Moreover, there is nothing inevitable about the demise of homophobia or racism.¹⁷⁸

Rather than do nothing, the problems associated with holding killers to the standard of a white and homophobic person — who retains that kernel of whiteness and homophobia even after being contextualised — might be met by doing away with the ordinary person altogether, leaving only a subjective test to govern the law of provocation. According to early critical law theorists, this would allow full consideration of 'the social reality which surrounds the defendant's act', unmediated by the standards of heterosexual, white men that inhere in the ordinary person.¹⁷⁹ That was the solution advanced by law reform commissions in South Australia and Victoria in the 1970s and 1980s respectively.¹⁸⁰ It was also the solution offered by Murphy J in his dissent in *Moffa v The Queen*. His Honour reasoned that

¹⁷⁶ *R v Lindsay* (2016) 126 SASR 362, 362–3 [1], 364 [9] (Vanstone J, Kelly and Blue JJ agreeing). Note that special leave to appeal to the High Court a second time was refused: *Lindsay v The Queen* [2017] HCATrans 131 (16 June 2017) 543–78 (Nettle J, Gordon J agreeing).

¹⁷⁷ *R v Meerdink* [2010] QSC 158 (13 May 2010) (Applegarth J); *R v Petersen* (Unreported, Supreme Court of Queensland, Atkinson J, 13 October 2011).

¹⁷⁸ Cai Wilkinson, 'Are We Winning? A Strategic Analysis of Queer Wars' (2017) *Australian Journal of International Affairs* 1, 5–6; Kent Blore, 'Sexuality Law Reform and the Language of Progress: What Lies Behind Statements that Equality for Lesbian and Gay People is Inevitable?' (2013) 18 *Deakin Law Review* 391, 391–2.

¹⁷⁹ Dolores A Donovan and Stephanie M Wildman, 'Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation' (1981) 14 *Loyola of Los Angeles Law Review* 435, 467.

¹⁸⁰ Criminal Law and Penal Methods Reform Committee of South Australia, *Fourth Report: The Substantive Criminal Law* (1977) 21–2 [11.1], 27–8 [11.6]; Law Reform Commissioner Victoria, *Provocation and Diminished Responsibility as Defences to Murder*, Report No 12 (1982) 17–18 [1.24], 20 [1.30(a)].

[t]he objective test is not suitable even for a superficially homogeneous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian.¹⁸¹

However, as Moran notes, ‘abandoning the ideal of reasonableness to a realm of purely subjective standards is even more corrosive of equality’ than the existing shortcomings of the ordinary person.¹⁸² Abandoning an external standard because it serves dominant interests can only work to validate subjectivities that internalise those dominant interests.¹⁸³ Sun Sun may no longer be held to a white standard, but the corollary is that he will no longer be held to any standard except his own, giving rise to a deficit of moral judgment. As Norrie points out, ‘the factual issue whether the accused was in control is insufficient to answer the question of moral-legal judgment: should the accused be permitted the defence of provocation?’¹⁸⁴ Not only would provocation’s role of determining moral blameworthiness be undermined, but so too would the potential of using the law to hold homophobia to account. The homosexual advance defence would be given free rein.

Instead of deserting the ordinary person altogether, we may address its whiteness by making the ordinary person more subjective. This is what McHugh J attempted to do in dissent in *Masciantonio v The Queen*:

In a multicultural society such as Australia, the notion of an ordinary person is pure fiction. Worse still, its invocation in cases heard by juries of predominantly Anglo-Saxon-Celtic origin almost certainly results in the accused being judged by the standard of self-control attributed to a middle class Australian of Anglo-Saxon-Celtic heritage, that being the stereotype of the ordinary person with which the jurors are most familiar ... [U]nless the ethnic or cultural background of the accused is attributed to the ordinary person, the objective test of self-control results in inequality before the law. Real equality before the law cannot exist when ethnic or cultural minorities are convicted or acquitted of murder according to a standard that reflects the values of the dominant class but does not reflect the values of those minorities.¹⁸⁵

¹⁸¹ *Moffa v The Queen* (1977) 138 CLR 601, 626 (Murphy J).

¹⁸² Moran, above n 27, 16.

¹⁸³ *Ibid* 206, 215.

¹⁸⁴ Norrie, above n 68, 127–8. See also *R v Smith* [2001] AC 146, 208 (Lord Millet in dissent).

¹⁸⁵ *Masciantonio v The Queen* (1995) 183 CLR 58, 73–4 (McHugh J) (reference omitted), relying heavily on Yeo, above n 92, 12–3. Though Yeo later reversed his position: Stanley Yeo, ‘Sex, Ethnicity, Power of Self-Control and Provocation’ (1996) 18 *Sydney Law Review* 304, 305.

On this approach, Sun Sun would be subject to an ‘ordinary Aboriginal person’ standard. Whereas the current approach treats Sun Sun’s Aboriginality as only relevant to assessing the gravity of the provocative conduct (provocativeness), an ordinary Aboriginal person standard would also take into account his Aboriginality in assessing the power of self-control expected of him (provocability). Such a test, however, would not be new. An ordinary Aboriginal person test applied in the Northern Territory from the 1950s, when it was developed by Kriewaldt J,¹⁸⁶ until 2006 when the Territory reformulated its provocation provision to fall in line with other jurisdictions.¹⁸⁷ That experience in the Northern Territory reveals that an ordinary Aboriginal person test does not solve white hegemony.

One problem with the test is that it implied that Aboriginal people have less self-control.¹⁸⁸ Indeed, Kriewaldt J perceived that a lack of civilisation caused Aboriginal people to resort to violent responses. For his Honour, civilisation was also a marker of humanity, so that a person with less self-control was also less human. In one case, Kriewaldt J directed a presumably all-white jury:

You may draw a distinction between the amount of provocation which is needed before *the ordinary reasonable human being, such as you are*, would lose his self-control, and the lesser, if you think it applies, the lesser degree of provocation needed before an Aboriginal of Australia loses his self-control.¹⁸⁹

For his Honour, the ordinary Aboriginal person test served the assimilation policy; the test’s purpose was to track Aborigines as they were civilised and assimilated.¹⁹⁰

¹⁸⁶ See *R v Patipatu* [1951] NTJ 18; *R v Muddarubba* [1956] NTJ 317; *R v Nelson* [1956] NTJ 327; *R v Balir Balir* [1959] NTJ 633. This test was preserved in the idea of ‘an ordinary person similarly circumstanced’ in s 34 of sch 1 of the *Criminal Code Act 1983* (NT). See *Jabarula v Poore* (1989) 68 NTR 26, 28 (Kearney J); *Mungatopi v The Queen* (1991) 2 NTLR 1, 6–7 (Martin, Angel and Mildren JJ).

¹⁸⁷ *Criminal Reform Amendment Act (No 2) 2006* (NT) ss 8, 17.

¹⁸⁸ *R v Miller* [2009] 2 Qd R 86, 97–8 [52] (Chesterman JA, McMurdo P and Fraser JA agreeing) (‘Underlying, and implicit in, the ground is that Aboriginal persons, or Aboriginal men, differ from others outside the group in their capacity for exercising self-control in the face of insults and provocation not referable to their race or Aboriginality. It is a large assertion that all members of one group differ from others outside the group in the extent to which they exercise self-control, and one that cannot be accepted in the absence of compelling evidence’). More broadly on the issue of inadvertently applying racist stereotypes in attempting to avoid applying dominant norms, see *Videski v Australian Iron and Steel Pty Ltd* (Unreported, New South Wales Court of Appeal, 17 June 1993) 6 (Kirby P), 9 (Meagher JA).

¹⁸⁹ *R v MacDonald* [1953] NTJ 186, 189 (Kriewaldt J), quoted in Colin Howard, ‘What Colour is the “Reasonable Man”?’ (1961) *Criminal Law Review* 41, 44 (emphasis added).

¹⁹⁰ Heather Douglas, ‘Assimilation and Authenticity: The “Ordinary Aboriginal Person” and the Provocation Defence’ (2006) 27 *Adelaide Law Review* 199, 203; Martin Kriewaldt, ‘The Application of the Criminal Law to the Aborigines of the Northern Territory of Australia’ (1960) 5(1) *University of Western Australia Law Review* 1, 4–5. See also Yeo, ‘Sex, Ethnicity, Power of Self-Control and Provocation’, above n 185, 316.

Yet lurking beneath the assimilation logic was the idea that Indigenous people are genetically incapable of being civilised because their ‘psychology is very different from that of their English conquerors’.¹⁹¹ Reduced to stereotypes about lack of self-control, the ordinary Aboriginal person test did not so much liberate Indigenous people from white standards as ‘other’ them, even dehumanise them.

A second problem with an ordinary Aboriginal person test is that the idea of an ordinary Aborigine in the hands of white judges and jurors becomes bound up in the idea of an ‘authentic’ Aborigine. Heather Douglas has shown that the demand for Aboriginal authenticity led defence counsel to peddle a narrative that their client was unassimilated and uncivilised, and prosecutors to emphasise the ways in which the defendant had tainted their cultural purity through exposure to the effects of colonisation.¹⁹² Both problems with the ordinary Aboriginal person test point to a deeper problem about who has the authority to construct the ordinary Aborigine. Without addressing the underlying dominance of whiteness — including its ordinariness — assigning a race to the ordinary person will not eliminate the power of whites to speak for it.

Rather than investing the ordinary person with more characteristics, reformists may instead seek to remove its undesirable qualities. This has been the approach taken in some jurisdictions to deal with the homosexual advance defence. The provocation provision in the Australian Capital Territory, the Northern Territory and Queensland are all now subject to the proviso that a non-violent sexual advance cannot, by itself, constitute provocation.¹⁹³ New South Wales has replaced provocation with a new defence of ‘extreme provocation’, under which only a serious indictable offence will qualify as provocative conduct. Out of caution, New South Wales also carved out non-violent sexual advances from the ambit of what can amount to extreme provocation.¹⁹⁴ Given that a non-violent sexual advance would only very rarely amount to a serious indictable offence, the carve out in New South Wales appears to be almost entirely symbolic.¹⁹⁵ In effect the legislatures in these jurisdictions intervened to raise the bar and expect a higher measure of self-control after the High Court refused to do so in *Green v The Queen*.¹⁹⁶ That is, the legislature has decreed that violent homophobia is not normal or ordinary, or to the same effect, that homophobia is not a morally defensible reason for killing. Thus, an ordinary person in those jurisdictions

¹⁹¹ Howard, above n 189, 41.

¹⁹² Douglas, above n 190, 219–20.

¹⁹³ *Crimes Act 1900* (ACT) s 13(3), introduced by *Sexuality Discrimination Legislation Amendment Act 2004* (ACT) sch 2, pt 2.1; *Criminal Code Act 1983* (NT) sch 1, s 158(5), introduced by *Criminal Reform Amendment Act (No 2) 2006* (NT) s 17; *Criminal Code Act 1899* (Qld) sch 1, s 304(4), (8), introduced by *Criminal Law Amendment Act 2017* (Qld) s 10.

¹⁹⁴ *Crimes Act 1900* (NSW) s 23(3)(a), introduced by *Crimes Amendment (Provocation) Act 2014* (NSW) sch 1.

¹⁹⁵ Thomas Crofts and Arlie Loughnan, ‘Provocation, NSW Style: Reform of the Defence of Provocation in NSW’ [2014] *Criminal Law Review* 109, 123.

¹⁹⁶ See Blore, above n 83, 41–2.

is no longer capable of killing simply because they were faced with a non-violent sexual advance. It should be noted, especially in the context of *Lindsay v The Queen*, and unlike the Bill introduced by Tammy Franks, that these reforms are truly queer; they did not ‘[codify] categories of sexuality in the process’ of addressing the homosexual advance defence.¹⁹⁷ So the queerness of prostitution is no more of an excuse than the queerness of homosexuality. Had Andrew made his offer to Sun Sun in Queensland, the High Court’s efforts to split queer sexualities would have been in vain.

Reformists might instead seek to raise the standard of ordinariness to undermine the defence of provocation altogether. They might insist that ordinary people today do not kill. Whatever may have been the case in former times, far from being ordinary, it is now considered extraordinary to form an intention to kill or cause grievous bodily harm (the objective limb of provocation).¹⁹⁸ This is an appeal to common sense about what is normal in contemporary society. The rhetoric is synonymous with a moral judgment that a person is never justified in taking life (unless, perhaps, they do so in self-defence); in Moran’s language, that killing is inconsistent with being attentive to the interests of others. As Murphy J said in *Moffa*:

It degrades our standards of civilization to construct a model of a reasonable or ordinary man and then to impute to him the characteristic that, under provocation (which does not call for defence of himself or others), he would kill the person responsible for the provocation.¹⁹⁹

Acceptance of the claim that killing is extraordinary, as well as other intractable problems with provocation, especially its gendered application, led to its abolition in Tasmania, Victoria, Western Australia, and New Zealand in the 2000s.²⁰⁰ In its wake, Victoria experimented with a new offence of defensive homicide, but the new offence fared no better in addressing the problems with provocation and was itself abolished in 2014.²⁰¹

¹⁹⁷ Ibid 64. See also Aleardo Zanghellini, ‘Queer, Antinormativity, Counter-Normativity and Abjection’ (2009) 18 *Griffith Law Review* 1, 2.

¹⁹⁸ Williams, above n 82, 742 (‘there are in this orderly age hardly any circumstances in which it can be asserted that an ordinary man would kill another person merely out of passion’). See also *Attorney-General (Jersey) v Holley* [2005] 2 AC 580, 589 [7] (Lord Nicholls).

¹⁹⁹ *Moffa v The Queen* (1977) 138 CLR 601, 627 (Murphy J).

²⁰⁰ *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas) s 4, repealing *Criminal Code Act 1924* (Tas) sch 1, s 160; *Crimes (Homicide) Act 2005* (Vic) s 3, inserting *Crimes Act 1958* (Vic) s 3B; *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12, replacing *Criminal Code 1902* (WA) sch 1, s 281; *Crimes (Provocation Repeal) Amendment Act 2009* (NZ) ss 4, 5, repealing *Crimes Act 1961* (NZ) ss 169, 170.

²⁰¹ *Crimes (Homicide) Act 2005* (Vic) ss 4, 6, inserting *Crimes Act 1958* (Vic) ss 4, 9AD, repealed by *Crimes Amendment (Abolition of Defensive Homicide) Act 2014* (Vic) s 3.

However, it would be beguilingly simple to think that the homophobia of the ordinary person can be solved neatly by abolishing provocation or carving out the homosexual advance defence from its ambit. As with all law reform, either solution may raise unintended consequences or prove ineffective to delegitimise homophobic violence once and for all. One unintended consequence is that limiting or eliminating any defence carries the risk of accentuating the disproportionate impact of the criminal justice system on Indigenous Australians. For this reason, the Aboriginal Legal Rights Movement has expressed its ‘oppos[ition] to the abolition of the provocation defence’ in South Australia.²⁰² This presents the classic problem that confronts intersectionality: the pursuit of ‘conflicting political agendas’.²⁰³ No doubt the High Court appreciated these conflicting agendas in choosing to emphasise a narrative of race over sexuality in *Lindsay*. On the one hand, the law should not legitimise homophobic violence. Provocation should be abolished or restricted on this basis. On the other hand, given that Indigenous people are more likely to be arrested and convicted, any law that operates to increase the sentencing range will have a greater impact on Indigenous people and contribute to their over-representation in prison populations.²⁰⁴ Even if the availability of any one defence has only a minimal impact on incarceration rates, from an Indigenous perspective, we must guard against *any* increase in the burden of the criminal justice system on Indigenous people. Provocation should be retained without amendment on this basis. Queer law reform advocates faced a similar dilemma in campaigning to exclude the homosexual advance defence from provocation in other jurisdictions which have mandatory sentencing for murder.²⁰⁵ Success meant subjecting people to ‘an extreme breach of accepted standards’ that punishment should be tailored to fit the crime in the particular circumstances of the case.²⁰⁶

Three things should be said about the seeming impossibility of this choice between queer victims and Aboriginal defendants. First, although the short-term political outcome advocated by each sectional group is mutually exclusive — either provocation is retained intact or it is not — the political agenda and the desired long-term political outcome of each need not be. There is no reason why we should not dare to imagine a legal system which is neither racist nor heteronormative.

Second, until we reach that legal Utopia, intersectionality requires difficult decisions to be made. But those decisions should be made with that ultimate aim of Utopia

²⁰² Legislative Review Committee (2017), above n 172, 27 [8.10].

²⁰³ Kimberle Williams Crenshaw, ‘Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color’ (1991) 43 *Stanford Law Review* 1241, 1252.

²⁰⁴ Heather McRae et al, *Indigenous Legal Issues: Commentary and Materials* (Lawbook, 4th ed, 2009) 557 [10.790].

²⁰⁵ See, eg, Blore, above n 83, 53.

²⁰⁶ Marcia Langton, ‘A Tragedy of Dumb Politics: Does Mandatory Sentencing Cause Fundamental Damage to the Legal System?’ in Hossein Esmaeili, Gus Worby and Simone Ulalka Tur (eds), *Indigenous Australians, Social Justice and Legal Reform: Honouring Elliott Johnston* (Federation Press, 2016) 63, 63.

in mind, directed to untangling the racist and heteronormative aspects of the law and isolating them for removal, rather than entrenching law reform compromises. If some political objectives are to be pursued at the expense of others, we should at least privilege those that deal with the underlying causes of the problem rather than those that merely mask it. The causes of Indigenous over-representation in prison are multifaceted and no doubt the availability of defences has its role to play in attenuating or accentuating the problem. However, the underlying causes are bound up in a history of subjugation by colonial authorities, in the ongoing effects of colonisation such as disempowerment and socio-economic disadvantage, and in the ongoing experiences of colonisation through overpolicing and overcharging, all of ‘which bring Aboriginal people into conflict with the criminal justice system in the first place’.²⁰⁷ The presence or absence of provocation as a defence will not address those deeper underlying causes. By contrast, legally endorsed homophobia persists so long as the law deems it ordinary to react to a homosexual advance with lethal violence. The presence or absence of provocation in its present form in South Australia has a direct bearing on the problem — the law’s excuse of violent homophobia. For this reason, provocation must be reformed or abolished as a step towards a legal system cured of its worst colonial vestiges, both racist and homophobic.

However, the third point to note about intersectionality is that the gaze of law reform cannot be narrowed to provocation alone, so that the problems raised by queer advocates are addressed while those of Indigenous advocates are not. Engaging in such a limited and narcissistic politics risks charges of homonationalism: ‘the tendency among some white gays to privilege their racial and religious identity’.²⁰⁸ Depending on how the law of provocation is framed by law reform advocates, there is also a risk that they will contribute to narratives about ‘other’ races and cultures condoning homophobia, in contrast to the progress made by white civilisation in accepting gays and lesbians. There is one aspect of provocation in particular which is vulnerable to being exploited for criticism by homonationalism in this way: that it treats the defendant’s non-white race and culture as relevant to how the ordinary person would react to a homosexual advance. Simplified for the purposes of opposition, cases like *Lindsay* may be re-read as authority that Indigenous people are more likely to exhibit violent homophobia. Even though the High Court was careful to avoid racialising homophobia in *Lindsay*, such reductive politics should be anticipated and guarded against in the age of homonationalism, ‘marked by the entrance of (some)

²⁰⁷ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 1, 15 [1.7.1].

²⁰⁸ Sarah Schulman, ‘Israel and “Pinkwashing”’, *New York Times* (online), 22 November 2011 <<http://www.nytimes.com/2011/11/23/opinion/pinkwashing-and-israels-use-of-gays-as-a-messaging-tool.html?mcubz=1>>. Note that Jasbir Puar, who first coined the term ‘homonationalism’, would likely disavow Schulman’s formulation as reductive: see Jasbir Puar, ‘Rethinking Homonationalism’ (2013) 45 *International Journal of Middle East Studies* 336, 336–7. Cf Jason Ritchie, ‘Pinkwashing, Homonationalism, and Israel-Palestine: The Conceits of Queer Theory and the Politics of the Ordinary’ (2015) 47 *Antipode* 616, 631.

homosexual bodies as worthy of protection by nation-states²⁰⁹ and the simultaneous exclusion of racial others who are ‘castigate[d] ... as homophobic and perverse’.²¹⁰ If white queer advocates fall into the trap of privileging their whiteness by dealing exclusively with the homosexual advance defence or by othering Indigenous people as homophobic, they risk becoming agents of the existing normative order, not the liberators from regimes of knowledge that queer theory promises.

There is also the prospect that the problems associated with provocation might outlive its abolition or reform. That is not to discount the value of law reform, but simply to rein in expectations of what it can achieve. When it comes to the exclusionary model of carving out homosexual advances, Thomas Crofts and Arlie Loughnan have pointed to the prospect that Australian courts will follow the decision of the Court of Appeal of England and Wales in *R v Clinton*.²¹¹ In England, for the rebadged partial defence of ‘loss of control’, there is now an express statutory carve out where the killing is triggered by sexual infidelity.²¹² Yet in *Clinton*, the Court held that the carve out does not apply where the ‘sexual infidelity is integral to and forms an essential part of the context’ of the killing.²¹³ The Court eviscerated the carve out due to its concern that compartmentalising sexual infidelity would be unrealistic and carry the potential for injustice.²¹⁴ The High Court was animated by similar concerns about preserving the ‘larger dimension’ in both *Green* and *Lindsay*, suggesting that home grown carve outs for homosexual advances are liable to suffer the same fate as in *Clinton*.²¹⁵

Abolishing provocation altogether may fare no better. Even after the abolition of provocation in Victoria, Kate Fitz-Gibbon and Sharon Pickering found that provocation-style cases were still being run with ‘the same narratives dominating the courtroom’.²¹⁶ According to an anonymous Supreme Court judge in her study, ‘juries will still acquit of murder if they think there is serious provocation. They’ll use some other concept’.²¹⁷ The reason is that ‘[o]ld norms do not die; they are

²⁰⁹ Puar, above n 208, 337.

²¹⁰ Jasbir Puar, *Terrorist Assemblages: Homonationalism in Queer Times* (Duke University Press, 2007) xii.

²¹¹ Crofts and Loughnan, above n 195, 123–4.

²¹² *Coroners and Justice Act 2009* (UK) c 25, s 55(6)(c).

²¹³ *R v Clinton* [2013] QB 1, 17 [39] (Lord Judge CJ, Henriques and Gloster JJ agreeing).

²¹⁴ *Ibid.* For anticipation of the problem of compartmentalisation, see Norrie, above n 25, 289.

²¹⁵ *Lindsay* (2015) 255 CLR 272, 300 [81] (Nettle J); South Australian Law Reform Institute, *The Provoking Operation of Provocation*, above n 173, 40–2 [5.6.3]–[5.6.8].

²¹⁶ Kate Fitz-Gibbon and Sharon Pickering, ‘Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond’ (2012) 52 *British Journal of Criminology* 159, 169, quoting an anonymous Victorian policy advisor. See also Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave Macmillan, 2014) 190.

²¹⁷ Fitz-Gibbon and Pickering, above n 216, 170.

resurrected in empty spaces, deliberate ambiguities, and new rhetorics. Indeed, old norms not only do not die, but also live alongside, and are perpetuated by, the denial that they still live'.²¹⁸ On a deeper level, Michel Foucault would say that the reason is that norms have grown more powerful than the law. For him, a consequence of the rising power of discourses centred around reproduction in the 18th and 19th centuries 'was the growing importance assumed by the action of the norm, at the expense of the juridical system of the law'.²¹⁹

As an example of norms outliving legal change, the defence ran a classic homosexual advance defence strategy in the Victorian case of *R v Johnstone*,²²⁰ even though provocation had been abolished. The strategy was an attempt to provide the jury with one of those 'other concepts' hinted at by the anonymous Supreme Court judge: manslaughter due to lack of intent or the new alternative verdict of defensive homicide. Aaron Johnstone claimed he 'lost it' when his gay housemate, Phillip Higgins made a sexually provocative remark.²²¹ Aaron punched Phillip three or four times until he fell to the ground, kicked him until he was unconscious and then dropped a platypus statue over his head.²²² Ultimately the strategy failed. The jury found Aaron guilty of murder both at first instance and at retrial following an appeal.²²³ The point, however, is that the law continued to allow a space for homophobic narratives. Of course, much of provocation's reach beyond the grave in Victoria can be put down to the experiment with defensive homicide which came to its own end in 2014. However, the New Zealand case of *R v Ahsee*²²⁴ shows that the homosexual advance defence can work effectively even if provocation is abolished and not replaced. Sold the usual story about a homosexual advance from a predatory older man, the jury found that Willie Ahsee did not intend to kill or cause grievous bodily harm when he repeatedly stabbed Denis Phillips so violently that the blade broke in two.²²⁵ Even if homophobic narratives are eliminated from murder trials, Rebecca McGeary and Kate Fitz-Gibbon have raised the possibility that the same problems will simply play out at the sentencing stage before the sentencing judge, which is borne out by the sentences they reviewed from 2000 to 2011.²²⁶

²¹⁸ Victoria Nourse, 'The "Normal" Successes and Failures of Feminism and the Criminal Law' (2000) 75 *Chicago-Kent Law Review* 951, 952.

²¹⁹ Foucault, above n 11, 144.

²²⁰ [2008] VSC 584 (19 December 2008); [2011] VSC 300 (30 June 2011).

²²¹ *Johnstone v The Queen* (2011) 31 VR 320, 323 [18] (Neave JA, Tate JA agreeing).

²²² *Ibid* 323 [19] (Neave JA, Tate JA agreeing).

²²³ *R v Johnstone* [2008] VSC 584 (19 December 2008) [3] (Coghlan J); *R v Johnstone* [2011] VSC 300 (30 June 2011) [1] (Osborne J).

²²⁴ [2011] NZHC 2009 (15 December 2011).

²²⁵ *Ibid* [27]–[29], [43] (Asher J).

²²⁶ Rebecca McGeary and Kate Fitz-Gibbon, 'The Homosexual Advance Defence in Australia: An Examination of Sentencing Practices and Provocation Law Reform' (2018) *Australian and New Zealand Journal of Criminology* (forthcoming, pre-published 11 January 2018). A possible solution to this further problem is guideline

These shortcomings of law reform arise because it is being called upon to address something that transcends legal categories. Theorists have shown how moral questions about whether the killing was justified continue to animate the law of provocation even though justificatory logic no longer has a foothold in the structure of provocation. In the same way, the spectre of ordinariness threatens to lurk as an unarticulated normative basis of the law, whether or not the law explicitly recognises the relevance of ordinariness. Ultimately, the ordinary person will remain violently homophobic so long as juries and judges can be convinced that homophobia is ordinary. Unless heteronormativity in the community is addressed, ordinariness is liable to manifest even in the absence of an ordinary person test.

Having said that, law reform would not be an exercise in futility. Even if abolition or reform is not effective in each and every individual case, it would nonetheless send a message that homophobia should not justify lethal violence.²²⁷ The reason it would send a message, according to Foucault, is that ‘the law operates more and more as a norm’.²²⁸ As laws and norms operate on the same plane, the twin forces of legal change and cultural change are mutually reinforcing.²²⁹ On this view, increasing acceptance of homosexuality leads to less homophobia among jurors as well as calls for changes to be made to the law of provocation. This in turn further delegitimises homophobia, and eventually immunises juries from narratives about heterosexual male honour. Thus, law reform cannot directly solve all the problems associated with provocation, but neither can it be dismissed entirely as a hollow gesture.

It can be seen that, from an Indigenous perspective, it is equally unsatisfactory to attempt to widen the reach of provocation through an ordinary Aboriginal person test as it is to attempt to narrow provocation’s scope by removing non-violent sexual advances from the circumstances in which the defence arises. The reason is that whichever way the law moves, white hegemony is preserved. The ordinariness of whiteness manifests in narratives of barbarism and inauthenticity in the first reform and in cementing high Indigenous prison rates in the second. From a queer perspective, juries may continue to condone lethal homophobia, whether the ordinary person is subjectivised or inoculated to non-violent sexual advances, or even

sentencing: Kate Fitz-Gibbon, ‘Homicide Law Reform in New South Wales: Examining the Merits of the Partial Defence of “Extreme” Provocation’ (2017) 40 *Melbourne University Law Review* 769, 804, 814.

²²⁷ Crofts and Loughnan, above n 195, 124; Kerstin Braun and Anthony Gray, ‘*Green and Lindsay*: Two Steps Forward — Five Steps Back: Homosexual Advance Defence — *Quo Vadis?*’ (2016) 41 *University of Western Australia Law Review* 91, 117.

²²⁸ Foucault, above n 11, 144.

²²⁹ See Gerald Torres, ‘Some Observations on the Role of Social Change on the Courts’ (2006) 54 *Drake Law Review* 895; Gerald Torres, ‘Legal Change’ (2007) 55 *Cleveland State Law Review* 135; Lani Guinier, ‘Demosprudence through Dissent’ (2008) 122 *Harvard Law Review* 6; Lani Guinier, ‘Courting the People: Demosprudence and the Law/Politics Divide’ (2009) 89 *Boston University Law Review* 539; Adiva Sifris, ‘Lesbian Parenting in Australia: Demosprudence and Legal Change’ (2011) 28(1) *Law in Context* 8.

whether provocation as a partial-defence is removed altogether. The ordinariness of homophobia can survive any of these changes and manifest in new and unexpected ways in courtrooms. It follows that Indigenous and queer law reform advocates are driven to address ordinariness itself; we must colour and queer the ordinary.

VI QUEERING THE ORDINARY

Queer theory offers one way to destabilise the self-evident ordinariness of being white and homophobic. For queer theorists, norms about what it means to be a man or a heterosexual are not ingrained in nature; rather, these norms are constructed by society. For example, Foucault revealed that the ‘homosexual’ only emerged as a sexual identity in the 19th century, and the ‘heterosexual’ only later in response.²³⁰ In fact, if one looks to Ancient Greek sources, entirely different sexual classifications existed, such as a person’s passive or active role during sex.²³¹ The crucial insight queer theory offers is that if the idea of being homosexual or heterosexual has not always existed, then there is nothing intrinsic or immutable about these ways of being today. Race and the naturalness of being white can be deconstructed in the same way.²³²

The present challenge is to use queer theory to undermine what it means to be ordinary without destroying the regulative standard altogether. The moral dimension of provocation impels us to retain some standard by which to cast judgments about the blameworthiness of killing. Thus, in order to queer the ordinary, we must first overcome a paradox. On the dominant account of queer theory, queer is deviant, perverse, abnormal and the other; it is at its core antinormative, the antithesis of ordinary, the counterpoint to the ordinary that gives both ends of the binary meaning. To queer is to deconstruct categories and norms. Yet ordinariness requires some bedrock of norms lest it be emptied of all content. As Lord Simonds LC said in respect of the ordinary person test, if ‘the normal man [is] endowed with abnormal characteristics, the test ceases to have any value’.²³³ Likewise, if ordinariness admits extraordinary qualities, it would mean everything and therefore nothing. Thus, an attempt to reconfigure ordinariness to fit queerness seems doomed to fail. Attempts to do the reverse, to tame queerness to fit some notion of the ordinary have been criticised as homonormative, as engaging in:

²³⁰ Foucault, above n 11, 43.

²³¹ Michel Foucault, *The Use of Pleasure: The History of Sexuality Volume 2* (Robert Hurley trans, Penguin Books, 1992) 35, 44–7 [trans of: *L’Usage des plaisirs* (first published (1984))].

²³² See, eg, Ruth Frankenberg, *White Women, Race Matters: The Social Construction of Whiteness* (University of Minnesota Press, 1993); Siobhan B Somerville, *Queering the Color Line: Race and the Invention of Homosexuality in America* (Duke University Press, 2000).

²³³ *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119, 1123.

a politics that does not contest dominant heteronormative assumptions and institutions — such as marriage, and its call for monogamy and reproduction — but upholds and sustains them while promising the possibility of a demobilized gay constituency and a privatized, depoliticized gay culture anchored in domesticity and consumption.²³⁴

But, need any attempt to queer the ordinary suffer the pitfalls of homonormativity?

Queer theory traditionally answers that question in the affirmative.²³⁵ Part of the reason for that is the lure of antinormativity, in that it embraces exclusion from the norm as a site from which to subvert the norm. It reclaims otherness and gives being excluded a sense of political purpose. Not only that, strategically ‘we tend to assume that when power fails to maintain itself, then in its absence we might find the agential space for contestation and intervention’.²³⁶ It seems difficult to imagine a capacity to subvert a norm while still subject to its power. However, as some queer theorists are beginning to suggest, queer theory might also benefit from a theoretical frame that allows queer subversion of the norm from *within*.²³⁷ Conceived in this way, rather than standing *outside* of the ordinary, queer is *part of* the ordinary.

One such theoretical frame is provided by François Ewald, who contends that from the early 19th century the norm shifted from a measurement against the rule — conceived as an absolute, much like the carpenter’s T-square — to a measurement against the average — a dispersed calculation that collates and gathers up everyone without exclusion.²³⁸ In this way:

the measurements, comparisons, adjudications, and regulations that generate the *average man* do so not in relation to a compulsory, uniform standard, but

²³⁴ Lisa Duggan, ‘The New Homonormativity: The Sexual Politics of Neoliberalism’ in Russ Castronovo and Dana D Nelson (eds), *Materializing Democracy: Toward a Revitalized Cultural Politics* (Duke University Press, 2002) 175, 179.

²³⁵ See, eg, Judith Butler, ‘Against Proper Objects’ (1994) 6 *differences* 1, 21 (‘normalizing the queer would be, after all, its sad finish’); David Halperin, *Saint Foucault: Towards a Gay Hagiography* (Oxford University Press, 1995) 113 (‘the more it verges on becoming a normative academic discipline, the less queer “queer theory” can plausibly claim to be’).

²³⁶ Vicki Kirby, ‘Transgression: Normativity’s Self-Inversion’ (2015) 26 *differences* 96, 114.

²³⁷ In 2015, *differences* devoted a special issue to the question of whether ‘queer theorizing [can] proceed without a primary commitment to antinormativity’, and in 2016, the *Journal for Early Modern Cultural Studies* devoted a special issue to the topic of queer early modernity beyond the antinormative, conceiving of the topic as being ‘deeply in touch with this present moment’: see Robyn Wiegman and Elizabeth A Wilson, ‘Introduction: Antinormativity’s Queer Conventions’ (2015) 26 *differences* 1, 1; Sarah Nicolazzo, ‘Introduction: Queer Early Modernity Beyond the Antinormative’ (2016) 16(4) *Journal for Early Modern Cultural Studies* 1, 4.

²³⁸ Ewald, above n 101, 140.

through an expansive relationality among and within individuals, across and within groups.²³⁹

This relationality renders the outlier subject to the standard measure at the centre of the norm, but equally it also embeds the outlier in the very heart of the norm. Stowed within heteronormativity are the seeds of the queer and stowed within whiteness are the seeds of colour. The norm then is ‘the reciprocal presence to one another of all the elements it unites’;²⁴⁰ the reciprocal presence of homosexuality in the face of heterosexuality and of Aboriginality in the face of whiteness. It is this relationality that holds out the hope that the ordinary can be queered.

Of course, to recognise that the queer inheres in the ordinary is not to say that heteronormativity provides a legitimate space for being queer. The periphery of the norm remains subject to the dictates of its centre. The reason why queerness inheres in the ordinary but not in heteronormativity is that we are speaking about two different orders of norms. There is a higher order norm — a kind of norm of norms — that the queer goes into the creation of a norm. However, the norm that is produced as a result of that process — the instantiation of that norm of norms — need not inherit that queer potential. That heteronormativity calls for the killing of queers bears this out.

Norms are, of course, human creations, so we can engineer a norm that reflects that higher order queer potential if we so choose. Such a norm would allow for ‘a zone of possibilities’ within the ordinary.²⁴¹ It would ‘[pluralize] the normal’, revealing that a ‘number of things can be normal’²⁴² or, as the courts would say, that ordinari-ness ‘lie[s] within a range’.²⁴³ It would give rise to an ordinary man who recognises his *potential* for homosexual desire, ‘free[ing] him to find and enjoy a sexuality of whatever sort emerged’, gay, straight or otherwise.²⁴⁴ The ordinary man bestowed with that queer potentiality would be liberated from the closet built around ‘his

²³⁹ Wiegman and Wilson, above n 237, 15 (emphasis added). The High Court has criticised equating the ‘average person’ with the ‘ordinary person’, but only because of the risk that jurors would perceive of the ‘average’ with too much precision: *Stingel v The Queen* (1990) 171 CLR 312, 331–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). However, Ewald, Wiegman and Wilson do not use ‘average’ as connoting any sense of a precise meaning.

²⁴⁰ Pierre Macherey, ‘Towards a Natural History of Norms’ in Timothy J Armstrong (ed), *Michel Foucault Philosopher: Essays* (Harvester Wheatsheaf, 1992) 176, 186.

²⁴¹ Lee Edelman, *Homographesis: Essays in Gay Literature and Cultural Theory* (Routledge, 2013) 114.

²⁴² Keja L Valens, *Desire Between Women in Caribbean Literature* (Palgrave Macmillan, 2013) 90. See also Heather Love, ‘Doing Being Deviant: Deviance Studies, Description, and the Queer Ordinary’ (2015) 26 *differences* 74, 91.

²⁴³ *R v Lindsay* (2014) 119 SASR 320, 364 [160] (Peek J). See also *Stingel v The Queen* (1990) 171 CLR 312, 331–2 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

²⁴⁴ Eve Kosofsky Sedgwick, *Epistemology of the Closet* (University of California Press, 1990) 207.

totalizing, basilisk fascination with and terror of homosexual possibility', even if in giving into that possibility it never materialises.²⁴⁵ Being same-sex attracted or being Aboriginal could be reinscribed as just another way of being ordinary.

The pursuit of such a norm centred around queer potentiality is a far larger political project than any law reform agenda. It would involve marshalling all of society — not just legally empowered individuals like legislators, judges or jurors — to engage in cultural change through an endless series of quotidian events — not a single event like delivering a verdict or amending a piece of legislation.²⁴⁶ One way to unlock the queer potential of the ordinary is to engage in a politics of empathy, in a widespread practice of being available²⁴⁷ to the other in face-to-face encounters,²⁴⁸ real and imagined. This may come close to Moran's norm of being attentive to the interests of others. As the construction of individuals is intersubjective, the individual is left with traces of the other simply by imagining being the other.²⁴⁹ Generalised across a population, such a practice of imagining otherness would aggregate into a norm similarly marked with traces of the other.²⁵⁰

Recourse to history can also help to normalise other ways of being. Remembering that "'mateship' found its expression in homosexuality' on the frontier can help to normalise the queer potential of homosocial bonds today.²⁵¹ Likewise, even remembering something as basic as the presence of Indigenous people at the birth of the Australian normative order can help to normalise being Indigenous today. Consider, for example, the debate about whether to correct plaques on statues in public squares and parks that tell history as though Indigenous people never existed, or at least as though the message is not intended for Indigenous people. This is consistent with the declarations of martial law by Governors Arthur and Lawler that placed Indigenous people firmly outside of the demarked limits of Australian society from

²⁴⁵ Ibid 206.

²⁴⁶ Cf Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence*, above n 216, 269; Peter Papathanasiou and Patricia Easteal, 'The "Ordinary Person" In Provocation Law: Is The "Objective" Standard Objective?' (1999) 11 *Current Issues in Criminal Justice* 53, 64, 65. Fitz-Gibbon, Papathanasiou and Easteal have in mind a more limited cultural change confined to the courtroom.

²⁴⁷ Availability in the sense of disponibilité: see Gabriel Marcel, *The Philosophy of Existentialism* (Manya Harari trans, Citadel Press, 1962) 39–40.

²⁴⁸ In the sense of the encounter with the face of the other that founds Emmanuel Levinas' ethics of responsibility for the other as the other-in-the-same. See, eg, Emmanuel Levinas, *Otherwise Than Being or Beyond Essence* (Alphonso Lingis trans, Martinus Nijhoff Publishers, 1981) 11–12, 180–1 [trans of: *Autrement qu'être ou au-delà de l'essence* (2nd ed, 1978)].

²⁴⁹ See Kirby, above n 236, 102–3.

²⁵⁰ Bettina Bergo, *Emmanuel Levinas* (3 August 2011) Stanford Encyclopedia of Philosophy <<https://plato.stanford.edu/entries/levinas/>> ('The responsibility and fraternity expressed now as the abyssal subject or other-in-the-same leaves a trace in social relations').

²⁵¹ Smith, above n 115, 320.

the beginning.²⁵² A corrected plaque would readdress its statement of history to an audience that includes Indigenous people, thereby affirming that they form part of the group. True it is, this would be a sign that the colonial state's claims to sovereignty over Indigenous people has succeeded, but it would also be a recognition that, as constituent elements of the group, Indigenous people are to be gathered up into the calculation of its norms. At the same time, the corrected plaque would be addressed to the public square, to the entire group — not just its Indigenous components — meaning that the norms society is communicating to itself would be a synecdochal reflection of the Indigenous voice within it. Yet this simple measure of correcting obvious errors of history is only one among innumerable measures required to normalise the other, and even it has faced considerable opposition.²⁵³ This only goes to show the enormity of what is required to queer and colour the ordinary.

VII CONCLUSION

When Andrew and Sun Sun walked into the Hallett Cove Tavern in 2011 the stage had been set nearly two centuries earlier. Like his cultural forebears who engaged in 'gin raiding' on the frontier, perhaps Andrew felt a sense of white entitlement to use Aboriginal bodies for sexual exploitation. He certainly does not appear to have felt any compunction in offering to pay Sun Sun for sex in front of his friends and family. Sun Sun too, no doubt, felt the ongoing impact of the colonisation first imposed on his ancestors, even if his disadvantage could not be attributed solely to colonisation in light of his acquired brain injury. Perhaps one of the impacts of colonisation felt by Sun Sun was a violent fear of homosexual possibility, a fear that can be traced not to anything intrinsic in the precolonial culture of Sun Sun's ancestors, but to Victorian moralism which was only heightened from the mid-19th century by the shame brought to bear by Sir William Molesworth. Sun Sun certainly reacted to Andrew's proposition according to the dictates of that heteronormativity. In defence of his heterosexual male honour, Sun Sun punched Andrew in the face, slammed his head into the ground, and then repeatedly stabbed him in the chest with a knife, severing his aorta.

When it came time two years later to judge Sun Sun's actions — to label what he did as murder or manslaughter — history also dictated the standard of ordinariness against which those actions were to be measured. Two vestiges of Australia's frontier society continue to inform notions of ordinariness today. First, because colonisers and Indigenous people were at war with each other, Indigenous people stood outside the nascent Australian legal system. Their gradual inclusion over time to serve white

²⁵² Stan Grant, 'It is a "Damaging Myth" that Captain Cook Discovered Australia', *ABC News* (online), 23 August 2017 <<http://www.abc.net.au/news/2017-08-23/stan-grant:-damaging-myth-captain-cook-discovered-australia/8833536>>.

²⁵³ See, eg, Keith Windschuttle, 'Let Cook and Macquarie Stand: Grant and Taylor are Wrong', *The Weekend Australian* (online), 23 August 2017 <<http://www.theaustralian.com.au/news/inquirer/let-cook-and-macquarie-stand-grant-and-taylor-are-wrong/news-story/40b157aac543734a6e0417b1397c3ec7>>.

interests has never fully displaced their original extraordinariness and conversely the ordinariness of being white. Second, the hyper-masculinity of white settler society meant more opportunities for more intense homosocial bonds — for the Australian ideal of ‘mateship’ — but equally heightened vigilance for and repulsion by the possibility of homosexual desire. The Molesworth Committee’s outing of that homosexual desire on the international stage was repressed on a societal scale and from that repression violent homophobia emerged as ordinary.

Those discourses of ordinariness have a very real impact on the law today. They feed directly into the objective limb of the test for provocation: was Andrew’s proposition capable of causing an ordinary person — infused with that history of normalised whiteness and violent homophobia — to lose self-control and form an intention to kill or cause grievous bodily harm? The ordinary person is, of course, a legal fiction and subsists in its current form for only so long as society maintains it. The law can be changed in the way it captures ordinariness. This is what a majority of the Full Court of the South Australian Supreme Court sought to do in *R v Lindsay*. Justice Peek in the lead judgment held that, as a matter of law, the ordinary person cannot be provoked into a homicidal rage by a non-violent homosexual advance. In effect, his Honour said, even if violent homophobia is still considered ordinary in some segments of society, it will not be considered ordinary for the purposes of the law. On appeal, the High Court refused to place any fetter on the law’s reception of societal norms about ordinariness. Their Honours refused to raise the bar of what the law expects from its subjects. If violent homophobia is ordinary, their Honours reasoned, then the jury should be entitled to construct an ordinary man who would kill in defence of his heterosexual masculinity.

Part of the reason their Honours declined to lay the homosexual advance defence to rest was that the case had a racial dimension. This brings intersectionality to the fore. Indigenous perspectives on why Sun Sun did what he did and Indigenous interests in maintaining the law of provocation as it stands come into direct conflict with queer perspectives about Andrew’s victimhood and queer interests in removing the homosexual advance defence from the ambit of provocation. Ultimately, maintaining the homophobia of the ordinary person will not address white entitlement nor address the underlying causes of over-representation of Indigenous people in the criminal justice system. By contrast, removing the homosexual advance defence will deal with the legal system’s endorsement of homophobia. For that reason, queer interests should be prioritised in this instance, but not at the expense of addressing those root causes of Indigenous over-representation as though it were a zero-sum game.

Given that the High Court has again refused to remove the homosexual advance defence, it now falls to the South Australian Parliament to do so. However, experience elsewhere has shown that tinkering with provocation or even abolishing it altogether may not solve the problem. Even in the wake of law reform, the ordinariness of whiteness and violent homophobia can manifest in courtroom narratives and verdicts tainted with racism or homophobia. Law reform advocates must not only address the ordinary person but ordinariness itself. A conservative option is simply to redefine the limits of the ordinary, thereby extending the protection of the law to a new category of privileged gays and lesbians, who are likely white, monogamous

and unwitting agents of the normative order that privileges heterosexuality. A more ambitious project is to attempt to draw out the inherent potentiality of the other in the ordinary, not only the privileged other who enjoys the rising status of acceptance, but the other who remains on the periphery of the norm. Empathy and history are two ways of revealing the possibility of other ways of being, and therefore of normalising the other. By remembering that there was an ‘other’ side of the frontier, the ordinary person becomes always potentially Indigenous. By reclaiming the findings of the Molesworth Committee as a source of pride rather than shame, we remember that the potential of homosexuality was always ordinary in colonial Australia.

A STATEMENT ON INCLUSIVE LAW AND RELIGION

I INTRODUCTION

‘Law and religion’, as a field of inquiry within the legal academy, is often associated with a partisan religious agenda. The agenda is advanced under the guise of protecting religious freedom from interference by the state or other non-state actors. All too often though, the seemingly legitimate objective of advancing religious freedom is a cover for saying that one ought to have the right to criticise others in speech or to discriminate against others in actions on the basis of a purported immutable order that is established by a deity — an order that cannot be challenged or questioned by humans.

We regard the association of law and religion with such a partisan religious agenda as both unfair and unfortunate. Moreover, we reject the frequent equation of law and religion scholarship with the advancement of a partisan religious agenda. Although the advancement of such an agenda is part of the body of scholarship in this field, it does not by any means define it, and it most certainly does not cover that field. While some might use the study of law and religion instrumentally as a vehicle to advance a partisan religious agenda, we see it as capable of encompassing those who consider the interaction of law and religion as an intrinsically worthy object of study in its own right, absent the advancement of any partisan agenda. In other words, we see law and religion as inclusive, and this statement explains the approach we take to its study.

II A STATEMENT ON INCLUSIVE LAW AND RELIGION

There are at least two ways of approaching the study of law and religion. One is to treat the two disciplines as institutionalised normative orders; as such, a scholar could study their systemic interaction. The other way is to treat the two as theoretical constructs, which consist of clusters of concepts; doing so allows a scholar to study their theoretical interaction. To be precise, one could call the latter approach ‘legal theory and theology’.¹ The former approach is social scientific, while the latter approach is humanistic. Hence, the study of law and religion spans both the humanities and the social sciences.

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¹ See Paul Babie, ‘Breaking the Silence: Law, Theology and Religion in Australia’ (2007) 31 *Melbourne University Law Review* 296.

A Law and Religion as Institutionalised Normative Orders

1.1 Those who claim religious liberty and those who oppose such claims are usually claiming to have the right to control the behaviour of others:

Neither side is actually asking to ‘just be left alone’: each is demanding a legal rule that affects and regulates the behavior of others and the state must make a choice between these conflicting entitlements.²

Deciding between these two opposing claims requires legal analysis and political thought. It is a matter of both legal doctrine and political philosophy.

1.2 We believe in the ‘right to freedom of thought, conscience and religion’ and the ‘right to freedom of opinion and expression’, as stated in the *Universal Declaration of Human Rights*,³ and later concretised in the *International Covenant on Civil and Political Rights*.⁴ These rights, with some variation, are also given effect in the domestic constitutional regimes of many liberal democratic states.⁵ However, while we believe in the inviolability of the freedom of conscience in the *forum internum*, we do not believe that the exercise any of these rights in the *forum externum* is absolute. In short, we agree with Justice Owen J Roberts of the United States Supreme Court, who wrote in *Cantwell v Connecticut* that a state must distinguish between the ‘freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society.’⁶ The right to express one’s beliefs through conduct will have to be balanced with other competing rights, and different constitutional regimes will have different ways and means of striking the balance in the domestic context. The *Canadian Charter of Rights and Freedoms*, for instance, does so this way:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.⁷

While this balancing is often left to those courts charged with adjudicating alleged violations of fundamental rights and freedoms, it will sometimes also form part of an

² Joseph William Singer, ‘Religious Liberty & Public Accommodation’, in Shyam Balganes, Ted Sichelmann and Henry Smith (eds), *Wesley Hohfeld A Century Later* (Cambridge University Press, 2018, forthcoming).

³ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 18.

⁴ *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(1).

⁵ See, eg, the *United States Constitution* amend I; the *Canada Act 1982* (UK) c 11, sch B pt I (‘*Canadian Charter of Rights and Freedoms*’) s 2; and *Australian Constitution*, s 116.

⁶ *Cantwell v Connecticut*, 310 US 296, 303–4 (1940).

⁷ *Canadian Charter of Rights and Freedoms*, s 1.

ongoing ‘dialogue’ between different branches of government — typically between the judiciary, on the one hand, and the executive and legislature, on the other — about where the line ought to be drawn between the individual and the community.⁸

1.3 We believe in anti-discrimination and equality as norms that might sometimes require limitations to be placed upon the right to religious freedom and expression.⁹ All rights must be considered within the context of pluralism that is a feature of modern liberal democratic states. Again, as with balancing, something like the *Canadian Charter of Rights and Freedoms* provides guidance:

This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.¹⁰

In our view, the full matrix of rights enjoyed by members of liberal democracies are best protected in a secular legal regime. And in a secular state which respects and guarantees all rights within a secular legal framework, sometimes accommodation for religion will result, as in *Multani v Commission scolaire MargueriteBourgeoys*¹¹ or *Burwell v Hobby Lobby*,¹² and sometimes equality or other fundamental rights will be found to prevail, as in *Reference Re Same-Sex Marriage*¹³ or *Obergefell v Hodges*.¹⁴ These cases, among many that could be found in different jurisdictions, represent the appropriate outcome of a secular system, in which no single right is treated as absolute and all rights are treated as equal and therefore deserving of some degree of protection.

⁸ See Peter W Hogg and Allison A Bushell, ‘The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn’t Such a Bad Thing after All)’ (1997) 35 *Osgoode Hall Law Journal* 75. Dialogue can be achieved by the use of something like the *Canadian Charter of Rights and Freedoms*, s 33, which provides, in part, that:

(1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

⁹ On such an approach, see Liam Elphick, ‘Sexual Orientation and “Gay Wedding Cake” Cases under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions’ (2017) 38 *Adelaide Law Review* 149.

¹⁰ *Canadian Charter of Rights and Freedoms*, s 27.

¹¹ *Multani v Commission scolaire MargueriteBourgeoys* [2006] 1 SCR 256.

¹² *Burwell v Hobby Lobby*, 573 US ____ (2014).

¹³ *Reference Re Same-Sex Marriage* [2004] 3 SCR 698.

¹⁴ *Obergefell v Hodges*, 579 US ____ (2015).

B Law and Religion as Theoretical Constructs

2.1 We believe in the interplay of religious ideas and legal ideas in the development of the Western legal tradition.¹⁵ Hence, the most ‘significant concepts of the modern theory of the state are secularized theological concepts.’¹⁶

2.2 We believe that religious ideas can be a powerful tool for change, when combined with legal ideas, in dealing with poverty, hunger, the environment, and a wide range of other social issues.¹⁷ Liberation theology is an example, which shows that religion does contain values that can inform and work with legal ideas.¹⁸ Sometimes religious values will affirm legal ideas; at other times, they will challenge them. In either case, the interaction will be illuminating.¹⁹

2.3 We believe that we can find connection and direction in seeing legal texts as religious, religious texts as legal, and both as literature. Reading the texts in this way casts new light on certain perennial issues in legal theory and theology, such as the normative force of text, the practice of interpretation, and the relationship between past and present.²⁰

III CONCLUSION

The interaction of law and religion is worthy of study for both sociological and historical reasons. The study of humans in society constitutes the *raison d’être* of the humanities and social sciences, and the legal academy is entrusted with the study and critique of the way in which law operates in, and to an extent constitutes, society. ‘Law and religion’, as a specific field of inquiry within the legal academy, studies the multifarious ways in which law interacts with religion in society. Bringing a partisan religious agenda to the study of ‘law and religion’ is partial and exclusive, and it does not do justice to the multifarious ways in which law interacts with religion. The scholarly enterprise calls for an inclusive approach to the study of ‘law and religion’.

¹⁵ See Harold Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Harvard University Press, 1983); Harold Berman, *Law and Revolution II: The Impact of the Protestant Reformations on the Western Legal Tradition* (Harvard University Press, 2006).

¹⁶ Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab trans, MIT Press, 1985) 36.

¹⁷ See Paul Babie, ‘Private Property, the Environment and Christianity’ (2002) 15 *Pacifica* 307.

¹⁸ See Gustavo Gutierrez, *A Theology of Liberation: History, Politics, and Salvation* (Orbis Books, revised ed, 1988).

¹⁹ See Paul Babie and Vanja Savić (eds), *Law, Religion and Love* (Routledge, 2017).

²⁰ See, eg, Joshua Neoh, ‘Text, Doctrine and Tradition in Law and Religion’ (2013) 2 *Oxford Journal of Law and Religion* 175; Joshua Neoh, ‘The Rhetoric of Precedent and Fulfillment in the Sermon on the Mount and the Common Law’ (2016) 12 *Law, Culture and the Humanities* 419.

*James Morgan**

OFFENCES AGAINST THE PERSON AND SEXUALLY TRANSMITTED DISEASES: *AUBREY V THE QUEEN* (2017) 260 CLR 305

I INTRODUCTION

Section 35 of the *Crimes Act 1900* (NSW) provides for a criminal offence of grievous bodily harm. Prior to legislative amendment in 2007,¹ this provision did not expressly extend criminal liability to transmission of disease. In the case of *Aubrey v The Queen*,² it fell to the High Court of Australia to interpret this historical version of s 35. In doing so, the High Court departed from the English authority of *R v Clarence*³ — interpreting that s 35, as it stood in 2004, did not require immediate physical injury, and extends to transmission of disease.

This case note, after reviewing the background and procedural history of *Aubrey*, turns to evaluation of the Court's decisions and its ramifications. With *Aubrey* relating purely to a historical version of New South Wales legislation, its immediate ramifications are somewhat limited. Indeed, s 35 as it now stands already expressly extends criminal liability to that which *Aubrey* extends its historical predecessor to. Nevertheless, *Aubrey* provides a persuasive indication as to the interpretation of both similar provisions in other Australian jurisdictions, and future provisions.

II BACKGROUND

A Transmission of HIV

Michael Aubrey ('the appellant') and the complainant engaged in unprotected sexual intercourse during the early months of 2004. The appellant did so with the knowledge that he had been diagnosed as HIV positive. As a result, the complainant contracted HIV.⁴

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¹ See generally *Crimes Amendment Act 2007* (NSW).

² (2017) 260 CLR 305 (*'Aubrey'*).

³ (1888) 22 QBD 23 (*'Clarence'*).

⁴ *Aubrey* (2017) 260 CLR 305, 311 [2].

B Procedural History

1 Initial Proceedings

The appellant was charged with two offences under the *Crimes Act 1900* (NSW).⁵ The appellant sought an order quashing the charge of the more general offence of maliciously inflicting grievous bodily harm under s 35(1)(b), on the basis that transmission of a disease did not constitute the *infliction* of grievous bodily harm under the *Crimes Act 1900* (NSW) as it stood in 2004.⁶ Hearing the motion, Sorby DCJ ruled that proceedings were to be stayed due to ‘uncertainty’ on this question.⁷

2 The First Appeal

The New South Wales Court of Criminal Appeal (‘NSWCCA’), on appeal by the Crown, dissolved the stay and accepted the Crown’s submission that:

the word ‘inflicts’ should not be given a limited and technical meaning which requires that the harm result from a violent act which creates an immediate result. That being so, the transmission of a disease which manifests itself after a period of time can amount to the infliction of grievous bodily harm.⁸

Special leave to appeal against this order to the High Court was refused.⁹

3 The Trial

Following these interlocutory appeals, the appellant was convicted at trial of maliciously inflicting grievous bodily harm under s 35(1)(b), and acquitted of the alternative charge.¹⁰

4 The Second Appeal

The appellant appealed against this conviction on the grounds that: firstly, the charge as alleged disclosed no offence known to law (contending that disease transmission does not constitute infliction of grievous bodily harm); and secondly, the trial judge

⁵ Note that the *Crimes Act 1900* (NSW) as it stood at the time of the appellant’s conduct is quite different to the state of the Act today. The provisions regarding the relevant offences, along with several other relevant sections, have been amended quite substantially since the *Crimes Amendment Act 2007* (NSW) and *Crimes Amendment (Reckless Infliction of Harm Act 2012)* (NSW).

⁶ *Aubrey* (2017) 260 CLR 305, 311 [3].

⁷ *R v Aubrey* (Unreported, District Court of New South Wales, 8 March 2012) [23].

⁸ *R v Aubrey* (2012) 82 NSWLR 748, 750 [9].

⁹ See Transcript of Proceedings, *Michael Aubrey (AKA Albury) v The Queen* [2013] HCATrans 110 (10 May 2013).

¹⁰ *Aubrey* (2017) 260 CLR 305, 312 [5].

erred in directing the jury that the malice element was satisfied.¹¹ A differently constituted NSWCCA dismissed the appeal, agreeing with the reasoning of the previous NSWCCA decision.¹²

Subsequently, the appellant was granted special leave to appeal to the High Court.¹³

C Central Issues

This appeal gave rise to two key issues for determination by the High Court. Firstly, whether the sexual transmission of a grievous bodily disease is capable of constituting the *infliction* of grievous bodily harm.¹⁴ Secondly, whether recklessness and maliciousness require that the accused person foresaw the *possibility*, or alternatively, the *probability* that sexual intercourse would result in the other person contracting the grievous bodily disease.¹⁵

III DECISION OF THE HIGH COURT

The High Court dismissed this appeal by a majority composed of Kiefel CJ, Keane, Nettle and Edelman JJ. Justice Bell was in dissent.

A Sexual Transmission of Disease as Infliction of Grievous Bodily Harm

1 The Majority Judgment

The majority held that s 35 of the *Crimes Act 1900* (NSW) does not require the production of immediate physical injury, meaning sexual transmission of a disease can indeed amount to infliction of grievous bodily harm.¹⁶

In doing so, their Honours departed from the English case of *Clarence*,¹⁷ in which a majority of the Court for Crown Cases Reserved held that a man who had sexual intercourse with his wife, knowing that he was infected with gonorrhoea, could not be convicted of maliciously inflicting grievous bodily harm under similar UK legislation.¹⁸ *Clarence* had long stood as authority that infliction of grievous bodily harm does not include the ‘uncertain and delayed operation of the act by which infection is

¹¹ *Ibid.*

¹² *Aubrey v The Queen* [2015] NSWCCA 323, [23]–[25].

¹³ See Transcript of Proceedings *MA v The Queen* [2016] HCATrans 277 (16 November 2016).

¹⁴ *Aubrey* (2017) 260 CLR 305, 312 [6].

¹⁵ *Ibid.*

¹⁶ *Ibid* 326 [40].

¹⁷ (1888) 22 QBD 23.

¹⁸ *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100, s 20.

communicated’,¹⁹ and requires ‘an assault and battery of which a wound or grievous bodily harm is the manifest *immediate and obvious result*.’²⁰

The majority in *Aubrey* articulated various key reasons why *Clarence* should no longer be followed.²¹ Crucially, the decision in *Clarence* and notion of infliction requiring immediate physical injury, ran counter to contemporaneous authority from the very same court.²² The majority in *Clarence* were also not unanimous in their reasoning — resting their conclusion on quite different bases²³ — and delivered their judgments alongside forceful dissents.²⁴ Furthermore, *Clarence* seemingly synonymously used the terms ‘inflicting’, ‘causing’, and ‘occasioning’;²⁵ regarded provisions which appeared to leave open infliction by any means;²⁶ and did not employ standardised language.²⁷ Additionally, *Clarence* rested on a mere rudimentary understanding of infectious diseases,²⁸ relied upon the marital sexual consent presumption,²⁹ and was rejected in later English decisions.³⁰

Whilst the majority in *Aubrey* acknowledged that the Court should ordinarily be hesitant to overturn a longstanding authority where the earlier judicial officers were more familiar with the purpose of the underlying legislative provision,³¹ their Honours were satisfied that it was appropriate to overturn in this instance. Notably, *Clarence* had been considered ‘doubtful’ for some time, and it was not clear that any of the majority judges had particular insight into the purpose of the UK legislative provision.³² Accordingly, their Honours were satisfied that it was appropriate to depart from *Clarence*.

Turning to the appellant’s various contentions regarding the interpretation of s 35, the majority rejected each of them in turn. Most notably, their Honours rejected the notion that infliction of disease requires ‘immediate consequence’; a disease can be inflicted without the symptoms being immediately manifest.³³

¹⁹ *Clarence* (1888) 22 QBD 23, 41–2.

²⁰ *Ibid* (emphasis added).

²¹ *Aubrey* (2017) 260 CLR 305, 319–21 [18]–[26].

²² *Ibid* 319 [18]; see generally *R v Martin* (1881) 8 QBD 54; see generally *R v Halliday* (1889) 61 LT 701.

²³ *Aubrey* (2017) 260 CLR 305, 319 [19].

²⁴ *Ibid* 319 [20].

²⁵ *Ibid* 319 [21].

²⁶ *Ibid* 320 [22].

²⁷ *Ibid* 320 [23].

²⁸ *Ibid* 320 [24].

²⁹ *Ibid* 320–1 [25].

³⁰ *Ibid* 321 [26].

³¹ *Ibid* 324 [35].

³² *Ibid* 324 [36].

³³ *Ibid* 321 [27] citing *Alcan Gove Pty Ltd v Zabic* (2015) 257 CLR 1.

2 *Justice Bell in Dissent*

In dissent, Bell J concluded that it was not appropriate to depart from *Clarence*, and held that transmission of HIV by sexual intercourse could not constitute the infliction of grievous bodily harm within the meaning of s 35(1)(b) as it stood in 2004, during the time of the appellant's conduct.³⁴ Her Honour remarked that:

it is a large step to depart from a decision which has been understood to settle the construction of a provision, particularly where *the effect of that departure is to extend the scope of criminal liability*. For more than a century *Clarence* has stood as an authoritative statement that the 'uncertain and delayed operation of the act by which infection is communicated' does not constitute the infliction of grievous bodily harm. *If that settled understanding is ill-suited to the needs of modern society, the solution lies in the legislature addressing the deficiency, as it has done.*³⁵

Turning to the legislation, her Honour noted that the *Crimes Act 1900* (NSW) essentially followed the UK Act³⁶ which was the subject of *Clarence*.³⁷ Her Honour went on to conclude that the common element in each analysis of the majority in *Clarence* was that infliction of grievous bodily harm requires an act having an immediate relationship to the harm, which is inconsistent with the 'uncertain and delayed operation of the act by which infection is communicated.'³⁸ Regarding the subsequent English decision that considered *Clarence*, Bell J considered that it 'does not undermine the conclusion that the sexual transmission of a disease is not within the expression "infliction of grievous bodily harm" in the 1861 UK Act and its analogues.'³⁹

Noting that the construction of 'infliction of grievous bodily harm' in *Clarence* is an entirely plausible one, her Honour considered that the Court should not depart from this authority.⁴⁰ Indeed, her Honour went on to remark that:

Certainty is an important value in the criminal law. That importance is not lessened by asking whether it is likely that persons would have acted differently had they known that the law was not as it had been previously expounded.⁴¹

³⁴ *Aubrey* (2017) 260 CLR 305, 331–2 [53].

³⁵ *Ibid* 332 [55] (emphasis added).

³⁶ *Offences Against the Person Act 1861*, 24 & 25 Vict, c 100.

³⁷ *Aubrey* (2017) 260 CLR 305, 333–4 [56]–[62].

³⁸ *Ibid* 335 [65].

³⁹ *Ibid* 338 [72].

⁴⁰ *Ibid* 338 [73].

⁴¹ *Ibid*.

Accordingly, her Honour would have allowed the appeal — ordering a verdict of acquittal be entered on the basis that sexual transmission of a disease could not constitute infliction of grievous bodily harm.⁴²

B Recklessness/Maliciousness — Foresight of Possibility vs Probability

The Court was unanimous in their conclusion that the fault element for infliction of grievous bodily harm required foresight of the *possibility* of harm, as opposed to the *probability*.⁴³ The majority detailed their reasoning for this conclusion, with which Bell J agreed — although her Honour noted that, in her view, this issue was not reached due to her dissenting conclusion regarding infliction of grievous bodily harm.⁴⁴

Observing that malice had no clear uniform meaning at common law at the time the relevant New South Wales provisions were enacted,⁴⁵ the Court went on to note that some other Australian jurisdictions, such as Victoria, have required proof of foresight of probability of harm for a grievous bodily harm offence (as opposed to possibility).⁴⁶ However, the Court ultimately held that the approach taken in the NSWCCA case of *R v Coleman*⁴⁷ — in which the Court rejected the Victorian approach of requiring foresight of probability of grievous bodily harm — was correct.⁴⁸ Indeed, the Court noted that foresight of probability (at least at common law) is closely tied to the moral significance of murder, and ‘does not necessarily, if at all, apply to statutory offences other than murder.’⁴⁹

The appellant also made submissions on the basis of recent English decisions which found that it was necessary to show that, where an accused person has foreseen the possibility of harm, it was unreasonable for them to take the risk in proceeding nevertheless. It was submitted that this development regarding recklessness should lead the Court to replace the requirement of foresight of possibility with one of foresight of probability.⁵⁰ The Court rejected this submission on the basis that recklessness is to be balanced against the social utility of particular activities⁵¹ — a task best left to juries.⁵²

⁴² Ibid 338 [74].

⁴³ Ibid 329 [47].

⁴⁴ Ibid 331–2 [53].

⁴⁵ Ibid 326 [41]; see also *ibid* 326–8 [42]–[44].

⁴⁶ Ibid 328 [45]; see generally *R v Campbell* [1997] 2 VR 585.

⁴⁷ (1990) 19 NSWLR 467.

⁴⁸ *Aubrey* (2017) 260 CLR 305, 329 [47].

⁴⁹ *Ibid*.

⁵⁰ Ibid 329–30 [48].

⁵¹ Ibid 330 [49].

⁵² Ibid 331 [50].

IV RAMIFICATIONS — EXTENDING THE SCOPE OF CRIMINAL LIABILITY

*A Ramifications in New South Wales*1 *The Current Version of s 35*

Prima facie, in departing from the authority of *Clarence*, *Aubrey* could be seen as expanding the scope of criminal liability imposed by s 35 in New South Wales to include sexual disease transmission. Indeed, it was for this very reason that Bell J expressed a hesitancy to depart from *Clarence*.⁵³

However, since 2004, when the appellant's relevant conduct took place, the *Crimes Act 1900* (NSW) has been significantly amended — including s 35, the provision providing for the grievous bodily harm offence in question. Accordingly, as it stands now, this New South Wales criminal offence is worded quite differently to the provision examined by the Court in this case. Most notably, the offence provided for in s 35 is now worded in terms of 'caus[ing]' grievous bodily harm (as opposed to 'inflicting'), with a fault element of 'recklessness' (as opposed to 'maliciousness').⁵⁴

This being so, the impact of *Aubrey* upon the interpretation of s 35 as it stands now is somewhat limited. Certainly, one cannot conclude that, due to this case, the current formulation of s 35 has been expanded to include criminal liability for sexual transmission of disease. Indeed, the statute now expressly defines grievous bodily harm as including grievous bodily disease⁵⁵ — meaning *s 35 as it now stands already extends criminal liability to such disease transmission*. In her dissent, Bell J noted this fact, reasoning that such extension of criminal liability was best left to the legislature.⁵⁶

2 *The Historical Version of s 35*

However, it is worth noting that *Aubrey* has certainly had the effect of expanding the scope of criminal liability imposed by the historical version of s 35, which was the subject of this case. This version of s 35 stood largely unchanged until an amendment on 27 September 2007 expressly defined grievous bodily harm to include contraction of disease.⁵⁷ For all trials and appeals regarding relevant conduct that occurred prior to 2007, the criminal liability imposed by s 35 has been similarly expanded by *Aubrey* to include sexual disease transmission. Therefore, only to this limited extent for conduct prior to 2007, *Aubrey* has had the effect of extending criminal liability in New South Wales. One imagines that in practical application, this will have somewhat limited consequences.

⁵³ Ibid 332 [55].

⁵⁴ *Crimes Act 1900* (NSW) s 35.

⁵⁵ *Crimes Act 1900* (NSW) s 4 (definition of 'grievous bodily harm').

⁵⁶ *Aubrey* (2017) 260 CLR 305, 332 [55].

⁵⁷ *Crimes Amendment Act 2007* (NSW) s 3, sch 1 cl 1. Note also that s 35 was further significantly amended in 2012: see generally *Crimes Amendment (Reckless Infliction of Harm) Act 2012* (NSW).

B *Ramifications in Other Australian Jurisdictions*

Turning to ramifications beyond New South Wales, the impact of *Aubrey* on most other Australian jurisdictions is similarly limited. Most Australian jurisdictions now expressly extend criminal liability to transmission of disease, though the exact wording and operation of these provisions varies from state to state. Specifically, the relevant legislation in Northern Territory, South Australia, Victoria and Western Australia already expressly captures disease transmission in their respective broad harm based offences.⁵⁸ This being so, *Aubrey* can have very limited effect on the interpretation of harm offence provisions in these jurisdictions.

However, certain other Australian jurisdictions do not yet expressly extend criminal liability to disease transmission for their broad harm offences. Specifically, the Australian Capital Territory, Queensland and Tasmania.⁵⁹ As such, the departure from *Clarence* in *Aubrey* could be seen to provide a persuasive indication as to the interpretation of the broad harm offences in these jurisdictions.

1 *Australian Capital Territory*

Of these three jurisdictions, only the Australian Capital Territory's broad harm offences use the same language of 'inflicting grievous bodily harm',⁶⁰ as with the historical s 35 examined in *Aubrey*. This similarity in language lends itself to a strong argument that *Aubrey* could be considered persuasive authority that the Australian Capital Territory's grievous bodily harm offences should be interpreted such as to extend criminal liability to sexual disease transmission. Indeed, the author suggests that the High Court is likely to interpret the relevant Australian Capital Territory provisions in this way, should this issue be brought before it.

2 *Queensland and Tasmania*

By comparison, Queensland and Tasmania's grievous bodily harm offences are less similar to the historical s 35. Instead, the relevant provisions respectively refer to 'do[ing]'⁶¹ and 'caus[ing]'⁶² grievous bodily harm, as opposed to 'inflict[ing]'.⁶³ Certainly, one could nevertheless tender a compelling argument that *Aubrey* is

⁵⁸ See *Criminal Code Act* (NT) ss 186, 1A(2); *Criminal Law Consolidation Act 1935* (SA) ss 24, 21 (definition of 'physical harm'); *Crimes Act 1958* (Vic) ss 18, 15 (definition of 'physical injury'); *Criminal Code Act Compilation Act 1913* (WA) ss 297, 1(4)(c).

⁵⁹ See *Crimes Act 1900* (ACT) s 20, dictionary (definition of 'grievous bodily harm'); *Criminal Code 1899* (Qld) ss 320, 1 (definition of 'grievous bodily harm'); *Criminal Code Act 1924* (Tas) ss 172, 1 (definition of 'grievous bodily harm').

⁶⁰ *Crimes Act 1900* (ACT) s 20 (emphasis added).

⁶¹ *Criminal Code 1899* (Qld) s 320.

⁶² *Criminal Code Act 1924* (Tas) s 172.

⁶³ *Crimes Act 1900* (NSW) s 35(1)(b), later amended by *Crimes Amendment Act 2007* (NSW).

persuasive authority to the same effect. However, this distinction in the legislation's language renders the argument somewhat less immediately convincing.

C Signal Regarding Interpretation of Future Provision

The contemporary *direct* implications of this case are somewhat limited. However, *Aubrey* nevertheless yields an informative signal regarding how the High Court will likely approach interpretation of future harm related provisions.

The *Crimes Act 1900* (NSW), along with corresponding criminal legislation in other Australian jurisdictions, will certainly undergo heavy amendment over future years. In departing from *Clarence*, the High Court has demonstrated a clear willingness to extend criminal liability to conduct not causing immediate physical injury, and particularly to disease transmission in harm based offences against the person, even without express inclusion by the legislature. As the legislation surrounding offences against the person develops, *Aubrey* may well prove an invaluable authority in the interpretation of future provisions.

V CONCLUSION

In *Aubrey*, the High Court broadened the scope of criminal liability imposed by a historical version of s 35 of the *Crimes Act 1900* (NSW) — departing from the English authority of *Clarence*. This historical version of s 35 has since been significantly amended, such that it now already expressly extends criminal liability to the same effect. As such, the direct repercussions of the decision in *Aubrey* are rather limited — with the criminal liability imposed by s 35 only being extended for conduct that occurred prior to 27 September 2007. Criminal liability in New South Wales is already expressly extended to the same effect for conduct after 2007 by virtue of legislative amendments.

Nevertheless, *Aubrey* provides a useful and persuasive indication as to how similar provisions in other Australian jurisdictions, and future provisions, would be interpreted by the High Court. Specifically, the High Court's departure from *Clarence* in *Aubrey* demonstrates that immediate physical injury is not necessarily required for harm based offences against the person, but rather extends to the comparatively delayed effects of disease transmission. This notion is one that has largely already been endorsed by Australian legislatures, with corresponding legislative amendments having been implemented in multiple Australian jurisdictions to dispel any doubt to the contrary. Yet, where this is not expressly clear in both current and future Australian criminal legislation, *Aubrey* could well prove instrumental in interpretation.

**‘EXTREME CIRCUMSTANCES’ LEAVE PUBLIC
SERVICE EMPLOYEES SILENT AND UNCERTAIN:
CHIEF OF DEFENCE FORCE V GAYNOR (2017)
246 FCR 298**

I INTRODUCTION

In *Chief of Defence Force v Gaynor*,¹ the Full Court of the Federal Court of Australia was required to consider the implied freedom of political communication in the context of statements made by Army reservist Bernard Gaynor. The Chief of the Defence Force (‘CDF’) terminated Mr Gaynor’s commission in the Australian Defence Force (‘ADF’) pursuant to reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth) (‘*Defence (Personnel) Regulations*’) for his various intolerant comments on social media and ensuing conduct.

Justices Perram, Mortimer and Gleeson confirmed that the implied freedom is a limit on the legislature and not an individual right.² Finding that the broad discretion provided by reg 85 would only restrain an ADF member’s ability to express political views in ‘extreme circumstances’, the Court concluded that the regulation was consistent with the *Australian Constitution*.³ This case note explains the Court’s reasoning and considers the broader implications of this decision on the rights of statutory employees to engage in political debate.

II FACTS

Bernard Gaynor was a major in the Army Reserve.⁴ During the years preceding Mr Gaynor’s termination, the ADF was outwardly engaged in a ‘process of cultural change towards greater diversity and gender equality’.⁵ In pursuance of this objective, the ADF published various documents and guidelines, such as policy restricting use of social media in a manner that was ‘offensive to any group or person based on

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¹ (2017) 246 FCR 298 (‘*Gaynor*’).

² Ibid 310 [47]–[48].

³ Ibid 324 [111]–[112].

⁴ Ibid 301 [9].

⁵ Ibid 300–1 [5], quoting Chief of Defence Force, ‘Submissions’, Submission in *Gaynor*, NSD 1685/2015, 29 April 2016.

personal traits, attributes, beliefs or practices'.⁶ It also granted permission to ADF members to march in uniform in the 2013 Sydney Mardi Gras.⁷

Commencing in January 2013, Mr Gaynor made a series of comments on social media expressing 'antipathy to tolerance of homosexuality or transgender behaviour' and criticism of Islam.⁸ He publically condemned the ADF's involvement in the Sydney Mardi Gras parade, its tolerance of transgender service members, and its approach to Islam.⁹ He justified his statements as a manifestation of his strong religious views, which he attributed to the Roman Catholic Church.¹⁰ While the statements were made in a personal capacity, it was not in dispute that he 'either identified himself, or could be easily identified by a reader, as an officer in the ADF' in making those statements.¹¹

In response to these comments, the ADF directed Mr Gaynor to cease posting material in the public domain that identified him as an ADF officer.¹² However, despite the instructions of the ADF, he did not remove any of the material and continued to post — '[h]e engaged with the direction he had been given, rather than complying with it'.¹³

Following a series of internal procedures,¹⁴ the CDF ultimately exercised the power conferred by reg 85 of the *Defence (Personnel) Regulations* to terminate Mr Gaynor's commission on 10 December 2014 by reason of his intolerant public statements ('Termination Decision').¹⁵

⁶ Ibid 301 [7], quoting Department of Defence, *Use of Social Media by Defence Personnel*, ADMIN 08-2 AMDT NO 1, 16 January 2013. This instruction was made pursuant to s 9A(2) of the *Defence Act 1903* (Cth).

⁷ *Gaynor* (2017) 246 FCR 298, 301 [6].

⁸ Ibid 301–2 [10], citing *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 191 [11].

⁹ *Gaynor* (2017) 246 FCR 298, 302 [12].

¹⁰ Ibid 301–2 [10], quoting *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 191 [11].

¹¹ Ibid [12].

¹² *Gaynor* (2017) 246 FCR 298, 302 [13]; Letter from Deputy Chief of Army (Major General Angus Campbell) to Bernard Gaynor, 22 March 2013.

¹³ *Gaynor* (2017) 246 FCR 298, 302 [14].

¹⁴ Ibid 302–3 [15].

¹⁵ Ibid 303 [16].

III PROCEEDINGS IN THE FEDERAL COURT

Mr Gaynor commenced proceedings in the Federal Court on 8 August 2014 to have the CDF's decisions set aside.¹⁶ He submitted that the decisions were in administrative error, raising 17 different grounds under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*AD(JR) Act*').¹⁷

He also advanced two constitutional arguments:

- i. that the decisions were in conflict with s 116 of the *Australian Constitution* as they imposed a religious test on him;¹⁸ and
- ii. that the decisions breached the implied freedom to communicate with respect to political and governmental matters.¹⁹

Justice Buchanan rejected the administrative law grounds,²⁰ and the argument based on s 116 of the *Australian Constitution*.²¹ Yet, his Honour found that the Termination Decision was in breach of the implied freedom of political communication.²²

His Honour found that the Termination Decision was not 'adequate in its balance'²³ as it was based on Mr Gaynor's expression of political opinion as a private citizen, when he was not on duty or in uniform, and otherwise free from military discipline.²⁴ While reg 85 did not directly contravene the implied freedom, Buchanan J accepted the proposition that 'the exercise of the statutory discretion in each case was in excess of a statutory grant of power properly construed as not authorising infringement of constitutional requirements of boundaries'.²⁵ Thus, his Honour made orders setting aside the Termination Decision.²⁶

¹⁶ *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 190 [6]–[8]: Mr Gaynor sought to challenge three asserted 'decisions': the decision by the CDF on 10 December 2013 to terminate Mr Gaynor's commission ('Termination Decision'); the decision by the CDF on 30 June 2014 to finally reject the applicant's Redress of Grievance; and an earlier report dated 24 January 2013 prepared by Mr Gaynor's commanding officer.

However, it was only the Termination Decision which was the subject of the appeal to the Full Court of the Federal Court: *Gaynor* (2017) 246 FCR 298, 324 [27].

¹⁷ *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 234 [177]; *Gaynor* (2017) 246 FCR 298, 321–2 [17].

¹⁸ *Ibid.*

¹⁹ *Gaynor* (2017) 246 FCR 298, 303 [17].

²⁰ *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 238–9 [192]–[203].

²¹ *Ibid* 240–1 [212]–[221].

²² *Ibid* 256 [289].

²³ *Ibid* 255 [284].

²⁴ *Ibid* 256 [287].

²⁵ *Ibid* 240 [208], cited in *Gaynor* (2017) 246 FCR 298, 303 [20].

²⁶ *Gaynor v Chief of Defence Force (No 3)* (2015) 237 FCR 188, 256 [290].

IV APPEAL TO THE FULL FEDERAL COURT

The CDF filed a notice of appeal to the Full Court of the Federal Court of Australia on 16 December 2015.²⁷ The CDF's submissions raised two central propositions:

- i. that the primary judge applied the implied freedom tests at the wrong level — his Honour erred by applying the *Lange v Australian Broadcasting Corporation*²⁸ test to the Termination Decision rather than directly to the legislative instrument, reg 85, which did not infringe the implied freedom; and
- ii. if the Termination Decision must satisfy the relevant tests, his Honour erred in holding that it did not do so.²⁹

Mr Gaynor refuted the appeal, submitting that the CDF 'sought to classify [Mr] Gaynor's political opinions ... as unacceptable behaviour.'³⁰ He argued that the CDF used the 'guise of "discipline" to silence political opinion' which is contrary to the implied freedom of political communication.³¹ By way of an amended notice of contention, Mr Gaynor also submitted that the Termination Decision was in administrative error under various grounds pursuant to the *AD(JR) Act*, and was contrary to s 116 of the *Australian Constitution*.³²

A Implied Freedom of Political Communication

The test for determining whether an exercise of power infringes the implied freedom of political communication has been established through the High Court's dicta in *Lange*³³ as redefined and developed in *Coleman v Power*³⁴ and *McCloy v New South Wales*.³⁵

The first inquiry is whether the law effectively burdens the freedom of communication about government or political matters either in its terms, operation or effect.³⁶ If the law does effectively burden that freedom, the second limb requires the Court to

²⁷ *Gaynor* (2017) 246 FCR 298, 306–7 [27].

²⁸ (1997) 189 CLR 520 ('*Lange*').

²⁹ *Gaynor* (2017) 246 FCR 298, 306–7 [27]–[28]: Four grounds of appeal were raised by the CDF which were distilled in the appellant's written submissions into two central propositions.

³⁰ *Gaynor* (2017) 246 FCR 298, 307 [32], citing Bernard Gaynor, 'Submissions', Submission in *Gaynor*, NSD 1685/2015, 2 May 2016, [4].

³¹ *Ibid.*

³² *Gaynor* (2017) 246 FCR 298, 306 [30].

³³ (1997) 189 CLR 520.

³⁴ (2004) 220 CLR 1.

³⁵ (2015) 257 CLR 178, 230–2 [125]–[132] (Gageler J) ('*McCloy*').

³⁶ *Lange* (1997) 189 CLR 520, 561–2; *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ), 230 [126] (Gageler J).

consider whether the burden is ‘reasonably appropriate and adapted’ to give effect to a legitimate end,³⁷ in the sense that the end is ‘suitable, necessary and adequate in its balance’.³⁸

1 *Level of Application*

The Court found that the primary judge erred in the level at which he applied the test for determining whether the implied freedom of political communication had been infringed.³⁹ The Court clearly iterated that the freedom of political communication is a limit on the legislative and executive power of the government, and not an individual right.⁴⁰

The Court accepted the existence of authority for the implied freedom being a restriction on executive power in addition to legislative power,⁴¹ but noted that the scope of this restriction had not yet been ‘squarely confronted’ in a case where there was no statutory source for the impugned power.⁴² Their Honours expressed the view that such a limitation could only apply in circumstances where the executive power is sourced only from the *Australian Constitution*, without a statutory grant of authority.⁴³

As the termination power granted by reg 85 was already limited by the legislative instrument conferring it, there was no need to separately consider whether the executive action infringed the implied freedom.⁴⁴ The correct test was whether reg 85 itself breached the implied freedom of political communication.⁴⁵

2 *Application to Reg 85*

The Court proceeded to correctly apply the *Lange* test; considering whether the specific grant of power under reg 85 contravened the implied freedom of political

³⁷ *Lange* (1997) 189 CLR 520, 562; *McCloy* (2015) 257 CLR 178, 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

³⁸ *McCloy* (2015) 257 CLR 178, 194 [2], 217–19 [79]–[87] (French CJ, Kiefel, Bell and Keane JJ).

³⁹ *Gaynor* (2017) 246 FCR 298, 310 [47].

⁴⁰ *Ibid* 310–11 [48], citing *Unions New South Wales v New South Wales* (2013) 252 CLR 530, 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

⁴¹ See, eg, *Lange* (1997) 189 CLR 520, 560–1; *Levy v Victoria* (1997) 189 CLR 579, 594 (Brennan CJ); *Wotton v Queensland* (2012) 246 CLR 1, 13–14 [21] (French CJ, Gummow, Hayne, Crennan and Bell JJ), 33 [88] (Kiefel J); *McCloy* (2015) 257 CLR 178, 206 [42] (French CJ, Kiefel, Bell and Keane JJ), 227 [114] (Gageler J), 280 [303] (Gordon J).

⁴² *Gaynor* (2017) 246 FCR 298, 314–15 [68].

⁴³ *Ibid* 315 [71]–[72].

⁴⁴ *Ibid* [72].

⁴⁵ *Ibid* 317–18 [82].

communication.⁴⁶ The *Defence (Personnel) Regulations* provided that a member's service could be terminated on various grounds, with reg 85 setting out the procedure for termination of an officer's service for 'other reasons'.⁴⁷ This regulation granted a broad discretion to terminate an officer's service if their retention was 'not in the interest of' the ADF.⁴⁸ The regulation required consideration of various factors, including the officer's behaviour or conviction of an offence, in making this decision.⁴⁹ Regulation 85 'directed attention to the conduct and behaviour of an officer, measured against her or his suitability — in all respects — to remain as an officer in the service of the ADF'.⁵⁰ In this regard, the Court found no basis to view the position of reservists differently from other ADF members given that they are 'liable to be called up at any time' and are 'subject to the same disciplinary and hierarchical requirements'.⁵¹

Considering the first limb of the *Lange* test, the Court accepted that the 'wide discretionary power to terminate the service of an officer in the ADF [was] capable of restricting political communication' in operation and effect.⁵² Regulation 85 granted a broad power to terminate an ADF member's service when their communications were considered to be 'no longer "in the interests" of the ADF'.⁵³ Thus, the operation of reg 85 effectively burdened the freedom of political communication; officers were liable to 'pay a price' for engaging in political communication that the ADF considered to be against its interests.⁵⁴

Applying the second limb of the *Lange* test, the Court found that the regulation did not infringe the implied freedom as the 'broad discretion conferred by reg 85 was suitable, necessary, and adequate in balance'.⁵⁵ The Court noted that the law did not explicitly purport to control communications, but was directed at the 'suitability ... of individuals to remain officers in the ADF'.⁵⁶

The Court found that reg 85 served multiple purposes. While reg 85 served a primarily disciplinary role,⁵⁷ it also operated to 'ensure, and enforce, the maintenance of objectively appropriate standards of behaviour and conduct by officers' of the ADF.⁵⁸

⁴⁶ Ibid.

⁴⁷ Ibid 308 [37].

⁴⁸ *Defence (Personnel) Regulations* reg 85(1)(d).

⁴⁹ Ibid regs 85(1A)(b) and (c).

⁵⁰ *Gaynor* (2017) 246 FCR 298, 323–4 [108].

⁵¹ Ibid 320 [97].

⁵² Ibid 322 [104].

⁵³ Ibid 323 [105].

⁵⁴ Ibid.

⁵⁵ Ibid [107].

⁵⁶ Ibid 323–4 [108].

⁵⁷ Ibid 320 [95].

⁵⁸ Ibid 321 [99].

The ADF is a unique arm of the Commonwealth public service. One distinct aspect of the ADF is its ‘central attribute as a disciplined organisation based on a command structure’.⁵⁹ Defence personnel must be able to ‘operate in circumstances of grave danger in which reliance upon one another and instantaneous obedience of orders are essential’.⁶⁰ The broad power to terminate the service of officers whose retention was ‘not in the interests’ of the ADF enabled the ADF to control membership and guarantee that officers were willing to ‘adhere to the hierarchical requirements of the Defence Force’ and ‘comply with standards set by those in command’.⁶¹ In light of its unique command structure, it was vital for the ADF to ensure the proper conduct of its personnel.

Looking to the purpose of the discretion granted by reg 85, the Court concluded that any restriction of the freedom of political communication resulting from this regulation ‘would be confined to extreme circumstances’.⁶² Given Mr Gaynor’s blatant disregard of orders and directions given by the ADF, their Honours considered the circumstances of Mr Gaynor’s comments to be ‘aptly described as extreme’.⁶³

The basis of the Termination Decision was not the subject matter of the communications but rather the respondent’s conduct and behaviour. The ‘tone and attributes of the communications’ infringing ADF policies and Mr Gaynor’s disobedience to lawful command were all ‘matters that [went] to the suitability of the officer, and the interests of the ADF’.⁶⁴ Thus, Mr Gaynor’s conduct was ‘sufficiently serious’ to justify his dismissal pursuant to reg 85.⁶⁵

B *Notice of Contention*

Their Honours quickly dismissed Mr Gaynor’s challenge to the Termination Decision based on s 116 of the *Australian Constitution*. The Court found that Mr Gaynor’s attribution of his public statements to the teachings of the Roman Catholic Church⁶⁶ was ‘simply too far removed’ to suggest that ‘reg 85 imposed a religious test on the respondent’.⁶⁷

The Court considered each of the administrative law grounds in turn, and did not identify any error in the primary judge’s conclusion or the Termination Decision.⁶⁸

⁵⁹ Ibid 307 [33].

⁶⁰ Ibid 320 [96], quoting *White v Director of Military Prosecutions* (2007) 231 CLR 570 [233] (Callinan J).

⁶¹ Ibid 320–1 [98].

⁶² Ibid 324 [111].

⁶³ Ibid.

⁶⁴ Ibid [110].

⁶⁵ Ibid [111].

⁶⁶ Ibid 326 [122].

⁶⁷ Ibid [123].

⁶⁸ Ibid 326–36 [124]–[167].

V APPEAL TO THE HIGH COURT

Mr Gaynor applied for special leave to appeal the decision to the High Court of Australia. On 8 August 2017, Keane and Edelman JJ refused the application.⁶⁹

VI COMMENT

Public servants, like all other members of society, should be free to engage in political debate; they cannot be ‘silent members of society’.⁷⁰ However, the Commonwealth government has persistently sought to curtail the political expression of its employees.⁷¹ While the immediate aftermath of *Gaynor* was met with concerns of the potential for the Commonwealth to silence all public servants,⁷² this case has only limited application. The unique factual matrix of the termination of Mr Gaynor’s commission does little to clarify the permissible limits on the capacity of statutory employees outside the ADF to engage in political debate.

In August 2017, the Australian Public Service Commission (‘APSC’) issued a guide for public service employees regarding their rights to make public comments on social media under the Australian Public Service (‘APS’) *Code of Conduct* (‘Code’).⁷³ Impartiality is an APS value.⁷⁴ As such, employees must not post material that would suggest that they are unable to serve the government in an unbiased manner.⁷⁵ The Guidelines specifically provide that it would be a breach of the Code if an employee

⁶⁹ Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 752–3.

⁷⁰ *Bennett v Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334, 357 [91] (Finn J), citing *Re Fraser and Public Service Staff Relations Board* (1985) 23 DLR (4th) 122 [131] Dickson CJC.

⁷¹ John Wilson, *Opportunity Missed in the High Court on the Free Speech of Public Servants* (13 October 2017) The Mandarin <<https://www.themandarin.com.au/84858-opportunity-missed-high-court-free-speech-public-servants/>>.

⁷² See, eg, John Wilson, ‘We Need the Clarity of a High Court Ruling on Bernard Gaynor’s Free Speech Crusade’, *Canberra Times* (online), 4 April 2017 <<http://www.canberratimes.com.au/national/public-service/we-need-the-clarity-of-a-high-court-ruling-on-bernard-gaynors-free-speech-crusade-20170329-gv9foz.html>>; Neil Foster, ‘Religious Free Speech in Australia: CDF v Gaynor’ on Law and Religion Australia (11 March 2017) <<https://lawandreligionaustralia.blog/2017/03/11/religious-free-speech-in-australia-cdf-v-gaynor/>>; Tess Delbridge, *Danger: Religious Displays at Work Could Get You Fired* (15 March 2017) Eternity News <<https://www.eternitynews.com.au/in-depth/danger-religious-displays-at-work-could-get-you-fired/>>.

⁷³ Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for APS Employees*, 7 August 2017 (‘Guidelines’).

⁷⁴ *Ibid* 2.

⁷⁵ *Ibid*.

criticised the work of their agency, Minister or seniority.⁷⁶ These restrictions extend to statements made outside of work, in a personal capacity, regardless of whether the person is identifiable as an APS employee.⁷⁷

Although the APS does have a legitimate interest in maintaining impartiality, such a gross infringement on the private lives of public servants — approximately 2 million Australians⁷⁸ — seems to undermine the operation of the systems of representative and responsible government, which the implied freedom of political communication exists to protect.⁷⁹ In the Guidelines, the APSC states that '[n]one of the litigation brought before various courts has successfully argued that the *Public Service Act*, or the *Code of Conduct*, amounts to an undue limitation of the freedom of political communication'.⁸⁰ While technically correct, this unfairly implies that this contentious issue of law has been settled,⁸¹ failing to consider the implications of analogous cases, such as *Gaynor*, on the validity of the Code.⁸² While it is too strong to suggest that the APSC is seeking to 'gag public servants',⁸³ the statement clearly intends to foster unwavering compliance.

The Full Court's decision in *Gaynor* leaves uncertain the constitutional validity of the Code.⁸⁴ Their Honours found the broad discretion granted by reg 85 was 'adequate in balance' as it would only operate to curtail the implied right to communicate on political and governmental matters in 'extreme circumstances'.⁸⁵ The Court was satisfied that the circumstances of Mr Gaynor's comments were indeed 'extreme'.⁸⁶

⁷⁶ Ibid 3–4.

⁷⁷ Ibid 6.

⁷⁸ Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia 2015–16* (15 December 2016) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/allprimarymainfeatures/3BF6A482829799AFCA2581D2000E95FA?opendocument>>.

⁷⁹ *Lange* (1997) 189 CLR 520, 559 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

⁸⁰ Australian Public Service Commission, above n 73, 7.

⁸¹ Gary Hansel and Adrienne Stone, 'Public Servants, Social Media and the Constitution' on Australian Public Law (5 September 2017) <<https://auspublaw.org/2017/09/public-servants-social-media-and-the-constitution/>>. See Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 703–5 (Mr Kirk).

⁸² Hansel and Stone, above n 81. The APSC also failed to consider *Bennett v Human Rights and Equal Opportunity Commission* (2003) 204 ALR 119, in which Finn J upheld a challenge to a regulation under the *Public Service Act 1922* (Cth) because it contravened the implied freedom of political communication: Ibid.

⁸³ Australian Broadcasting Corporation, 'Silencing Public Servants', Background Briefing, 8 May 2016 (Di Martin).

⁸⁴ Wilson, *Opportunity Missed in the High Court*, above n 71.

⁸⁵ *Gaynor* (2017) 246 FCR 298, 324 [111].

⁸⁶ Ibid.

Mr Gaynor was clearly identifiable as an ADF member in making his statements.⁸⁷ He then refused to comply with direct instructions to stop posting the material in a manner that connected him to the ADF.⁸⁸ The ADF was in a process of cultural change; it ‘did not wish to censor Mr Gaynor’s personal views, but did not want those views to be associated with the ADF’.⁸⁹ The unique nature of the ADF means that there is also a heightened need for compliance and cooperation in this organisation. Mr Gaynor’s conduct, which exhibited complete disregard for ADF policies and directions, was therefore ‘sufficiently serious’ to warrant his dismissal pursuant to reg 85.⁹⁰

Given the ‘extreme circumstances’ in *Gaynor*,⁹¹ this decision provides little guidance on the constitutional validity of other laws seeking to limit the ability of public servants to engage in political debate. Further, the Court’s reliance on the ADF’s unique command structure in considering the legitimate objectives of reg 85 cannot be imported to other arms of the Commonwealth government.

It is arguable that the importance placed on the observable connection between Mr Gaynor’s statements and the ADF in the Termination Decision implies that the restrictions in the Code could not validly extend to anonymous statements — despite the APSC’s assertion in the Guidelines.⁹² However, the absence of any clear judicial comment to this end leaves the issue unresolved.

The appeal to the High Court was highly anticipated as an opportunity for this uncertainty to finally be settled.⁹³ However, the ‘obvious difference’ between army reservists and public servants,⁹⁴ and the ‘extreme circumstances’ of Mr Gaynor’s statements meant that this was not the case for the High Court to conclude on the permissible limits on Commonwealth employees’ freedom to express political views.⁹⁵ These issues remain ‘just over the horizon’.⁹⁶ Public servants must silently await another case capable of ‘elucidat[ing] the boundaries of their right to free speech’.⁹⁷

⁸⁷ Ibid 302 [12].

⁸⁸ Ibid 302 [12]–[14].

⁸⁹ James Mattson, ‘Expressing an Opinion on Social Media: Speech or Employment Peril’ (2017) 20 *Internet Law Bulletin* 50, 50.

⁹⁰ *Gaynor* (2017) 246 FCR 298, 324 [111].

⁹¹ Ibid.

⁹² Australian Public Service Commission, above n 73, 6.

⁹³ Wilson, ‘We Need the Clarity of a High Court Ruling on Bernard Gaynor’s Free Speech Crusade’, above n 72.

⁹⁴ Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 389–91 (Keane J).

⁹⁵ Ibid 404–11 (Mr Kirk), 749–54 (Keane J); Wilson, *Opportunity Missed in the High Court*, above n 71.

⁹⁶ Transcript of Proceedings, *Gaynor v Chief of Defence Force* [2017] HCATrans 162 (18 August 2017) 410–11 (Mr Kirk).

⁹⁷ Wilson, *Opportunity Missed in the High Court*, above n 71.

VII CONCLUSION

In *Gaynor*, the Full Court found that reg 85 — which allowed the dismissal of an Army Reservist for statements made on social media, when not in uniform or otherwise under military command — did not contravene the implied freedom of political communication. The broad discretion provided by reg 85 was suitable, necessary and adequate in balance to enable the ADF to effectively ensure that its members were able to operate within its unique command structure.

While commentators viewed this decision with apprehension,⁹⁸ given the ‘extreme circumstances’ of Mr Gaynor’s statements, the decision provides little clarification on the constitutional validity of legislative instruments regulating the political expression of Commonwealth employees. With the High Court refusing to consider the appeal, the ability of public servants to freely engage in political debate remains uncertain.

⁹⁸ See, eg, Wilson, ‘We Need the Clarity of a High Court Ruling on Bernard Gaynor’s Free Speech Crusade’, above n 72; Foster, above n 72; Delbridge, above n 72.

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