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THE PRESIDENT AND CONGRESS: SEPARATION OF POWERS IN THE UNITED STATES OF AMERICA

ABSTRACT

Although the framers of the *Australian Constitution* adopted many features of the *United States Constitution*, they rejected the separation of legislative and executive power in favour of responsible government in a parliamentary system like that of the United Kingdom. In doing so, Australians depended on existing conventions about the nature of responsible government instead of specification of its attributes in constitutional text. The *United States Constitution* contains detailed provisions about separation of powers, but unwritten conventions have produced some central features of American government. This article reviews conventions developed by Congress that constrain Presidents in the domestic sphere with regard to the appointment of executive and judicial officers and the funding of the federal government. The article then reviews conventions developed by Presidents that liberate them in the conduct of foreign relations and war making. These aspects of the American experience may aid the analysis of problems of executive power under the *Australian Constitution*.

I INTRODUCTION

Like our peoples, our constitutions are cousins. Ever since the framers of the *Australian Constitution* adopted some features of the *United States Constitution* (especially federalism), the development of constitutional law in the two nations has proceeded along similar although not identical paths.¹ This article considers a feature of the *United States Constitution* that Australia did *not* adopt: separation of the legislative and executive branches of government. Instead, our framers adopted the model of responsible government as it then existed in the separate Australian colonies and in the United Kingdom. This combination produced an innovative form of government that is deeply interesting to an American observer.

* Rosenbaum Professor of Law, University of Colorado. This article is an adaptation of a lecture given at the University of Adelaide Law School under the sponsorship of the Aim for the Stars Program of the Faculty of the Professions, and at Sydney Law School in their Distinguished Lecture Program. I thank Dean John Williams and Dr Gabrielle Appleby of the University of Adelaide Law School and Professors Peter Gerangelos and Barbara McDonald of the Sydney Law School for their many courtesies in arranging my visit to Australia.

¹ For an excellent comparative analysis, see Cheryl Saunders, *The Constitution of Australia: A Contextual Analysis* (Hart Publishing, 2011).

In order to describe and analyse some features of American separation of powers that should especially interest Australians, I shall compare them to aspects of both the Australian and British systems. In that sense my article might be titled ‘Three Constitutions Compared’ in homage to Sir Owen Dixon’s great essay, which attributes the strength of our ‘community of interest’ to sharing the common law tradition that originated in England.² That tradition explains much of what I will say in these pages. The particular comparisons that this article makes flow from our shared common law tradition, because the generation of conventions that form constitutional law in all three nations occurs through a common law process of setting precedents that attain binding effect through acceptance by the actors in the political systems, and by the peoples of the three nations.

It is a commonplace that while the constitutions of the United States and Australia are written, that of the United Kingdom is not. This is true in a sense, but it is highly misleading. For the constitution of the UK *is* written down, but in many places — in important statutes, in judicial decisions and above all in the history books.³ Similarly, the constitutions of the US and Australia have many important unwritten features. Australians will not be surprised by this observation because the central feature of your system, responsible government, goes almost entirely unmentioned in your constitution, except for such indirect references as the requirement that Ministers be Members of Parliament.⁴ Therefore, one cannot interpret the *Australian Constitution* without an understanding that it incorporates traditions of responsible government that antedated it.⁵

Surprisingly, many Americans *would* be surprised by my assertion that critical aspects of the *United States Constitution* are unwritten — constitutional discourse in the US, at both the legal and political levels, often proceeds as if the hoary text were all that matters. (The current debate in the US about ‘original intent’ interpretations of the *United States Constitution* is one example of this tendency.)⁶ Perhaps the difference in national attitudes toward constitutional text results from the fact that in the US the text preceded the development of unwritten practices that interpret it, whereas in Australia the text assumes the existence of well-developed, pre-existing practices. In any event, it is the history of the American government that has shaped the separation of powers as it operates today.

² Dixon’s ‘Two Constitutions Compared’ is in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (Sydney Law Book, 1965) 100.

³ Peter Leyland, *The Constitution of the United Kingdom* (Hart Publishing, 2nd ed, 2012).

⁴ *Australian Constitution* s 64. For an illuminating discussion of the unwritten aspects of the *Australian Constitution*, see Helen Irving, *Five Things to Know About the Australian Constitution* (Cambridge University Press, 2004).

⁵ For Australian constitutional history, see John Williams, ‘The Emergence of the Commonwealth Constitution’ in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1.

⁶ For an example of this approach, see Antonin Scalia, *A Matter of Interpretation* (Princeton University Press, 1997).

Divergence between the American and Australian constitutions is partly due to a historical accident. At the American founding in 1787, responsible government had not yet developed in the UK. Instead, as the American framers saw Britain, a king ruled arbitrarily through his Ministers, dominating Parliament partly through what was called ‘corruption’, the awarding of lucrative offices to Members of Parliament in an effort to secure their allegiance to the Crown.⁷ The American system of separated legislative and executive powers was a reaction to this perception — the branches were kept apart to prevent executive domination of the legislature.

As events in the UK proved in succeeding decades, however, a system of blended powers can be dominated by either partner. By approximately 1835, Britain had achieved ministerial responsibility to the House of Commons so that the practical control of government could center in Parliament not the Crown. The developing Australian colonies also followed that path and codified the model of responsible government at the time of Federation. Eventually the power of the Prime Minister grew sufficiently in both the UK and Australia to provoke persistent complaints that the government dominated Parliament overmuch. It appears that executive power has a tendency to resist control.

Thus, proceeding by somewhat different routes, all three nations have developed powerful executives. Let us turn to the features of the *United States Constitution* that remain distinctive. It is elementary that the American constitutional system relies on both the separation of powers and checks and balances that blend the branches partially in hopes of achieving an overall balance of power. The incompatibility clause in art I of the *United States Constitution* guarantees the separation by forbidding anyone to serve in both the executive and legislative branches at the same time, although they may move from one to the other.⁸ This provision has forestalled evolution of the American government toward a parliamentary system.

Several of the *Constitution*’s checks have assumed great importance in modern American government.⁹ First, the President nominates principal executive officers and judges subject to confirmation by a majority vote of the Senate.¹⁰ The President may not, as in a parliamentary system, simply choose Ministers and judges who are minimally acceptable to the majority party. Second, a Bill becomes a statute only after gaining support from three separate bodies having different constituencies: the House of Representatives, with its local constituencies; the Senate, representing

⁷ Harold H Bruff, ‘The Incompatibility Principle’ (2009) 59 *Administrative Law Review* 225, 231–32.

⁸ *United States Constitution* art I § 6: ‘no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office’.

⁹ For more development of the points made in the remainder of this Introduction, see Harold H Bruff, *Balance of Forces: Separation of Powers Law in the Administrative State* (Carolina Academic Press, 2006).

¹⁰ *United States Constitution* art II § 2: ‘he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, ... Judges of the Supreme Court, and all other Officers of the United States’.

the states; and the President, who has a national base.¹¹ This scheme was supposed to limit the power of Congress and to ensure that legislation served the broad public interest rather than narrow special interests.

The framers gave the President the additional check of a qualified veto, which can be overridden by 2/3 majorities in both houses of Congress.¹² In practice, a presidential veto is very difficult to override, because Presidents can almost always muster the support of a third of one house, whereupon they prevail. Presidents cannot ignore Congress, however. As in the British and Australian systems, Congress received the power of the purse, the discretion to grant or withhold ‘supply’ as a primal control on the executive.¹³

The coexistence of the President’s veto and Congress’ power of the purse appears to be a prescription for deadlock, but for most of American history it has brought the branches together. This is because when Congress wants to legislate they must craft bills that will avoid the President’s powerful veto, and when the President wants funding, he or she must come to Congress, which can prevail by doing nothing.

The American framers did not believe in political parties. Instead, they envisioned a republic of civic virtue, in which elected officials would pursue the general public interest in a nonpartisan fashion.¹⁴ This dream was hopelessly naïve — the forerunners of the two modern American parties were in place within a decade of the founding. But the *United States Constitution*, reflecting the dream of the framers, nowhere mentions parties and makes no provision for them.

It soon became clear that party politics could alter the framers’ scheme in either of two fundamental ways. If the same party held the presidency and both houses of Congress, legislation might flow rapidly, almost unimpeded by the formal separation of powers, mimicking a parliamentary system in practice. The famous ‘hundred days’ of New Deal legislation under President Franklin Roosevelt is an example.¹⁵ But if different parties held the presidency and one or both houses of Congress, deadlock could ensue in these periods of divided government. For most of the past 45 years, the US has experienced divided government and recurrent instances of deadlock. Similarly, Australia’s experience of deadlock in 1975 stemmed from having a system of responsible government but two houses having different compositions, so that when the Senate refused supply there was no easy resolution of the crisis, leading to the Governor-General’s controversial dismissal of the Whitlam Government.¹⁶

¹¹ Ibid art I § 7.

¹² Ibid.

¹³ Ibid art I § 8.

¹⁴ Akhil R Amar, *America’s Unwritten Constitution* (Basic Books, 2012) ch 10.

¹⁵ Johnathan Alter, *The Defining Moment* (Simon & Schuster, 2007).

¹⁶ George Winterton, ‘1975: The Dismissal of the Whitlam Government’ in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229.

II THE PRESIDENT 'BOUND'

Now let us turn our gaze to the contemporary situation in the US as it is affected by the separation of powers and conventions that have developed under the party system. There is an apparent paradox in how American government functions — an inconsistency between what I will call the 'President bound' in domestic matters and the 'President unbound' in foreign affairs. Domestically, a deadlocked Congress with a Republican House and a Democratic Senate teeters constantly on the brink of inability to pay the nation's bills and fund its government. Nor can the President readily induce the Senate to confirm executive and judicial nominees. By contrast, in foreign affairs Presidents conduct the war on terror with the vigour that has produced the death of Osama bin Laden, secret computer warfare against nations like Iran and the use of drones to kill al Qaeda leaders wherever they may be found. It is surely true that in most modern democracies, the government can act with more freedom in foreign than domestic matters, but why is the divide so stark in the US today?

The answer lies in the unwritten *United States Constitution*, in the evolution of conventions that have favoured Presidents in some ways, and disfavoured them in others. I define a convention as 'a rule of behaviour accepted as obligatory by those concerned in the working of the constitution'.¹⁷ A convention, then, is binding in the simple sense that everyone will abide it, whether or not it is legally enforceable in any court. This distinction about enforceability is important — the conventions I discuss here are almost all unenforceable in court — they are 'political questions' that are left to the political branches of government to resolve. They are, nevertheless, binding in the sense that informal sanctions within the political system enforce them quite effectively.

As the constitutional history of Chapter II of the *Australian Constitution* demonstrates, a convention can supplement or even contradict the apparent meaning of text. The same is true in the United States. The critical feature of these conventions is that they have been developed by the legislative and executive branches themselves, and not by the courts. It may dismay but cannot surprise the reader that conventions developed by Congress have favoured legislative power; conventions developed by Presidents have favoured executive power. We expect judicial development of the common law to display the neutrality that we require of judges, but it may be too much to ask to expect elected political leaders to develop their own traditions neutrally.

First, the 'President bound'. Here the text of the *Constitution* has combined with some traditional practices and contemporary politics to hamstring the President. The essential problem is that pertinent provisions of the constitutional text carry offsetting implications, allowing the evolution of conventions that have favoured

¹⁷ Kenneth Wheare, *Modern Constitutions* (Oxford University Press, 1951) 179 quoted in Geoffrey Marshall, *Constitutional Conventions: The Rules and Forms of Political Accountability* (Clarendon Press, 1984) 7. I believe this to be a standard ('conventional') definition of convention. See Ian Killey, *Constitutional Conventions in Australia: An Introduction to the Unwritten Rules of Australia's Constitutions* (Australian Scholarly Publishing, 2009).

some textual provisions at the expense of others — and at the expense of presidential power. Article I of the *United States Constitution* creates and empowers Congress. Quite sensibly, art I provides that a majority of each house constitutes a quorum for doing business, such as legislating.¹⁸ This apparent entrenchment of majority rule certainly accords with conventions about the conduct of collective decision-making bodies that antedate the *United States Constitution*. But it also authorises each house of Congress to make rules for its internal operations.¹⁹ This is also a sensible and necessary provision, but it has allowed the Senate to develop the convention of the filibuster, which deeply undermines the precept of majority rule.

The ordinary definition of a filibuster is an individual Senator's engagement in extended debate in an effort to stop passage of a Bill.²⁰ In early American history the filibuster was used only rarely, and was confined to contexts of high importance or principle, for example in the great debates over slavery. By the end of the 20th century, however, its use had expanded so much that it had become an obstacle both to ordinary legislation and to routine nominations of executive and judicial officers. The rules of the Senate enshrine the filibuster by allowing the closure ('cloture') of debate only if 60 of the 100 Senators concur. Consequently, the Democratic Party, which currently holds 56 seats in the Senate, has been unable to control the legislative process without Republican support, which is rarely forthcoming. In the limited context of confirmation of executive officers and judges of the lower federal courts, the Senate has recently altered its rules to provide that a majority vote prevails. This is a heartening development, but it leaves the filibuster in place for legislation and Supreme Court nominations.

I believe that the filibuster is unconstitutional, because the American political precept of majority rule should guide interpretation of art I.²¹ It is unlikely, however, that the Senate will abandon it entirely, notwithstanding the Senate's recent willingness to confine its application. Senators are aware that today's majority can become tomorrow's minority, and are unwilling to give up the safeguard for legislative minorities that the filibuster provides. Nor will the other branches of government invalidate the filibuster. The President lacks the internal leverage in Congress that would exist in a parliamentary system. Party loyalties to the President within Congress are offset by institutional resistance to executive meddling. American courts have regarded most issues concerning the internal processes of Congress as 'political questions' that are not fit for judicial resolution.²²

¹⁸ *United States Constitution* art I § 5: 'a majority of each [House] shall constitute a Quorum to do Business'.

¹⁹ *Ibid*: 'Each House may determine the Rules of its Proceedings'.

²⁰ The much larger House of Representatives (435 members) operates under majority control, enforced by a powerful Rules Committee that governs debate.

²¹ Such an interpretation would leave ample scope for the rulemaking power of the houses, which could regulate the flow of legislation and other matters in many ways consistent with majority rule.

²² Peter M Shane and Harold H Bruff, *Separation of Powers Law* (Carolina Academic Press, 3rd ed, 2011) ch 2.

In consequence, in the United States today, even when a party holds only one of the houses of Congress, it can dictate policy to the other house and President within broad limits. Because revenue Bills must originate in the House (as in a system of responsible government) and spending Bills ordinarily do so, that body always holds ultimate control over supply. This is a salutary feature, but in the American system the Senate has full power to amend or reject funding bills. If the Senate always operated by majority rule, the American legislative process would be much less vulnerable to a minority in that body.

The current gridlock is greatly exacerbated by a new phenomenon in American politics: the presence of a large numbers of legislators who are willing to stop the federal government as a whole from performing its essential functions. Lord John Russell once remarked that any political system that vests final decisional authority in more than one entity relies on mutual forbearance if it is to work.²³ American politics has lost that forbearance, which traditionally relied on both political parties' desire for the government to function and their willingness to compromise to achieve that end. In recent times, however, the American right wing, partly embodied by the Tea Party, is perfectly willing or even anxious to dismantle many current functions of the federal government in pursuit of a hazy 19th century Arcadia of sharply limited government that exists in their minds. They are also willing to have the United States default on its debt if that is the price of the severe spending cuts they favor. The recent controversy over deep mandatory spending cuts, or 'sequesters', which were enacted as the price of authority to extend the debt limit, is an example of this spirit of the wrecking ball.

A convention that is really a version of the filibuster has stymied presidential nominations to staff the executive and judiciary — and may continue to do so in some cases notwithstanding recent reforms to the filibuster rule. Here the supposedly limited check of Senate confirmation has expanded to make each Senator as powerful as the President. Because each Senator represents a state constituency, Senators have always expected to have a voice in the selection of all state-based federal officers, such as local federal judges or customs officers. Over the years, Presidents sparred with powerful Senators to determine which branch would control patronage. It was a game played with no rules other than power politics.

The Senate, having powerful incentives to maximise the political gains for incumbent Senators that flow from controlling patronage, quickly developed the practice of 'senatorial courtesy', by which the entire Senate will defer to a single member's objection to a nominee. This meant that senatorial control of the selection of local federal officers was always potentially present and was often the reality, unless the President's own party powers could counteract it. Senators place 'holds' on pending nominations to force the administration to yield to their demands on wholly unrelated matters. This leverage is so powerful that it is easy to understand why the Senate as a whole is unlikely to reform the practice, no matter how much damage it does to the nation. As with the filibuster, Presidents and courts cannot force reform.

²³ Quoted in Woodrow Wilson, *Congressional Government* (Houghton, Mifflin, 1885) 163.

It remains to be seen whether the courtesy convention will negate filibuster reform for all statebased federal officers.

Recent Presidents have responded to domestic gridlock by using the tools that are available to them. In particular, they tap the reservoir of administrative discretion that is contained in the existing body of statutes. For a long time, Presidents who lacked the legislative support needed to obtain new statutory authority have issued executive orders to the agencies, instructing them to take particular actions that are neither clearly authorised nor clearly forbidden by existing statutes.²⁴ The use of this workaround has accelerated in recent years, under both President George W Bush and President Barack Obama. A prominent example is President Obama's order to immigration authorities to cease deportation efforts against undocumented aliens who have been in the United States since childhood. Thus, Presidents who are unable to command effective legislative majorities dance at the edge of existing statutes, making incremental policy advances where they can.

Now we have seen the 'President bound', chained by the intransigence of legislative minorities or even individual legislators who rely on congressionally developed conventions that are in tension with portions of the constitutional text that ought to be controlling. This situation cannot be consistent with the expectations of the American framers, but there is no obvious remedy for it unless and until the American people elect Members of Congress who will pledge to stop it.

III THE PRESIDENT 'UNBOUND'

In American foreign affairs a different picture emerges. The reason for the difference is that the practical power to take effective action shifts from Congress to the President, who gains the opportunity to generate the controlling conventions. Possession of the initiative is critical in a system of separated power. Even though Congress can generally check or reverse presidential action after the fact in foreign affairs, the President possesses both broad constitutional powers and ample practical means to take actions that will very likely survive. Here, in sharp contrast to the domestic context, constitutional conventions have evolved in ways that empower Presidents, rather than disabling them.

The President's explicit constitutional powers regarding foreign policy and war are surprisingly sparse and are mostly shared with Congress. The President is Commander-in-Chief of the military, but Congress declares war and regulates the military.²⁵ The President nominates ambassadors, but a majority of the Senate confirms them. The President negotiates treaties, but a 2/3 vote of the Senate is needed to ratify

²⁴ Bruff, *Balance of Forces*, above n 9, ch 5.

²⁵ *United States Constitution* art II § 2: 'The President shall be Commander in Chief of the Army and Navy of the United States.' Under art I § 8, Congress has power, inter alia, 'to declare War', 'To raise and support Armies', 'to provide and maintain a Navy', and 'To make Rules for the Government and Regulation of the land and naval Forces'.

them.²⁶ The President receives foreign ambassadors, but that function may have been intended as merely ceremonial, rather than a power to decide what governments to recognise.²⁷ Congress possesses other relevant powers as well, for example to regulate foreign commerce.²⁸

It is very difficult to glimpse the world's most powerful officer in this congeries of textual fragments. There is a good reason for the sketchy and incomplete description of the presidency in art II of the *United States Constitution*: the framers had no model for the office to aid them. They knew that they did not wish to create a monarch, having just rid themselves of one. Nor did they wish to proceed without any executive branch at all, as the temporary *Articles of Confederation* had done.²⁹ Hence they specified the features of the presidency that occurred to them, and left the rest to statutory implementation and to the precedents that would be generated by the Presidents themselves as they conducted the office.³⁰

It is largely in the provisions of the *United States Constitution* that structure the federal government that the vast potential power of the presidency lies, hidden in plain sight. First, the President derives a massive institutional advantage over Congress from the vesting of the executive power in a single individual, who can operate the executive branch with 'energy, secrecy, and dispatch'.³¹ Congress, as a many-headed institution, is built to be deliberative, open and slow to react. The President's daily control of the executive apparatus of government empowers him or her to dispatch diplomatic and military officers around the globe, carrying communications or bearing arms. What these officers do under presidential command forces events that Congress must confront and can attempt to control only in retrospect.

Second, the President is elected independently of Congress for a term of four years.³² This is the central difference between the American system and a parliamentary one. Its importance is revealed by the fact that the *United States Constitution's* framers considered and ultimately rejected providing for a President who would be elected by Congress for a set term.³³ Even if the President inhabited a formally separate branch of government, that arrangement would have greatly increased the dependency of

²⁶ Ibid art II § 2: 'He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur'.

²⁷ Ibid art II § 3: 'he shall receive Ambassadors and other public Ministers'.

²⁸ Ibid art I § 8.

²⁹ Bruff, *Balance of Forces*, above n 9, ch 1.

³⁰ Harold H Bruff, *Untrodden Ground: How Presidents Have Interpreted the Constitution* (University of Chicago Press, 2015) ch 1.

³¹ This phrase was used at the Constitutional Convention by James Wilson. Max Farrand, *The Records of the Federal Convention of 1787* (Yale University Press, revised ed, 1966) 66. Article II § 1 of the *United States Constitution* begins: 'The executive Power shall be vested in a President of the United States of America'.

³² *United States Constitution* art II § 1.

³³ Bruff, *Balance of Forces*, above n 9, ch 1.

Presidents on congressional support, both in the promises that would need to precede election and the compromises in office that would enable re-election, if allowed. Instead, the independent political base has allowed Presidents to govern — and even govern effectively at times — when the opposition party holds one or both houses of Congress. The resultant tensions are understandable to Australians, because your Senate tends not to be in the hands of the party holding a majority in the House of Representatives.

The President's set term of four years produces independence from both Congress and the people, absent impeachment. America's decoupling of the presidency from the will of a current majority of the people mystifies most inhabitants of parliamentary systems, and it is certainly a mixed blessing for the United States. There have been times in American history when a parliamentary executive would have been dismissed by Congress. Two examples will suffice to show how the fixed term of office can allow Presidents to be courageous. During the Civil War, in the dismal summer of 1864, Abraham Lincoln thought he would fail to be re-elected in the fall; he might well have been sacked by a Congress having that power. In 1951 Harry Truman endured a political firestorm after his justified dismissal of General Douglas MacArthur in Korea. In both cases, politics eventually took a turn and these Presidents went on to their other considerable accomplishments.

Of course a term that is guaranteed absent impeachment can cause great havoc in the US. Andrew Johnson wrecked Reconstruction and survived impeachment; Richard Nixon wrecked the rule of law and was forced out of office rather than suffer impeachment.³⁴ In any event, the specified term is certainly empowering while it lasts as compared with parliamentary office. As the imbroglio involving Bill Clinton demonstrates, a popular President need not fear removal by impeachment for sins less dire than grave malfeasance in office.

Third, the two-term limit on presidential service that began as a practice with George Washington and was eventually enshrined in the *United States Constitution* by Amendment XXII makes each President a lame duck the morning after re-election, but it is also liberating.³⁵ Barack Obama, like many of his predecessors, has followed his re-election by showing increased aggressiveness toward Congress and an eye for his place in history. Unfortunately, several recent Presidents have suffered second-term failures, suggesting that diminished political accountability has its hazards for both the incumbent and the nation.³⁶ A system of responsible government such as Australia's does not encounter this hazard of an untethered executive.

A structural quirk in the constitutional organisation of the early federal government allowed Presidents to develop broad foreign policy and war powers without

³⁴ Bruff, *Untrodden Ground*, above n 30, chs 6, 11.

³⁵ The amendment was added after Franklin Roosevelt was elected four times, breaching the tradition.

³⁶ I count Lyndon Johnson, Richard Nixon, Ronald Reagan and Bill Clinton in this category. George W Bush did rather better in his second term than his first, except for his failed response to Hurricane Katrina.

interference from Congress. Once developed, these powers have endured. From the inception of the *United States Constitution* until 1933, Presidents were inaugurated in March but Congress did not meet in regular session until December.³⁷ This gave new Presidents a nine-month window of opportunity to take unilateral action with the statutory tools and funds that were available. (Congress was out of session much of the rest of the time as well.) Presidents could present their belatedly assembling Congress with faits accomplis that were very difficult politically to overturn. Some of the most important presidential actions that have expanded executive power took place while Congress was absent. Prominent examples include Washington's declaration of neutrality in the European war in the 1790s, Thomas Jefferson's acquisition of Louisiana in 1803 and Lincoln's early aggressive conduct of the Civil War in 1861 (including his suspension of habeas corpus).

Presidential power grew over the years in a process resembling the evolution of the common law, with particular actions forming precedents that would sustain later actions by Presidents if Congress and the people acquiesced in them (the courts often did not review presidential actions, or did so well after the fact). For example, George Washington treated the presidential power to receive ambassadors as a unilateral power to decide what foreign governments the United States would recognise and all subsequent Presidents have claimed and exercised that power without challenge. Again, the difference from the common law is that a self-interested officer rather than a neutral judge generates the conventions that will support later executive action.

By the time of Australian federation early in the 20th century, American Presidents felt free to determine foreign policy unilaterally in any way that did not require a treaty or violate a statute. Presidents also deployed the military at their discretion even if a war might be provoked. For example, in 1846 President James Polk sent the US army into a part of southern Texas that Mexico claimed; hostilities erupted and Congress speedily declared war. Presidents also conducted many small-scale military operations that did not seem to call for a declaration of war, such as punitive expeditions in Latin America.

This already potent office was empowered more permanently after World War II when the US created a massive standing military establishment for the first time. (Demobilisation had followed all prior wars.) Nowadays, the American national security establishment is vast and highly secretive. Congress finds it very difficult even to monitor, much less to control, what the executive branch is doing. The accountability of the President to the people that the Constitution contemplated, either directly or at least through Congress, is much attenuated.

The aftermath of the terror attacks on the United States of September 11, 2001, has tested the limits to presidential power. President George W Bush immediately sought and received from Congress the equivalent of a declaration of war against

³⁷ Amendment XX removed this odd arrangement; now Congress convenes each January and is in session much of the time. Presidents are inaugurated in January as well.

al Qaeda.³⁸ No one doubted the general constitutional propriety of the military pursuit of al Qaeda in Afghanistan that followed. Some of the President's particular actions, however, lacked any statutory support or even violated statutory restrictions.³⁹

Here, a fundamental distinction must be emphasised. Presidents take many actions that are based directly on their constitutional powers without plausible support from any statute. Often these actions are fully justified; for example, an immediate military response to an attack on American citizens. The question is one of limits, and the limits are mostly unknown in the realms of foreign policy and war. There is much loose talk about 'inherent' executive power to do this or that, but in fact presidential actions can almost always be tied to some explicit grant of constitutional power (although the connection is somewhat tenuous at times).⁴⁰ These constitutionally-based presidential initiatives differ fundamentally from actions that violate existing statutory restrictions. In fact, Presidents have very rarely contravened clear statutory constraints on their power.⁴¹ Any attempt to do so threatens destabilisation of the American constitutional scheme, because if successful it disables congressional control of executive action.⁴²

President Bush's actions did contravene statutory limits in at least two contexts. First, the Supreme Court held that his executive order establishing military commissions to try terror suspects for war crimes violated statutory limits and the *Geneva Conventions*.⁴³ Second, his secret program for electronic surveillance of terror suspects ignored statutory restrictions on that activity.⁴⁴ Neither statutory violation was necessary — Congress readily altered the statutes to grant the President the discretion he sought once the legal difficulties became known.

In two other contexts, President Bush stretched his constitutional powers to a degree that violated either the constitutional rights of individuals or federal criminal statutes. He ordered terror suspects to be imprisoned indefinitely with no substantial process to identify whether the individuals detained were actually dangerous.

³⁸ It is styled an *Authorization to Use Military Force (AUMF)*, Pub L No 107-40, 115 Stat 224. From a constitutional perspective it serves the purpose of a declaration of war.

³⁹ For exploration of these matters, see Harold H Bruff, *Bad Advice: Bush's Lawyers in the War on Terror* (University Press of Kansas, 2009).

⁴⁰ Australian constitutional law also features a debate about inherent executive power. The classic analysis is George Winterton, *Parliament, The Executive, and the Governor-General* (Melbourne University Press, 1983). For a fine recent analysis, see Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia' (2012) 12 *Oxford University Commonwealth Law Journal* 97.

⁴¹ The most prominent example is Andrew Johnson's refusal to enforce the Reconstruction statutes, for which he was impeached and nearly removed from office.

⁴² The Supreme Court's iconic steel seizure case, *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579 (1952) makes this point emphatically.

⁴³ *Hamdan v Rumsfeld*, 548 US 557 (2006).

⁴⁴ The Supreme Court has not adjudicated the merits of this question. For analysis, see Bruff, *Bad Advice*, above n 39, ch 7.

The Supreme Court held that the due process clause in Amendment V to the *United States Constitution* required fair procedure to make these determinations.⁴⁵ Even more controversially, the President approved ‘enhanced’ interrogation techniques that may well have constituted torture, in violation of both federal criminal statutes and international law.⁴⁶

By the end of President Bush’s time in office, many of the early excesses of the war on terror had abated substantially.⁴⁷ Suspects enjoyed some procedural rights, electronic surveillance and trial by military commission were authorised by statute and the most brutal interrogation techniques were no longer in use. When Barack Obama succeeded Bush as President, there was widespread expectation that he would change the conduct of the war on terror dramatically. He did not do so. Instead, he continued many practices, such as the indefinite detention of the most dangerous suspects. He modified others, for example by limiting interrogation techniques to traditional military practices.⁴⁸ The imperatives of effective response to the murky threats of terrorist attacks abide, whoever occupies the presidency.

What has most surprised observers about Barack Obama’s approach to the war on terror is his expansion of some activities to levels not seen in the Bush administration.⁴⁹ The American political and legal systems are still trying to understand these developments and to craft ways to conform them appropriately to law. All three of the activities that I will describe — military special forces raids, drone attacks and computer attacks against other computers — are conducted secretly. American law usually imposes three kinds of rudimentary legal controls on such ‘covert’ activities.⁵⁰ First, they must be funded. The money is usually hidden in the giant budgets of the Department of Defense and the Central Intelligence Agency (‘CIA’). Second, the President must take personal responsibility for each action by signing a secret ‘finding’ describing it and asserting its necessity. And third, the President must ordinarily report his decisions and actions to the intelligence oversight committees in the two houses of Congress, or at least to their leaders. The sufficiency of these controls to meet basic norms of legitimacy in a constitutional democracy is open to serious doubt, but better alternatives have yet to emerge.

Obama has implemented a number of new and expanded initiatives. First, he sharply increased secret raids by military special forces in Afghanistan and Pakistan (‘AfPak’), to over ten per night.⁵¹ Of course, the most famous of these raids was the one in Pakistan that, at long last, killed Osama bin Laden.⁵² Early in his presidency,

⁴⁵ *Hamdi v Rumsfeld*, 542 US 507 (2004).

⁴⁶ Bruff, *Bad Advice*, above n 39, ch 11.

⁴⁷ Jack Goldsmith, *The Terror Presidency* (W W Norton, 2009).

⁴⁸ Jack Goldsmith, *Power and Constraint* (W W Norton, 2012).

⁴⁹ David E Sanger, *Confront and Conceal* (Crown Publishers, 2012).

⁵⁰ Bruff, *Bad Advice*, above n 39. Goldsmith, *Power and Constraint*, above n 48, explores these and other control techniques.

⁵¹ Sanger, above n 49, ch 10.

⁵² *Ibid* ch 4; Thomas Mann, *The Obamians* (Penguin, 2012) ch 21.

Obama had instructed the CIA to reinvigorate the hunt for bin Laden, which had gone cold. Once bin Laden was tentatively located, the plans for the raid were held very close within the administration. The Government of Pakistan was not informed due to its mixed loyalties. President Obama displayed considerable courage in ordering the raid in the face of uncertainty as to whether bin Laden would be found in the targeted compound, and with the risks of an operational failure like earlier ones in Iran and Somalia or a violent reaction by Pakistan to the presence of American troops. Whether the mission was explicitly to kill bin Laden or to attempt a capture if possible was left uncertain, but the obvious nightmares that would attend having a live bin Laden in the dock may have registered with all concerned.

After monitoring the bin Laden raid from the White House with his advisers huddled around him, Obama reacted to the news of success in his characteristically restrained manner: ‘We got him’.⁵³ Legal justifications for the killing relied on the congressional declaration of war against al Qaeda, the President’s Commander-in-Chief power, international law rights of national self-defense and the right to kill enemy combatants under the law of war.⁵⁴ Surely these were adequate grounds in the case of bin Laden; controversy has focused on other killings.⁵⁵

In his second major initiative, Barack Obama stepped up the military campaign against al Qaeda by increased use of unmanned, ‘drone’ aircraft in AfPak.⁵⁶ In his first term, Obama ordered over 250 drone attacks, compared to about 40 by Bush. Strikes within Pakistan in particular required secrecy to avoid offending the Government of Pakistan by broadcasting the continuing infringement of its sovereignty. Over 400 drones are operated by the Air Force and the CIA from over 60 bases around the world. During his first term, the President would say little more about the program than that it was on a ‘tight leash’.⁵⁷

The consequent constitutional questions are as difficult as they are novel. Does the President’s Commander-in-Chief power allow him to target and kill any enemy of the United States anywhere in the world? The constitutional argument for the initial phase of drone assaults in AfPak was relatively straightforward: Congress had authorised military force against al Qaeda, and the law of war allows targeting those who plan to attack in an act of self defence.⁵⁸ Soon, however, the drones ranged beyond the initial theater in AfPak where the congressional authorisation and the law of war had the clearest application.

⁵³ Sanger, above n 49, 101.

⁵⁴ Goldsmith, *Power and Constraint*, above n 48, 225.

⁵⁵ Bruff, *Untrodden Ground*, above n 30, ch 15.

⁵⁶ Mann, above n 52, chs 7–8, 15.

⁵⁷ Sanger, above n 49, 252.

⁵⁸ This argument also countered criticism that the President was breaking a still-extant promise made by President Gerald Ford in a 1975 executive order banning assassination of foreign leaders. Because it is politically impossible to rescind Ford’s promise openly, Presidents have evaded it when necessary.

In a controversial case, the President approved drone strikes that eventually killed an American citizen named al-Awlaki, a radical Islamic cleric based in Yemen who had fomented terror activities against the United States. The Obama administration formally justified targeting this American citizen overseas as a form of ‘lawful extra-judicial killing’.⁵⁹ The explanation was that after due diligence, it must appear to the executive that the target is an active combatant who poses an imminent threat to the United States, and that capture is impracticable.

This might be a sensible interim approach from the perspective of American constitutional law, whatever its merits in international law. For a very long time, Presidents have lashed out at anyone they can reach who seems to threaten Americans, as in many ‘police actions’ in Latin America. Modern technology has greatly expanded the President’s practical capacity to strike, however, raising questions about the need for new constitutional controls. At present, the executive’s decisions are not checked in advance by a neutral magistrate (as occurs with electronic surveillance). The only external check consists of whatever scrutiny the congressional committees provide. The drones operate at (or perhaps over) the edge of law.

Obama’s third initiative involved what is called ‘cyber warfare’, the use of one computer to attack another. This form of covert assault is even stealthier than drones, because the victim may be unaware that an attack has even occurred and will likely have great difficulty identifying the source. Since cyber wars do not involve physical violence, are they governed by the domestic and international law of war at all, and, if so, how? Here is a known example of this new kind of activity to consider.

Iran possesses both nuclear dreams and an ingrained hostility to the United States. Military action against Iran’s well-protected nuclear facilities may not be feasible and President Obama has wanted to divert Israel from attacking the facilities in self-defense. While pressuring Iran with sanctions, Obama tried unsuccessfully to negotiate with its leaders.⁶⁰ The failure of traditional means for influencing or forcing Iran to abandon its nuclear program led Obama to conduct the first major cyber war in history. President Clinton had tried ordinary sabotage against the program, for example by having defective industrial parts and designs shipped to Iran. President Bush had initiated some cyber attacks on the computers controlling Iran’s nuclear facilities by sending ‘worms’ into their software, while trying to prevent collateral damage to civilian facilities such as schools and hospitals.⁶¹ Thus analogies to traditional law of war concepts have guided the American approach from the outset.

In a closely guarded operation called Olympic Games, President Obama initiated a new kind of cyber war.⁶² A worm now known as Stuxnet invaded the Iranian computers and caused physical damage in the nuclear facilities by, for example,

⁵⁹ Scott Shane and Charlie Savage, ‘Report on Targeted Killing Whets Appetite for Less Secrecy’, *The New York Times* (New York), 6 February 2013, A11.

⁶⁰ Sanger, above n 49, ch 7.

⁶¹ *Ibid* ch 8.

⁶² *Ibid*.

causing centrifuges to spin out of control. As a covert intelligence operation, Olympic Games required presidential findings, which were crafted and provided to the intelligence committees in Congress. The President stayed closely involved as the operation developed, insisting that the worm be kept ‘unattributable’ as long as possible. It appears that Stuxnet significantly damaged the Iranian program before it was revealed after having escaped accidentally into international cyberspace, where it created a furore.

There now exists a United States Cyber Command, a joint effort of the National Security Agency and Department of Defense, with a staff of about 13,000 people and a budget of about \$3.4 billion.⁶³ Most of its activities are unknown beyond selected precincts in the executive and Congress. The administration admits defending against cyber attacks coming from anywhere. For example, it appears that an attack on the computer systems of some large American banks was an Iranian effort to retaliate for Stuxnet. Recent news reports trace computer assaults on American computers to a Chinese army facility. Both domestic and international concepts of lawful warfare must evolve to grapple with this new reality.

Because war by machines can be precisely targeted, minimising the collateral damage that conventional warfare imposes and is cheap in both American lives and money, its availability provides a constant temptation to overuse, especially in the absence of developed legal constraints. President Obama has been busily developing both the operational and legal fronts of these two new kinds of war, but without meaningful participation by Congress, except for consultation with the relevant committees and occasional hearings. Nor, of course, do the American people know much about the facts, except for the occasional bulletin concerning a completed drone attack or computer crash. Thus we glimpse executive actions that have emerged into public view, leaving all else hidden. What other covert activities is the administration conducting? We do not know.

At its core, the President’s duty and opportunity to interpret the *United States Constitution* and to develop precedents under it remain deeply personal. The primal links to the other two branches of government and the people do remain, although in altered form. Congress knows of most important presidential initiatives, and has opportunities to exert informal pressure or even to intervene with controlling legislation. The courts eventually show their willingness to play a role in regularising the war on terror. The people eventually learn what their Presidents have been doing and provide a verdict that informs history and future Presidents. In a world marked by vast leaks of information — for example, the disclosures by Edward Snowden — no President should contemplate taking action in the expectation that it will remain secret for long.

Thus the presidency is controlled either too much or too little, with not much middle ground where the control seems about right. Where Congress controls the development of constitutional conventions, presidential discretion is bounded too much. Where Presidents control the development of those conventions, their discretion

⁶³ Ibid ch 10.

is bounded too little. American lawyers and politicians are struggling to make our 18th century constitution function in the 21st century. Fortunately, the *United States Constitution* is flexible enough to adapt to the times, if 21st century Americans have the wisdom to make it work well.

IV CONCLUSION: AUSTRALIA VIEWED FROM AMERICA

What are the implications of the American experience for the development of Australian constitutional law? Australian constitutional lawyers and judges have displayed increased interest in the limits of executive power in recent years, as old certainties have been shaken by cases such as *Pape v Commissioner of Taxation* and *Williams v Commonwealth*.⁶⁴ The issue in these cases is whether the *Australian Constitution's* grants of executive power in Chapter II can support spending by Parliament on subjects not within the heads of power granted it directly, such as the school chaplaincy program struck down in *Williams*. The primary constitutional concern is federalism, to protect the residual powers of the States from an undue expansion of Commonwealth power. This general tension is understandable to an American, because the United States has a long line of Supreme Court cases that define the scope of federal legislative power.⁶⁵ The American cases, though, speak exclusively about the power of Congress under its enumerated grants in art I of the *Constitution*.

What is new to an American observer is the idea that the grants of executive power in Chapter II of the *Australian Constitution* can empower the legislature to enact statutes that would otherwise be beyond its power. This possibility is far easier to imagine in a fused system like Australia's than in a separated one like America's. Especially intriguing is the prominence of a 'nationhood' concept in *Pape*, which allows the Commonwealth to take some actions that inhere in independent nationhood and are beyond the competencies of individual States, such as the national emergency disbursement in that case. Because such issues would not have arisen in Australia before independence was fully attained, they remain rather new and only partially explored.

By contrast, the United States has over two centuries of experience with arguments about 'inherent' executive powers. The question arises regularly because of our separated executive and the vagueness of art II of the *Constitution*, which sketches executive responsibilities. (Of course, it is far more specific than Chapter II of

⁶⁴ *Pape v Commissioner of Taxation* (2009) 238 CLR 1 ('*Pape*'); *Williams v Commonwealth* (2012) 86 ALJR 713 ('*Williams*'); Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253; Anne Twomey, 'Pushing The Boundaries of Executive Power — Pape, The Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313.

⁶⁵ In a recent prominent case, the Supreme Court upheld federal health care under the taxing and spending power, but not the commerce power. *National Federation of Independent Business v Sebelius*, 132 S Ct 2566 (2012).

the *Australian Constitution*.) The American experience supports the concern that has surfaced in the Australian literature about unfocused discussion of ‘inherent’ executive powers. Such discussions careen around in the American constitutional literature like loose cannons. But, Presidents have usually grounded their actions in particular constitutional powers, so that legislators, courts and citizens might then dispute the validity of these actions in an informed way. For example, Abraham Lincoln’s Emancipation Proclamation did not simply free all the slaves in the United States — Lincoln correctly assumed he had no such power. But he did assert the power to issue a military order under his power as Commander-in-Chief to free slaves in regions still in rebellion in order to undermine the rebel military effort, and that is what he did. Thus an essential control on presidential development of conventions about executive power is the justification of a precedent in a way that locates it in constitutional text and, where available, prior presidential practice.

In Australia, the executive duty of ‘maintenance’ of the *Constitution* and laws under s 61 is susceptible to some of the essentially unguided and unbounded arguments about ‘inherent’ power that have bedevilled American constitutional law. In Australia, as in the United States, assertions of power to ‘maintain’ the nation will be made by the government, which has an interest in expanding executive power. Although such an expansion would also increase legislative power in Australia, your system of responsible government does not include the American check of the separation of legislative and executive power, with all of its attendant jealousies. That leaves the courts as the constraining institution, with the difficult duty of defining what it means to ‘maintain’ the *Constitution*. To an American, this seems to place great pressure on the judiciary to decide questions it may feel unsuited to resolve.

Another unsolved question in American constitutional law may arise in Australia. The issue is whether some executive actions are immune from legislative control in that they may not be limited by statute. In most parliamentary systems, this kind of question is very unlikely to occur because Prime Ministers will not act without the support of their House, which can readily alter existing legislation that may bar proposed executive action. In Australia, however, with a separately elected Senate that usually does not match the party control of the House of Representatives, a clash can occur that prevents altering existing legislation. The 1975 crisis over supply shows how this could occur. Another possibility is that exigencies of time might require immediate action, for example in response to a terrorist attack.

Might an Australian Prime Minister someday decide to violate an existing statutory limit to meet a crisis for which enabling legislation cannot be obtained? If so, there would be a dearth of domestic constitutional law on the subject. In the United States, experience has shown that the executive is almost always able to accomplish what the nation needs without infringing existing statutes and no Supreme Court case has upheld a presidential action that is conceded to contravene a valid statute.

Perhaps this aspect of American history will provide some comfort to Australians considering this basic constitutional issue. For both nations, the course of wisdom may be to recognise the possibility that a realm of executive immunity from statutory control might be needed someday in the press of crisis, without articulating

an everyday version of such a doctrine in advance, an exercise that would risk its overuse. Constitutional ambiguity about the ultimate allocation of constitutional power has served the United States well so far; Australia might be no different.

As Australians consider their own government, I suggest they draw guidance from an authority well known to both the American and Australian framers, the Baron de Montesquieu, whose great book guided our constitution-makers, and through ours, yours. Montesquieu is best known as an early advocate of the separation of powers, but that is not the aspect of his work I emphasise now. Consider the title of his great book, *De L'esprit des Lois*, 'The Spirit of the Laws'. His title reflected the nature of his project. After considering many forms of government, he stressed that what matters most is that the spirit of a nation's laws match the spirit of its people. That is the question you should ask about your own Constitution, just as I constantly ask it about my own. Does your Constitution match the spirit of the Australian people today, and if not, what changes will make it do so? If changes are needed, what is the appropriate interplay of power between Parliament, the Government, the High Court and the people acting by constitutional referendum? This last question, it appears, raises issues of the separation of powers, and so I end near where I began.

*Luke Beck**

THE ESTABLISHMENT CLAUSE OF THE AUSTRALIAN CONSTITUTION: THREE PROPOSITIONS AND A CASE STUDY

ABSTRACT

This article argues that the reasoning in *Attorney-General (Vic) ex rel Black v Commonwealth*, the sole High Court case on the meaning of the establishment clause of s 116 the *Constitution*, is too narrow and requires reconsideration. It begins that process of reconsideration and argues that the proper meaning of the establishment clause encompasses at least the following three propositions. First, the establishment clause prohibits federal expenditure for religious purposes such as religious activities. Secondly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. Thirdly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. The article concludes by testing the Australian Government's National School Chaplaincy and Student Welfare Program against those three propositions.

I INTRODUCTION

The High Court of Australia has decided only one case on the 'establishment clause' of s 116 of the *Constitution*. Section 116 provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The decision was the 1981 case of *Attorney-General (Vic) ex rel Black v Commonwealth* ('*DOGS Case*') in which it was held that federal funding of non-government schools that happened to be operated by religious organisations did not contravene the establishment clause when the funding was for ordinary educational purposes.¹ The reasoning in the *DOGS Case* has been described variously as 'restrictive',²

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¹ (1981) 146 CLR 559.

² *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)* (2011) 256 FLR 156, 165 [28].

‘strict’³ and as setting ‘a very high threshold’.⁴ The narrow reasoning in that case — as opposed to its result — is also inconsistent with the reasoning of the High Court in *Williams v Commonwealth (No 1)* (*School Chaplains Case*),⁵ which dealt with the religious tests clause of s 116. The narrow reasoning in the *DOGS Case* is also inconsistent with the High Court’s approach to interpreting other prohibitions on power contained in the *Constitution*. The meaning of the establishment clause therefore requires reconsideration.

This article offers a first step in the reconsideration of the meaning of the establishment clause. It uses the facts of the National School Chaplaincy and Student Welfare Program (‘the NSCSWP’) as a useful point of reference. It does so not simply because the High Court refuses to consider abstract questions of legal principle divorced from any application to facts (and mimicking the High Court’s approach is methodologically useful in any attempt to predict the course of legal development), but also because statements of legal principle are more readily understood in their application to factual scenarios. The use of the NSCSWP as the factual scenario is further justified because the reconsideration of the establishment clause arises, in part, from the *School Chaplains Case*.

Part II of this article explains how the reasoning in the *DOGS Case* is too narrow because of its inconsistency with the reasoning in the *School Chaplains Case* and the High Court’s approach to interpreting other prohibitions on power. Part III presents some factual background about the NSCSWP and the work of school chaplains as part of that program. Part IV moves to a consideration of the meaning of the establishment clause and presents three propositions as arguable statements of legal principle concerning its meaning. The first proposition is that the establishment clause prohibits federal expenditure for religious purposes such as religious activities. The second proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. The third proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. Finally, Part V applies those principles to the facts of the NSCSWP as a demonstration of how reasoning under a reconsidered establishment clause might play out in practice.

II THE REASONING IN THE *DOGS CASE* IS TOO NARROW

In late 2012, Ron Williams, a Queensland father of school-aged children, achieved a short-lived victory in his High Court challenge to the National School

³ Joshua Puls, ‘The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees’ (1998) 26 *Federal Law Review* 139, 144.

⁴ Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 85.

⁵ (2012) 248 CLR 156.

Chaplaincy Program.⁶ This program had been established and funded by the Commonwealth in a purported exercise of the executive power of the Commonwealth in the absence of any statutory authorisation beyond a mere appropriation statute. In the *School Chaplains Case*, Mr Williams succeeded in arguing that this was not a lawful basis for the Commonwealth's expenditure.⁷ The High Court rejected Mr Williams' additional argument that the program contravened the prohibition in s 116 of the *Constitution* against religious tests for offices under the Commonwealth. The chaplains, the High Court held, did not hold an office under the Commonwealth.⁸

A few days after the High Court handed down its decision, the Commonwealth Parliament enacted legislation to put what had by then become the NSCSWP on a legislative footing.⁹ In response to that legislation, Mr Williams indicated his intention to launch a second challenge to the NSCSWP.¹⁰ In August 2013, Mr Williams made good his intention and commenced proceedings in the High Court challenging the legislation.¹¹ In June 2014, the High Court held that the legislation, to the extent it purported to apply to the NSCSWP, was not supported by any constitutional head of power.¹² Despite the invalidation of the NSCSWP, it remains a useful case study to examine the meaning of the establishment clause. The analysis in this article therefore proceeds on the assumption that the NSCSWP is somehow within Commonwealth power. In this regard, it is noted that following the decision in *Williams (No 2)* the Commonwealth indicated its intention to consider continuing a version of the NSCSWP by means of s 96 grants to the states.

In the *School Chaplains Case*, in the course of holding that the chaplains did not hold an office under the Commonwealth, Gummow and Bell JJ said that 'it may be accepted that, given the significance of the place of s 116 in the *Constitution*,

⁶ Ibid.

⁷ For discussions of this aspect of the case, see, eg, Shipra Chordia, Andrew Lynch and George Williams, 'Williams v Commonwealth: Commonwealth Executive Power and Australian Federalism' (2013) 37 *Melbourne University Law Review* 189; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35(2) *Sydney Law Review* 253; Benjamin B Saunders, 'The Commonwealth and the Chaplains: Executive Power after *Williams v Commonwealth*' (2012) 23 *Public Law Review* 153.

⁸ For a discussion of this part of the case, see Luke Beck, 'Williams v Commonwealth: School Chaplains and the Religious Tests Clause of the *Constitution*' (2012) 38 *Monash University Law Review* 271.

⁹ *Financial Framework Amendment Act (No 3) 2012* (Cth).

¹⁰ Nicola Berkovic, 'Father Flags Second Chaplaincy Challenge', *The Australian* (online), 27 June 2012, <<http://www.theaustralian.com.au/national-affairs/education/father-flags-second-chaplaincy-challenge/story-fn59nlz9-1226409555822>>.

¹¹ Ronald Williams, 'Statement of Claim', *Williams v Commonwealth*, S154/2013, 8 August 2013.

¹² *Williams v Commonwealth (No 2)* [2014] HCA 23.

the term *should not be given a restricted meaning* when used in that provision.¹³ The separate judgments of French CJ,¹⁴ Hayne,¹⁵ Crennan¹⁶ and Kiefel JJ¹⁷ indicated their agreement with Gummow and Bell JJ on s 116 issues. Gummow and Bell JJ's statement should be read carefully. The term in question was 'office' and their Honours held it should not be given a restricted meaning. The reason for that interpretive approach was the significance of the place of s 116 in the *Constitution*. Obviously, the 'significance of the place of s 116 in the *Constitution*'¹⁸ does not change in respect of the different clauses of s 116. It follows that, both being concrete terms, the interpretive approach in respect of the word 'office' is equally applicable to the word 'establishing'.

This rejection of restricted meanings conflicts with the reasoning in the *DOGS Case*.¹⁹ The case concerned a challenge to federal funding of non-government schools that happened to be operated by religious groups. The High Court, by six to one, held that such funding did not breach the establishment clause.²⁰ The reasoning in the *DOGS Case* is considered in more detail below. What is important for present purposes is the fact that the reasoning in the *DOGS Case* was, as mentioned in the introduction, rather restrictive.

In 2011, in *Hoxton Park Residents Action Group v Liverpool City Council (No 2)* ('*Hoxton Park (No 2)*'), the New South Wales Court of Appeal overturned a decision to strike out a claim that federal funding of an Islamic school contravened the establishment clause.²¹ The original striking out had been made on the ground that the issue had been authoritatively decided by the *DOGS Case*. In deciding to overturn this decision, the Court of Appeal said 'it may be accepted that the term "establishing" in s 116 was given a restrictive meaning' in the *DOGS Case*.²² However, the Court of Appeal also pointed out that approaches to constitutional interpretation have evolved since the *DOGS Case* was decided. References to the record of the Conventions at which the *Constitution* was drafted have, since the *DOGS Case*,

¹³ *School Chaplains Case* (2012) 248 CLR 156, 223 [110] (emphasis added) (footnote omitted).

¹⁴ *Ibid* 182 [9].

¹⁵ *Ibid* 240 [168].

¹⁶ *Ibid* 341 [476].

¹⁷ *Ibid* 374 [597].

¹⁸ *School Chaplains Case* (2012) 248 CLR 156, 223 [110] (Gummow and Bell JJ).

¹⁹ The case is known as the *DOGS Case* because it was brought by an organisation called Defence of Government Schools.

²⁰ *DOGS Case* (1981) 146 CLR 559 (Barwick CJ, Gibbs, Stephen, Mason, Aickin, Wilson JJ; Murphy J dissenting).

²¹ (2011) 256 FLR 156. For a detailed discussion of the case, see Luke Beck, 'Dead *DOGS?* Towards a Less Restrictive Interpretation of the Establishment Clause: *Hoxton Park Residents Action Group Inc v Liverpool City Council (No 2)*' (2013) 36 *University of Western Australia Law Review* 59.

²² *Ibid* 165 [28].

become a permitted source of constitutional reasoning and references to American jurisprudence are now more readily entertained by the High Court.²³ These developments might, the Court of Appeal considered, 'allow submissions to be made supporting a more a flexible approach to the constraints on legislative power expressed in s 116.'²⁴

Reliance need not be placed on the Court of Appeal's characterisation of the reasoning in the *DOGS Case* as 'restrictive' to show that the reasoning in that case is inconsistent with the *School Chaplains Case*. A number of the majority judges in the *DOGS Case* said themselves that they were being deliberately narrow in their reasoning. Justice Gibbs said '[t]here is no reason to give [s 116] a liberal interpretation.'²⁵ Justice Wilson, with whom Mason J agreed,²⁶ stated what while grants of power 'should be construed with all the generality which the words used will admit ... the same is not true of a provision which proscribes power.'²⁷ It follows that there is an inconsistency between the interpretive approach to s 116 adopted in the *School Chaplains Case* and that adopted in the *DOGS Case*.

The restrictive approach to interpretation in the *DOGS Case* is also inconsistent with the High Court's approach to interpreting other constitutional prohibitions on power. A clear example of this is s 117, which prohibits discrimination based on a citizen's state of residence. As Amelia Simpson has explained, the High Court's early cases on s 117 'gave the provision a very narrow construction'.²⁸ In 1989, however, the High Court rejected those narrow constructions in *Street v Queensland Bar Association* and gave the provision a broad construction.²⁹ What is important for present purposes is that, as George Williams and David Hume have commented, the 'judgments in *Street*, in direct contrast to those of Mason J and Wilson J in the *DOGS case* just eight years previously ... were infused with the notion that important constitutional guarantees should be liberally construed.'³⁰

There is another reason why the approach to interpreting the establishment clause in the *DOGS Case* is too narrow. Reid Mortensen argues that the interpretation given to the establishment clause in the *DOGS Case* is so narrow that the

²³ Ibid 166 [32].

²⁴ Ibid 166 [34].

²⁵ *DOGS Case* (1981) 146 CLR 559, 603.

²⁶ Ibid 612.

²⁷ Ibid 653.

²⁸ Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32 *Melbourne University Law Review* 639, 642.

²⁹ (1989) 168 CLR 461.

³⁰ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 277.

clause ‘means nothing’.³¹ The meaning given to the clause in the *DOGS Case* is discussed below. What matters for present purposes is Mortensen’s point that the Commonwealth has no power in the first place to do what the High Court in the *DOGS Case* said establishing a religion involves.³² It is a rather peculiar approach to constitutional interpretation that has the result of rendering a constitutional provision meaningless and the scope of Commonwealth power the same as if a provision that is expressed to limit Commonwealth power had never been included in the *Constitution* in the first place or had later been repealed. This provides an additional reason for the conclusion that the reasoning in the *DOGS Case* is too narrow or restrictive.

It is clear then that the approach to interpreting the establishment clause taken by the majority in the *DOGS Case* can no longer be viewed as authoritative. That approach is too narrow. That is not to say, however, that the result in the *DOGS Case* — that federal funding of schools that happen to be operated by religious groups is not prohibited by the establishment clause — is incorrect. As it happens, the broader reading of the establishment clause outlined below would not alter the result in that case. Before turning to the task of developing a less-restricted interpretation of the establishment clause, it is necessary to explain the facts of the NSCSWP which will be used to help expound that interpretation.

III THE FACTUAL SCENARIO

A The National School Chaplaincy and Student Welfare Program

In September 2011, the Commonwealth announced that the existing National School Chaplaincy Program would become the National School Chaplaincy and Student Welfare Program with effect from January 2012.³³

Under the former National School Chaplaincy Program, schools could apply to the Commonwealth for funding that would enable the provision of ‘chaplaincy services’ by a ‘school chaplain’ in the school. The NSCSWP was an expanded version of its predecessor.³⁴ Whilst there were changes relating to administrative matters such as procedures for working with children checks and for handling complaints, the principal difference between the two versions was that in the broader NSCSWP schools had the option of engaging the services of a secular student welfare worker, who was chosen without regard to their religion and religious qualifications, instead

³¹ Reid Mortensen, ‘The Establishment Clause: A Search for Meaning’ (2014) 33 *University of Queensland Law Journal* 109, 119–20.

³² *Ibid.*

³³ Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy and Student Welfare Program Guidelines*, June 2013 (‘*NSCSWP Guidelines*’) 9.

³⁴ Jeremy Patrick, ‘Religion, Secularism and the National School Chaplaincy and Student Welfare Program’ (2014) 33 *University of Queensland Law Journal* 187 provides a thorough overview and analysis of the program and its history.

of a religious chaplain, who must be ordained or accredited by a recognised religious institution.³⁵ As the *National School Chaplaincy and Student Welfare Program Guidelines* state:

The new National School Chaplaincy and Student Welfare Program (the Program) was announced in September 2011. Commencing in January 2012, the Program builds upon the success of the National School Chaplaincy Program and supports school communities to establish school chaplaincy and student welfare services or to enhance existing services ... From January 2012, schools funded under the Program are able to choose the services of a school chaplain to provide pastoral care services and/or select the services of a non faith-based, or secular, student welfare worker.³⁶

Under the NSCSWP, individual schools did not receive Commonwealth funds. Rather, the Commonwealth entered into a contractual arrangement with an organisation described by the Guidelines as a 'Funding Recipient'. The Funding Recipient was responsible for engaging either a 'school chaplain' or a 'student welfare worker' who would provide services at a particular school. Whether a school chaplain or a student welfare worker would be engaged was at the election of individual schools and those schools that elected a chaplain could also elect the chaplain's religious affiliation. The identity of the chaplain or student welfare worker was also a decision for the school.³⁷

The operational substance of the NSCSWP was established by the *NSCSWP Guidelines* issued by the relevant Commonwealth department.³⁸ Those Guidelines were also incorporated into the contracts between the Commonwealth and the various Funding Recipients.³⁹

B *School Chaplains and Chaplaincy Services*

As noted above, schools could elect to engage either a school chaplain or a student welfare worker. Those terms are defined in the Guidelines:

³⁵ In 2008, the original program was modified to allow a 'secular pastoral care worker' to be engaged but only where the school is unable to identify a suitable candidate for a chaplaincy position: Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy Program 2011: Have Your Say – A Discussion Paper*, February 2011, 20. The primary reason for this modification was 'the inability of some schools to source an individual for the chaplaincy role who was agreeable to the whole school community': at 9. See also, Commonwealth Ombudsman, *The Department of Education, Employment and Workplace Relations' Administration of the National School Chaplaincy Program*, Report, July 2011, 4 [1.9].

³⁶ *NSCSWP Guidelines*, above n 33, 9.

³⁷ See *NSCSWP Guidelines*, above n 33

³⁸ *Ibid* 10.

³⁹ *Ibid* 10.

For the purposes of this Program, a school chaplain is a person who:

- is recognised by the school community and the appropriate governing authority for the school as having the skills and experience to deliver school chaplaincy (as outlined at Section 1.5) to the school community
- is recognised through formal ordination, commissioning, recognised religious qualifications or endorsement by a recognised or accepted religious institution or a state/territory government approved chaplaincy service ...⁴⁰

With respect to student welfare workers, the Guidelines state:

For the purposes of this Program, a student welfare worker is a person who:

- is recognised by the local school community and the appropriate governing authority for the school as having the skills and experience to deliver student welfare services (as outlined at Section 1.5) to the school community.⁴¹

The particular services that school chaplains and student welfare workers provide vary depending on the needs and desires of particular schools. The Guidelines state that these services could include things like running breakfast clubs, delivering peer leadership and support programs and contributing to school newsletters.⁴²

The Guidelines also state that a school chaplain may provide services with a far more obvious religious character. Most relevantly for the argument of this article, the Guidelines permit school chaplains, if parental consent is obtained, to ‘deliver activities/services that promote a particular view or religious belief’,⁴³ ‘provid[e] services with a spiritual content’,⁴⁴ and ‘[perform] religious services/rites (such as worship or prayer during school assembly etc).’⁴⁵

The Guidelines are not clear as to whether student welfare workers may also perform these religious activities, although, given the qualifications for the position, they presumably would not do so in practice. The Guidelines state that the expression ‘student welfare service’ means ‘*secular* student welfare service/s’.⁴⁶ This would suggest that the work of a student welfare worker should not extend to religious activities. However, Part 3 of the *NSCSWP Guidelines* states that the ‘key tasks of a school/chaplain student welfare worker ... could include’ and then sets out a list of bullet points giving examples of various activities without any suggestion that there are activities that may be performed by one class of position and not the other.

⁴⁰ Ibid 12.

⁴¹ Ibid.

⁴² Ibid 11, 17.

⁴³ Ibid 16.

⁴⁴ Ibid 15.

⁴⁵ Ibid 16.

⁴⁶ Ibid 10 (emphasis added).

For the purposes of this article, it is not necessary to pursue this issue.⁴⁷ It suffices that the *NSCSWP Guidelines* clearly authorise school chaplains to perform religious activities.

Almost all school chaplains — more than 99 per cent — belonged to one of the various Christian denominations. In its response to a question on notice about the religious affiliations of school chaplains during Budget Estimates hearings, the Department of Education, Employment and Workplace Relations stated:

As at 1 November 2012, there were 2,607 chaplains (excluding Student Welfare Workers) registered for the National School Chaplaincy and Student Welfare Program. Of these, 2,593 identify as various Christian denominations and 14 from other religions...⁴⁸

The Department provided this breakdown of the religious affiliation of school chaplains:⁴⁹

Religious Denomination		Total
Christian Religions		2593
Anglican	143	
Baptist	143	
Catholic	182	
Churches of Christ	55	
Eastern Orthodox	1	
Lutheran	20	
Pentecostal	168	
Presbyterian & Reformed Churches	10	
Salvation Army	22	
Seventh Day Adventist	28	
Uniting Church	45	
Unspecified	1776	
Other Religions		14
Aboriginal traditional religions	2	
Buddhist	1	
Baha'i	1	
Islam	6	
Judaism	4	
Total		2607

⁴⁷ For a discussion of the NSCSWP in practice see, eg, Marion Maddox, *Taking God to School: The End of Australia's Egalitarian Education?* (Allen & Unwin, 2014) ch 6.

⁴⁸ Senate Standing Committee on Education Employment and Workplace Relations, *Supplementary Budget Estimates 2012-2013: Answer to Question on Notice EW0726_13* (30 January 2013) Parliament of Australia <www.aph.gov.au/Parliamentary_Business/Senate_Estimates/eetctte/estimates/sup1213/index>.

⁴⁹ Ibid.

By way of contrast, in the 2011 Census, 61.1 per cent of the population reported adherence to a Christian religion, 7.2 per cent reported adherence to a non-Christian religion and 22.3 per cent reported having no religion.⁵⁰

IV THE ESTABLISHMENT CLAUSE

The analysis above concerning the *School Chaplains Case* and the High Court's broader interpretive approach to s 117 clearly indicates that the narrow approach of the *DOGS Case* would be subject to reconsideration in an appropriate case. However, the *School Chaplains Case* gives no indication of how non-restrictive any new interpretation might be. A methodological approach does, however, present itself. The High Court has recently re-endorsed a method of constitutional reasoning that understands concepts referred to in the text of the *Constitution* in terms of their centre and circumference. In a 2013 case in which the scope of the Commonwealth's power to make laws with respect to 'marriage' was in issue, French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ said:

It may readily be accepted that what Windeyer J described as 'the monogamous marriage of Christianity' would have provided, at Federation, the central type of 'marriage' with respect to which s 51(xxi) conferred legislative power. But, as Higgins J said in relation to the trade marks power, usage of the term in 1900 may give the centre of the power but 'it does not give us the *circumference* of the power' (emphasis added). Hence, as Windeyer J rightly said in the *Marriage Act Case*, '[m]arriage law is not a matter of precise demarcation'. It is, instead, 'a recognized topic of juristic classification'.⁵¹

The analysis which follows below takes the reasoning of the majority in the *DOGS Case* as sitting somewhere near the centre of the concept 'establishing any religion' and seeks to expand the circumference. There is a sensible reason for adopting this methodological approach for the purposes of this article. The article's starting premise is not that the reasoning in the *DOGS Case* is entirely wrong. The starting premise is that the reasoning in the *DOGS Case* is too narrow or restrictive. This is what the NSW Court of Appeal said in *Hoxton Park (No 2)*. It is also what follows from the High Court's approach to s 117 and from the *School Chaplains Case*. The reasoning in the *DOGS Case* can therefore be seen as being located somewhere near the centre of the prohibition but not constituting its outer limits.

It is, of course, inherent in the centre and circumference approach to interpretation that a judgment must be made as to how far the radius of a concept should extend from the centre. Since the purpose of this article is to offer only a first step in the reconsideration of the meaning of the establishment clause, it does not attempt to move away from the reasoning in the *DOGS Case* in any fundamentally profound

⁵⁰ Australian Bureau of Statistics, *Cultural Diversity in Australia* (16 April 2013) <<http://abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features902012-2013>>.

⁵¹ *Commonwealth v Australian Capital Territory* (2013) 304 ALR 204, 209 [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) (citations omitted).

way. Instead, the approach is to make relatively straight-forward arguments derived from considering the position of the Church of England in the United Kingdom, which is undoubtedly an established church and which was referred to in the *DOGS Case*, and that seem relevant in a consideration of the validity of the NSCSWP in terms of the establishment clause.

Adopting the centre and circumference approach to interpretation approved and adopted by the High Court in 2013 is not problematic in the context of analysing the meaning of ‘establishing any religion’. As Gibbs J recognised in the *DOGS Case* it ‘may be a question of degree whether a law is one for establishing a religion.’⁵²

The following three propositions may be readily defended as statements of legal principle concerning the meaning of the establishment clause. First, the establishment clause prohibits federal expenditure for religious purposes such as religious activities. Secondly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. Thirdly, the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories.

None of these principles, it should be noted, would alter the result in the *DOGS Case*. Federal funding in a non-discriminatory manner of non-government schools that are owned or operated by religious organisations would not be invalid by reason of any of these principles. It is the reasoning, and not the result, in the *DOGS Case* which calls for reconsideration.

A The First Proposition: The Establishment Clause Prohibits Federal Expenditure for Religious Purposes such as Religious Activities

As mentioned above, the *DOGS Case* is the only High Court decision on the meaning of the establishment clause. All of the majority judges in the *DOGS Case* emphasised that the funding of religiously-affiliated non-government schools was for ordinary educational activities and not for any religious activities. Barwick CJ emphasised that funds were being granted purely for ordinary educational purposes:

Nothing in the laws made by the Parliament expressly authorizes the use of Commonwealth funds for [religious] purposes ... I have been unable to find any statutory authorization by the Commonwealth of any religious activity on the part of the non-government schools in the course of their educational activities.⁵³

Similarly, Gibbs J said that, ‘[t]he primary purpose of the challenged legislation is the advancement of education within Australia. That would, no doubt, not be decisive if the legislation had the further purpose of establishing any religion.’⁵⁴

⁵² *DOGS Case* (1981) 146 CLR 559, 604.

⁵³ *Ibid*, 583.

⁵⁴ *Ibid* 604.

Justice Mason said:

It is altogether too much to say that a law which gives financial aid to churches generally, to be expended on education, is a law for establishing religion. The mere provision of financial aid to churches generally, more particularly when that aid is genuinely linked to expenditure on education, falls short of ‘establishing’ a ‘religion’...⁵⁵

Justice Wilson said that the funding scheme in the *DOGS Case* had ‘a secular legislative purpose, that of upgrading the quality and range of education in primary and secondary government and non-government schools throughout Australia.’⁵⁶ He continued:

It may be true that in many cases one effect may be to advance religion appreciably, but, even so, such a result is not central to the operation of the legislative scheme. It is an incidental or indirect consequence of the pursuit of the educational purpose. In no case is religion a criterion which attracts a grant.⁵⁷

What is significant for present purposes is that these judges appear to hold the view that no law of the Commonwealth could, consistently with the establishment clause, directly support federal funding for a religious purpose such as funding of religious activities.

This is also the reading of the *DOGS Case* offered in 2011 by the New South Wales Court of Appeal in *Hoxton Park (No 2)*.⁵⁸ In that case, the plaintiffs alleged that the Commonwealth was funding the construction of a religious school with associated buildings that included a mosque. The judge at first instance struck out the claim on the ground that it was doomed to fail by reason of the result in the *DOGS Case*.⁵⁹ The Court of Appeal, however, considered that it was ‘clear’ that the factual matters raised in the case differed from those raised in the *DOGS Case*.⁶⁰ The *DOGS Case* concerned Commonwealth funding of religious schools for educational purposes. The allegation in this case concerned the additional and quite different issue of funding of a religious body for religious purposes, namely the construction of the mosque. The Court of Appeal pointed out that this ‘was not an issue raised in [the *DOGS Case*].’⁶¹ The strike out decision was, therefore, overturned.

There is, therefore, a basis in the case law for the proposition that the establishment clause of s 116 prohibits federal expenditure for religious purposes, such as for religious activities. The Convention Debates also support this proposition. The meaning of the

⁵⁵ Ibid 616.

⁵⁶ Ibid 656.

⁵⁷ Ibid.

⁵⁸ (2011) 256 FLR 156.

⁵⁹ *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 218–19.

⁶⁰ *Hoxton Park (No 2)* (2011) 256 FLR 156, 165 [28].

⁶¹ Ibid 165 [28], 166 [34].

establishment clause was not subject to very much discussion at all at the Convention Debates, with the bulk of the discussion centred on the necessity of s 116.⁶² However, there were some brief comments that are relevant. Edmund Barton thought that a provision such as s 116 was unnecessary, especially a prohibition against establishing any religion. He said: ‘as to establishing any religion, that is so absolutely out of the question, so entirely not to be expected.’⁶³ George Reid sought clarification about this from Barton on a matter relevant to the present discussion:

Mr REID I suppose that money could not be paid to any church under this Constitution?

Mr BARTON No; you have only two powers of spending money, and a church could not receive the funds of the Commonwealth under either of them.⁶⁴

It would seem then that these delegates believed that the granting of public funds to churches could amount to an establishment of religion. This did not need to be expressly prohibited, Barton believed, because the Commonwealth was being granted no power under which it could grant public funds to churches. As it happens, the Commonwealth does give funds to churches, as for example the religious groups who provide employment services to the unemployed under the Commonwealth’s Job Network program. Nevertheless, given that the modern phenomenon of outsourcing of government service delivery was unlikely to be at the forefront of their minds, what Barton and Reid must have been concerned about was the granting of public funds to churches for religious purposes.

In advancing the first proposition there is no real departure from the reasoning in the *DOGS Case* and thus no real expansion of the circumference of the concept ‘establishing any religion’. Indeed, this proposition is simply a corollary of the reasoning in the *DOGS Case*, and one that finds support in the Convention Debates. The next two propositions do move away somewhat from that reasoning.

B The Second Proposition: The Establishment Clause Prohibits the Commonwealth from Instituting Programs that Result in a Religion or Multiple Religions Becoming Identified with the Commonwealth

In the *DOGS Case*, the majority judges offered similar explanations of the concept of establishment. Barwick CJ gave this definition:

Establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth.

⁶² See Luke Beck, ‘Higgins’ Argument for Section 116 of the Constitution’ (2013) 41 *Federal Law Review* 393.

⁶³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1772 (Edmund Barton).

⁶⁴ *Ibid* (George Reid and Edmund Barton).

It involves the identification of the religion with the civil authority *so as to involve the citizen in a duty to maintain it and the obligation of, in this case, the Commonwealth to patronize, protect and promote the established religion*. In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth ‘establishment’. *One can perceive these concepts in the decision of the House of Lords in General Assembly of Free Church of Scotland v Lord Overtoun (1904) AC 515. I feel no doubt that this is the sense in which the relevant part of the language of s 116 was used when our Constitution was formed*. As I have indicated, I think the words would mean the same if constitutionally used today. Thus what s 116 forbids is the passage of a law which will erect a religion into such a relationship to the body politic of the Commonwealth as I have attempted to describe.⁶⁵

The italicised words are problematic. The first set of italicised words would seem to throw doubt on the proposition that the Church of England is established in England, since it is not obvious that the Church of England meets that description.⁶⁶ It is not clear that any citizens are under a duty to maintain the Church of England. Such an interpretation of the meaning of the establishment clause cannot be accepted.

The citation to authority in the second set of italicised words is rather odd. *Overtoun* did not concern the legal meaning of ‘establishing’, or any variant form of that word. *Overtoun* was recently explained by the Outer House of the Scottish Court of Session:

In 1900, the majority of the Free Church finally unified with the United Presbyterian Church, becoming the ‘United Free Church’. The minority refused to participate. Instead, they commenced an action in the Court of Session seeking to have the property and assets of the Free Church transferred to them as adherents of the true Free Church. In the House of Lords in *Bannatyne v Overtoun* [1904] AC 515 [another name for the same case], the minority were vindicated. Their Lordships identified fundamental tenets of the Free Church from which the majority had departed, including the doctrine of predestination and the Establishment Principle (concerning the right and duty of the state to establish and maintain the Christian Faith). The minority were found to be the true Free Church, and were awarded all the assets.⁶⁷

In other words, *Overtoun* concerned the meaning of ‘the establishment principle’ as a matter of Presbyterian religious doctrine for the purposes of deciding a trusts dispute. It can hardly be accepted that the theological meaning of a Presbyterian

⁶⁵ *DOGS Case* (1981) 146 CLR 559, 582 (emphasis added).

⁶⁶ See Luke Beck, ‘Clear and Emphatic: The Separation of Church and State under the Australian Constitution’ (2008) 27 *University of Tasmania Law Review* 161, 174 n 67.

⁶⁷ *The Free Church of Scotland v The General Assembly of the Free Church of Scotland* [2005] CSOH 46, [7].

religious doctrine controls the meaning of s 116.⁶⁸ In order to avoid moving too far from the position in the *DOGS Case*, Barwick CJ's definition could be reformulated for present purposes by deleting the italicised words such that it reads:

Establishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, in this instance, the Commonwealth. It involves the identification of the religion with the civil authority ... In other words, establishing a religion involves its adoption as an institution of the Commonwealth, part of the Commonwealth 'establishment'.

This reformulation of the passage does not necessarily go against the grain of Barwick CJ's intended meaning. The extracted passage from Barwick CJ's judgment concludes with 'as I have attempted to describe'. In other words, his Honour seems to suggest that there may be some lack of precision in his definition; that his definition is an *attempt* at a definition about which Barwick CJ seems to have some slight hesitation. It is *seeming* hesitation because Barwick CJ also says 'I find no ambiguity in the language of s 116'.⁶⁹ In any event, since the purpose of this article is to expand the circumference of the concept 'establishing any religion' taking the reasoning in the *DOGS Case* as somewhere near the centre point, any change in meaning is defensible.

Justice Gibbs gave this definition: 'The natural meaning of the phrase "establish any religion" is, as it was in 1900, to constitute a particular religion or religious body as a state religion or state church.'⁷⁰ His Honour also said that the clause means 'that the Commonwealth Parliament shall not make any law for conferring on a particular religion or religious body the position of a state (or national) religion or church.'⁷¹

Justice Stephen said that establishing a religion is 'to place (a church or a religious body) in the position of a state church.'⁷² His Honour went on:

So much may readily enough be accepted: to speak of a religion being established by the laws of a country may well be to include much more than the act of according material recognition and status to a set of beliefs, a system of moral philosophy or particular doctrines of faith; it would certainly include the recognition of a particular religion or sect, with its priestly hierarchy and tenets, as that of the nation.⁷³

⁶⁸ Reid Mortensen has also made this point: Reid Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion* (PhD Thesis, University of Queensland, 1996) 231; Reid Mortensen, 'Judicial (In)Activism in Australia's Secular Commonwealth' in Christine Parker and Gordon Preece (eds), *Theology and Law: Partners or Protagonists?* (ATF Press, 2005) 52, 63–4; Reid Mortensen, 'The Establishment Clause: A Search for Meaning' (2014) 33 *University of Queensland Law Journal* 109, 117.

⁶⁹ *DOGS Case* (1981) 146 CLR 559, 582.

⁷⁰ *Ibid* 597.

⁷¹ *Ibid* 604.

⁷² *Ibid* 606.

⁷³ *Ibid*.

Justice Wilson said that he saw in s 116 ‘a narrow notion of establishment, namely, that which requires statutory recognition of a religion as a national institution.’⁷⁴ Mason J, stating his agreement with Wilson J, said that the establishment clause ‘forbids the establishment or recognition of a religion (and by this term I would include a branch of a religion or church) as a national institution.’⁷⁵

Justice Aickin did not give separate reasons, instead expressing his agreement with the reasons of Gibbs and Mason JJ.⁷⁶

The terms ‘national institution’ used by Mason and Wilson JJ and ‘state church’ used by Stephen and Gibbs JJ would seem to be short-hand expressions for the concept more fully articulated by the modified form of Barwick CJ’s definition.⁷⁷ In other words, Barwick CJ’s notion of ‘identified with’ does the conceptual work. As Gibbs J explained in the *DOGS Case* it ‘may be a question of degree whether a law is one for establishing a religion’.⁷⁸ Thus it is a question of degree whether a relationship or association between state and religion — which, among other things, might involve the granting of state imprimatur to a religion or to religious or spiritual activities or beliefs, or state participation or collaboration in or encouragement of religious activities or rites — amounts to an identification of the state with a religion. The relationship between state and religion that exists, for example, when the fire brigade attends a burning church or when an electoral commission hires a church hall for the purposes of using it as a polling place would not amount to an identification of the state with a religion because the religious element to the relationship in question is tenuous and purely incidental.

If the idea that establishment is a question of identification of religion with the state is a defensible reading of the judgments in the *DOGS Case*, then the explanation of the meaning of establishment offered by the majority judges in the *DOGS Case* would seem to make strides towards demonstrating the proposition that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth.

However, the *DOGS Case* does not, by itself, demonstrate that proposition. It would seem only to go so far as indicating that the establishment clause prohibits the Commonwealth from instituting programs that result in a *single* religion becoming identified with the Commonwealth. Justice Stephen, for example, described the establishment clause as prohibiting only ‘the elevation of one church above all others’.⁷⁹

⁷⁴ Ibid 653.

⁷⁵ Ibid 612.

⁷⁶ Ibid 635.

⁷⁷ See Evans, above n 4, 84; Beck, ‘Clear and Emphatic: The Separation of Church and State under the *Australian Constitution*’, above n 66, 174–5; David C Bennett, ‘Case Note: *Attorney-General for Victoria; Ex Rel Black v The Commonwealth*’ (1981) 12 *Federal Law Review* 271, 273.

⁷⁸ *DOGS Case* (1981) 146 CLR 559, 604.

⁷⁹ Ibid 610.

Mason J also suggested that establishment was a singular concept, stating that ‘[t]he text of s 116 more obviously reflects a concern with the establishment of one religion as against others than the language of the First Amendment which speaks of the “establishment of religion”, not the “establishment of any religion”’.⁸⁰ Wilson J made a similar suggestion. His Honour said that ‘the point to be made is that establishment involves the deliberate selection of one to be preferred from among others’.⁸¹

There is every reason to be confident that the High Court would hold that the establishment clause not only prohibits the Commonwealth from instituting programs that result in a single religion becoming identified with the Commonwealth, as seems to be the holding in the *DOGS Case*, but also those that result in more than one religion becoming identified with the Commonwealth.

There is nothing in the text of the establishment clause that suggests that its operation should not extend to prohibiting multiple religious establishments. It would seem almost self-evident that a federal statute that provided, for example, ‘Islam and Buddhism shall be the official religions of the Commonwealth of Australia’ would be inconsistent with the establishment clause. Moreover, the United Kingdom provides a clear example that multiple religious establishments are possible at the same time.⁸² In the United Kingdom, the Anglican Church of England and the Presbyterian Church of Scotland were and are both established at the same time.⁸³ The *Union with Scotland Act 1706* (Eng) and *Union with England Act 1707* (Scot) resulted in the union of the kingdoms of England and Scotland as the United Kingdom and created a combined Parliament. Those Acts did not, however, affect the respective religious establishments that had existed in the separate kingdoms. Indeed, this was an express condition of the Union provided for in legislation of both the English and Scottish Parliaments.⁸⁴ Whilst ‘the forms of establishment in Scotland and England are very different’⁸⁵ and the establishments are geographically confined, through their established status both churches are identified with the British state.⁸⁶

⁸⁰ Ibid 615.

⁸¹ Ibid 653.

⁸² This point is also made in Beck, ‘Dead *DOGS*? Towards a Less Restrictive Interpretation of the Establishment Clause’, above n 21, 69–70.

⁸³ In *Macqueen v Frackelton* (1909) 8 CLR 673, 690, Griffith CJ referred to the ‘Church of Scotland as by law established’. See further Mark Hill, Norman Doe and Russell Sandberg, *Religion and the Law in the United Kingdom* (Kluwer Law International, 2011) 31; Russell Sandberg, *Law and Religion* (Cambridge University Press, 2011) 70–2; R M Williams, ‘Establishment in Scotland’ in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009).

⁸⁴ *Protestant Religion and Presbyterian Church Act 1707* (Scot); *An Act for securing the Church of England as by Law Established 1706*, 6 Anne c 8.

⁸⁵ R M Williams, ‘Introduction: Mapping the Issues’ in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009) 1, 1.

⁸⁶ Hilary M Carey, ‘An Historical Outline of Religion in Australia’ in James Jupp (ed), *The Encyclopedia of Religion in Australia* (Cambridge University Press, 2009) 5, 7: ‘in the United Kingdom there were two established churches’.

Elsewhere in Europe, for example, the Swiss Canton of Berne has three cantonal churches⁸⁷ and ‘Finland has *two* established churches’.⁸⁸

There appear, therefore, to be strong reasons in favour of the proposition that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth.

C The Third Proposition: The Establishment Clause Prohibits the Commonwealth from Instituting Programs that Result in a Religion or Multiple Religions becoming Identified with the States and Territories

The reasoning of the majority judges in the *DOGS Case* appears to suggest that the establishment clause of s 116 prohibits only *national* establishments of religion. Barwick CJ’s definition of establishment, for example, seems premised on this idea. He said ‘[e]stablishing a religion involves the entrenchment of a religion as a feature of and identified with the body politic, *in this instance, the Commonwealth*’.⁸⁹ Similarly, Wilson and Mason JJ each used the phrase ‘*national* institution’.⁹⁰ The idea that the establishment clause only prohibits the Commonwealth from bringing about a national establishment of religion is very restricted and there are reasons to suppose that it would not be accepted by the High Court as an accurate view of the meaning of the establishment clause.⁹¹

There is nothing in the text of the establishment clause that suggests that its operation should not extend to prohibiting non-national establishments of religion. A federal statute that provided ‘Buddhism shall be the official religion of Norfolk Island’ or ‘Islam shall be the official religion of the Northern Territory’ would plainly contravene the establishment clause of s 116.

There is support in the *DOGS Case* for the idea that the establishment clause prohibits the Commonwealth from creating non-national establishments of religion.⁹² Gibbs J, for example, considered that ‘if the conditions of a grant of financial assistance [to a state] require the state to which the grant is made to establish a religion within the meaning of [s 116], the Act by which the grant is authorized [will be]

⁸⁷ Frank Cranmer, ‘Church and State in Western Europe (Excluding Scandinavia)’ in Frank Cranmer, John Lucas and Bob Morris, *Church and State: A Mapping Exercise* (The Constitution Unit, 2006) 97, 115

⁸⁸ Frank Cranmer, ‘Church-State Relations in Scandinavia’ in Frank Cranmer, John Lucas and Bob Morris, *Church and State: A Mapping Exercise* (The Constitution Unit, 2006) 78, 85 (emphasis in original).

⁸⁹ *DOGS Case* (1981) 146 CLR 559, 582 (emphasis added).

⁹⁰ *Ibid* 612, 653 (emphasis added).

⁹¹ This point is also made in Beck, ‘Dead *DOGS*? Towards a Less Restrictive Interpretation of the Establishment Clause’, above n 21, 68–9.

⁹² Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 421 cites a majority in the *DOGS Case* as establishing this point.

invalid as contrary to s 116.⁹³ If this is correct and the Commonwealth cannot use money to induce a state to establish a religion within its jurisdiction by way of state legislation then it must also be the case that the Commonwealth cannot itself directly establish a religion in a state.

There is no need to rely on statements by a single judge or, as with the issue of multiple establishments of religion, resort to hypothetical examples to demonstrate the point about non-national establishments of religion. Actual examples exist: the Church of England and the Church of Scotland.⁹⁴ As Jeroen Temperman has explained, in some countries

the issue of state-religion identification is not a national or federal matter but is left at the discretion of the constituent states or provinces. This, when it leads to the situation that some constituent parts have an established religion while others have not, could be referred to as ‘regional establishment’.⁹⁵

It may be taken as uncontroversial that the Church of England, as it exists today, is established.⁹⁶ It may also be taken as uncontroversial that any attempt by the Commonwealth to legislate for a church in Australia to occupy an equivalent position would violate the establishment clause of s 116. However, the Church of England is not established throughout the entire country, that country being the United Kingdom of Great Britain and Northern Ireland. With effect from 1871, the *Irish Church Act 1869* dissolved the union between the Irish and English Churches

⁹³ *DOGS Case* (1981) 146 CLR 559, 592. His Honour was referring to grants under s 96, which permits the Commonwealth to grant funds to the states on such terms as the Commonwealth Parliament thinks fit.

⁹⁴ It is interesting to note the logical inconsistency in Mason J’s judgment in the *DOGS Case* which despite stating that the establishment clause prohibits ‘national’ establishments of religion immediately goes on to recognise that the Church of England was not established throughout the entire United Kingdom:

By it we mean the authoritative establishment or recognition by the State of a religion or a church as a national institution.

This is not only the meaning which is given in the standard English dictionaries, but it is also the meaning which it has in our minds and had in the minds of the citizens of the Australian colonies at the end of the nineteenth century. They were acutely familiar with the relationship between church and state in England and Wales, Scotland and Ireland. They were aware that the Church of England, the Church of Scotland and the Church of Ireland respectively were referred to as ‘the Established Church’: *Ibid* 616–7.

⁹⁵ Jeroen Temperman, *State-Religion Relationships and Human Rights Law* (Martinus Nijhoff, 2010) 47.

⁹⁶ See *DOGS Case* (1981) 146 CLR 559, 606 (Stephen J):

The plaintiffs point to the undoubted imprecision surrounding the concept of establishment as applied to the Church of England. Again, it may be accepted that there is no single characteristic of that Church which of itself constitutes the touchstone of its establishment ... The status of establishment which the Church of England has long enjoyed in England has no single characteristic ...

and provided that ‘the Church of Ireland, as so separated, should cease to be established by law’.⁹⁷ Likewise, the *Welsh Church Act 1914* operated to ‘terminate the establishment of the Church of England in Wales and Monmouthshire’.⁹⁸ Moreover, the Church of England was never established in Scotland: the *Protestant Religion and Presbyterian Church Act 1707* (Scot) ensured that on the union of England and Scotland the establishment of the Presbyterian Church of Scotland would not be affected.⁹⁹

In the Canadian context, Margaret Ogilvie has suggested that the Church of England might still be the established church in New Brunswick, Nova Scotia and Prince Edward Island by virtue of old colonial legislation that has never been repealed.¹⁰⁰

There are also examples of multiple religious establishments existing at the sub-national level. The Swiss Canton of Berne is, as noted above, one example. Another example comes from colonial America. Mortensen has noted that in colonial America, ‘New York (including those parts that became New Jersey and Delaware) had an unusual pattern of “multiple establishments”, by which all Protestant churches in the colony were sponsored, endowed and controlled by government.’¹⁰¹

Furthermore, it might even be the case that the establishment clause is not limited only to those non-national establishments of religion that are state or territory establishments. A federal statute that provided, for example, that ‘Hinduism is the official religion of the City of Darwin’ would also be invalid. *Hoxton Park (No 2)* was, in fact, a case in which the plaintiffs were attempting to pursue that notion. One of the plaintiffs’ arguments was that by apparently funding the construction of a mosque in the Sydney suburb of Hoxton Park the Commonwealth had established Islam in that suburb.¹⁰² There are also historical precedents for this notion. Justice Thomas of the United States Supreme Court, for example, has noted that colonial American

⁹⁷ 32 & 33 Vict, c 42 preamble. See further J Lucas and R M Morris, ‘Disestablishment in Ireland and Wales’ in R M Williams (ed), *Church and State in 21st Century Britain* (Palgrave Macmillan, 2009).

⁹⁸ 4 & 5 Geo 5, c 91 preamble. The *Suspensory Act 1914* 4 & 5 Geo 5, c 88 delayed the coming into effect of the *Welsh Church Act* 4 & 5 Geo 5, c 91. For a discussion see, eg, Roger L Brown, ‘The Disestablishment of the Church in Wales’ (1999) 5 *Ecclesiastical Law Journal* 252.

⁹⁹ See also *Union With England Act 1707* (Scot) Anne c 7; *Union With Scotland Act 1706* (Eng) 6 Anne c 11.

¹⁰⁰ M H Ogilvie, ‘What is a Church by Law Established?’ (1990) 28 *Osgoode Hall Law Journal* 179, 183.

¹⁰¹ Mortensen, *The Secular Commonwealth: Constitutional Government, Law and Religion*, above n 68, 111.

¹⁰² *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 219 [35]; *Hoxton Park (No 2)* (2011) 256 FLR 156, 161 [16]. There was an unexplored question as to whether the statute in question actually authorised funding for the construction of the mosque as the plaintiffs claimed it did.

religious establishments in the South were determined and maintained at the local or municipal level rather than state level.¹⁰³

The discussion presented above appears sufficient to demonstrate that it is a readily defensible statement of legal principle that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories.

V IS THE NATIONAL SCHOOL CHAPLAINCY AND STUDENT WELFARE PROGRAM INCONSISTENT WITH THE ESTABLISHMENT CLAUSE?

Having demonstrated that it is open to argue that the above three propositions are statements of legal principle flowing from the establishment clause, it is now useful to consider how those principles might play out in relation to the factual scenario presented by the NSCSWP. As mentioned above, the function of this exercise is to gain a better understanding of those principles and see how they might work in practice. The following application of the three propositions shows how an argument of constitutional invalidity might be constructed.

A The First Proposition

The first proposition is that the establishment clause prohibits federal expenditure for religious purposes such as for religious activities. The NSCSWP has, at least in substantial part, a religious purpose in that funding for the program includes funding for religious activities.

In his media release of 29 October 2006 announcing the establishment of the original National School Chaplaincy Program, the then Prime Minister, John Howard, said:

To assist our schools in providing greater pastoral care and supporting the spiritual wellbeing of their students, I am pleased to announce a new initiative today, the Australian Government's National School Chaplaincy Program. ...

Each local school community will decide if they want to participate in this voluntary program. The choice of chaplaincy services, including the religious affiliation and denomination, is entirely a decision for the school community, including teachers and parents. ...

Chaplains will be expected to provide pastoral care, general religious and personal advice and comfort and support to all students and staff, irrespective

¹⁰³ *Town of Greece v Galloway*, 572 US ____ (2014) 2, 6; See also W Cole Durham and Brett G Scharffs, *Law and Religion: National, International and Comparative Perspectives* (Wolters Kluwer, 2010) 25–6; Leonard W Levy, 'Establishment of Religion' in Leonard W Levy and Kenneth L Karst (eds), *Encyclopedia of the American Constitution* (Macmillan, 2nd ed, 2000) 927, 928.

of their religious beliefs. A chaplain might support school students and the wider school community in a range of ways, such as assisting students in exploring their spirituality; providing guidance on religious, values and ethical matters; helping school counsellors and staff in offering welfare services and support in cases of bereavement, family breakdown or other crisis and loss situations.¹⁰⁴

Consistently with the then Prime Minister's announcements, the guidelines for the original version of the program stated that '[t]he objectives of the National School Chaplaincy Program are to assist schools and their communities to provide greater pastoral care, general religious and personal advice and comfort to all students and staff.'¹⁰⁵

It follows that the purpose of the original program was, in substantial part, religious. The replacement NSCSWP 'builds upon' the original program.¹⁰⁶ It certainly allows secular student welfare services to be provided; but this add-on does not negate the religious character of some of the activities that may be provided and the religious character of the chaplains providing them. The purposes of the NSCSWP, to that extent, remain the same and are plainly religious in character.

This is made clear in the media release of 7 September 2011 by the then Minister for School Education, Early Childhood and Youth, Peter Garrett, announcing the NSCSWP. The Minister said that the Commonwealth was 'extending this successful scheme' and clearly referenced the religious character of the chaplains and their activities, stating that 'we also want to give schools greater choice. This means schools won't miss out on applying for the program if the school community would prefer to have a secular welfare worker instead of a chaplain.'¹⁰⁷

The Minister also indicated that, under the expanded program, the purposes of the original program were not being replaced but added to. He said: 'The scheme will be re-named the National School Chaplaincy and Student Welfare Program to reflect its broader scope.'¹⁰⁸ That the current, expanded version of the program maintains its religious purposes is also made clear by the *NSCSWP Guidelines*, which state that '[t]he objectives of the Program are to assist school communities to provide pastoral care and general spiritual, social and emotional comfort to all students'.¹⁰⁹

¹⁰⁴ John Howard, Prime Minister, 'National School Chaplaincy Program' (Media Release, 29 October 2006) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2FF77MV6%22>>.

¹⁰⁵ Commonwealth Department of Education, Employment and Workplace Relations, *National School Chaplaincy Program Guidelines*, 16 February 2010, 4.

¹⁰⁶ *NSCSWP Guidelines*, above n 33, 9.

¹⁰⁷ Peter Garrett, Minister for School Education, Early Childhood and Youth, 'Schools Given Greater Choice Under Expanded Chaplains Program' (Media Release, 7 September 2011) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1065455%22>>.

¹⁰⁸ *Ibid.*

¹⁰⁹ *NSCSWP Guidelines*, above n 33, 10.

To the extent that religious chaplains and religious activities are involved, the NSCSWP has a religious purpose. In addition, there can be no doubt that under the NSCSWP the Commonwealth is funding religious activities. The Guidelines authorise chaplains to ‘deliver activities/services that promote a particular view or religious belief’,¹¹⁰ ‘provid[e] services with a spiritual content’¹¹¹ and ‘[perform] religious services/rites (such as worship or prayer during school assembly etc).’¹¹² These are plainly religious activities, which are very much a core part of the NSCSWP; they are not incidental or peripheral in character. In the words of Barwick CJ in the *DOGS Case*, there is ‘authorization by the Commonwealth of ... religious activity’.¹¹³ In the words of Wilson J, the religious activities involved in the NSCSWP are not ‘an incidental or indirect consequence of the pursuit of the [secular] purpose’ and religion is very much ‘a criterion that attracts a grant [of funds by the Commonwealth].’¹¹⁴

B *The Second Proposition*

The second proposition is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth. To the extent that the NSCSWP involves the provision of services with a spiritual content, the promotion of particular religious beliefs and the performance of religious rites, it is arguable that the Commonwealth is associating itself with such things or even participating in them through intermediaries. After all, everything a chaplain does must be authorised by, and done in a manner consistent with, the Commonwealth’s Guidelines. Any ‘religious services/rites (such as worship or prayer during school assembly etc)’, for example, are performed by a person chosen in accordance with criteria, including religious criteria, established by the Commonwealth, at the Commonwealth’s expense and as part of a Commonwealth program. This, it might be suggested, results in the identification of the religion of the chaplain with the Commonwealth.

It is unclear whether this is a case of a single religion or multiple religions being established through their becoming identified with the Commonwealth. In the *DOGS Case*, Barwick CJ suggested that the various Christian denominations were but different manifestations of the one religion, Christianity.¹¹⁵ If this is the correct understanding of the word ‘religion’ in the establishment clause, then it would seem that the NSCSWP has the effect of identifying a single religion, Christianity, with the Commonwealth. As noted above, more than 99 per cent of school chaplains engaged under the NSCSWP are Christian.

¹¹⁰ Ibid 16.

¹¹¹ Ibid 15.

¹¹² Ibid 16.

¹¹³ *DOGS Case* (1981) 146 CLR 559, 583.

¹¹⁴ Ibid 656.

¹¹⁵ Ibid 580.

Alternatively, the various Christian denominations might be considered separate religions for the purposes of s 116. If this is the case, then the NSCSWP can be seen as establishing multiple religions. This situation is analogous to the situation of multiple religious establishments in the United Kingdom. The establishment of the Churches of England and Scotland do not overlap geographically. They are established in different parts of the United Kingdom. Likewise, the alleged establishments in the case of the NSCSWP do not overlap geographically as the schools in which the NSCSWP operates are located in separate, various parts of Australia. Indeed, in *Hoxton Park (No 2)* the plaintiffs sought to argue that the Commonwealth had established Islam in the suburb of Hoxton Park.¹¹⁶ Similarly, the argument here would be that the Commonwealth has established the relevant religion in respect of each individual school. In any case, the Swiss and Finnish examples noted above indicate that overlapping, simultaneous establishments are conceptually possible.

The argument that there is a breach of the second proposition might be seen as somewhat weaker because the notion of becoming identified with involves questions of degree. This is not a conceptual problem for the claim that the second proposition is a statement of legal principle. In the *DOGS Case*, Gibbs J indicated that it ‘may be a question of degree whether a law is one for establishing a religion.’¹¹⁷ In any event, the purpose here is not principally to say that the NSCSWP is invalid but simply to apply the propositions articulated above to a factual scenario.

C The Third Proposition

The third proposition that arguably flows from the establishment clause as a statement of legal principle is that the establishment clause prohibits the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. It is arguable that the role of school principals in the NSCSWP has the result that the religions of the chaplains become identified with the states and territories in whose schools they work. This argument would not apply to the NSCSWP to the extent that it operates in non-government schools because it turns on the fact that in a public school a school principal is a state or territory government official.

School principals have an important role in the NSCSWP. According to the Guidelines, they have ‘a lead role in coordinating and managing all aspects of the chaplaincy ... services within the school.’¹¹⁸ They are responsible for ‘overseeing the delivery of chaplaincy ... services within the school.’¹¹⁹ It is also the role of the school principal to ‘lead, coordinate and manage all aspects of the chaplaincy ...

¹¹⁶ *Hoxton Park Residents Action Group Inc v Liverpool City Council* (2010) 246 FLR 207, 219 [35]; *Hoxton Park (No 2)* (2011) 256 FLR 156, 161 [16].

¹¹⁷ *DOGS Case* (1981) 146 CLR 559, 604.

¹¹⁸ *NSCSWP Guidelines*, above n 33, 17.

¹¹⁹ *Ibid.*

services within the school'.¹²⁰ In the *School Chaplains Case*, Gummow and Bell JJ, in rejecting the claim that school chaplains held offices under the Commonwealth, emphasised that chaplains 'provide services under the control and direction of the school principal.'¹²¹

The result is that a state or territory government official is required by the Commonwealth to lead, coordinate and manage the performance of religious services/rites, the provision of services with a spiritual content and the promotion of particular religious beliefs. (And they do so in the context of a core activity of a state, since the provision of compulsory education is a core activity of a state.) Since a state or territory can only act through its officials or other agents, the effect is that a state or territory is leading, coordinating and managing those religious activities. This, it could be said, results in the religion of the school chaplain becoming identified with the relevant state or territory. This would, depending of the definition of 'religion' adopted, involve multiple establishments of religion since the religious affiliation of the school chaplains varies (albeit really only between Christian denominations) between different schools.

The functions of a school principal in the NSCSWP might even be characterised as loosely comparable in some respects to the functions of a bishop in overseeing the work of subordinate clergy. This analogy is convenient because it leads to High Court dicta in support of the argument that the supervisory function of school principals constitutes religious establishment. In *Wylde v Attorney-General (NSW) ex rel Ashelford*, a case about charitable trusts unrelated to s 116 of the *Constitution*, Dixon J said:

The better opinion appears to be that the Church of England came to New South Wales as the established Church and that it possessed that status in the colony for some decades. The first chaplain and all the early chaplains formed part of the civil establishment. The governor's instructions made it his duty to enforce a due observance of religion and to take steps for the due celebration of public worship as circumstances would permit.¹²²

The chaplains to whom Dixon J referred were, of course, Church of England ministers. They were subject to the control of the colonial Governor in some respects, including religious activities, as well as being controlled by their bishop.¹²³ This is rather similar in character to the way in which school chaplains are supervised and controlled by the school principal but otherwise technically employed by the relevant Funding Recipient with whom the Commonwealth has contractual relations. In essence, this analogy simply serves to reinforce the factual analysis above about the religious function of school principals, and therefore of the states and territories, in the NSCSWP.

¹²⁰ Ibid 12.

¹²¹ *School Chaplains Case* (2012) 248 CLR 156, 223 [109].

¹²² *Wylde v A-G (NSW) ex rel Ashelford* (1948) 78 CLR 224, 284.

¹²³ See *ibid* 284ff.

VI CONCLUSION

This article has argued that the meaning given to the establishment clause of s 116 of the *Constitution* in the *DOGS Case* is not authoritative. The reasoning in that case is too narrow and is inconsistent with the *School Chaplains Case* and the High Court's approach to interpreting other prohibitions on power. The article has taken some first steps in considering what meaning should be attributed to the establishment clause. It has argued that the establishment clause prohibits federal expenditure for religious purposes such as for religious activities, the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the Commonwealth, and the Commonwealth from instituting programs that result in a religion or multiple religions becoming identified with the states and territories. These principles have also been given practical demonstration through their application to the issue of the constitutional validity of the NSCSWP with the result that the constitutional validity of that program is in doubt.

That only three statements of principle have been put forward in this article should not be taken to suggest that they exhaust the meaning of the establishment clause. They are, however, statements of principle that are readily defensible and, as such, represent the first steps in a reconsideration of the meaning of the establishment clause. How much further the High Court might be inclined to expand the meaning of the establishment clause is a matter that awaits an appropriate case.

COHERENCE AND ACCEPTANCE IN INTERNATIONAL LAW: CAN HUMANITARIANISM AND HUMAN RIGHTS BE RECONCILED?

ABSTRACT

The relationship between international humanitarian law and international human rights law has been widely debated. Influential discussions have been produced by both the International Court of Justice and the International Law Commission. This article brings a new perspective to this issue, emphasising and contrasting the underlying concepts that the two areas of law rely on for their legitimacy. I argue that while international human rights law derives its legitimacy largely from the value of coherence, international humanitarian law emphasises the notion of acceptance. This contrast has important implications for efforts to integrate the two fields.

I INTRODUCTION

The relationship between international humanitarian law and international human rights law has long been debated.¹ Influential discussions have been produced by both the International Court of

* Associate Professor, TC Beirne School of Law, University of Queensland. I would like to thank Anthony Cassimatis, Eve Massingham and Kylie Weston-Scheuber for their helpful comments and Constance Youngwon Lee for her excellent research assistance.

¹ See, eg, Gerald Irving Anthony Dare Draper, 'Humanitarian Law and Human Rights' [1979] *Acta Juridica* 193; Leslie C Green, 'Human Rights and the Law of Armed Conflict' (1980) 10 *Israel Yearbook on Human Rights* 9; Dietrich Schindler, 'Human Rights and Humanitarian Law: Interrelationship of the Laws' (1982) 31 *American University Law Review* 935; Louise Doswald-Beck and Sylvain Vit , 'International Humanitarian Law and Human Rights Law' (1993) 293 *International Review of the Red Cross* 94; Vera Gowlland-Debbas, 'The Right to Life and Genocide: The Court and an International Public Policy' in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice and Nuclear Weapons* (Cambridge University Press, 1999) 315; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239; Dale Stephens, 'Human Rights and Armed Conflict: The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case' (2001) 4 *Yale Human Rights and Development Law Journal* 1; Ren  Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002); Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 856 *International Review of the Red Cross* 789; William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741;

Justice ('ICJ')² and the International Law Commission ('ILC').³ These two bodies have helped forge a general consensus that international humanitarian law and international human rights law should be viewed as part of an integrated body of rules governing armed conflicts. The orthodox view developed by these bodies is that the two fields of law can be reconciled by drawing on the maxim *lex specialis derogat legi generali* (the specialised law overrides the general law).⁴ International humanitarian law effectively amends international human rights law to the extent that they are in tension.

This article highlights a shortcoming in the orthodox account of the relationship between international humanitarian law and human rights. It does so by examining the underlying concepts that the two areas of law rely on for their legitimacy. I argue that while international human rights law derives its legitimacy largely from the value of coherence, international humanitarian law emphasises the notion of acceptance. This contrast has important implications for efforts to integrate the two fields. The article begins by clarifying the challenges raised by tensions between the two bodies of law. It then engages critically with the approaches of the ICJ and the ILC, drawing on the conceptions of coherence and legitimacy offered by theorists such as Ronald Dworkin. I argue that genuine progress in integrating the two areas depends upon recognising the differences in their organising values.

II RESOLVING CONFLICTS OF NORMS

The following discussion focuses on the challenges posed by tensions between international humanitarian law and international human rights law. However,

Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards During Armed Conflicts' (2005) 45 *German Yearbook of International Law* 60; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 *International Review of the Red Cross* 737; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (International Committee of the Red Cross, 2005) 299–305; Anthony Cassimatis, 'International Humanitarian Law, International Human Rights Law and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623.

² *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]–[26] ('*Nuclear Weapons Advisory Opinion*'); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106] ('*Israeli Wall Advisory Opinion*'); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (International Court of Justice, Judgment, 19 December 2005) [216]–[217] ('*Democratic Republic of the Congo v Uganda*').

³ International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law* (Report of the Study Group of the International Law Commission, 13 April 2006).

⁴ See, eg, *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106]; International Law Commission, above n 3, 47–8.

it bears noting at the outset that although these two bodies of law sometimes conflict, in many ways they are mutually supporting.⁵ The lists of fundamental guarantees found in the 1949 *Geneva Conventions* and the *Additional Protocols* of 1977, which protect everyone affected by armed conflict, enshrine many of the basic protections of human rights law on issues ranging from freedom from torture to equality before the law.⁶ These provisions exhibit no conflict with human rights. Arguably, the same is not true of other aspects of these treaties.

It is useful at this point to distinguish the different ways in which international humanitarian law and international human rights law might be said to be in tension. The most obvious way this might happen is through a direct clash of norms: for example, if international humanitarian law *requires* an action that international human rights law *prohibits*. However, it is hard to conjure examples of direct clashes of this sort. Generally, neither body of law requires action that would be precluded under the other. It is usually possible to follow both sets of rules by respecting the more demanding standard.

A second way that international humanitarian law and international human rights law might be in tension is if one field of law *permits* an action that the other *prohibits*. This comes closer to capturing the problem, though, as we will see later, there are broader issues at stake. An obvious and often cited example of a tension of this kind concerns the right to life under international law, as enshrined in art 6 of the *International Covenant on Civil and Political Rights*.⁷ This right purports to

⁵ Cf Henckaerts and Doswald-Beck, above n 1, 299–305.

⁶ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 3 ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (Second Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1949) art 3 ('*Geneva Convention II*'); *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 3 ('*Geneva Convention III*'); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 3 ('*Geneva Convention IV*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1979) art 75 ('*Additional Protocol I*'); *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 609 (entered into force 7 December 1978) arts 4, 5 ('*Additional Protocol II*'). See also Henckaerts and Doswald-Beck, above n 1, ch 32.

⁷ For discussion of the status of this right during armed conflict, see *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25]; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

restrain states from launching deadly attacks on individuals within their territories. However, international humanitarian law permits such attacks against combatants, provided that the rules on matters such as proportionality and prohibited weapons are respected.⁸

It is possible that even this kind of tension can be reconciled through existing legal mechanisms. There are two related strategies that might be pursued in this context. The first strategy makes use of provisions in human rights treaties that allow derogations in emergency situations. According to art 4(1) of the *ICCPR*, for example, states may derogate from their duties under the treaty in times of ‘public emergency threatening the life of the nation’ to ‘the extent strictly required by the exigencies of the situation’. Similar provisions appear in the European and American human rights conventions.⁹

It might therefore be argued that those aspects of international humanitarian law that initially seem to licence violations of human rights standards really just reflect the derogable character of the rights in question. Armed conflict, it might be said, is an exceptional situation in which derogations from the normal requirements of international human rights law are necessary. This view of warfare as an emergency scenario is explicitly enshrined in some human rights conventions. Article 15(1) of the *European Convention on the Protection of Human Rights and Fundamental Freedoms*, for example, provides that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.¹⁰

Likewise, art 15(2) of the *ECHR* expressly allows derogations from the right to life under art 2 ‘in respect of deaths resulting from lawful acts of war’.¹¹ The *American Convention on Human Rights* contains a similar provision to art 15(1).¹² Derogations

⁸ See, eg, *Additional Protocol I* arts 48, 57.

⁹ See *European Convention on the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, ETS 5 (entered into force 3 September 1953) art 15(1) (*‘ECHR’*); *American Convention on Human Rights*, opened for signature 22 November 1969, OAS 36, 1144 UNTS 123 (entered into force 18 July 1978) art 27 (*‘ACHR’*). The scope given to states to derogate from human rights treaties in light of regional circumstances is further expanded by the margin of appreciation doctrine developed in European human rights jurisprudence. See, eg, *Brannigan and McBride v United Kingdom* (European Court of Human Rights, Judgment, 26 March 1993). For critical discussion, see Susan Marks, ‘Civil Liberties at the Margin: The UK Derogation and the European Court of Human Rights’ (1995) 15 *Oxford Journal of Legal Studies* 69.

¹⁰ *ECHR* art 15(1).

¹¹ See also *ECHR* art 2(2).

¹² *ACHR* art 27.

from international human rights standards based on wartime exigencies cannot extend to violations of *jus cogens* norms (overriding norms of international law from which no derogation is permitted), but it is hard to see how international humanitarian law could reasonably be construed as permitting acts such as torture, genocide and slavery.¹³ The basic rules of international humanitarian law are also widely viewed as having *jus cogens* status.¹⁴

A more difficult issue arises in relation to the right to life under art 6 of the *ICCPR*. While art 4(1) of the *ICCPR* allows for derogations in emergency situations, that provision is expressly made inapplicable to art 6.¹⁵ The ICJ has therefore relied on a second strategy to reconcile art 6 with international humanitarian law. This strategy relies on the malleability of the human rights standards themselves. The application of human rights norms, on this view, depends on the context. The demands of human rights law in wartime might therefore prove significantly different from those in peacetime. A version of this approach to art 6 was developed by the ICJ in the *Nuclear Weapons Advisory Opinion*:

[T]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life ... is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.¹⁶

This analysis suggests that wartime modifies the requirements of international human rights law, while the nature and extent of this modification is governed by international humanitarian law. In other words, during armed conflict, the former set of norms is amended by the latter to the extent that they are in tension. In wartime, international human rights law is the *lex generalis* (general law) and yields to the *lex specialis* (specialised law) of international humanitarian law. This accords with the statutory interpretation maxim *lex specialis derogat legi generali* (the specialised law overrides the general law).

¹³ Cf *Geneva Conventions I-IV* art 3; *Additional Protocol I* art 75; *Additional Protocol II* arts 4, 5. For discussion of whether international humanitarian law may legitimately be construed as permitting genocide, see *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [26].

¹⁴ International Law Commission, above n 3, 189.

¹⁵ *ICCPR* art 4(2).

¹⁶ *Legality of the Threat or Use of Nuclear Weapons* (International Court of Justice, Advisory Opinion, 8 July 1996) [25].

The ICJ further clarified its analysis of the relationship between international humanitarian and international human rights law in the *Israeli Wall Advisory Opinion*:

The protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation ... As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.¹⁷

This passage, read with the excerpt from the *Nuclear Weapons Advisory Opinion*, suggests that the ICJ's approach effectively combines the two strategies mentioned above. In the context of armed conflict, any tension between human rights and humanitarian norms is resolved in favour of the latter. This is accomplished by relying on the notion of derogations or by using international humanitarian law to determine the contours of the rights themselves. The analysis set out in the *Israeli Wall Advisory Opinion* was later reiterated by the ICJ in *Democratic Republic of the Congo v Uganda*.¹⁸

Each of the above strategies for reconciling international humanitarian law and human rights implicitly presents the two sets of norms as part of a unified framework. They assume that we can make sense of the applicability of human rights in armed conflict by treating humanitarian norms as either specifying the application of human rights standards in wartime or reflecting exceptions already built into human rights by virtue of their derogable character. The assumption that humanitarian and human rights standards can be coherently integrated is now commonplace. However, this raises important questions about the conceptions of legitimacy underlying the two fields of law.

III MONISM AND SYSTEMIC INTEGRATION

It is useful at this point to introduce two competing views that might be taken on the question of whether international human rights law applies in wartime. The dualist view, as we might call it, holds that international humanitarian law applies only in wartime and international human rights law applies only in peacetime. There is no overlap between the two legal regimes. Conversely, the monist view holds that international human rights law applies in both wartime and peacetime. This

¹⁷ *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (International Court of Justice, Advisory Opinion, 9 July 2004) [106].

¹⁸ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* (International Court of Justice, Judgment, 19 December 2005) [216]–[217].

view entails that during an armed conflict international humanitarian law and international human rights law coexist.¹⁹

The dualist view was defended in an early article on humanitarian law and human rights written in 1979 by distinguished military lawyer and scholar Colonel Gerald Irving Anthony Dare Draper.²⁰ However, the position has few supporters today. Dualism removes the prospect of conflict between international humanitarian law and international human rights law, but it is difficult to reconcile with human rights treaties that specifically envisage that their provisions will apply in wartime.²¹ It is also inconsistent with the ICJ judgments considered above. The monist view, by contrast, is now generally accepted, partly, but certainly not only, as a result of its adoption by the ICJ. The authors of the International Committee of the Red Cross ('ICRC') study on customary international humanitarian law note that '[t]here is extensive state practice to the effect that human rights law must be applied during armed conflicts'.²² They also cite numerous United Nations resolutions and investigations where the applicability of human rights norms during armed conflict has been noted and violations condemned.

In situations of armed conflict, the monist view aspires to a unified body of international law that incorporates standards from both international humanitarian law and international human rights law, as appropriate. This project inescapably raises difficult questions about precisely how the two sets of norms are to be integrated. The notion of international humanitarian law as the *lex specialis* represents a useful device for analysing these types of conflicts, but it does not automatically resolve all the questions that arise on specific issues.

The general presumption under the *lex specialis* maxim is that international humanitarian law will prevail during armed conflicts. However, the framework also entails that human rights standards will generally still operate in such circumstances, even though international humanitarian law does not provide for them. The difficulty, then, is to decide which human rights norms continue unaltered in armed conflict and which do not. This will involve assessing whether the norms are in tension with humanitarian law and, if so, to what extent. It may be that this type of question can only be fully resolved on a case-by-case basis.

A more complete understanding of the motivations for the monist view can be gained from the report on fragmentation of international law produced in 2006 by a high profile study group of the ILC.²³ The study group was chaired by Martti

¹⁹ My use of the terms 'dualism' and 'monism' in this context differs from their use in the literature on the relationship between national and international law. Cf Ian Brownlie, *Principles of Public International Law* (Oxford University Press, 6th ed, 2003) 31–3.

²⁰ Draper, above n 1.

²¹ See, eg, *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 38; *ECHR* arts 2(2), 15(2).

²² Henckaerts and Doswald-Beck, above n 1, 303.

²³ International Law Commission, above n 3. For a helpful overview, see Cassimatis, above n 1.

Koskenniemi, who had previously explored the issue in his academic publications.²⁴ The ILC study group placed particular emphasis on the need for what it termed ‘systemic integration’ of different fields of international law.²⁵ Decision-makers in international law have a responsibility to seek coherence between the various norms that are relevant to a dispute that comes before them. This aspiration reflects the nature and normative aims of law as an institution:

[L]aw is also about protecting rights and enforcing obligations, above all rights and obligations that have a backing in something like a general, public interest. Without the principle of ‘systemic integration’ it would be impossible to give expression to and to keep alive any sense of the common good of humankind, not reducible to the good of any particular institution or ‘regime’.²⁶

This argument is worthy of sustained attention. The claim in this passage is that systemic integration is a value inherent in the notion of law. This is because law is concerned with advancing rights and the common good, rather than furthering the objectives of any particular regime.²⁷

The argument articulated above clearly owes something to the jurisprudence of Dworkin, who is cited elsewhere in the ILC report in connection with the claim that ‘systemic thinking penetrates all legal reasoning’ by virtue of a political obligation that legal decision makers owe to the community.²⁸ It is unclear, however, whether the ILC study group meant to adopt Dworkin’s view that coherence (or ‘integrity’²⁹) is of inherent value in legal decision-making. There are two possible interpretations of the study group’s argument in the above passage, reflecting two possible views of the value of coherence in law.

Dworkin treats coherence in law as holding inherent political value; in his view, integrity is valuable in and of itself. He supports this position by appealing to our deeply held intuitions about the undesirability of certain legal practices that reject integrity.³⁰ An alternative view is that integrity holds instrumental value as part of a legal framework that seeks to realise a particular collection of normative goals. Law

²⁴ See, eg, Martti Koskenniemi, ‘The Politics of International Law’ (1990) 1 *European Journal of International Law* 4; Martti Koskenniemi and Päivi Leino, ‘Fragmentation of International Law? Postmodern Anxieties’ (2002) 15 *Leiden Journal of International Law* 553.

²⁵ International Law Commission, above n 3, 25–8. See also Campbell McLachlan, ‘The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention’ (2005) 54 *International and Comparative Law Quarterly* 279.

²⁶ International Law Commission, above n 3, 244.

²⁷ *Ibid* 65–73. The ILC report uses the term ‘regime’ in a specialised sense to mean self-contained systems of international legal rules that deviate from general international law in their remedies, requirements or guiding principles.

²⁸ *Ibid* 24.

²⁹ Ronald Dworkin, *Law’s Empire* (Belknap Press, 1986) chs 6–7.

³⁰ *Ibid*.

should not be coherent just for the sake of it, but rather to ensure consistency with its deeper motivations.³¹

Suppose, by way of illustration, that I am engaged by a charitable organisation to draft a mission statement. I am instructed that the document must be consistent with the aims and values of the organisation, which are expressed to me in a general form. It seems clear that, in order to do the job well, I should do my best to ensure that my statement coheres with the values of the organisation. I must pay attention to what Dworkin calls integrity. Coherence, in this situation, holds instrumental value. I must respect coherence in order to fulfil my brief of drafting a document that gives expression to the values of the group. We can contrast the instrumental value of coherence in this example with Dworkin's account of integrity as a 'distinct political virtue' and an 'independent ideal'.³² Integrity, for Dworkin, is valuable in itself and is not merely a means to pursue a deeper set of values.

Which of these conceptions of coherence is intended by the ILC study group in the passage cited above? There is room for argument here, but the wording of the passage suggests the instrumental conception just outlined may be closest to the mark. On this view, coherence in international law may or may not be valuable in and of itself, but it is of instrumental value if one conceives of international law as protecting the 'rights and obligations' that are necessary for the 'common good of humankind'.³³ In other words, legal decisions should strive to be consistent with the underlying source of value represented by the common good. Consistency with the common good is therefore a central virtue of legal reasoning.

This is a plausible line of argument,³⁴ but it rests on some significant assumptions. For our purposes, the most significant assumption is that all facets of international law place equal emphasis on coherence with the common good or, more precisely, that all fields of international law work to achieve this coherence in reconcilable ways. I suggest below that there is reason to doubt this assumption. This is because some forms of law promote the common good not by seeking coherence with fundamental human ideals, but by creating a level of more detailed norms that promote social coordination. International humanitarian law arguably provides an example: its legitimacy stems more from general acceptance of its norms than its strict coherence with deeper values.

IV COHERENCE AND ACCEPTANCE

Some of the tensions between international humanitarian law and international human rights law can potentially be resolved by treating armed conflict as an

³¹ For further discussion, see Jonathan Crowe, 'Dworkin on the Value of Integrity' (2007) 12 *Deakin Law Review* 167.

³² Dworkin, above n 29, 176.

³³ International Law Commission, above n 3, 244.

³⁴ Cf Crowe, 'Dworkin on the Value of Integrity', above n 31.

exceptional situation that modifies the usual requirements imposed by human rights standards. However, there is arguably a deeper source of tension between the two fields of law: they rest on fundamentally different, and perhaps opposing, motivations and theories.³⁵

An argument along these lines can be found in the article by Draper mentioned earlier.³⁶ Draper argues that international humanitarian law exists mainly to regulate the relationship between states engaged in armed hostilities, whereas human rights law aims to regulate the relationship between governments and their subjects. He then contends that '[h]ostilities and government governed relationships are different in kind, origin, purpose, and consequences'.³⁷ International humanitarian law is not concerned with regulating the condition of humans in normal society and human rights instruments do not address the problem of what to do under conditions of armed conflict. Furthermore, international humanitarian law operates between communities, whereas human rights law concerns the relationship of government and governed within extant community structures.

Draper's argument is now somewhat dated in its treatment of both international humanitarian law and international human rights law. The former is increasingly concerned with non-international conflicts and the position of non-state armed groups,³⁸ while the latter is frequently invoked in communications between states in both peacetime and wartime. However, Draper's concerns about the conflicting aims and emphases of humanitarian and human rights law are echoed in more recent work by René Provost. Provost contends that international humanitarian law focuses on imposing obligations on individuals, whereas human rights law is concerned with regulating the actions of governments. It follows that the former body of law focuses on duties, while the latter emphasises rights.³⁹

My concern in this article, however, is not with the different types of entities humanitarian and human rights law seek to regulate or the kinds of normative standards they impose. Rather, I wish to distinguish two aspirations that often guide the development of legal principles. The first aspiration is to create a coherent and consistent body of norms. This corresponds generally to what the ILC study group calls the goal of systemic integration and Dworkin calls the value of integrity. The second aspiration is to achieve general acceptance of the norms that comprise

³⁵ Cf Doswald-Beck and Vité, above n 1.

³⁶ Draper, above n 1.

³⁷ Ibid 204.

³⁸ International Committee of the Red Cross, *International Humanitarian Law and the Challenge of Contemporary Armed Conflicts* (International Committee of the Red Cross, 2011) 6. For discussion of the position of non-state armed groups under international humanitarian law, see Antonio Cassese, 'The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *International and Comparative Law Quarterly* 416; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369.

³⁹ Provost, above n 1, 13.

the legal system, ensuring that these norms are respected. These two objectives frequently go hand-in-hand.⁴⁰ A legal system is more likely to be respected if it contains a coherent and dependable body of rules.⁴¹

It is no accident that legal systems often cite coherence and acceptance as their guiding aims.⁴² A good case can be made that these two values lie at the heart of the legitimacy of law as an institution. Legal philosopher Joseph Raz famously argues that one of the distinctive features of law is that it claims legitimate authority.⁴³ As Raz puts it, legal systems ‘claim authority to regulate any type of behaviour’ to the exclusion of other varieties of social norms.⁴⁴ However, philosophers have long debated whether law’s claim to authority can be justified.⁴⁵

The twin values of coherence and acceptance figure prominently in attempts to explain the legitimacy of legal institutions.⁴⁶ Sometimes law simply requires us to behave in accordance with our pre-existing obligations. Consider the law prohibiting assault. This law prohibits people from punching random strangers on the street. Most people would readily accept that punching strangers on the street is something we have a moral obligation not to do. We might rely on this pre-existing obligation to explain why we should obey the relevant law.

This view of legal authority relies centrally on law’s coherence with pre-existing norms. Something like this seems to lie behind the ILC study group’s remarks about the value of systemic integration.⁴⁷ A problem immediately arises, however, in that

⁴⁰ Koskenniemi argues that legal rules will only be regarded as legitimate if they exhibit both normativity and concreteness: that is, if they simultaneously aspire to higher ideals and reflect the political interests of their subjects. However, he sees these two impulses as ultimately contradictory. See Koskenniemi, ‘The Politics of International Law’, above n 24, 7–9.

⁴¹ For further discussion of the value of coherence in law, see Crowe, ‘Dworkin on the Value of Integrity’, above n 31.

⁴² For discussion, see Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) ch 2.

⁴³ Ibid. See also Jonathan Crowe, ‘Natural Law in Jurisprudence and Politics’ (2007) 27 *Oxford Journal of Legal Studies* 775, 785–6.

⁴⁴ Joseph Raz, *Practical Reason and Norms* (Oxford University Press, 1999) 150–2.

⁴⁵ Raz argues that although law *claims* legitimate authority, it does not in fact *possess* such authority. See Raz, above n 42, ch 12. See also AJ Simmons, *Moral Principles and Political Obligations* (Princeton University Press, 1979); AJ Simmons, ‘The Duty to Obey and Our Natural Moral Duties’ in Christopher Wellman and AJ Simmons (eds), *Is There a Duty to Obey the Law?* (Cambridge University Press, 2005) 91; MBE Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’ (1973) 82 *Yale Law Journal* 950; Leslie Green, *The Authority of the State* (Clarendon Press, 1990).

⁴⁶ Thomas Franck, for example, treats ‘coherence’ and ‘adherence’ as two important ‘indicators of legitimacy’ in both national and international law. See Thomas M Franck, *Fairness in International Law and Institutions* (Clarendon Press, 1995) 38–46.

⁴⁷ International Law Commission, above n 3, 244.

a significant proportion of laws do not simply reproduce pre-existing obligations. Rather, they purport to bring new obligations into existence. For example, zoning regulations prohibit people from running certain types of businesses in particular neighbourhoods. These types of rules typically go beyond pre-existing norms.

Examples from international humanitarian and human rights law are not difficult to find. It seems plausible that legal norms requiring participants in armed conflict to refrain from ‘mutilation, cruel treatment or torture’ of people placed *hors de combat* simply reproduce pre-existing moral obligations.⁴⁸ The same could reasonably be said of most, if not all, of the substantive provisions of the *ICCPR* and the *ECHR*. At the other end of the spectrum lie the highly detailed provisions of *Geneva Convention III* dealing with the treatment of prisoners of war. The rule that prisoners of war who have worked for one year shall be granted a rest of eight consecutive days with full pay imposes more detailed obligations on detaining authorities than can plausibly be found in pre-existing moral requirements.⁴⁹ The four *Geneva Conventions* of 1949 contain numerous examples of similarly detailed rules.

Philosophers have long wondered why this second kind of rule should be regarded as binding.⁵⁰ Why should people simply accept the detailed requirements imposed by legal regimes on topics where morality plausibly leaves them some discretion? Many of the most popular responses to this issue have relied on the role of law in promoting mutually beneficial social coordination. Some theorists have argued that our obligation to obey the law stems from a natural duty to promote the wellbeing of members of the community.⁵¹ It is best for the community as a whole that people act according to a shared set of rules. Other theorists have argued that when we gain benefits and protections from the cooperative efforts of others, we have a duty of fairness to make our own contribution.⁵²

The common thread in these explanations lies in the emphasis they place on the salience of legal solutions as a mode of social coordination. One question such theories must answer is why citizens should follow the requirements of law, rather

⁴⁸ *Geneva Conventions I-IV* art 3. See also *ICCPR* art 7; *ECHR* art 3.

⁴⁹ *Ibid* art 53.

⁵⁰ This way of framing the question goes back at least to Thomas Aquinas. See Thomas Aquinas, *Summa Theologiae*, I-II, q 95, art 2.

⁵¹ See, eg, John Finnis, *Natural Law and Natural Rights* (Clarendon Press, 1980) ch 9; John Finnis, ‘The Authority of Law in the Predicament of Contemporary Social Theory’ (1984) 1 *Notre Dame Journal of Law, Ethics and Public Policy* 115; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press, 2006) ch 5; Christopher Wellman, ‘Samaritanism and the Duty to Obey the Law’ in Wellman and Simmons, above n 45, 1.

⁵² See, for example, John Rawls, ‘Legal Obligation and the Duty of Fair Play’ in Sidney Hook (ed), *Law and Philosophy* (New York University Press, 1964) 3; John Rawls, *A Theory of Justice* (Harvard University Press, 1999) 96–8, 301–8; H L A Hart, ‘Are There Any Natural Rights?’ (1955) 64 *Philosophical Review* 175; George Klosko, *The Principle of Fairness and Political Obligation* (Rowman and Littlefield, 1992).

than adopting other plausible methods of fulfilling their duties to others. A standard response to this difficulty is that it makes sense for citizens to follow the law, rather than devising their own strategies, because law represents the solution that is most likely to be adopted by other members of the community. In other words, law represents the salient response to problems of social coordination, because it is generally accepted as binding by affected parties. This feature of law suggests that, if we are under a duty to cooperate with others to solve social problems, the best way to do this is often to follow legal rules.⁵³

Law, then, may be legitimate in some cases because it exhibits coherence with underlying norms and in other cases because it supplies a generally accepted solution to a social coordination problem. These twin sources of legal legitimacy help to explain why legal systems that claim legitimate authority in Raz's sense also tend to appeal to the values of coherence and acceptance. They represent two distinct ways that laws may seek to promote the common good.

V HUMANITARIANISM AND HUMAN RIGHTS

Both coherence and acceptance plausibly lie at the heart of legal legitimacy. These two values are often mutually supporting and many fields of law place significant emphasis on both. Nonetheless, legal systems may differ in the extent to which they prioritise one or the other. It is arguable that international human rights law places particularly high value on coherence, due to its aspirational character and its reliance on concepts such as human dignity and natural rights. The normative force of human rights, in other words, rests substantially on their claim to embody shared human goals.

International humanitarian law, by contrast, might be said to lie towards the other end of the spectrum. Since the primary aim of this body of law is to secure recognition and respect from all participants in armed conflict, humanitarian norms often prioritise simplicity and clarity over coherence with underlying ethical principles. An example is provided by the distinction between the *jus ad bellum* and the *jus in bello*. The former area of law concerns when an armed conflict may legitimately be commenced, while the latter sets out the standards of conduct applicable once the conflict has started. The two bodies of rules have traditionally been kept separate, meaning that all parties to an armed conflict are subject to the same standards, regardless of how the conflict began.⁵⁴

International humanitarian law, then, applies the same fundamental guarantees and responsibilities to all participants in armed conflict. It avoids the need to draw difficult and controversial distinctions between just and unjust causes. It also avoids

⁵³ For critical discussion of this line of argument, see Crowe, 'Natural Law in Jurisprudence and Politics', above n 43; Jonathan Crowe, 'Five Questions for John Finnis' (2011) 18 *Pandora's Box* 11.

⁵⁴ For a helpful overview, see Christopher Greenwood, 'The Relationship Between *Ius ad Bellum* and *Ius in Bello*' (1983) 9 *Review of International Studies* 221.

passing judgment on which of the parties to a conflict may be at fault. Let us call this feature of humanitarian norms the *principle of neutrality*. There is good reason why international humanitarian law adopts this principle: if it imposed different rules on unjust aggressors and innocent parties, both sides of a conflict would try to exploit this distinction for their own advantage. This would undermine the underlying goal of establishing dependable limits on warfare.

The principle of neutrality has, however, long been considered controversial. A series of authors have noted that the principle sits poorly with attempts by just war theorists to provide a principled account of the ethical duties of participants in armed conflicts.⁵⁵ A significant strand of the just war tradition holds that the most plausible ethical basis for international humanitarian law lies in an analogy with self-defence.⁵⁶ However, this analogy does not support neutrality between the parties to a conflict. Imagine, by way of illustration, that Kate is asleep in her bed when she hears a noise downstairs. She comes down to find that Andrew has broken into her house and is brandishing a gun. Kate also happens to have a gun nearby, which she keeps for self-defence. The two confront each other in Kate's living room.

Let us suppose that Kate and Andrew each see that the other is armed. They are in genuine fear for their lives. Most people would agree that Kate is entitled to defend herself from Andrew. This is a classic case of self-defence. She should probably disarm him or flee if she can, but she may use force to defend herself if necessary. Andrew, however, seems to be in a different position. He is the one who caused the altercation by wrongfully breaking into Kate's house. If Kate defends herself against Andrew and injures him, she is not culpable. If Andrew ends up injuring Kate, he is to blame, even if he feared for his life.

An analogy between humanitarian norms and self-defence suggests that different rules of conduct apply to aggressors and innocent parties. This is what Jeff McMahan calls the 'deep morality' of warfare.⁵⁷ However, as McMahan points out, the deep morality of warfare imposes significantly different requirements to the law of war.⁵⁸ The international law of armed conflict, then, does not derive its legitimacy from its strict coherence with the deep morality of warfare, but rather from the need

⁵⁵ See, eg, Michael Walzer, *Just and Unjust Wars* (Basic Books, 1977) ch 3; Jeff McMahan, 'Innocence, Self-Defence and Killing in War' (1994) 2 *Journal of Political Philosophy* 193; Jeff McMahan, 'The Ethics of Killing in War' (2004) 114 *Ethics* 693; Gerhard Øverland, 'Killing Civilians' (2005) 13 *European Journal of Philosophy* 345; Gerhard Øverland, 'Killing Soldiers' (2006) 20 *Ethics and International Affairs* 455. For some responses to these arguments, see Patrick Emerton and Toby Handfield, 'Order and Affray: Defensive Privileges in Warfare' (2009) 37 *Philosophy and Public Affairs* 382; David Luban, 'War Crimes: The Law of Hell' in Larry May (ed), *War: Essays in Political Philosophy* (Cambridge University Press, 2008) 266, 270–3.

⁵⁶ The analogy is far from universally accepted. Cf David Rodin, *War and Self-Defence* (Clarendon Press, 2002); Emerton and Handfield, above n 55.

⁵⁷ McMahan, 'The Ethics of Killing in War', above n 55, 730.

⁵⁸ *Ibid* 730–3.

for clear and generally accepted conventions to ‘mitigate the savagery of war’.⁵⁹ These conventions bear some relation to underlying values, but their most important feature is that they are generally followed.

McMahan’s observation that the principle of neutrality derives its legitimacy less from its strict coherence with underlying values than from its conventional status connects with a long tradition of thought about the relationship between the *jus ad bellum* and the *jus in bello*. Hersch Lauterpacht, for example, argues in a classic article that the distinction rests on pragmatic foundations.⁶⁰ He acknowledges that it would be ‘logical and fully consistent with principle’ to deny an unjust aggressor the protection of international law, but goes on to note that such a course would undermine the reciprocity that makes rules of war possible:

It is impossible to visualize the conduct of hostilities in which one side would be bound by rules of warfare without benefiting from them and the other side would benefit from them without being bound by them. ... The result would be the abandonment of most rules of warfare, including those which are of a humanitarian character.⁶¹

Lauterpacht’s comments make it clear that the issue is not merely that self-defence is an unpromising candidate to provide the ethical basis for the distinction between the *jus ad bellum* and the *jus in bello*. A more robust foundation for international humanitarian law might lie in something like the notion of respect for human dignity. However, this seems equally hard to square with the principle of distinction, according to which combatants may be targeted with impunity,⁶² subject only to the prohibition on superfluous injury and limitations on particular forms of weaponry. The deeper point is that the nature and origins of the law of war militate against the search for a coherent set of underlying values. As a whole, international humanitarian law prioritises acceptance above coherence. Its primary aim is to place reliable limits on warfare.

The comparison with human rights law is instructive here. International human rights treaties tend to focus on setting out general principles, whereas the *Geneva Conventions* are full of detailed rules for the protection of particular groups. The *ICCPR*, for example, with its broad standards and aspirational tenor, contrasts notably with *Geneva Convention III*, with its highly detailed standards for the treatment of prisoners of war. This is no accident. The two regimes were designed with fundamentally different aims in mind. International human rights law seeks to articulate the shared goals that should guide the governance arrangements of humans in community. Humanitarian law, by contrast, exists precisely to regulate situations where human values and community structures have broken down.

⁵⁹ Ibid 730.

⁶⁰ Hersch Lauterpacht, ‘The Limits of the Operation of the Law of War’ (1953) 50 *British Yearbook of International Law* 206.

⁶¹ Ibid 212.

⁶² *Additional Protocol I* art 48; *Additional Protocol II* art 13(2).

Humans living together under conditions of peace should aspire to more than mere coexistence. They should set their sights on the pursuit of a full conception of human flourishing. International human rights law is intended to guide human communities in this aim. International humanitarian law, on the other hand, seeks primarily to prevent armed conflict from descending into what Carl von Clausewitz famously termed ‘absolute warfare’, where the only objective is to annihilate the enemy.⁶³ It is the last-ditch hold-out position of humanity against arbitrary violence. It is not surprising, then, that humanitarian law prioritises the certainty of detailed and reliable rules over strict coherence with underlying values.

The above argument does not mean that international humanitarian law lacks an ethical basis. However, its ethical basis is not found in coherence with a unifying set of values. Acceptance provides an ethical foundation for legal rules in its own right, provided those rules effectively promote mutually beneficial social coordination. Most legal regimes emphasise both coherence and acceptance to some degree. However, I argue that the focus international humanitarian law places on mitigating the savagery of armed conflict means that, unlike many other regimes, it relies more heavily on acceptance as the source of its legitimacy. It contrasts sharply, in particular, with international human rights law.

VI CONCLUSION

International human rights standards seek to recognise and protect the basic components of human flourishing in a range of diverse social contexts. International humanitarian law, by contrast, aims primarily at universal acceptance of a common set of rules to moderate the harmful effects of armed conflict. Claims to the legitimacy of human rights law and humanitarian norms rest on distinct and, to some extent, conflicting theories. If the legitimacy of human rights law stems primarily from its coherence with an underlying narrative of human flourishing, the legitimacy of humanitarian law might be said to rest mainly on its widespread acceptance by the international community.

Human rights scholars sometimes complain that the pragmatism of international humanitarian law is inconsistent with the lofty aspirations of human rights norms. Humanitarian law, from this perspective, involves ‘a grim “balancing” or “equation” between military necessity and human suffering, shrouded in euphemisms such as collateral damage’.⁶⁴ However, the opposite charge can also be made: allowing the relatively vague and aspirational demands of human rights law to apply in wartime risks undermining humanitarian law’s central quest for a clear and uniform set of rules that all parties to a conflict can agree upon.

The monist vision of international law, endorsed by the ICJ and the ILC study group, assumes that this tension can be overcome and that humanitarian and human rights law can be integrated into a unified collection of norms. However, neither body

⁶³ Carl von Clausewitz, *On War* (Wordsworth, 1997) 6–7 [bk I ch I, § 3].

⁶⁴ Gowlland-Debbas, above n 1, 335.

provides a detailed road map for how this can be accomplished while still upholding the claims to legitimacy associated with both fields of law. The monist view is now widely endorsed. It is doubtful, in any case, that dualism provides a desirable alternative, given that it entails a general suspension of human rights norms in wartime. Nevertheless, the challenges involved in integrating humanitarianism and human rights should not be understated.

What, then, is lost or gained by highlighting the different organising values underpinning the two fields of law? The program of integrating the two areas need not be abandoned, but a shift in focus is needed to ensure that the restraining function of international humanitarian law is maintained. I suggested earlier that tensions between specific norms of international humanitarian law and human rights law can only be fully identified and addressed on a case-by-case basis. The analysis offered in this article suggests that this exercise should be conducted on two parallel levels. The first question that arises concerns tensions between individual norms. The second issue concerns tensions between the application of a particular norm and the general claims to legitimacy of the relevant bodies of law.

It is at this second level that tension may arise between the application of a human rights norm in wartime and the emphasis international humanitarian law places on the value of acceptance. Any attempt to reconcile the tensions between the two bodies of law needs to take issues such as these into account. This may involve reconceptualising or reframing the human rights norm in question in order to render it more consistent with the emphasis on certainty that underpins the law of armed conflict. With these overarching factors in mind, a gradual process of harmonisation may ultimately prove more stable and adaptable than the narrower *lex specialis* framework articulated by the ICJ.

The central point of this article is not that the quest to integrate humanitarianism and human rights be abandoned, but rather that it needs to be approached with a full appreciation of the contrasting claims to legitimacy presented by the two areas of law. The ICJ is correct to insist that human rights norms apply in armed conflicts, but it would be a mistake to think that coherence with basic human values is the sole, or even the primary, motivation for the law of armed conflict. It is crucial that the application of human rights in wartime is carried out with the goal of acceptance firmly in mind. It is only by maintaining clear, stable and predictable conventions concerning conduct on the battlefield that the international community can place reliable and effective limits on warfare.

ETHNOCIDE AND INDIGENOUS PEOPLES: ARTICLE 8 OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

ABSTRACT

Article 8 of the *Declaration on the Rights of Indigenous Peoples* provides that Indigenous peoples and individuals have the right to be free from forced assimilation and destruction of culture. In addition, this provision requires that states provide effective mechanisms for prevention and redress of actions that: deprive Indigenous peoples of their integrity as distinct peoples; dispossess Indigenous peoples of land; force population transfers, assimilation or integration; or promote or incite discrimination. This article aims to develop a greater understanding of this novel provision. It investigates the historical development of art 8 of the *Declaration on the Rights of Indigenous Peoples*, together with the concept and jurisprudence of cultural genocide expressed in the *Convention on the Prevention and Punishment of the Crime of Genocide* in an effort to determine the scope and content of the right, whether or not it is legally binding and its enforcement. Article 8 should ensure Indigenous peoples are able to use their own languages and protect their historical, cultural and religious heritage and objects in libraries, museums, schools, historical monuments, places of worship or other cultural institutions. In essence, this article protects the right of Indigenous peoples and individuals to live in an environment where they can enjoy their own cultures and where those cultures are able to develop and flourish.

I INTRODUCTION

The *United Nations Declaration on the Rights of Indigenous Peoples* ('*Declaration*')¹ was adopted by the General Assembly of the United Nations in September 2007, concluding more than twenty years of negotiations. It is significant as the only human rights instrument that specifically addresses the rights of Indigenous peoples.

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¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

This article focuses on art 8 of the *Declaration* ('Article 8'): the right of Indigenous peoples and individuals not to be subjected to forced assimilation or destruction of their cultures.² The inclusion of this right is significant, as the condemnation of ethnocide and cultural genocide (the terms used in the initial draft of Article 8)³ has long been hailed as an effective avenue of protecting Indigenous peoples' rights.⁴ Having said that, Article 8 is a novel provision and has received little academic attention since its adoption seven years ago.⁵

Article 8 prescribes that Indigenous peoples should be free from forced assimilation and cultural destruction. However, exactly what is meant by 'forced assimilation' and 'destruction of culture'? Do these concepts overlap entirely with the pre-existing notions of ethnocide and cultural genocide? What does the right entail and how can it be used by Indigenous peoples to safeguard their cultures?

In an effort to answer these questions, this article will examine Article 8 in terms of its historical development, specifically considering the *travaux préparatoires* of the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*')⁶ and its subsequent jurisprudence. The *Genocide Convention* is significant in this context as there was considerable debate surrounding the inclusion of cultural genocide within the definition of genocide.⁷ This debate has continued in

² *Declaration* art 8.

³ As discussed in detail in Part III, B Travaux Préparatoires, there is no clear agreement on the meaning of the terms ethnocide and cultural genocide. In general, ethnocide is regarded as the destruction of people and cultural genocide as the destruction of the physical manifestations of culture.

⁴ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fifth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) 16 [61]; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its Eleventh Session*, 45th sess, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993) annex 1 art 7 ('*Report of the Working Group on Indigenous Populations on its Eleventh Session*'); C C Tennant and M E Turpel, 'A Case Study of Indigenous Peoples: Genocide, Ethnocide and Self-determination' (1990) 59 *Nordic Journal of International Law* 287, 297.

⁵ It received only a passing reference in Siegfried Weissner et al, 'Sofia Conference (2012): Rights of Indigenous Peoples' (Final Report, International Law Association, 2012) <<http://www.ila-hq.org/en/committees/index.cfm/cid/1024>> 8 and a short discussion in the context of rights to land in Jérémie Gilbert and Cathal Doyle, 'A New Dawn Over the Land: Shedding Light on Collective Ownership and Consent' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 289, 295–6.

⁶ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

⁷ Genocide is defined as committing acts, including killing of members of a group, with the intention of destroying a national, ethnical, racial or religious group in whole or part: *ibid* art 2. The debates surrounding the inclusion of cultural genocide in the *Genocide Convention* are discussed below in Part IV, B Travaux Préparatoires.

the genocide jurisprudence, despite the fact that cultural genocide was not included in the *Genocide Convention*.

The first part of this article outlines the right contained in Article 8. The second part looks at the *Declaration* in detail, tracing its historical development and the negotiations in relation to Article 8 in each phase of the drafting. The third part has regard to the development of the *Genocide Convention* and its jurisprudence in relation to cultural genocide. The final part of the article uses these sources to develop a greater understanding of the right in terms of its scope and content, its legal enforceability and its enforcement.

Article 8 is particularly relevant for Indigenous peoples living in post-colonial states. In countries such as Australia, where Indigenous people have been, and continue to be, marginalised, Article 8 addresses persistent human rights violations.⁸ This article argues that Article 8 is of great significance for Indigenous peoples as it serves as a concrete recognition of their right to be free from forced assimilation or the destruction of their cultures. This freedom should ensure Indigenous peoples are able to live in an environment where they are free to enjoy their own cultures and where those cultures are able to develop and flourish.

II THE RIGHT

Article 8 provides:

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
 - (d) Any form of forced assimilation or integration;
 - (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.⁹

⁸ Human Rights and Equal Opportunity Commission, 'Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families, Human Rights and Equal Opportunities Commission, 1997) (*Bringing Them Home*); Anna Cowan, 'UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia' (2013) 22(2) *Pacific Rim Law & Policy Journal* 247.

⁹ *Declaration* art 8.

This is a novel provision with few, if any, precedents. There is no comparable provision in the *Universal Declaration of Human Rights*,¹⁰ the *International Covenant on Civil and Political Rights* ('ICCPR'),¹¹ the *International Covenant on Economic, Social and Cultural Rights* ('ICESR')¹² or the *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.¹³ There is no such provision in the Inter-American system for the protection of human rights,¹⁴ the *European Convention on Human Rights*¹⁵ or the African *Banjul Charter*.¹⁶ The provision regarding propaganda designed to promote or incite racial or ethnic discrimination echoes art 4 of the *Convention on the Elimination of All Forms of Racial Discrimination*.¹⁷

The protection from ethnocide found in Article 8 is closely linked to the prohibition on genocide included in art 7 of the *Declaration*. This article affords Indigenous peoples the 'collective right to live in freedom, peace and security as distinct peoples' and prohibits 'any act of genocide or any other act of violence, including forcibly removing children of the group to another group'.¹⁸

The connection between Article 8 and genocide is also apparent as the initial drafts of the article used the term 'cultural genocide'.¹⁹ While the *Genocide Convention*

¹⁰ *Universal Declaration of Human Rights*, GA Res 217A(III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) ('*Universal Declaration*').

¹¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹² *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

¹³ *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992).

¹⁴ 'Official Documents: American Declaration of the Rights and Duties of Man' (1949) 43(3) *American Journal of International Law Supplement* 133; *American Convention on Human Rights*, opened for signature 22 November 1969, OAS Treaty Series No 36 (entered into force 18 July 1978); *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights*, opened for signature 17 November 1988, OAS Treaty Series No 69 (entered into force 16 November 1999).

¹⁵ *European Convention on Human Rights*, opened for signature 4 November 1950, CETS No 005 (entered into force 3 September 1953) (amended on 1 October 2009).

¹⁶ *African (Banjul) Charter on Human and Peoples' Rights*, adopted 27 June 1981, 21 ILM 58 (entered into force 21 October 1986).

¹⁷ *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 7 January 1969) art 4 ('*Convention on the Elimination of All Forms of Racial Discrimination*').

¹⁸ *Declaration* art 7(2).

¹⁹ *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, annex 1 art 7; Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Sub-Commission on*

does not contain any such provision, cultural genocide was included in the initial drafts of the *Genocide Convention*.²⁰ Consequently, the drafting of the *Genocide Convention* is also relevant in this context.

Article 8 has received very little academic attention, which is surprising for such an innovative right. The Australian Human Rights Commission has interpreted arts 7 and 8 to give Indigenous peoples the following rights:

the right to life, including the right to live as a distinct group. These rights are to be enjoyed freely and securely. This includes the protection of our minds and bodies ... to be free from forced assimilation, genocide, violence and the destruction of our cultures. Governments should take steps to prevent:

- actions that take away our cultural values or identities
- actions that dispossess us from our country
- any form of forced assimilation, relocation or removal of our children
- information or stories about us that lead to discrimination against us.

If any of these rights are violated, governments should provide some form of compensation.²¹

Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session, 46th sess, UN Doc E/CN.4/Sub.2/1994/56 (28 October 1994) 103, 1078 art 7 ('*Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*'). The amended version of the article was included in the Chairperson-Rapporteur's proposals for the draft Declaration and submitted to the Commission on Human Rights: Commission on Human Rights, *Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32 on its Tenth Session: Addendum*, 61st sess, UN Doc E/CN.4/2005/89/Add.2 (1 April 2005) 12–13 ('*Report of the Working Group on its Tenth Session: Addendum 2*'); Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 on its Eleventh Session*, 62nd sess, UN Doc E/CN.4/2006/79 (22 March 2006) annex I 26 art 7 ('*Report of the Working Group on its Eleventh Session*').

²⁰ Secretary-General of the United Nations, *Draft Convention on the Crime of Genocide*, UN Doc E/447 (26 June 1947) 5 ('*Draft Convention on the Crime of Genocide*'); Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) annex art 3; Sixth Committee of the General Assembly, *Summary Record of the Eighty-Third Meeting*, 3rd sess, 83rd plen mtg, UN Doc A/C.6/SR.83 (25 October 1948) 206 ('*Eighty-Third Meeting of the Sixth Committee of the General Assembly*'); General Assembly, *Summary Record of the Hundred and Seventy-Ninth Plenary Meeting: Continuation of the Discussion on the Draft Convention on Genocide: Reports of the Economic and Social Council and of the Sixth Committee*, 3rd sess, 179th plen mtg, UN Doc A/PV.179 (9 December 1948) 847–8 ('*Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*').

²¹ Australian Human Rights Commission, 'The Community Guide to the UN Declaration on the Rights of Indigenous Peoples' (Report, Australian Human Rights Commission, 2010) 28.

It is interesting to note that the Australian Human Rights Commission states that the government ‘should take steps to prevent’ the actions outlined, but makes no reference to the government establishing effective redress mechanisms in relation to those actions, which is also referred to in Article 8. This will be discussed in detail below.

In order to better understand the right, it is necessary to examine the historical development and *travaux préparatoires* of the *Declaration* and the *Genocide Convention* in detail.

III DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

A Historical Development

In 1985, the Working Group on Indigenous Populations (‘WGIP’) began drafting a declaration on the rights of Indigenous peoples.²² At its first meeting in relation to formulating a specific instrument for Indigenous rights, WGIP decided that such an instrument should be in the form of a declaration ‘in the first instance’ with the possibility that a convention may ‘emerge further down the road, possibly with inspiration from the declaration’.²³ This decision was in keeping with its mandate to ‘give special attention to the evolution of standards concerning the rights of Indigenous populations’.²⁴ WGIP stressed the need for special Indigenous rights standards as a result of

[i]nequalities and oppression suffered for centuries; ethnocidal practices; the actual dismal situation and marginalized existence in many countries, notwithstanding lofty statutes and policies; lack of understanding and knowledge reflected in accusations of backwardness and primitiveness; and forced assimilation and integration by majority populations ...²⁵

²² Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session*, UN Doc A/HRC/Sub.1/58/22 (14 August 2006) 5 [1b]. WGIP was authorised by Economic and Social Council in 1982: *Study of the Problem of Discrimination Against Indigenous Populations*, ESC Res 1982/34, UN ESCOR, 1st sess, 28th plen mtg, Supp No 1, UN Doc E/1982/82 (7 May 1982). It was established in order to review developments in relation to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations and give special attention to the evolution of standards concerning the rights of Indigenous populations: Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its Twenty-Fourth Session*, UN Doc A/HRC/Sub.1/58/22 (14 August 2006) 5 [1a].

²³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fourth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1985/22 (25 August 1985) 19 [85] (*Report of the Working Group on Indigenous Populations on its Fourth Session*).

²⁴ *Report of the Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN.4/Sub.2/1985/22, 19 [85].

²⁵ *Ibid* 14 [61].

Member states played a limited role in the drafting of the *Declaration*, as the process involved unprecedented input from Indigenous groups in the early drafting stage.²⁶ Indeed, the drafting proceeded on the basis of two drafts prepared by Indigenous groups.²⁷ While WGIP was an expert body consisting of five members, more than 600 people attended WGIP's 11th session in 1993.²⁸ This number swelled to more than 790 attendees at the 12th session in 1994, significantly outnumbering the 42 governmental observers present.²⁹

Following almost a decade of drafting and consultation with Indigenous groups, states and experts, WGIP adopted the text of the draft Declaration in 1993.³⁰ The draft Declaration was then submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which adopted it in 1994 before passing it to the United Nations Commission on Human Rights for consideration.³¹

The Commission on Human Rights began its consideration of the draft Declaration in 1995. To do so, the Commission on Human Rights established an on-going inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples (the 'Working Group on the Draft Declaration') composed of representatives of member states.³² States became actively involved in the negotiations at this point. More than 60 States and just under 70 Indigenous and non-governmental organisations were at the first session of the Working Group on the Draft Declaration,

²⁶ Russel Lawrence Barsh, 'Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force' (1996) 18(4) *Human Rights Quarterly* 782, 782–3.

²⁷ *Report of the Working Group on Indigenous Populations on its Fourth Session*, UN Doc E/CN.4/Sub.2/1985/22, annex III–IV.

²⁸ *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 4 [3], 7 [11]. In 1993, 34 State observers, more than 200 Indigenous organisations and non-governmental organisations, and more than 100 individual observers were present: *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 4 [5], 5–7 [8]–[11].

²⁹ In 1994 more than 250 Indigenous organisations and non-governmental organisations present and more than 60 individual observers were present: Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its Twelfth Session*, 46th sess, UN Doc E/CN.4/Sub.2/1994/30 (17 August 1994) 5 [5], 5–8 [10]–[12], 8 [13].

³⁰ *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, 44 [209], annex I.

³¹ *Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/Sub.2/1994/56, 103.

³² *Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, CHR Res 1995/32, UN ESCOR, 51st sess, 53rd mtg, Supp No 4, UN Doc E/1995/23 (3 March 1995) 111.

with similar numbers attending the last session in 2006.³³ Indigenous organisations continued to have a presence in the negotiations and their participation was ‘absolutely fundamental to the process of elaborating a draft declaration’.³⁴

The negotiations that took place in the Working Group on the Draft Declaration were long and drawn out, serving to highlight the gulf between Indigenous peoples’ expectations and what states were willing to accept. Only two articles were adopted in the third session of the Working Group on the Draft Declaration in 1997,³⁵ and no provisions were agreed upon at the fourth, fifth, seventh, eighth, ninth or tenth sessions.³⁶ The highlight of progress at the sixth session was agreement by governments to adopt art 45: that nothing in the finalised *Declaration* may be interpreted as allowing any act contrary to the *Charter of the United Nations*.³⁷ Some Indigenous representatives were so frustrated by the lack of progress that they went on a hunger

³³ Ibid 3–4 [8]–[13]. Similar numbers of states and Indigenous and non-governmental organisations were present at the 11th session in 2006: *Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, annex II 79–80 [3]–[8].

³⁴ Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, 53rd sess, UN Doc E/CN.4/1997/102 (10 December 1996) 6 [22] (*Report of the Second Session of the Working Group on the Draft Declaration*). Similar sentiments were expressed by Denmark, Canada, Norway, Chile, Sweden, New Zealand, the United States, Colombia and Russian Federation: at 6–8 [23], [24], [26]–[28], [30], [31], [33], [34].

³⁵ The articles that were adopted were art 43 (‘All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals’) and art 5 (‘Every indigenous individual has the right to a nationality’): Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32*, 54th sess, UN Doc E/CN.4/1998/106 (15 December 1997) 8–9 [41], [42].

³⁶ Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 55th sess, UN Doc E/CN.4/1999/82 (20 January 1999) 5 [27]; Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 56th sess, UN Doc E/CN.4/2000/84 (6 December 1999); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 58th sess, UN Doc E/CN.4/2002/98 (6 March 2002) (*Report of the Seventh Session of the Working Group on the Draft Declaration*); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 59th sess, UN Doc E/CN.4/2003/92 (6 January 2003) (*Report of the Eighth Session of the Working Group on the Draft Declaration*); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 60th sess, UN Doc E/CN.4/2004/81 (7 January 2004); Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on its Tenth Session*, 61st sess, UN Doc E/CN.4/2005/89 (28 February 2005).

³⁷ Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32*, 57th sess, UN Doc E/CN.4/2001/85 (6 February 2001) 23 [141].

strike.³⁸ The Commission on Human Rights' adoption of the draft Declaration,³⁹ based on 'a final compromise text'⁴⁰ in June 2006 has been described as a 'miracle'.⁴¹

Events took yet another turn when the draft Declaration was passed to the General Assembly ('GA') for adoption. The Group of African States sought to delay the vote on the draft for another year and submitted a list of 30 amendments.⁴² This led Canada, Colombia, New Zealand and the Russian Federation to offer another series of 20 amendments.⁴³ Ultimately, only nine amendments were agreed upon.⁴⁴ The most significant of the amendments was in relation to self-determination and territorial integrity.⁴⁵ There was also a successful amendment to art 8(2)(d) of the

³⁸ Statement by the International Indian Treaty Council, the Indigenous World Association and the International Organization of Indigenous Resource Development (non-governmental organisations in consultative status to the United Nations Economic and Social Council) in Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 on its Tenth Session: Addendum*, 61st sess, UN Doc E/CN.4/2005/89/Add.1 (24 February 2005) annex III A 4. The hunger strike started on 29 November 2004 and ended on 2 December 2004 following meetings between the six participants and representatives of the Commission on Human Rights: *Hunger Strike by Indigenous Peoples* (3 December 2004) The Ogiek People <<http://www.ogiek.org/indepth/break-hunger-strike.htm>>.

³⁹ The Declaration received 32 votes in favour (Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, the Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom of Great Britain and Northern Ireland, Uruguay, Zambia), two against (Canada and Russia) and 12 abstentions (Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, Philippines, Senegal, Tunisia, Ukraine): *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, HRC Res 1/2, UN GAOR, 61st sess, 21st mtg, UN Doc A/61/53 (29 June 2006) 18.

⁴⁰ *Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, 7 [30].

⁴¹ 'A UN Declaration on the Rights of Indigenous Peoples: Rights and Wrong Sides of History' (2006) I(1) *Indigenous Review Quarterly* 20.

⁴² Namibia, *Amendments to Draft Resolution A/C.3/61/L.18*, 61st sess, UN Doc A/C.3/61/L.57/Rev.1 (21 November 2006); *Resolution to Defer Consideration of the Draft Declaration on the Rights of Indigenous Peoples*, GA Res, 61st sess, 82nd plen mtg, UN Doc A/Res/61/178 (20 December 2006); African Group, *Draft Aide Memoire* (9 November 2006) Indigenous Peoples of Africa Co-ordinating Committee <<http://www.ipacc.org.za/uploads/docs/Africanaidememoire.pdf>>; 'Draft Declaration Faces Litmus Test at UNGA: There is a Way Out for the African Group' (2007) II(2) *Indigenous Rights Quarterly* 7, 7.

⁴³ Permanent Mission of Canada, Permanent Mission of Colombia, Permanent Mission of New Zealand and Permanent Mission of the Russian Federation, *Proposed Amendments to the Draft Declaration on the Rights of Indigenous Peoples* (13 August 2007). Author has document on file.

⁴⁴ Rachel Davis, 'Summary of the UN Declaration on the Rights of Indigenous Peoples' (Briefing Paper, Jumbunna Indigenous House of Learning, University of Technology Sydney, November 2007).

⁴⁵ *Declaration* art 46.

draft Declaration, which removed ‘by other cultures or ways of life imposed on them by legislative, administrative or other measures’ that appeared after ‘any form of forced assimilation or integration’.⁴⁶

The *Declaration* was passed by the GA in September 2007 with 143 votes in favour. Four States voted against adoption (Australia, Canada, New Zealand and the United States) and eleven abstained (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine).⁴⁷ This was the first time states had voted against a human rights declaration.⁴⁸ However, following a change in government, Australia changed its position in relation to the *Declaration* and endorsed it on 3 April 2009.⁴⁹ New Zealand, Canada and the United States have all also moved to endorse the *Declaration*.⁵⁰

⁴⁶ African Group, *Amendments to the United Nations Declaration on the Rights of Indigenous Peoples* (2007) 4. Author has document on file.

⁴⁷ *Declaration*, 15.

⁴⁸ *Universal Declaration* (8 States abstained); *United Nations Declaration on the Rights of the Child*, UN Doc A/PV.841; *United Nations Declaration on the Elimination of All Forms of Racial Discrimination*, GA Res 1904 (XVIII), UN GAOR, 18th sess, 1261st plen mtg, UN Doc A/PV.1621 (20 November 1963); *United Nations Declaration on the Elimination of Discrimination Against Women*, GA Res 2263 (XXII), UN GAOR, 22nd sess, 1597th plen mtg, UN Doc A/PV.1597 (7 November 1967); *Declaration on the Right of Mentally Retarded Persons*, GA Res 2856 (XXVI), UN GAOR, 26th sess, 2027th plen mtg, UN Doc A/PV.2027 (20 December 1971) (9 States abstained); *Declaration on the Rights of Disabled Persons*, GA Res 3447 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/PV.2433 (9 December 1975); *Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 3452 (XXX), UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/PV.2433 (9 December 1975); *Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief*, GA Res 36/55, UN GAOR, 36th sess, 73rd plen mtg, UN Doc A/PV.73 (25 November 1981); *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 47th sess, 92nd plen mtg, Supp No 49, UN Doc A/47/49 (18 December 1992); *Declaration on the Elimination of Violence Against Women*, GA Res 48/104, UN GAOR, 48th sess, 85th plen mtg, UN Doc A/PV.85 (20 December 1993).

⁴⁹ Jenny Macklin, ‘Statement on the United Nations Declaration on the Rights of Indigenous Peoples’ (Speech delivered at Parliament House, Canberra, 3 April 2009) <http://www.un.org/esa/socdev/unpfii/documents/Australia_official_statement_endorsement_UNDRIP.pdf> 2.

⁵⁰ New Zealand, *Parliamentary Debates*, House of Representative, 20 April 2010, 10229 (Simon Power) <http://www.parliament.nz/en-NZ/PB/Debates/Debates/6/5/a/49HansD_20100420_00000071-Ministerial-Statements-UN-Declaration-on.htm>; Aboriginal Affairs and Northern Development Canada, ‘Canada Endorses the United Nations Declaration on the Rights of Indigenous Peoples’ (News Release, 2-3429, 12 November 2010) <<http://www.aadnc-aandc.gc.ca/eng/1292354321165/1292354361417>>; US Department of State, *Announcement of US Support for the United Nations Declaration on the Rights of Indigenous Peoples: Initiatives to Promote the Government-to-Government Relationship and Improve the Lives of Indigenous Peoples* (16 December 2010) US Department of State <<http://www.state.gov/documents/organization/153223.pdf>>.

B Travaux Préparatoires of the Declaration

The issues of ethnocide and cultural genocide are evident throughout the *travaux préparatoires*, revealing the concerns of both state and Indigenous representatives. At its first session in 1982, WGIP considered the recently adopted *Declaration of San José*.⁵¹ The *Declaration of San José* describes ethnocide in terms of ‘the loss of cultural identity among Indian populations of Latin America.’⁵² Ethnocide occurs when ‘an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether collectively or individually.’⁵³ It involves an ‘extreme form of massive violation of human rights’⁵⁴ such as the right of ethnic groups to respect for their cultural identities. The *Declaration of San José* contended that this right is established by numerous declarations, covenants and agreements of the United Nations (‘UN’) and its specialised agencies, as well as various regional intergovernmental bodies and numerous non-governmental organisations.⁵⁵

Article 1 of the *Declaration of San José* equates ethnocide with cultural genocide, stating that it is ‘a violation of international law equivalent to genocide, which was condemned by the United Nations *Convention on the Prevention and Punishment of Genocide* of 1948.’⁵⁶ This marked the first official recognition of ethnocide within the UN.⁵⁷ However, it must be noted that it is only a declaration made by a meeting of experts in Latin America under the auspices of the United Nations Education Scientific and Cultural Organisation (‘UNESCO’) and therefore has limited application.

The issues of ethnocide and cultural genocide were raised by Indigenous organisations as early as 1987.⁵⁸ The preservation of the cultural identity of Indigenous populations

⁵¹ United Nations Education Scientific and Cultural Organisation, *Meeting of Experts on Ethno-Development and Ethnocide in Latin-America: Final Report, Declaration of San José*, UN Doc SS 82/WS.32 (12 July 1982) preamble para 1 (*Declaration of San José*). See Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its First Session*, 35th sess, UN Doc E/CN.4/Sub.2/1982/33 (25 August 1982) 12 [52], 13 [60], 16 [78]. It was also mentioned in subsequent meetings: *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 13 [59].

⁵² *Declaration of San José*, UN Doc SS 82/WS.32, preamble para 1.

⁵³ *Ibid* preamble para 2.

⁵⁴ *Ibid*.

⁵⁵ *Ibid*.

⁵⁶ *Ibid* art 1.

⁵⁷ Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Study on the Protection of Cultural and Intellectual Property of Indigenous Peoples*, ESCOR, 45th sess, UN Doc E/CN.4/Sub.2/1993/28 (28 July 1993) 4 [2].

⁵⁸ Sub-Commission Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Fifth Session*, 38th sess, Agenda Item 11, UN Doc E/CN.4/Sub.2/1987/22 (24 August 1987) 9 [34], 16 [60].

was justified as Indigenous cultures form ‘part of humankind’s cultural heritage and there was an urgent need to reduce pressure towards cultural assimilation.’⁵⁹

The right was included in the draft Declaration adopted by WGIP at its 11th session in the following terms:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
- b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
- c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;
- d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;
- e) Any form of propaganda directed against them.⁶⁰

During discussions at the session, the Chairperson-Rapporteur clarified that ‘cultural genocide’ referred to the destruction of the physical aspects of a culture and ‘ethnocide’ described ‘the elimination of an entire “ethnos” and people.’⁶¹

The considerable discussion in relation to the draft article focused on the reference to ‘cultural genocide’, which was subsequently replaced by ‘forced assimilation or destruction of their culture’ in the final version of the article. Some states in the Working Group on the Draft Declaration expressed reservations in relation to the terms ‘ethnocide’ and ‘cultural genocide’, as they were ‘not clear concepts to be usefully applied in practice’.⁶² This was reiterated by Canada, Chile and the United States.⁶³ The United States suggested that the provision should reiterate the application of the *Genocide Convention* to Indigenous peoples and state that

⁵⁹ Ibid 16 [61].

⁶⁰ *Report of the Working Group on Indigenous Populations on its Eleventh Session*, UN Doc E/CN.4/Sub.2/1993/29, annex 1 art 7. The substance of art 7 of the draft Declaration was included as art 8 of the *Declaration*.

⁶¹ Ibid 16 [48]. This article was repeated in subsequent drafts: *Draft United Nations Declaration on the Rights of Indigenous Peoples in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-Sixth Session*, UN Doc E/CN.4/Sub.2/1994/56, 103, 107–8 (art 7).

⁶² Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1994) 14 [64].

⁶³ *Report of the Second Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/1997/102, 35 [183], 36 [186], 36–7 [188]; *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 12 [53]–[55].

they have a right to be free from ‘actions aimed at destroying their rights to belong to the group and enjoy their own culture, language and religion.’⁶⁴ For other states, the term ‘genocide’ was not problematic, unlike the concepts of cultural genocide and ethnocide, while others stressed that the notion of ‘cultural ethnocide’ had no precedent in international law.⁶⁵ Australia supported the right of Indigenous peoples not to be removed forcibly from their lands.⁶⁶

As far as some Indigenous organisations were concerned, art 7 of the draft Declaration was simply a restatement of the provisions of the *Genocide Convention*. The terms ‘ethnocide’ and ‘cultural genocide’ were regarded as important due to the history and impact of colonisation.⁶⁷ However, in later meetings Indigenous representatives stressed that it did not simply mirror existing international law but sought to establish standards for distinct peoples.⁶⁸ The article was strongly supported by Indigenous representatives who resisted efforts to dilute it or eliminate references to ethnocide or cultural genocide.⁶⁹ For Indigenous representatives, the notion of ethnocide included forced relocations, population transfers, forced assimilation into the dominant society and dispossession of land.⁷⁰ One representative noted that ‘in many instances, acts of cultural genocide had preceded or accompanied acts of genocide.’⁷¹

Discussion surrounding the controversial terms continued in 2003 and a number of alternatives were suggested,⁷² as it was felt that ethnocide and cultural genocide were not ‘terms that were generally accepted in international law.’⁷³ In response, an Indigenous representative claimed that because the terms were used in the *Declaration of San José* they did exist in international law.⁷⁴ This was rejected on the basis

⁶⁴ *Report of the Second Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/1997/102, 37 [188].

⁶⁵ *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 17 [73].

⁶⁶ *Report of the Second Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/1997/102, 36 [185].

⁶⁷ Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1994) 14 [64].

⁶⁸ *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 17-18 [74].

⁶⁹ *Ibid* 17 [74]; *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 13 [59].

⁷⁰ *Report of the Seventh Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2002/98, 18 [74]–[75].

⁷¹ *Ibid* 18 [75].

⁷² *Report of the Eighth Session of the Working Group on the Draft Declaration*, UN Doc E/CN.4/2003/92, 12–13 [51]–[61].

⁷³ *Ibid* 12 [52].

⁷⁴ *Ibid* 13 [59].

that the declaration ‘was developed by experts on ethnodevelopment and ethnocide, not by states, and ... was not generally accepted in international law.’⁷⁵ States were also unclear about the meanings of the terms, what the scope and content of the right was and whether the intention was to create a new right that was unique to Indigenous peoples.⁷⁶ Norway suggested amending the article to refer to ‘genocide, forced assimilation or destruction of their culture’.⁷⁷ This change in wording was supported by New Zealand, Canada and some Indigenous representatives.⁷⁸ In 2005, New Zealand proposed that the controversial terms ‘ethnocide and cultural genocide’ be replaced with ‘forced assimilation or destruction of their culture’.⁷⁹ The amended version of the article was included in the Chairperson-Rapporteur’s proposals for the draft Declaration and submitted to the UN Commission on Human Rights.⁸⁰

The only change between the draft Declaration and the final *Declaration* was the removal of the words ‘by other cultures or ways of life imposed on them by legislative, administrative or other measures’ that appeared after ‘any form of forced assimilation or integration’ in part (d) of the article.⁸¹

Analysis of the *travaux préparatoires* reveals the concerns of states and Indigenous representatives with the concepts of ethnocide and cultural genocide. Much of the

⁷⁵ Ibid 12 [52].

⁷⁶ Ibid 12 [53]–[54].

⁷⁷ Ibid 12 [55].

⁷⁸ Ibid 13 [60], 23, 24.

⁷⁹ Commission on Human Rights, *Working Group Established in accordance with Commission on Human Rights Resolution 1995/32: Information Provided by States*, 61st sess, UN Doc E/CN.4/2004/WG.15/CRP.1 (6 September 2004) art 7; Commission on Human Rights, *Report of the Working Group on its Tenth Session: Addendum 2*, UN Doc E/CN.4/2005/89/Add.2, 12–13.

⁸⁰ *Report of the Working Group on its Tenth Session: Addendum 2*, UN Doc E/CN.4/2005/89/Add.2, 12–13; *Revised Chairman’s Summary and Proposal: Draft Declaration on the Rights of Indigenous Peoples in Report of the Working Group on its Eleventh Session*, UN Doc E/CN.4/2006/79, annex I 26 art 7.

⁸¹ This was one of only nine amendments of the thirty suggested by the African Group in the GA that was agreed upon before the final adoption of the *Declaration*: African Group, *Amendments to the United Nations Declaration on the Rights of Indigenous Peoples* (2007) 4. Author has document on file. There is no discussion of this particular amendment in any of the documents associated with the African Group’s amendments to the *Declaration*: African Group, *Draft Aide Memoire*, above n 42; Albert Barume et al (African Group of Experts), *Response Note to The Draft Aide Memoire of the African Group on the UN Declaration in the Rights of Indigenous Peoples* (21 March 2007) International Working Group for Indigenous Affairs <www.iwgia.org/sw21505.asp>; African Commission on Human and Peoples Rights, *Advisory Opinion of the African Commission on Human and Peoples’ Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (May 2007) African Union <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf>; ‘Draft Declaration Faces Litmus Test at UNGA: There is a way out for the African Group’, (2007) II(2) *Indigenous Rights Quarterly* 7.

debate focused on the meaning of these terms, which were considered to be unclear or not generally accepted under international law. There was no clear agreement on the meaning of the terms ethnocide and cultural genocide. Initially the two were regarded as interchangeable and concerned with loss of cultural identity such that Indigenous peoples were not free to enjoy, develop and transmit their own cultures and languages. A subsequent distinction was made between ethnocide as the destruction of the people and cultural genocide as the destruction of the physical manifestations of culture. There was little discussion in relation to what conduct constituted either ethnocide or cultural genocide, beyond the comments of Indigenous representatives that included forced relocations, population transfers, forced assimilation into the dominant society and dispossession of land within the concept of ethnocide. The confusion surrounding the terms ethnocide and cultural genocide led to their replacement with 'forced assimilation or the destruction of their culture'.⁸² Neither of these concepts were the subject of detailed discussion. It is unclear whether the change in wording has a significant impact on the meaning of the right, as forced assimilation and destruction of culture appear to be synonymous with ethnocide and cultural genocide. Consequently, the scope and content of the right are still to be determined.

IV THE GENOCIDE CONVENTION

As cultural genocide was the subject of considerable debate in the drafting of the Genocide Convention, an analysis of the drafting process may offer further insights into the meaning of Article 8. This link between the *Declaration* and the *Genocide Convention* is evident in the Sub-Commission on Prevention of Discrimination and Protection of Minorities' technical review of the draft Declaration.⁸³

A Historical Background

A 1946 resolution of the GA proposed a convention on genocide.⁸⁴ The resolution affirmed that genocide was 'a crime under international law which the civilized world condemns'.⁸⁵ The groups that it specified for protection were 'racial, religious, political and other groups'.⁸⁶

⁸² *Declaration*, art 8(2)(d).

⁸³ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical Review of the United Nations Declaration on the Rights of Indigenous Peoples: Note by the Secretariat*, Agenda Item 15, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994) 8 [36].

⁸⁴ *The Crime of Genocide*, GA Res 96 (I), UN GAOR, 1st sess, 55th plen mtg, in *Yearbook of the United Nations* [1946–47] 255, 255–6; Matthew Lippman, 'The 1948 Convention on the Prevention and Punishment of the Crime of Genocide: Forty-Five Years Later' (1994) *Temple International Law Journal* 1, 7–8.

⁸⁵ *The Crime of Genocide*, GA Res 96 (I), UN GAOR, 1st sess, 55th plen mtg, in *Yearbook of the United Nations* [1946–47] 255, 255.

⁸⁶ *Ibid.*

The initial draft of the *Genocide Convention* was prepared by the UN Secretary-General in June 1947, assisted by a group of experts.⁸⁷ The draft Genocide Convention stated that the purpose of the convention 'is to prevent the destruction of racial, national, linguistic, religious or political groups of human beings.'⁸⁸ Genocide was defined as 'a criminal act directed against any one of the aforesaid groups of human beings, with the purpose of destroying it in whole or in part, or of preventing its preservation or development.'⁸⁹ This initial draft included a provision pertaining to cultural genocide.⁹⁰

The Social and Economic Council's Ad Hoc Committee and the Commission on Human Rights adopted a draft Genocide Convention with a separate provision in relation to cultural genocide in 1948, before transferring it to the GA for consideration.⁹¹ The GA referred the draft Genocide Convention to its Sixth Committee.⁹² The Sixth Committee ultimately decided to exclude the cultural genocide provision from the draft Genocide Convention.⁹³ Following its adoption by the Sixth Committee, the draft Genocide Convention was recommended for adoption by the GA.⁹⁴ Debate continued in the GA as the Union of Soviet Socialist Republics reintroduced an amendment to include cultural genocide in the draft Genocide Convention.⁹⁵ The amendment was rejected by 31 votes to 14, with

⁸⁷ *Draft Convention on the Crime of Genocide*, UN Doc E/447, 15.

⁸⁸ *Ibid* art 1(I).

⁸⁹ *Ibid* art 1(II).

⁹⁰ *Ibid*.

⁹¹ Ad Hoc Committee on Genocide, *Summary Record of the Twenty-Sixth Meeting*, UN Doc E/AC.25/SR.26 (12 May 1948) 4, 7; Commission on Human Rights, *Summary Record of the Seventy-Sixth Meeting*, 3rd sess, UN Doc E/CN.4/SR.76 (1 July 1948) 15; Commission on Human Rights, *Draft Convention on the Prevention and the Punishment of Genocide*, 3rd sess, UN Doc E/CN.4/136 (15 June 1948).

⁹² *Yearbook of the United Nations* [1948–49] 953. The final version of the *Genocide Convention* was completed in the Sixth Committee of the General Assembly during 51 meetings over a two-month period: William A Schabas, 'Origins of the Genocide Convention: From Nuremburg to Paris' (2007–2009) 40 *Case Western Reserve Journal of International Law* 35, 40; Josef L Kunz, 'The United Nations Convention on Genocide' (1949) 43 *American Journal of International Law* 738, 739.

⁹³ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 206.

⁹⁴ Sixth Committee of the General Assembly, *Summary Record of the One Hundred and Thirty-Second Meeting*, 3rd sess, UN Doc A/C.6/SR.132 (1 December 1948) 701; Sixth Committee of the General Assembly, *Report of the Sixth Committee on Genocide: Draft Convention and Report of the Economic and Social Council*, UN Doc A/760 (3 December 1948) 8–13 [25].

⁹⁵ USSR, *Amendments to the Draft Convention on the Prevention and Punishment of Genocide Proposed by the Sixth Committee*, UN Doc A/766 (5 December 1948) 1 [2].

ten abstentions.⁹⁶ The GA unanimously adopted the *Genocide Convention* on 9 December 1948.⁹⁷

B Travaux Préparatoires of the Genocide Convention

1. Secretary-General's Draft Convention on the Crime of Genocide

The initial 1947 draft Genocide Convention made a distinction between physical genocide, biological genocide and cultural genocide.⁹⁸

According to the 1947 draft, the cultural aspects of the definition of genocide include:

Destroying the specific characteristics of the group by:

- a) Forced transfer of children to another human group; or
- b) Forced and systematic exile of individuals representing the culture of a group; or
- c) Prohibition of the use of the national language even in private intercourse; or
- d) Systematic destruction of books printed in the national language or of religious works or prohibition of new publications; or
- e) Systematic destruction of historical or religious monuments or their diversion for alien uses, destruction or dispersion of documents and objects of historical, artistic, or religious value and of objects used in religious worship.⁹⁹

This aspect of genocide was divisive.¹⁰⁰ Two of the experts felt that it was 'an undue extension of the notion of genocide'.¹⁰¹ In contrast, another expert considered that 'a racial, national, or religious group cannot continue to exist unless it preserves its spirit and moral unity'.¹⁰² The continued existence of such groups was morally justified on the grounds of the groups' valuable contributions to civilisation in terms of cultural diversity.¹⁰³ Cultural genocide 'was a policy which, by drastic methods, aimed at the rapid and complete disappearance of the cultural, moral and religious life of a group of human beings'.¹⁰⁴ Despite these differences, all the experts agreed

⁹⁶ *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 847–8.

⁹⁷ *Ibid* 851.

⁹⁸ *Draft Convention on the Crime of Genocide*, UN Doc E/447, 17.

⁹⁹ *Ibid* art 1(II).

¹⁰⁰ *Ibid* 26.

¹⁰¹ *Ibid* 27 (Professors Donnedieu de Vabres and Pella).

¹⁰² *Ibid* (Professor Lemkin).

¹⁰³ *Ibid*.

¹⁰⁴ *Ibid*.

that the transfer of children to another human group should be covered by the convention on genocide.¹⁰⁵

2. *Ad Hoc Committee on Genocide*

The inclusion of cultural genocide was ‘one of the thorniest aspects’¹⁰⁶ of drafting the *Genocide Convention* undertaken by the Ad Hoc Committee on Genocide established by the Economic and Social Council in 1948.¹⁰⁷ The delegates were deeply divided over whether or not the concept should be included, the definition of cultural genocide and whether it should be dealt with in the *Genocide Convention* or more properly under minority human rights protection.¹⁰⁸

The Ad Hoc Committee voted by six votes to one to include cultural genocide in the draft Genocide Convention, albeit as a separate article.¹⁰⁹

The final version of the cultural genocide provision,¹¹⁰ included in the Ad Hoc Committee’s Report, was in the following terms:

¹⁰⁵ Ibid.

¹⁰⁶ Commission on Human Rights, *Summary Record of the Seventy-Sixth Meeting*, 3rd sess, UN Doc E/CN.4/SR.76 (1 July 1948) 7.

¹⁰⁷ *Genocide*, ECOSOC Res 117 (VI), 6th sess, 160th plen mtg, UN Doc E/777 (3 March 1948); Ad Hoc Committee on Genocide, *Summary Records of Meetings*, UN Doc E/AC.25/SR.1-28 (5 April 1948–9 June 1948).

¹⁰⁸ Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) 17. States in favour of the inclusion of cultural genocide: see Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 2 (Mr Perez-Perozo (Venezuela)), 6 (Mr Azkoul (Lebanon)), 5 (Mr Lin Mousheng (China)); 8 (Mr Morozov (USSR)). States against inclusion: Mr Maktos (United States) (Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 10); Mr Ordonneau (France) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 4); Ad Hoc Committee on Genocide, *Summary Record of the Tenth Meeting*, UN Doc E/AC.25/SR.10 (16 April 1948) 12); Mr Azkoul (Lebanon) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 3). A number of States considered that cultural genocide should be dealt with in relation to minority rights: Mr Rudzinski (Poland) (Ad Hoc Committee on Genocide, *Summary Record of the Third Meeting*, UN Doc E/AC.25/SR.3 (13 April 1948) 3–4); Mr Ordonneau (France) (Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 4); Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 9); Mr Maktos (United States) (Ad Hoc Committee on Genocide, *Summary Record of the Fourteenth Meeting*, UN Doc E/AC.25/SR.14 (21 April 1948) 10).

¹⁰⁹ Ad Hoc Committee on Genocide, *Summary Record of the Fifth Meeting*, UN Doc E/AC.25/SR.5 (16 April 1948) 8; Ad Hoc Committee on Genocide, *Summary Record of the Tenth Meeting*, UN Doc E/AC.25/SR.10 (16 April 1948) 12.

¹¹⁰ There were a number of iterations of the cultural genocide provision: Ad Hoc Committee on Genocide, *Summary Record of the Twelfth Meeting*, UN Doc E/AC.25/SR.12 (23 April 1948) 3; Ad Hoc Committee on Genocide, *Summary Record of the*

In this Convention genocide also means any deliberate act committed with the intent to destroy the language, religion, or culture of a national, racial or religious group on grounds of the national or racial origin or religious belief of its members such as:

- 1) prohibiting the use of the language of the group in daily intercourse or in schools, or the printing and circulation of publications in the language of the group;
- 2) destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.¹¹¹

The Ad Hoc Committee's Report explained that the inclusion of cultural genocide recognises that it is possible to suppress a group, not just by murdering individuals, but also by abolishing the specific traits that make them into a group.¹¹²

3. *Sixth Committee of the General Assembly*

The inclusion of cultural genocide was one of the major issues discussed in the Sixth Committee. Some members of the committee supported the inclusion of cultural genocide on the basis that it had been included in the original GA resolution.¹¹³ They focused on the indivisible nature of cultural and physical genocide. Pakistan described cultural genocide as the end and physical genocide the means.¹¹⁴ Lebanon stated that cultural and physical genocide were 'two facets of one and the same act having the same origin and the same purpose, namely, the destruction of a group, whether by the extermination of its members or by the eradication of its distinctive characteristics.'¹¹⁵ Ecuador pointed out that whether the genocide was cultural or physical the result was the same.¹¹⁶

Fourteenth Meeting, UN Doc E/AC.25/SR.14 (21 April 1948) 5, 12–14; Ad Hoc Committee on Genocide, *Summary Record of the Twenty-Fourth Meeting*, UN Doc E/AC.25/SR.24 (12 May 1948) 6–7.

¹¹¹ Ad Hoc Committee on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee*, UN Doc E/794 (24 May 1948) annex art 3.

¹¹² *Ibid* 17.

¹¹³ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fifth Meeting*, 3rd sess, UN Doc A/C.6/SR.65 (2 October 1948) 22 ('*Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*'); Sixth Committee of the General Assembly, *Summary Record of the Seventy-Fifth Meeting*, 3rd sess, UN Doc A/C.6/SR.75 (15 October 1948) 113; *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 195–6 (Mr Pérez Perozo (Venezuela)). See also *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 194 (Sardar Bahadur Khan (Pakistan)).

¹¹⁴ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 193.

¹¹⁵ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Sixth Meeting*, 3rd sess, UN Doc A/C.6/SR.66 (4 October 1948) 33.

¹¹⁶ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203.

There was also a sentiment that a failure to protect against cultural genocide would ‘facilitate the perpetration of physical genocide’.¹¹⁷ Egypt argued that whilst ‘[c]ultural genocide was certainly not such a heinous crime as the physical destruction of a group ... it did nevertheless constitute a real danger for human groups.’¹¹⁸ The member gave examples of the kind of conduct that could constitute cultural genocide, including systematic destruction of schools and libraries, the attempt to assimilate groups and forced conversions.¹¹⁹

Amongst the supporters of the inclusion of cultural genocide, there was a clear sense that the notion of genocide contained in the *Genocide Convention* had to be narrow in scope to obtain the largest number of signatories.¹²⁰ Venezuela contended that it was essential that the term be used with great accuracy and only in reference to ‘violent and brutal acts which were repugnant to the human conscience, and which caused losses of particular importance to humanity, such as the destruction of religious sanctuaries, libraries, etc.’¹²¹

Opposition to the inclusion of cultural genocide was based on the difficulty in adequately defining the term. Opponents argued that it would be better dealt with under human rights or minority protection conventions.

France felt that the notions of physical and cultural genocide should be separated as physical genocide can be defined in precise legal terms whereas the conception of cultural genocide is less precise and could lead to excessive interference in the domestic affairs of states.¹²² The words ‘cultural genocide’ ‘failed to convey the idea of the destruction of a culture’, according to Denmark.¹²³ They stated that

¹¹⁷ Ibid 204; *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 27 (Mr Kovalenko (USSR)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 202 (Mr Khomussko (Byelorussian Soviet Socialist Republic)).

¹¹⁸ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 199.

¹¹⁹ Ibid. See also Mr Tarazi (Syria) at 200; Mr Tsien Tai (China) at 198.

¹²⁰ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Ninth Meeting*, 3rd sess, UN Doc A/C.6/SR.69 (7 October 1948) 31 (Mr Petren (Sweden)); Sixth Committee of the General Assembly, *Summary Record of the Seventy-Second Meeting*, 3rd sess, UN Doc A/C.6/SR.72 (12 October 1948) 82 (Mr Reid (New Zealand)).

¹²¹ *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 22. See also *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 204 (Mr Correa (Ecuador)); Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 7 (Mr Raafat (Egypt)).

¹²² Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 8; *Sixty-Fifth Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.65, 58–9.

¹²³ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 198.

‘it would show a lack of logic and of a sense of proportion to include in the same convention both mass murders in the gas chambers and the closing of libraries.’¹²⁴ South Africa felt that the definition of cultural genocide broadened the concept and ‘went too far in respect to the protection of minorities.’¹²⁵ The Netherlands were systematic in their rejection of the draft Genocide Convention’s definition of cultural genocide, stating that there was an essential difference between cultural genocide and genocide as defined in the draft Genocide Convention, cultural genocide was too vague a concept to allow precise definition and delimitation for the inclusion in the convention and the inclusion of cultural genocide in the convention might give rise to abuses by reason of the vagueness of the concept.¹²⁶ India stated that cultural genocide, whilst reprehensible, could not be linked to ‘genocide proper’.¹²⁷

A number of delegates supported the concept of cultural genocide but argued it should be dealt with in relation to human rights. France considered that the punishment of cultural genocide was related to the protection of human rights and would be better protected under that rubric.¹²⁸ Other delegates considered some other form of protection was appropriate, such as a separate supplementary convention.¹²⁹

The inclusion of cultural genocide in the draft Genocide Convention was opposed outright by Sweden, Denmark, Canada, Iran, New Zealand, India, Peru, South Africa, the Netherlands, the United States and Belgium.¹³⁰

¹²⁴ Ibid 199.

¹²⁵ Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 8.

¹²⁶ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203.

¹²⁷ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 15; *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 201. See also Sixth Committee of the General Assembly, *Summary Record of the Sixty-Fourth Meeting*, 3rd sess, UN Doc A/C.6/SR.64 (1 October 1948) 16 (Mr Manini y Rios (Uruguay), Sir Hartley Shawcross (United Kingdom)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 203 (Mr de Beus (Netherlands)), 197 (Mr Amado (Brazil)), 202 (Mr Egeland (South Africa)), 203 (Mr Gross (United States of America)).

¹²⁸ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Third Meeting*, 3rd sess, UN Doc A/C.6/SR.63 (30 September 1948) 13 (Mr Chaumont (France)).

¹²⁹ Sixth Committee of the General Assembly, *Summary Record of the Sixty-Sixth Meeting*, 3rd sess, UN Doc A/C.6/SR.66 (4 October 1948) 31 (Mr Abdoh (Iran)); *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 197 (Mr Petren (Sweden)).

¹³⁰ *Eighty-Third Meeting of the Sixth Committee of the General Assembly*, UN Doc A/C.6/SR.83, 197–20.

The Sixth Committee ultimately decided to exclude provisions in relation to cultural genocide from the draft Genocide Convention.¹³¹ Nehemiah Robinson concluded, at the time, that the reasons for the rejection were ‘that “cultural” Genocide was too indefinite a concept to be included in a Convention; that the difference between mass murder and the closing of libraries was too great; that cultural Genocide falls rather in the sphere of protection of minorities.’¹³²

4. *General Assembly Consideration of the Genocide Convention*

A proposed amendment to include cultural genocide in the *Genocide Convention* ensured that the cultural genocide debate continued in the GA. The amendment was a new art 3, which sought to include in the definition of genocide

any deliberate act committed with the intent to destroy the language, religion or culture of a national, racial or religious group on grounds of national or racial origin, or religious beliefs such as:

- a) Prohibiting the use of the language of the group in daily intercourse or in schools or the printing and circulation of publications in the language of the group;
- b) Destroying or preventing the use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions and objects of the group.¹³³

The discussion in relation to this amendment largely echoed that which had taken place in the Sixth Committee meetings on the same topic. The USSR and Poland stressed the importance of cultural genocide protection, its connection with physical genocide and that its absence could be used to justify oppression of minorities.¹³⁴

¹³¹ The decision to exclude received 25 votes in favour (Union of South Africa, United Kingdom, the United States of America, Australia, Belgium, Bolivia, Brazil, Canada, Chile, Denmark, Dominican Republic, France, Greece, India, Iran, Liberia, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Peru, Siam, Sweden and Turkey) to 16 against (USSR, Yugoslavia, Byelorussian Soviet Socialist Republic, China, Czechoslovakia, Ecuador, Egypt, Ethiopia, Lebanon, Mexico, Pakistan, Philippines, Poland, Saudi Arabia, Syria and Ukrainian Soviet Socialist Republic), 4 abstentions (Venezuela, Afghanistan, Argentina and Cuba) and 13 delegations absent during the vote: *Ibid* 206.

¹³² Nehemiah Robinson, ‘The Genocide Convention: Its Origins and Interpretation’ (1949) reprinted in (2007–2009) 40 *Case Western Journal of International Law*, 19.

¹³³ USSR, *Amendments to the Draft Convention on the Prevention and Punishment of Genocide Proposed by the Sixth Committee*, UN Doc A/766 (5 December 1948) 1 [2].

¹³⁴ General Assembly, *Summary Record of the Hundred and Seventy-Eighth Plenary Meeting: Draft Convention on Genocide: Reports of the Economic and Social Council and of the Sixth Committee*, 3rd sess, 178th plen mtg, UN Doc A/PV.178 (9 December 1948) 813–14 (Mr Morozov (USSR)) (‘*Hundred and Seventy-Eighth Plenary Meeting of the General Assembly*’); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 842 (Mr Katz-Suchy (Poland)).

Venezuela again raised the issue of the impact of cultural genocide protection on States with significant immigrant populations.¹³⁵ The United States and United Kingdom did not think that the draft Genocide Convention should be broadened in any way.¹³⁶ Many delegates stressed the importance of the unanimous adoption of the *Genocide Convention*, which meant that something as contentious as cultural genocide could not be included.¹³⁷ Others argued that protection in relation to cultural genocide should be dealt with under the auspices of human rights.¹³⁸ Ultimately, the amendment was rejected.¹³⁹

The fact that cultural genocide was not included in the final version of the *Genocide Convention* makes it clear that the notion of genocide is restricted to the physical destruction of a group. The inclusion of a cultural genocide provision would have been significant in recognising the inherent link between a racial, ethnic or religious group and its culture. Moreover, it would have placed culture in a central position in one of the cornerstones of the UN system. However, the issue of the existence of cultural genocide in international law persists: it has been raised in a number of cases, before both domestic and international tribunals,¹⁴⁰ long after the negotiations on the drafting of the *Genocide Convention* ended.

5. *Three Aspects of Cultural Genocide*

The *travaux préparatoires* of the *Genocide Convention* enhance our understanding of cultural genocide by highlighting three distinct aspects of the concept.

The first is the inclusion of the concept of the forced transfer of children from one group to another within understandings of cultural genocide. Even those who opposed the inclusion of the concept accepted this as cultural genocide.¹⁴¹ This also relates to forced assimilation or conversion of groups.

A second aspect relates to the use of language, evident in the included prohibition on the use of language in private, in schools and in publications, together with systematic destruction of books in that language.

¹³⁵ *Hundred and Seventy-Eighth Plenary Meeting of the General Assembly*, UN Doc A/PV.178, 815 (Mr Pérez Perozo (Venezuela)).

¹³⁶ *Ibid* 820–1 (Mr Gross (United States)); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 837 (Mr Fitzmaurice (United Kingdom)).

¹³⁷ *Hundred and Seventy-Eighth Plenary Meeting of the General Assembly*, UN Doc A/PV.178 822 (Mr Dignam (Australia)), 824 (Mr Abdoh (Iran)), 826 (Mr Sundaram (India)), 829 (Mr Raafat (Egypt)); *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 835 (Mr Alfaro (Panama)), 836 (Mr Amdao (Brazil)), 839 (Mr Kaeckenbeeck (Belgium)).

¹³⁸ *Hundred and Seventy-Ninth Plenary Meeting of the General Assembly*, UN Doc A/PV.179, 827 (Mr Sundaram (India)).

¹³⁹ *Ibid* 847–8.

¹⁴⁰ See below Part IV, C *Jurisprudence*.

¹⁴¹ *Draft Convention on the Crime of Genocide*, UN Doc E/447, 27.

A third aspect is evident in the destruction of cultural material such as documents, objects of cultural, historical or religious significance and historical, cultural or religious monuments. This understanding is reflected in the restrictions on use or destruction of libraries, museums, schools, historical monuments, places of worship or other cultural institutions of a group. These amount to an attack on the continued enjoyment of a group of their cultural life.

C Jurisprudence

Until the creation of the International Criminal Court in 2002 there was no treaty body responsible for the *Genocide Convention*.¹⁴² As such it 'lay all but dormant for much of its existence.'¹⁴³

However, the 1990s, some 40 years after the conclusion of the treaty itself, saw an increase in activity related to the treaty. Decisions in domestic courts such as *Kruger v The Commonwealth*¹⁴⁴ in Australia and *Hugo Princz v Federal Republic of Germany*¹⁴⁵ in the United States raised issues of genocide. Ad hoc tribunals were established, including the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of former Yugoslavia ('ICTY') in 1991 and the International Criminal Tribunal for Rwanda in 1994.¹⁴⁶ Much of the jurisprudence on genocide is a product of ad hoc tribunals in relation to the atrocities committed in the former Yugoslavia, Rwanda and Sudan. The jurisprudence, whilst recognising that cultural genocide is not a crime under the *Genocide Convention*, sheds light on the notion of destruction of culture.

The ICTY recognised, in the trial of Radislav Krstic, that the drafters of the *Genocide Convention* expressly rejected the notion of cultural genocide as it 'was considered too vague and too removed from the physical or biological destruction that motivated the Convention.'¹⁴⁷ The Trial Chamber stated

[t]he physical destruction of a group is the most obvious method, but one may also conceive of destroying a group through purposeful eradication of its culture

¹⁴² *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute of the International Criminal Court*').

¹⁴³ David L Nersessian, 'The Razor's Edge: Defining and Protecting Human Groups Under the Genocide Convention' (2003–2004) 36 *Cornell International Law Journal* 293, 294.

¹⁴⁴ *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

¹⁴⁵ *Hugo Princz v Federal Republic of Germany* 26 F 3d 1166, 1174 (DC Cir 1994).

¹⁴⁶ SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993); SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994).

¹⁴⁷ *Prosecutor v Krstic (Trial)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-98-33-T, 2 August 2001) [576] ('*Krstic*').

and identity resulting in the eventual extinction of the group as an entity distinct from the remainder of the community.¹⁴⁸

The Trial Chamber also stated that it is possible to take into account evidence relating to cultural and other non-physical forms of group destruction in determining whether there is the requisite intention to destroy the group.¹⁴⁹ However, the Trial Chamber concluded that ‘an enterprise attacking only the cultural or sociological characteristics of a human group in order to annihilate these elements which give to that group its own identity distinct from the rest of the community would not fall under the definition of genocide.’¹⁵⁰

The Appeals Chamber agreed with the Trial Chamber’s analysis of the governing legal principle.¹⁵¹ Judge Shahabuddeen handed down a partially dissenting judgment, which held that there must be an intention to destroy the group, but that intention does not have to be physical or biological.¹⁵² He also argued that the destruction of culture may be used as evidence of an intention to destroy the group.¹⁵³ In this particular case, ‘the razing of the principal mosque confirm[ed] an intent to destroy the Srebrenica part of the Bosnian Muslim group.’¹⁵⁴ However, he also stated that this was in no way an argument for the inclusion of cultural genocide under the *Genocide Convention*.¹⁵⁵ Judge Shahabuddeen’s view was echoed in the subsequent cases of *Blagojevic*¹⁵⁶ and *Krajisnik*,¹⁵⁷ and was further endorsed by the International Court of Justice (‘ICJ’) in *Bosnia v Serbia*.¹⁵⁸

The ICJ considered the cultural aspects of genocide in *Bosnia v Serbia*.¹⁵⁹ Bosnia claimed that Serb forces deliberately destroyed historical, religious and cultural

¹⁴⁸ Ibid [574]. This was on the basis of the working group established to report of human rights violations in South Africa in 1985 and the International Law Commission’s 1996 report that state genocide corresponds to the crime of persecution under the Nuremberg Tribunal’s statute, which included acts designed to destroy the social or cultural bases of a group: at [575].

¹⁴⁹ Ibid [577], [579].

¹⁵⁰ Ibid [580].

¹⁵¹ *Prosecutor v Krstic (Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-98-33-A, 19 April 2004) [26].

¹⁵² Ibid [51].

¹⁵³ Ibid [51].

¹⁵⁴ Ibid [53].

¹⁵⁵ Ibid.

¹⁵⁶ *Prosecutor v Blagojevic* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-02-60-T, 17 January 2005) [659].

¹⁵⁷ *Prosecutor v Krajisnik* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber I, Case No IT-00-39-T 27, September 2006).

¹⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 124 [344] (*‘Bosnia v Serbia’*).

¹⁵⁹ Ibid.

property, including mosques, Catholic churches, synagogues, cemeteries, monasteries, archives and libraries, in an attempt to wipe out traces of the group's existence.¹⁶⁰ The Court concluded that there was 'conclusive evidence of the deliberate destruction of the historical, cultural and religious heritage of the protected group'.¹⁶¹ However, the Court stressed that

[t]he destruction of historical, cultural and religious heritage cannot be considered to constitute the deliberate infliction of conditions of life calculated to bring about the physical destruction of the group. Although such destruction may be highly significant inasmuch as it is directed to the elimination of all traces of the cultural or religious presence of a group, and contrary to other legal norms, it does not fall within the categories of acts of genocide set out in Article II of the Convention.¹⁶²

The ICJ determined that Serbia had not committed acts of genocide but had failed in its obligations to prevent the genocide in Srebrenica in July 1995 and, by failing to cooperate fully with the ICTY, to punish genocide.¹⁶³

In Australia, prior to the enactment of the *International Criminal Court Act 2002* (Cth),¹⁶⁴ the applicability of the crime of genocide in domestic courts arose in relation to government policies affecting Indigenous people in *Kruger* (before the High Court)¹⁶⁵ and in *Nulyarimma v Thompson* (in the Federal Court).¹⁶⁶ In each case, the court stated that genocide did not form part of Australian law.¹⁶⁷ This was reiterated by the Senate Legal and Constitutional Affairs References Committee in its report on the Anti-Genocide Bill 1999 (Cth).¹⁶⁸ The orthodox view that genocide does not include cultural genocide and, as such, cultural genocide is not prohibited under treaty law was confirmed in *Kruger*, where Dawson J stated that '[t]he Genocide Convention is not concerned with cultural genocide, references to cultural genocide being expressly deleted from it in the course of its being drafted'.¹⁶⁹

¹⁶⁰ Ibid 121–3 [335]–[343].

¹⁶¹ Ibid 124 [344].

¹⁶² Ibid.

¹⁶³ Ibid 161 [449]–[450]; 168 [471].

¹⁶⁴ *International Criminal Court Act 2002* (Cth) s 3(1). The *International Criminal Court Act 2002* (Cth) had the effect of making genocide part of Australia's domestic law by accepting the jurisdiction of the International Criminal Court, as set out in the *Rome Statute of the International Criminal Court*, which includes genocide.

¹⁶⁵ *Kruger* (1997) 190 CLR 1.

¹⁶⁶ (1999) 96 FCR 153.

¹⁶⁷ *Kruger* (1997) 190 CLR 1, 70–71; *Nulyarimma v Thompson* (1999) 96 FCR 153, 166 [32], 173 [58].

¹⁶⁸ Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Humanity Diminished: The Crime of Genocide* (2000) 27.

¹⁶⁹ *Kruger* (1997) 190 CLR 1, 72.

In *Kruger*, the Court held that the removal of Indigenous children from their families between 1925 and 1949 (under the Northern Territory's *Aboriginals Ordinance 1918*)¹⁷⁰ did not come within the scope of the *Genocide Convention*, as there was no intention to destroy the group.¹⁷¹ Justice Dawson stated that the *Genocide Convention* does not form part of domestic law, as there is no legislation implementing it, a requirement referred to in *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*.¹⁷² Further, the *Ordinance* predated the *Genocide Convention*, which does not have retrospective force.¹⁷³ Even if there were a requirement to interpret the *Ordinance* in keeping with Australia's international obligations, the result would be no different as there was nothing in the *Ordinance* 'which authorises acts committed with intent to destroy in whole or part any Aboriginal group'; words or intent to this effect would be required for the acts to amount to genocide.¹⁷⁴ Accordingly, the plaintiffs' claims were rejected.¹⁷⁵

Kruger must be seen in the wider context of the Human Rights and Equal Opportunity Commission's national inquiry into the separation of Indigenous children from their families requested by the federal Attorney-General.¹⁷⁶ The report of the inquiry, *Bringing Them Home*, stated that '[t]he Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law.'¹⁷⁷ This was on the basis that '[g]enocide does not necessarily mean the immediate physical destruction of a group'.¹⁷⁸ The report referred specifically to the provision in art 2 of the *Genocide Convention*, which includes the forcible transfer of children.¹⁷⁹ The fact that not all Indigenous children were removed did not detract from a finding of genocide, provided that the requisite intention to destroy the group as such in whole or part could be proven.¹⁸⁰ The report stated that

[t]he predominant aim of Indigenous child removals was the absorption or assimilation of the children into the wider, non-Indigenous community so that their unique cultural values and ethnic identities would disappear, giving way to models of Western culture ... Removal of children with this objective in mind is genocidal because it aims to destroy the 'cultural unit' which the Convention is concerned to preserve.¹⁸¹

¹⁷⁰ *Aboriginals Ordinance No 9 of 1918* (Cth) ('*Ordinance*').

¹⁷¹ *Kruger* (1997) 190 CLR 1, 5, 40 (Brennan CJ), 70–1 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

¹⁷² (1995) 183 CLR 273, 286–7, 298, 304, 315, cited in *ibid* 70–71.

¹⁷³ *Ibid* 70.

¹⁷⁴ *Ibid*.

¹⁷⁵ *Ibid* 73 (Dawson J), 88 (Toohey J), 107 (Gaudron J), 144 (McHugh J), 159 (Gummow J).

¹⁷⁶ *Bringing Them Home*, above n 8.

¹⁷⁷ *Ibid* 230.

¹⁷⁸ *Ibid* 235.

¹⁷⁹ *Ibid*.

¹⁸⁰ *Ibid* 236–7.

¹⁸¹ *Ibid* 237.

The report further concluded that

from 1946 laws and practices which, with the purpose of eliminating Indigenous cultures, promoted the removal of Indigenous children for rearing in non-Indigenous institutions and households were in breach of the international prohibition of genocide.¹⁸²

The inquiry determined that there was an obligation, imposed by international law, on the Australian government to make reparations in relation to the wrongs committed.¹⁸³ Such reparation should include acknowledgement and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.¹⁸⁴

This position was in contrast to the finding in *Kruger* and the Final Report of the Royal Commission into Aboriginal Deaths in Custody, where it was determined that the removal of Indigenous children was for their own protection.¹⁸⁵ This is evident in the Commission's report:

The crime of genocide requires the act constituting it to be performed intentionally. The crucial issue of intention raises difficulty because assimilationist policies are clearly undertaken, not for the purpose of exterminating a people, but for their preservation. Whether or not they are informed by despairing, patronising or idealistic motives, such policies are ultimately benign in so far as they intend to preserve the individual members and their descendants but as members of a different culture.¹⁸⁶

The report further stated that it was evident, from the discussions surrounding the drafting of the *Genocide Convention* and art 27 of the *ICCPR*, that 'assimilation, at least in its broad terms, was not seen by the UN to meet the criteria of the Convention against genocide.'¹⁸⁷

A similar policy of removing Native American children from their families to state-run boarding schools, with the aim of assimilation, was carried out in the United States from 1876 to the 1970s. Lorie Graham states that the removal of Native American children was an 'integral part of a larger government effort to eradicate indigenous cultures and communities in the United States.'¹⁸⁸ She further

¹⁸² Ibid 241.

¹⁸³ This was on the basis of art 8 of the *Universal Declaration*, art 2(3) of the *ICCPR*, art 39 of the *Convention on the Rights of the Child* and art 6 of the *Convention on the Elimination of All Forms of Racial Discrimination*: ibid 243–4.

¹⁸⁴ Ibid 245.

¹⁸⁵ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 [36.3.7].

¹⁸⁶ Ibid.

¹⁸⁷ Ibid [36.3.17].

¹⁸⁸ Lorie M Graham, 'Reparations, Self-Determination, and the Seventh Generation' (2008) 21 *Harvard Human Rights Journal* 47, 68.

argues that '[t]he use of the terms "genocide" and "ethnocide" in conjunction with the treatment of indigenous peoples and their children, while perhaps controversial, is consistent with the various domestic, international, and scholarly definitions' of the crime.¹⁸⁹ The issues associated with this policy were addressed by the *Indian Child Welfare Act 1978*,¹⁹⁰ which included reparations provisions on rehabilitation, restitution, prevention of future harm and collective compensation.¹⁹¹

In Canada, there was a policy of compulsory enrolment in residential boarding schools for Indigenous children.¹⁹² In 2006, an agreement was reached between the Canadian government, Indigenous groups and church organisations to settle class actions in relation to the compulsory residential boarding schools.¹⁹³ The agreement made almost CAD\$2 billion available for reparations, including the settlement costs of class actions, contributions to a healing foundation, the establishment of a Truth and Reconciliation Commission and a commemoration fund.¹⁹⁴

D *Cultural Genocide's Lessons for the Declaration*

Despite clear statements throughout the genocide jurisprudence that cultural genocide does not come within the ambit of the *Genocide Convention*,¹⁹⁵ cultural genocide remains relevant — the destruction of a culture may be used as evidence of the requisite intention to destroy the group physically.¹⁹⁶ As such, cultural genocide may be relevant in proving claims of physical genocide. The International Law Commission and Special Rapporteurs have argued that cultural genocide should be included in the *Genocide Convention*.¹⁹⁷

¹⁸⁹ Ibid 67–8.

¹⁹⁰ 25 USC §§ 1901–1963 (1978).

¹⁹¹ Graham, above n 188, 90, 102.

¹⁹² Ibid 48, 50, 87.

¹⁹³ *Indian Residential Schools Settlement Agreement*, 8 May 2006 <<http://www.residentialschoolsettlement.ca/settlement.html>> ('*Indian Residential Schools Settlement Agreement*'). The issue of abuse in Indian Residential Schools was raised in a number of Canadian cases including *AQ v Canada (Attorney General)* (1998) 169 Sask R 1, *DA v Canada (Attorney General)* (1998) 173 Sask R 312 and *LH v Canada (Attorney General)* [2005] SCC 25.

¹⁹⁴ *Indian Residential Schools Settlement Agreement*, [1.01], [3].

¹⁹⁵ *Kruger* (1997) 190 CLR 1, 72.

¹⁹⁶ *Krstic* (Case No IT-98-33-T) [580].

¹⁹⁷ Matthew Lippman, 'The Drafting of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide' (1985) *Boston University International Law Journal* 1, 63; 'Report of the International Law Commission on the Work of its Forty-Eighth Session (6 May–26 July 1996)' [1996] II(2) *Yearbook of the International Law Commission* 46; Nicodème Ruhashyankiko, *Study of the Question of the Prevention and Punishment of the Crime of Genocide*, 31st sess, UN Doc E/CN.4/Sub.2/416 (4 July 1978) [461]; B Whitaker, *Review of Further Developments in Fields with which the Sub-Commission has been Concerned: Revised and Updated Report on the Question of the Prevention and Punishment of the Crime of Genocide*, 38th sess,

Moreover, the jurisprudence in relation to the cultural aspects of genocide is significant in the context of the *Declaration* as it provides some insight into the concept of destruction of culture. It highlights the concern with culture as historical, cultural and religious heritage. This historical, cultural and religious heritage includes religious places, demonstrated by the reference to mosques, churches, synagogues and monasteries in *Bosnia v Serbia*, and repositories for cultural material, such as libraries and archives.¹⁹⁸

The Australian, Canadian and United States' experiences of the removal of Indigenous children are also relevant to the interpretation of Article 8, which specifically refers to 'any form of forced population transfer' and 'any form of forced assimilation or integration', and art 7 of the *Declaration*, which refers to 'forcibly removing children of the group to another group'.¹⁹⁹ Forced population transfers, assimilation or integration necessarily involve the absorption of Indigenous peoples into another community such that their own cultural identity is lost.

One significant difference between the *Declaration* and the *Genocide Convention* is that in the former there is no requirement that the action is taken with the intent of destroying the group. The issue of intent was raised in the Australian context where it was argued that there was no genocidal intent in the policies of forced removal of Indigenous children; rather, the intention was to preserve individual members of the group.²⁰⁰ This suggests that it would be significantly easier to prove instances of forced population transfers, forced assimilation or integration under the *Declaration* than under the *Genocide Convention*.

Article 8 provides that states are to 'provide effective mechanisms for prevention of, and redress for' such actions.²⁰¹ Some types of redress that could be used are described in the Human Rights and Equal Opportunity Commission's report, *Bringing Them Home*, and include acknowledgement and apology, guarantees against repetition, measures of restitution, measures of rehabilitation and monetary compensation.²⁰² These are reflected in measures used in the United States and Canada, which focused on rehabilitation and healing, the establishment of a Truth and Reconciliation Commission, restitution, commemoration, prevention of future harm and collective compensation.²⁰³ Clearly a wide range of government responses can be encompassed in the notions of effective measures for prevention and redress.

UN Doc E/CN.4/Sub.2/1985/6 (2 July 1985) 17 [33]. Some commentators have even argued that protection against cultural genocide can be implied into the *Genocide Convention*: See Tennant and Turpel, above n 4, 296.

¹⁹⁸ *Bosnia v Serbia* [2007] ICJ Rep 43, 121–3 [335]–[343].

¹⁹⁹ *Declaration* arts 7–8.

²⁰⁰ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5 [36.3.7]; *Kruger* (1997) 190 CLR 1, 5, 47, 70.

²⁰¹ *Declaration* art 8.

²⁰² *Bringing Them Home*, above n 8, 245.

²⁰³ Graham, above n 188, 90, 102; *Indian Residential Schools Settlement Agreement*, [1.01], [3].

V SCOPE AND CONTENT OF THE RIGHT

Having looked closely at the historical development of Article 8, together with its antecedents in the *Genocide Convention*, it is now time to use those insights to develop a better understanding of the right contained in the article.

A Content of the Right

Article 8 guarantees Indigenous peoples and individuals a number of specific rights. These include the right to

- integrity as distinct peoples with cultural values and distinct identities;
- land, territory or resources;
- be free from forced population transfers;
- be free from forced assimilation or integration; and
- be free from propaganda to promote discrimination.

Article 8 refers to Indigenous peoples and individuals, making it explicit that the rights contained in the article are both individual and collective. The inclusion of both individual and collective rights is one of the hallmarks of the *Declaration*. It is significant as it reflects the way in which Indigenous peoples consider their rights and as such is an apt method of protection.

Although the terms ‘cultural genocide’ and ‘ethnocide’ are not used, Article 8 reflects the same preoccupations evident in the discussion of cultural genocide in the drafting of the *Genocide Convention* and ethnocide from the *Declaration of San José*:²⁰⁴ concern over the loss of cultural identity and Indigenous peoples’ freedom to enjoy, develop and transmit their own cultures and languages. The first two parts of Article 8 give Indigenous peoples the right to enjoy their own cultures, cultural values and identities and the right to the land, territory and resources that are an integral part of their cultures.²⁰⁵ The third and fourth parts of the article aim to protect the integrity of Indigenous peoples as groups by protecting them from forced population transfers, assimilation or integration. The final part of the article enhances this protection by preventing propaganda that promotes discrimination.

The notion of enjoying one’s own culture links into the minority rights provisions contained in art 27 of the *ICCPR*.²⁰⁶ Article 27 of the *ICCPR* provides that persons belonging to minorities have the right to live in a society that does not interfere with their enjoyment of their own culture and, indeed, takes active steps to ensure that their culture is able to develop. The notion of enjoying one’s own culture was initially

²⁰⁴ Siegfried Wiessner et al, ‘The Hague Conference (2010): Rights of Indigenous Peoples’ (Interim Report, International Law Association, 2010) <<http://www.ila-hq.org/en/committees/index.cfm/cid/1024>> 17.

²⁰⁵ Gilbert and Doyle, above n 5, 295; Jérémie Gilbert, ‘Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 14 *International Journal on Minority and Group Rights* 207, 224; *Declaration* art 8(2)(b).

²⁰⁶ *ICCPR* art 27.

regarded in terms of access to high culture, that is, art, literature and music through museums, libraries and schools.²⁰⁷ This view was reflected in *Bosnia v Serbia*, in which protection of culture in the sense of historical, cultural and religious heritage was emphasised over culture as daily life.²⁰⁸ Over time, the concept of culture has evolved to encompass all aspects of a minority group's way of life that are relevant to its cultural identity.²⁰⁹ This is evident in *Krstic*, in which it was suggested that culture is a significant aspect of any group's identity and should be protected.²¹⁰ As such, culture may be regarded as encompassing high culture, mass culture and culture as a way of life. Culture also includes the preservation of identity and cultural heritage, literature, graphic and dramatic arts, the establishment and maintenance of museums, theatres and libraries, access to mass media including print media, radio and television and the ability to transmit culture, including dietary practices, distinctive clothing and legal traditions, from one generation to the next.²¹¹ Culture may even include economic activity where that economic activity has a cultural dimension.²¹² Consequently, the right to enjoy culture under art 27 'means all aspects of that culture; what is at stake is the ability of ethnic minorities to preserve their cultural identity and their cultural inheritance, *their own culture*.'²¹³ This is particularly the case in relation to Indigenous peoples, for whom cultural identity is regarded as firmly rooted in their ways of life.²¹⁴

Article 8 also creates an obligation for states to 'provide effective mechanisms for prevention of, and redress'.²¹⁵ This suggests that states are under an obligation

²⁰⁷ Patrick Thornberry, *Indigenous Peoples and Human Rights* (Juris Publishing, 2002) 162; Yvonne Donders, *Towards a Right to Cultural Identity?* (Intersentia, 2002) 142.

²⁰⁸ *Bosnia v Serbia* [2007] ICJ Rep 43, 121–3 [335]–[343], 124 [344].

²⁰⁹ See eg UNESCO, *Recommendation on Participation by the People at Large in Cultural Life and Their Contribution to it (Nairobi)*, Records of the General Conference, 19th sess, Vol 1, UN Doc 19C Resolutions (26 November 1976) annex I 29; *UNESCO Universal Declaration of Cultural Diversity*, UNESCO Res 25, 20th plen mtg, 31st sess, UNESCO OR, UN Doc 31C/Res.25 (2 November 2001) annex 1 Preamble.

²¹⁰ *Krstic* (Case No IT-98-33-T) [580].

²¹¹ Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, UN Doc E/CN.4/Sub.2/384/Rev.1 (1979) 37–8 [223], 67 [380]–[381], annex II 107 [16]–[17].

²¹² Human Rights Committee, *Views: Communication No 197/1985*, UN GAOR, 43rd sess, Supp No 40, UN Doc A/43/40 (27 July 1988) ('*Kitok v Sweden*') 229 [9.2]; Human Rights Committee, *Views: Communication No 511/1992*, UN GAOR, 50th sess, Supp No 40, UN Doc A/50/40 (26 October 1994) ('*Ilmari Länsman v Finland*') 74 [9.2]; Human Rights Committee, *Views: Communication No 760/1997*, 69th sess, UN Doc CCPR/C/69/D/760/1997 (6 September 2000) ('*Diergaardt v Namibia*'), 15 (Elizabeth Evatt and Cecelia Medina Quiroga).

²¹³ Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford University Press, 1991) 187 (emphasis in original).

²¹⁴ Human Rights Committee, *General Comment No 23 (50) Article 27*, 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (26 April 1994) 4 [7].

²¹⁵ *Declaration* art 8.

to protect the rights included in the article and to prevent violations. This could be achieved through legislative means as well as education and their inclusion in government policies. It has been suggested that the use of the term ‘effective mechanisms’ ‘presupposes that the form of redress granted must be perceived *by the community concerned* as adequate to feel actually repaired for the wrong suffered according to their own perspective’.²¹⁶ In order to be effective, redress mechanisms must be able to mitigate the effects of the wrong suffered.²¹⁷

States must also introduce judicial, administrative and other remedies in relation to breaches of Article 8. This raises the issue of the means of redress for Indigenous peoples and individuals. The term ‘redress’ implies that reparations must be determined on a case-by-case basis.²¹⁸ Redress should not be limited to material reparations but may also include non-material reparations such as

recognition of wrongs by the State or other perpetrators; guarantee of non-repetition; disclosure of truth; apology; punishment of the perpetrators; various kinds of psychosocial reparations, which allow victims to fully recuperate their place in the society to which they belong.²¹⁹

Such measures should also take into account the preferences of Indigenous peoples in how their rights are protected and the means of redress in the event of a breach.²²⁰ Australian examples of redress include Prime Minister Kevin Rudd’s apology to Australia’s Indigenous Peoples in 2008.²²¹ In Canada and the United States, redress options include the payment of monetary compensation to individuals as well as financing rehabilitation and healing.²²²

In essence, Article 8 ensures the survival of Indigenous cultures by guaranteeing that Indigenous peoples and individuals are not subjected to forced assimilations or

²¹⁶ Wiessner et al, above n 204, 40.

²¹⁷ Ibid 52.

²¹⁸ Ibid 40.

²¹⁹ Ibid 39.

²²⁰ See also art 11(2) of the *Declaration*, which provides ‘States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples’. In the context of state obligations under the *ICESCR*, see Committee on Economic, Social and Cultural Rights, *Report on the Fifth Session*, UN ESCOR, 5th sess, UN Doc E/1991/23 (26 November–14 December 1990) annex III; Committee on Economic, Social and Cultural Rights, *General Comment No 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Article 15, Paragraph 1 (c), of the Covenant)*, 35th sess, UN Doc E/C.12/GC/17 (12 January 2006).

²²¹ Kevin Rudd, ‘Apology to Australia’s Indigenous Peoples’ (Speech delivered at Parliament House, Canberra, 13 February 2008) <<http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples>>.

²²² Graham, above n 188, 90, 102; *Indian Residential Schools Settlement Agreement*, [1.01], [3].

destruction of their culture. Once this is guaranteed, other cultural rights contained in the *Declaration* aim to protect Indigenous culture. This is evident in provisions which ensure Indigenous peoples have the right to engage freely in all traditional activities,²²³ and can maintain, strengthen and protect their cultures, including distinct cultural institutions,²²⁴ cultural traditions and customs,²²⁵ cultural heritage, traditional knowledge and traditional cultural expressions.²²⁶ Maintaining and strengthening these aspects of culture also requires the protection of past, present and future manifestations of Indigenous cultures, including visual arts.²²⁷ To this end, states are under an obligation to take effective measures, in conjunction with Indigenous peoples, to recognise and protect the exercise of these rights.²²⁸

B Is Article 8 Legally Binding?

The *Declaration* is, as its name suggests, only a declaration and as such does not impose legal obligations on states. Only provisions of the *Declaration* that reflect customary international law (the general principles of law recognised by civilised nations) or *jus cogens* impose obligations on states.²²⁹ Accordingly, art 7, as it relates to genocide, is a legally binding rule; genocide is clearly within the realm of *jus cogens*.²³⁰ However, the answer is less clear in relation to the other articles of the *Declaration*, particularly a novel article such as Article 8.

Had the *Declaration* received unanimous support from states, it could constitute customary international law.²³¹ However, that Australia, Canada, the United States and New Zealand, all countries with significant Indigenous populations, voted against its adoption weighs heavily against this argument.²³² The precise objections of these states need to be considered in determining the significance of their votes against the *Declaration*. It must be noted that while these states voted against the *Declaration*

²²³ *Declaration* art 20.

²²⁴ *Ibid* art 5.

²²⁵ *Ibid* art 11

²²⁶ *Ibid* art 31.

²²⁷ *Ibid* art 11.

²²⁸ *Ibid* art 31.

²²⁹ *Statute of the International Court of Justice* art 38; *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53; Wiessner et al, above n 204, 43.

²³⁰ For authority on this point, see Jan Wouters and Sten Verhoeven, 'The Prohibition of Genocide as a Norm of *Ius Cogens* and Its Implications for the Enforcement of the Law of Genocide' (Working Paper No 69, Institute for International Law, January 2005) 5–6.

²³¹ Alexandra Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne Journal of International Law* 27, 36.

²³² See *North Sea Continental Shelf Cases (Germany v Denmark; Germany v The Netherlands)* (Judgment) [1969] ICJ Reports 3, 43–4 [73–4] in relation to the position of 'specially affected states'.

on the basis of the wording of specific articles and the process of adoption of the *Declaration*, they ‘also expressed a general acceptance of the core principles and values advanced by the *Declaration*.’²³³ However, even states that voted in favour of the *Declaration* expressed reservations about elements of the *Declaration*.²³⁴

Robert Hill, Australia’s representative to the GA, was emphatic in limiting the impact of the *Declaration*, stating

it is the clear intention of all States that it be an aspirational declaration with political and moral force but not legal force. It is not intended itself to be legally binding or reflective of international law. As this declaration does not describe current State practice or actions States consider themselves obliged to take as a matter of law, it cannot be cited as evidence of the evolution of customary international law. This declaration does not provide a proper basis for legal actions, complaints or other claims in any international, domestic or other proceedings. Nor does it provide a basis for the elaboration of other international instruments, whether binding or non-binding.²³⁵

The notion that the *Declaration* does not reflect customary international law is also reinforced by the language used in the *Declaration* itself — the Preamble refers to the *Declaration* ‘as a standard of achievement to be pursued in a spirit of partnership and mutual respect’.²³⁶

Moves by all four states that voted against the *Declaration* to adopt it indicate ‘a remarkable consensus among States’.²³⁷ However, this consensus is not without limits. The non-binding nature of the *Declaration* was stressed by a number of states

²³³ James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, S. James Anaya, 9th sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008) 12 [35]; Claire Charters, ‘Indigenous Peoples and International Law and Policy’ (2007) 18 *Policy and Law Review* 22, 34.

²³⁴ Japan rejected the notion of collective rights for Indigenous peoples and limited rights over territories and resources with respect to third party interests (General Assembly, *107th Plenary Meeting*, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/61/PV.107 (13 September 2007) 20 (*‘107th Plenary Meeting of the General Assembly’*)), the United Kingdom rejected the notion of collective rights, beyond self-determination for Indigenous peoples (*107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 21), Mexico limited rights over territories and resources with respect to third party interests (*107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 23), Sweden rejected collective human rights (*107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 24) Slovakia rejected collective human rights (General Assembly, *108th Plenary Meeting*, UN GAOR, 61st sess, 108th plen mtg, UN Doc A/61/PV.108 (13 September 2007) 5 (*‘108th Plenary Meeting of the General Assembly’*)).

²³⁵ *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 12. Similar comments were made by the Canadian and New Zealand representatives: at 13, 15.

²³⁶ *Declaration* art 4; Xanthaki, above n 231, 36.

²³⁷ Wiessner et al, above n 204, 2, 40.

in adopting the *Declaration*.²³⁸ The Australian Minister for Indigenous Affairs stated that '[t]he Declaration is historic and aspirational. While it is non-binding and does not affect existing Australian law, it sets important international principles for nations to aspire to.'²³⁹

The International Law Association ('ILA') includes the right to be free from ethnocide as a right that is part of customary law.²⁴⁰ This is based on general international law developments, regional developments, the practice of UN bodies and states. The ILA argues that

it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provisions of [the *Declaration*] in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future. What is really significant for the present enquiry is that the adoption of [the *Declaration*], after more than twenty years of negotiations, confirms that the international community has come to a consensus that indigenous peoples are a concern of international law, which translates into the existence of customary rules of binding force for all States irrespective of whether or not they have ratified the relevant treaties (which, on their part, taken together bind virtually all countries in the world).²⁴¹

Despite this, there is no real consensus on the issue.²⁴² States have been very careful to limit the application of the *Declaration* and far more would be required to make a novel provision contained in the *Declaration* part of customary international law. The ILA cites the Australian cases of *Mabo*²⁴³ and *Wik*²⁴⁴ as part of the

massive amount of highly significant international practice recognizing the rights of indigenous peoples, which is accompanied and confirmed by the practice developed at the domestic level by most countries in the territory of which a significant population of indigenous people live.²⁴⁵

²³⁸ *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 22 (United Kingdom), 26 (Guyana), 27 (Suriname); *108th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.108, 3 (Nepal), 5 (Turkey); United Kingdom Foreign and Commonwealth Office, 'Human Rights' (Annual Report, United Kingdom Foreign and Commonwealth Office, 2006) 299; Macklin, above n 49, 4.

²³⁹ Macklin, above n 49, 4.

²⁴⁰ Wiessner et al, above n 204, 51.

²⁴¹ *Ibid.*

²⁴² Donders, above n 207, 223.

²⁴³ *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁴⁴ *Wik Peoples v The State of Queensland* (1996) 187 CLR 1.

²⁴⁵ Wiessner et al, above n 204, 49–50.

While these cases are significant, neither supports the notion that forced assimilation or the destruction of Indigenous peoples' cultures comes within the general principles of law recognised by civilised nations.

It must be noted that there are theorists, such as Hans Kelsen, who suggest that unless a right is justiciable it is not a right *per se*.²⁴⁶ A right will only be regarded as a legal right when there is recourse to a third party to determine that a violation of the right has occurred, that is, the right is justiciable and enforceable.²⁴⁷ Article 8 is clearly not a right in this theoretical sense. However, it is still referred to as a right, consistent with the terminology used in the *Declaration* itself.

The fact that the *Declaration* is soft law and not binding as such does not mean that it is 'legally insignificant'.²⁴⁸ In UN practice, a declaration is aspirational and ordinarily goes further than the existing practice of states, with the aim of encouraging all states to adopt more effective measures.²⁴⁹ Evidently, the *Declaration* will be of political and moral force.²⁵⁰ This is reflected in the attitude of states: the United Kingdom described the *Declaration* as an 'important policy tool'²⁵¹ and Nepal stated that it reflected the 'good intentions of the international community'.²⁵² The influential nature of the *Declaration* is evident in the fact that it has been referred to by New Zealand courts and the Waitangi Tribunal in its inquiry into the Indigenous Flora and Fauna and Cultural and Intellectual Property Claim,²⁵³

²⁴⁶ Hans Kelsen, *Pure Theory of Law* (Max Knight trans, Lawbook Exchange, 2002) 125–6 [trans of: *Reine Rechtslehre* (2nd ed, 1960)], cited in E W Vierdag, 'The Legal Nature of the Rights Granted by the *International Covenant on Economic, Social and Cultural Rights*' (1978) 9 *Netherlands Yearbook of International Law* 69, 73.

²⁴⁷ Asbjørn Eide, *The New International Economic Order and the Promotion of Human Rights: Report on the Right to Adequate Food as a Human Right*, 39th sess, UN Doc E/CN.4/Sub.2/1987/23 (7 July 1987) 13 [56]–[59].

²⁴⁸ Peter Billings and Anthony E Cassimatis, 'Redesigning the Northern Territory Emergency Response: Social Welfare Reform and Non-Discrimination' (2009) 27(2) *Law in Context* 58, 78.

²⁴⁹ Erica-Irene Daes, *Discrimination Against Indigenous Peoples: Protection of the Heritage of Indigenous People: Final Report*, 47th sess, UN Doc E/CN.4/Sub.2/1995/26 (21 June 1995) 5 [19].

²⁵⁰ Commission on Human Rights, *Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Organization of the Work of the Session*, 52nd sess, UN Doc E/CN.4/1996/84 (4 January 1996) 5 [22]; Donders, above n 207, 223.

²⁵¹ *107th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.107, 22.

²⁵² *108th Plenary Meeting of the General Assembly*, UN Doc A/61/PV.108, 3.

²⁵³ Charters, above n 233, 34; *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553, 560 (It must be noted that the case merely states that 'A right of development of indigenous rights is indeed coming to be recognised in international jurisprudence, but any such right is not necessarily exclusive of other persons or other interests.');

Takamore v Clarke [2012] NZSC 116; Waitangi Tribunal, *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Wai 262 Waitangi Tribunal Report (2011).

addressed by the Supreme Court of Belize,²⁵⁴ and incorporated into domestic law in Bolivia, Ecuador and Nepal.²⁵⁵ In Australia, the *Declaration* has been referred to in the High Court cases of *Maloney v The Queen*²⁵⁶ and *Wurridjal v Commonwealth*²⁵⁷ and in the Queensland Supreme Court in *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury*.²⁵⁸ Despite the fact that it is soft law, the *Declaration* can also be influential in the interpretation of other laws.²⁵⁹ In cases where a statute is ambiguous, courts should favour an interpretation that is in conformity with international law.²⁶⁰

The *Declaration* can be used by states as a guide in the adoption of laws, policies and programs relating to Indigenous peoples.²⁶¹ Indigenous peoples can use the provisions of the *Declaration* in their political advocacy and discussions with all

²⁵⁴ Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 *The American Journal of International Law* 29, 52.

²⁵⁵ Mauro Barelli, 'The Role of Soft Law in the International Legal System: The Case of the *United Nations Declaration on the Rights of Indigenous Peoples*' (2009) 58 *International and Comparative Law Quarterly* 957, 982; Clive Baldwin and Cynthia Morel, 'Using the *United Nations Declaration on the Rights of Indigenous Peoples in Litigation*' in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, 2011) 121, 124.

²⁵⁶ [2013] HCA 28. In this case, the appellant argued that the provisions of the *Racial Discrimination Act 1975* (Cth) should be interpreted in light of art 19 of the *Declaration*: Joan Monica Maloney, 'Appellant's Submissions', Submission in *Maloney v The Queen*, No B57 of 2012, 26 October 2012, [56]–[57]. Justice Keifel rejected this argument, stating that 'non-binding extraneous materials' cannot be elevated over the language of the text of an international convention and incorporated into domestic legislation: [2013] HCA 28, [134] (Keifel J).

²⁵⁷ [2009] 237 CLR 309, [269].

²⁵⁸ *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1, 37 [33].

²⁵⁹ See Megan Davis, 'To Bind or Not to Bind: The *United Nations Declaration on the Rights of Indigenous Peoples* Five Years On' (2012) 19 *Australian International Law Journal* 17, 38–9 in relation to cases in Australia and internationally. See also Barelli, above n 255, 982, 987 and van Genugten, above n 254, 52 in relation to a case dealing with Indigenous land rights in Belize.

²⁶⁰ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, 287 (Mason CJ and Deane J); Stephen Norrish, 'Are Indigenous People Likely to Receive Greater Penalties than Non-Indigenous People in the Courts? What Should be Done About it?' (Paper presented at AIJA Indigenous Justice Conference — Current Issues in Delivering Indigenous Justice — Challenges for the Courts, Adelaide, 18–19 July 2013) 32.

²⁶¹ *Declaration* art 42; Victoria Tauli-Corpuz, *Statement of Victoria Tauli-Corpuz Chair of the UN Permanent Forum on Indigenous Issues on the Occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples* (13 September 2007) United Nations Permanent Forum on Indigenous Issues <<http://www.un.org/esa/socdev/unpfii/en/news.html>> 3.

levels of government.²⁶² People should use the *Declaration* in policy statements and guidelines, in law reform submissions to governments, in court matters and media campaigns.²⁶³ As Social Justice and Native Title Commissioner Mick Dodson stated:

I think people should use the Declaration at every opportunity. If you are writing to government quote articles of the Declaration. If you're involved in health quote the health articles, if you are involved in native title or land rights quote the lands, territories and resources articles, if you are in education quote the articles about education and language. If you are on about political organisation talk about self-determination and our right to be autonomous and govern ourselves. For any aspect of Aboriginal or Torres Strait Islander life there is something in the Declaration that you can use and utilise to reinforce your arguments and what you and your mob are trying to do.²⁶⁴

C Enforcement of the Right

The Special Rapporteur on the rights of Indigenous peoples has stated that the *Declaration* 'represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples'.²⁶⁵ This amounts to a willingness to measure state conduct against the rights contained in the *Declaration*.²⁶⁶ This is reflected in the Special Rapporteur's report on Australia where he focused on the need to

incorporate into government programmes a more holistic approach to addressing indigenous disadvantage across the country, one that is compatible with the objective of the United Nations Declaration of securing for indigenous peoples, not just social and economic wellbeing, but also the integrity of indigenous communities and cultures, and their self-determination.²⁶⁷

²⁶² Megan Davis, 'The United Nations Declaration on the Rights of Indigenous Peoples' (2007) 6(3) *Indigenous Law Bulletin* 6, 6; Australian Human Rights Commission, above n 21, 66.

²⁶³ Australian Human Rights Commission, above n 21, 66.

²⁶⁴ *Ibid* 65.

²⁶⁵ James Anaya, *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, S James Anaya, 9th sess, Agenda Item 3, UN Doc A/HRC/9/9 (11 August 2008) 24 [85].

²⁶⁶ Siegfried Wiessner, 'The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges' (2011) 22(1) *European Journal of International Law* 121, 130. This position was also adopted by the International Law Association: Wiessner et al, above n 204, 5.

²⁶⁷ James Anaya, *Report by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People*, James Anaya, *Preliminary Note on the Situation of Indigenous Peoples in Australia*, 12th sess, Agenda Item 3, UN Doc A/HRC/12/34/Add.10 (24 September 2009) 3 [10].

He also reiterated the importance of the *Declaration* in

framing and evaluating legislation, policies, and actions that affect the Aboriginal and Torres Strait Islander peoples. The Declaration expresses the global consensus on the rights of indigenous peoples and corresponding state obligations on the basis of universal human rights. The Special Rapporteur recommends that the Government undertake a comprehensive review of all its legislation, policies, and programmes that affect Aboriginal and Torres Strait Islanders in light of the Declaration.²⁶⁸

VI CONCLUSIONS

Whilst the *Declaration* is not legally binding, it represents a significant advance for Indigenous peoples in protecting their cultures. Article 8 contains a novel individual and collective right to be free from forced assimilation and destruction of culture. In addition, states are to provide effective mechanisms for prevention and redress in relation to their integrity as distinct peoples, dispossession of land, forced population transfers, assimilation or integration or propaganda designed to promote or incite discrimination.

Article 8 is also significant as it makes an explicit connection between Indigenous peoples' cultures and their continued possession of land, territories and resources. Further, Article 8 lowers the bar for proving instances of forced population transfers, forced assimilation or integration, as there is no requirement that action is taken with the intent of destroying the group. Moreover, the Special Rapporteur has stated that he will use the *Declaration* to measure states' conduct.

Article 8 is inextricably linked with the concepts of ethnocide and cultural genocide, which appeared in the initial drafts and were the subject of considerable debate in the drafting of the *Genocide Convention*. Ethnocide and cultural genocide are understood as the loss of cultural identity through forced relocations, assimilation into a dominant society and dispossession of land. The concepts also extend to the use of language, evident in policies that prohibit the use of language in private, in schools and in publications, together with systematic destruction of books in that language.²⁶⁹ A third aspect of the concept relates to historical, cultural and religious heritage. This is seen in the destruction of cultural material such as documents, objects or monuments of cultural, historical or religious significance. It is also reflected in descriptions of the destruction or restrictions on use of libraries, museums, schools, historical monuments, places of worship or other cultural institutions of a group as ethnocide or cultural genocide. Such measures amount to an attack on the continued enjoyment of a group of their cultural life. In essence, Article 8 seeks to ensure that Indigenous peoples are free to enjoy, develop and transmit their own cultures and languages.

²⁶⁸ Ibid 5 [18].

²⁶⁹ In relation to Indigenous peoples and language policies, see Fernand de Varennes, *Language, Rights and Opportunities: The Role of Languages in the Inclusion and Exclusion of Indigenous Peoples*, Submission to the UN Expert Mechanism on the Rights of Indigenous Peoples, 17 February 2012 <www.ohchr.org/Documents/Issues/IPeoples/EMRIP/StudyLanguages/FernandDeVarennes.doc>.

INDIGENOUS STUDENTS AT LAW SCHOOL: COMPARATIVE PERSPECTIVES

ABSTRACT

Indigenous students face significant challenges in gaining admission to law school. General entry standards are exclusionary to the extent that they sustain historical stereotypes and fail to reflect the unique profile of indigenous students. It is argued that traditional equity initiatives should be supplanted with access programs that provide orientation for the study of law and formative assessment of both generic and discipline-specific skills such as literacy, comprehension, case analysis and research techniques. The latter stage of the program would be dedicated to applying acquired skills to certain key areas of substantive law. This model would provide greater predictive accuracy for successful transition to law school while affirming the distinct cultural identity of indigenous students.

I INTRODUCTION

This article considers the unique challenges facing law schools in certain post-colonial jurisdictions in respect of their policies regarding indigenous students.¹ This will principally focus on tertiary legal education in Australia, New Zealand and Canada.

Many indigenous students in these countries share similar backgrounds: poor socio-economic conditions, limited literacy skills, distinct world-views, an emphasis on oral traditions and exposure to a Eurocentric education system at variance with their own culture. For some, attending university is an alienating experience. All too often there are adverse consequences such as academic underachievement and poor retention rates.

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¹ See text at footnotes 12–17 for reference to the ethnic composition and definition of indigenous people in Australia, New Zealand and Canada.

These problems are compounded in law school. For indigenous students, learning to think like a lawyer represents an immersion in an institution that epitomises the dominant society and the values that maintain it. There is an inevitable tension between indigenous knowledge systems and the western intellectual tradition.² For such students, there is an ‘authenticity gap’ with fundamental legal constructs. For example, for indigenous peoples, the concept of property is often dissociated from notions of individual ownership and perceived holistically by reference to ideas that are not recognised by statute or common law. Similarly, the tenets of criminal law are understood from a different perspective. For instance, some Canadian First Nations cultures³ do not have a literal translation of the word ‘guilt’.⁴ And as a social phenomenon, criminal law may represent a negative factor in the lives of the students and their community.

Indigenous students may cynically regard formal legal education as an exercise in rationalising injustices. International law may be seen as a foundation for claims of sovereignty; constitutional law as legitimising the exclusion of indigenous peoples from full participation in civil society. In a similar vein, land law may be identified as the system that formalises the dispossession of their forebears.

In the last 30 years, much has been done to address historical grievances. Looking to the future, there are fundamental shifts in attitudes towards the role of indigenous students at law school. Tertiary education policies demonstrate a growing commitment to attract and retain indigenous students while affirming their distinct cultural identities.⁵ This article argues that the outcome of these initiatives depends on the way in which barriers to education are perceived and addressed by

² Some enlightening work on indigenous knowledge has been written by Portuguese legal sociologist Boaventura de Sousa Santos. See, eg, Boaventura de Sousa Santos, *Toward a New Legal Common Sense* (Cambridge University Press, 2nd ed, 2002). See also, Enrique Díaz Álvarez, *Interview with Boaventura de Sousa Santos* (April–June 2011) Barcelona Metropolis <<http://w2.bcn.cat/bcnmetropolis/arxiu/en/page0b1a.html?id=22&ui=518>>.

³ “First Nations cultures” refers to Status and non-status “Indian” peoples in Canada. See, eg, <www.aadnc-aandc.gc.ca/eng>.

⁴ Patricia Monture, ‘Now that the Door is Open: First Nations and the Law School Experience’ (1990) 15 *Queen’s Law Journal* 179, 202–3.

⁵ For example, Maori student support initiatives at the Faculty of Law, University of Auckland, which affirm Maori identity and aspirations as an integral feature of the law degree programme. These initiatives include a Maori Law Students Association, a Maori Support Coordinator, Scholarships and awards for Maori students and information about Maori academics and successful career role models. Maori students receive ongoing academic support throughout their degree. See, eg, University of Auckland, *Maori Student Support* <<http://www.law.auckland.ac.nz/uoa/home/for-current-students/current-undergraduate-students/cs-maori-student-support>>. See also The University of New South Wales’ Pre-Law Program, which offers cultural and academic support to indigenous students prior to their undergraduate study in law. See Nura Gili, *Pre-Programs* (29 May 2014) University of New South Wales <<http://www.nuragili.unsw.edu.au/pre-programs-0>>.

tertiary institutions. Interventions are often well intentioned but limited. There is a need to look beyond a deficit model, which focuses on personal deficiencies of indigenous students, and to see the challenge in terms of an institutional response to the individual.

The orientation to the problem matters. From one perspective it can be said that special admissions policies denote a lowering of standards. Conversely, such policies can be characterised as expanding the selection criteria while supplanting measures that have limited predictive accuracy and reflect cultural bias. Much depends on the objectives to be achieved and framing the enquiry accordingly. If indigenous students are to enter law school with due recognition of their individual abilities, particular consideration must be given to access programs. These will be assessed and a model based on a nationally accredited program will be proposed in respect of law schools in Australia and New Zealand.⁶

II COMMON THEMES

Some statistics are sufficiently stark as to speak for themselves. Prior to 1990, only twenty-one LLB graduates were of Indigenous origin Australia-wide.⁷ Twenty years later, there were only three indigenous barristers on the bar roll in Victoria.⁸ In a similar vein, when the pre-law program at the University of Saskatchewan commenced in 1973, there were only four indigenous lawyers and five indigenous law students in Canada.⁹ In New Zealand, Maori comprise approximately 15 per cent of the population, but represent only 5.5 per cent of the legal profession.¹⁰ Similarly, when statistics were collected in 2010 from all New Zealand law schools,¹¹ Maori constituted eight per cent of the 2010 law graduates.

Such statistics reveal shared systemic problems. Indigenous students are significantly under-represented in law schools and only a limited number enter the legal

⁶ While Law Schools have a central role in developing these programs, such initiatives should be undertaken in conjunction with tertiary Indigenous Centres and Schools. This partnership is necessary to ensure that Indigenous perspectives on law and justice are appropriately addressed.

⁷ Heather Douglas, 'The Participation of Indigenous Australians in Legal Education 1991–2000' (2001) 24 *University of New South Wales Law Journal* 485, 488.

⁸ Michael Pelly, 'Victoria's Push for Indigenous Barristers', *The Australian* (online), 11 September 2009 <<http://www.theaustralian.com.au/business/legal-affairs/victorias-push-for-indigenous-barristers/story-e6frg97x-1225771722323>>.

⁹ University of Saskatchewan, *Program of Legal Studies for Native People: Quick Facts* <www.usask.ca/plsnp/plsnp-course/quick-facts.php>.

¹⁰ Rachael Breckon, 'Maori Under-Represented in Legal Profession' (2011) 781 *Lawtalk: Newsletter of The New Zealand Law Society* 1. According to the 2013 Census, 598,605 people identified as being part of the Maori ethnic group, accounting for 14.9% of the New Zealand population, while 668,724 people (17.5%) claimed Maori descent.

¹¹ Except Auckland University of Technology, which had not produced a graduating class at that stage.

profession. Indigenous students in Australia, New Zealand and Canada are disadvantaged in higher education. The same may be said of students from regional and remote locations, as well as those from low socio-economic backgrounds. Of course the connection can readily be made that indigenous students often fall into these categories as well.¹²

The term ‘indigenous’ requires elaboration because it is not necessarily descriptive of a distinct and homogenous ethnic group although there may be degrees of connection within that group. In Australia, an Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as being of Aboriginal or Torres Strait Islander origin and who is accepted as such by the community with which the person associates.¹³ This definition is widely accepted by Commonwealth and other government agencies for determining eligibility for certain programs and benefits.¹⁴ The Aboriginal and Torres Strait Islander population is approximately 669,900 (or three per cent of the total population).¹⁵

In New Zealand, according to the 2013 Census, 598,605 people identify as being part of the Maori ethnic group, accounting for 14.9 per cent of the New Zealand population, while 668,724 people, representing 17.5 per cent of the population claim Maori descent.¹⁶ This highlights the distinction between descent, as a biological concept, and ethnicity, which has a social and cultural base. In Canada, the term ‘Aboriginal Peoples’ embraces three groups: Indian (First Nations), Inuit and Metis,¹⁷ comprising 1,400,685 people or 4.3 per cent of the national population.

The task of identifying a target group requiring assistance in accessing tertiary education is overlain with subtle social and economic factors that are not readily quantifiable. For example, some members of identifiable ethnic groups may have assimilated in mainstream education at primary and secondary school and experienced no difficulties gaining admission to university and law school. Thus, the identification of membership of a particular ethnic group does not necessarily

¹² Ekaterina Pechenkina and Bradley Anderson, Department of Education, Employment and Workplace Relations, *Consultation Paper on Indigenous Australian Higher Education: Trends, Initiatives and Policy Implications* (September 2011) 5.

¹³ See, eg, Aboriginality or Torres Strait Islander Descent form issued by Indigenous Business Australia <www.iba.gov.au>.

¹⁴ See, eg, Aboriginality or Torres Strait Islander Descent form, *ibid.* See also, Australian Institute of Aboriginal and Torres Strait Islander Studies <www.aiatsis.gov.au/fhu/aboriginality.html>, and ‘What Works. The Work Program’ <www.whatworks.edu.au/1_1_1.htm>.

¹⁵ See Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population Nearing 700,000* (30 August 2013) <<http://abs.gov.au/ausstats/abs@.nsf/latestProducts/3238.0.55.001Media%20Release1June%202011>>.

¹⁶ Statistics New Zealand, *2013 Census QuickStats About Maori* (3 December 2013) <<http://www.stats.govt.nz/Census/2013-census/profile-and-summary-reports/quickstats-about-maori-english/population.aspx>>.

¹⁷ *Constitution Act 1982* (Canada), s 35.

correspond with need for assistance. In the context of Maori, it has aptly been said that:

The issue of how to define Maori is inextricably linked to the issue of which Maori ought to benefit from public policy measures ... Maori is an ethnic group, not a socio-economic class ... an effective strategy, it seems, ought to take account of both ethnicity and need.¹⁸

Determining how, and on what basis, indigenous applicants from low-decile schools can be admitted to law school¹⁹ requires careful consideration, but it is evident that admission policy and wider access is only part of the issue. Once enrolled, indigenous completion rates are comparatively lower than those of non-indigenous students.²⁰ Strategies are therefore required to reinforce and enhance the academic experience. Ensuring a quality student experience and providing adequate support networks factor greatly in indigenous students' success in higher education. In short, the situation must be assessed holistically in terms of admission, retention and completion.

By way of illustration, in 2011, the retention rate in New Zealand universities for Maori and Pacific Island students was 71 per cent and 73 per cent respectively, compared with 79 per cent for other students. Further, the completion of tertiary qualifications by Maori and Pacific Island students was 62 per cent and 52 per cent respectively, compared to a general completion rate of 75 per cent.²¹ Mirroring these results, the retention rates for Australian Indigenous students are lower than their non-indigenous counterparts.²² The disparity in completion rates is dramatic. Over a five-year period (2005–10), 40.8 per cent of Aboriginal and Torres Strait Islander students enrolled in tertiary education completed a bachelors course. This compares with 68.6 per cent for non-Indigenous students over the same period.²³

¹⁸ Tahu Kukutai, 'Who Ought to Benefit? : From Defining Maori to Entitling Maori' in 'The Problem of Defining an Ethnic Group for Public Policy: Who is Maori and Why Does it Matter?' (23 December 2004) *Social Policy Journal of New Zealand Te Puna Whakaaro* <<https://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj23/23problem-of-defining-an-ethnic-group-for-public-policy-who-is-maori-and-why-does-it-matter-p86-108.html>>.

¹⁹ See text to footnote 71 onwards for discussion of different pathways to Law School.

²⁰ See text above to footnotes 16–18.

²¹ Tertiary Education Commission (NZ), *About Universities* (6 September 2012) <www.tec.govt.nz>

²² In 2010, 63.4 per cent of Australian indigenous students who were studying at university in 2009 were still enrolled. This retention rate compares with 79.8 per cent for non-indigenous students. See Larissa Behrendt et al, Department of Industry, Innovation, Science, Research and Tertiary Education, *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People Final Report* (July 2012) 8.

²³ *Ibid.* Similarly, for discussion of completion rates for Canadian indigenous students, see, eg, Kerry Peacock, 'Setting a New Course for Aboriginal Education', *National Post* (Canada), 1 June 2012, 2.

The case for greater representation of indigenous students at tertiary institutions is a common refrain. In its *Tertiary Education Strategy 2010–2015*,²⁴ the New Zealand Ministry of Education acknowledged that the tertiary education sector should respond to the diverse needs of all groups. The ministry stated that this may require targeted services to create an inclusive environment for those who might otherwise languish on the margins.²⁵ Certain cohorts with low completion rates, such as Maori and Pacific Island students,²⁶ are likely to need tailored support to reverse these outcomes.²⁷ The Australian Department of Industry, Innovation, Science, Research and Tertiary Education has also expressed the view that under-representation of Indigenous Australians in higher education means that their significant and unique perspectives are not shared in lecture theatres or reflected in research output.²⁸ The point has been forcefully put that diversity in law schools fulfils a need for non-European insights in legal education.²⁹ This provides a valuable comparative perspective and tests established understandings from a different social and cultural reference point. More broadly, successful performance by all sectors of the community is conducive to better economic outcomes for the whole of society. The Canadian Centre for the Study of Living Standards estimates that more than CAD\$170 billion could be added to Canada's economy by 2026 if Indigenous Canadians achieved the same education levels as the wider community.³⁰ Countries with educated populations are the most productive and competitive in the international marketplace where, increasingly, tertiary qualifications are prerequisites for participation in the 'knowledge economy'. From a negative perspective, there are obvious economic and fiscal costs associated with lower outcomes for Indigenous people in higher education, as evidenced by disproportionate levels of dependency on government support.³¹

III TENSION BETWEEN INDIGENOUS KNOWLEDGE SYSTEMS AND WESTERN INTELLECTUAL TRADITION

A common feature of public education in Australia, New Zealand and Canada is a tension between indigenous knowledge systems and western intellectual tradition. The former may be shrouded in secrecy and only conveyed within the narrow

²⁴ Ministry of Education, *Tertiary Education Strategy 2010–2015* (22 December 2009) <<http://www.minedu.govt.nz/NZEducation/EducationPolicies/TertiaryEducation/PolicyAndStrategy/TertiaryEducationStrategy.aspx>>.

²⁵ *Ibid* 6.

²⁶ "Pacific Island students" refers to students identifying with the indigenous peoples of the Pacific Islands.

²⁷ Ministry of Education, above n 24, 6–7.

²⁸ Behrendt et al, above n 22, 4.

²⁹ Hugh MacAulay, 'Improving Access to Legal Education for Native People in Canada: Dalhousie Law School's IBM Program in Context' (1991–92) 14 *Dalhousie Law Journal* 133, 137.

³⁰ D'arcy Levesque, 'Why Aboriginal Education is Our Business', *The Globe and Mail* (online) (Canada), 21 June 2011 < <http://www.theglobeandmail.com/globe-debate/why-aboriginal-education-is-our-business/article583799/>>.

³¹ Behrendt et al, above n 22, 4.

confines of kinship or family relationship. Knowledge may be expressed as an oral tradition, transmitted through specific elders, in language and syntax that is unique to that particular culture.³² The cyclical and holistic philosophy of most native communities contrasts with the linear philosophy of western society. When indigenous students are taught the fundamentals of the legal system, they confront values that are at variance with their own beliefs and systems. This requires adaption. It takes time and a refocusing of thoughts by the academy as well as by Indigenous students, to recognise that in studying law, Indigenous students are learning another language and another code.³³

Concepts of property law, for example, can present challenges that are not immediately apparent to the wider community. It may be difficult for indigenous students to reconcile their personal understandings with the formalised concepts of estates, title and interests in land. For Canadian First Nation People, land belongs not only to those presently living but also to past and future generations. In some value systems, the land also belongs not only to humans but also to other living beings.³⁴ Thus, fundamental beliefs as to the nature of property may be a source of conflict with Western political and legal traditions. This is evident in respect of claims to native title and recognition of indigenous customary law.³⁵ Again, for Maori students, discussion of the New Zealand Constitution and the Crown's relationship to the Treaty of Waitangi³⁶ can be a highly charged and politicised issue.³⁷

With this background in mind, the task of learning the fundamentals of a legal system is certainly more difficult if law teachers assume that all students have a shared set of values and cultural experiences.³⁸ Even traditional competency-based learning with prescribed minimum pass grades may require explanation to some indigenous groups for whom complete mastery is required before further levels of learning can be undertaken. Here, indigenous students may need reassurance that 50 per cent is a sufficient basis to continue studies in a law degree.³⁹ It is commonly reported that success in tertiary studies is linked to experiences in which tertiary educators create

³² Asmi Wood, 'Law Studies and Indigenous Students' Wellbeing: Closing the (Many) Gap(s)' (2011) 21 *Legal Education Review* 251, 256.

³³ Even the primary written and spoken language of indigenous students may have a bearing on their transition to the discipline of law. A review of native legal education conducted by the Canadian Department of Justice in 1977 revealed that students who spoke a native language as a first language were less likely to succeed. See also MacAulay, above n 29, 139–40.

³⁴ Donald Purich, 'Affirmative Action in Canadian Law Schools: The Native Student in Law School' (1986–1987) 51 *Saskatchewan Law Review* 79, 83–4.

³⁵ Phil Falk, 'Racism in Legal Education Special — Law School and the Indigenous Student Experience' (2005) 6(8) *Indigenous Law Bulletin* 8, 10.

³⁶ Treaty of Waitangi, New Zealand, 6 February 1840.

³⁷ Stephanie Milroy, 'Part 1: Biculturalism and the Founding of Waikato Law School' (2005) 8(2) *Yearbook of New Zealand Jurisprudence* 173, 192–3.

³⁸ *Ibid* 192.

³⁹ Wood, above n 32, 256.

effective links between university studies and the cultural background of minority groups.⁴⁰ The *Review of Higher Education Access and Outcomes for Aboriginal and Torres Strait Islander People Final Report* (2012) identifies cultural recognition as a pivotal factor in achieving favourable outcomes for indigenous tertiary students.⁴¹ If indigenous people feel that they are in a culturally safe environment, they are likely to remain at university and aspire to the ideals of that institution.

IV LAW AND INDIGENOUS SOCIETIES

It is not uncommon for indigenous people to have negative perceptions of law and the administration of justice. For successive generations, the legal system may seem foreign and inaccessible, while lawyers are regarded as representatives of the dominant society and its values. With few native judges, lawyers or police officers, the justice system in all its manifestations seems an essentially non-native institution.⁴² The absence of role models or accessible representation compounds this sense of alienation.

Clearly, law schools are pivotal in influencing this state of affairs. Law schools are the gatekeepers of legal education and ultimately, the legal profession itself.⁴³ Law schools are the breeding ground for future leaders in many fields,⁴⁴ and the success of Indigenous graduates has positive outcomes, not least because they serve as exemplars to their particular communities. With increasing enrolment of indigenous students and programs that acknowledge their cultural perspectives,⁴⁵ indigenous people are beginning to regard law as a tool for protecting and enforcing their rights. Similarly, increased representation of indigenous people in the legal system engenders greater respect for both the system and its place in society. For example, where indigenous people hold judicial office there is greater acceptance by their community of the role of courts and their decisions.⁴⁶ Until indigenous people are proportionately represented in the legal profession, it cannot be said that the

⁴⁰ Airini et al, 'Success For All: Improving Maori and Pasifika Student Success in Degree-Level Studies' (Milestone Report 8, Auckland Uniservices Ltd, 21 December 2009) 17.

⁴¹ Behrendt et al, above n 22, 143.

⁴² Ibid. See also Purich, above n 34, 84.

⁴³ Charles Smith, 'Who is Afraid of the Big Bad Social Constructions? Or Shedding Light on the Unpardonable Whiteness of the Canadian Legal Profession' (2008) 45 *Alberta Law Review* 55, 63.

⁴⁴ MacAulay, above n 29, 135. MacAulay observes that the close relationship between the legal profession and political office is clearly apparent in Canada where lawyers are strongly represented in the ranks of Members of Parliament, Cabinet Ministers and Provincial Premiers.

⁴⁵ For example, in March 2013 the University of Western Australia announced a new indigenous law pathway to the JD program through an Advanced Diploma in Indigenous Legal Studies. See, eg, University of Western Australia, *New Indigenous Law Pathway Launched* (4 March 2013) <<http://www.news.uwa.edu.au/201303045456/events/new-indigenous-law-pathway-launched>>.

⁴⁶ MacAulay, above n 29, 136.

profession is properly representative of the people it serves.⁴⁷ Thus, the availability of more indigenous lawyers could be conducive to assisting the disproportionate number of indigenous people who are in conflict with the criminal justice system.

V FORMAL BASIS FOR MODERN OBLIGATIONS TO INDIGENOUS STUDENTS IN TERTIARY EDUCATION

Australia, New Zealand and Canada are committed to furthering the academic success of indigenous students in tertiary education. This is sometimes expressed as a formal obligation of the state and affirmed as institution-specific goals. In New Zealand, the Treaty of Waitangi provides a formal basis for obligations to indigenous students.⁴⁸ In the last decade or so, these obligations have become more expansive. In the process, public dialogue on the fulfilment of educational aspirations has become more focused.

For many years the Treaty was applied only to physical resources. However, following the Royal Commission on Social Policy in 1988,⁴⁹ a case was made for the Treaty to be recognised in social, environmental and economic policies. From this perspective, developments in tertiary education can be seen as part of a wider set of reforms.⁵⁰ Article 3 of the English version of the Treaty states that ‘in consideration thereof Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection and imparts to them all the Rights and Privileges of British subjects’. This raises the question as to whether this language encompasses social rights. Modern theories of citizenship suggest such a link.⁵¹ While the scope of art 3 is susceptible to varied interpretations, it has been argued that the provision contemplates the enjoyment of social benefits and that there should be equitable access to such benefits for all members of society. Extending this argument, it has been asserted that the Treaty was an instrument for positive development of the Maori community. It was not envisaged that Maori would become an underclass in their own land and therefore policies should be developed which assist legitimate social aspirations. Central to this thesis is equality of educational opportunities.⁵²

This is affirmed in the *Education Act 1989* (NZ), which imposes a duty on the council of tertiary institutions to acknowledge the principles of the Treaty of Waitangi. The obligation falls within a broader gamut of fostering the educational potential of all sectors of society, with particular emphasis on groups that are under-represented.⁵³

⁴⁷ Pelly, above n 8.

⁴⁸ As some commentators observe, irrespective of Treaty obligations, government policies and programs that target Maori can also be understood from a social justice perspective. See Mason Durie, ‘Indigenous Higher Education: Maori Experience in New Zealand’ (Address to the Australian Indigenous Higher Education Advisory Council, Canberra, 1 November 2005) 5–6.

⁴⁹ *Report of the Royal Commission on Social Policy* (1988) (NZ).

⁵⁰ Durie, above n 48, 6.

⁵¹ Mark Barrett and Kim Connolly-Stone, ‘The Treaty of Waitangi and Social Policy’ (1998) 11 *Social Policy Journal of New Zealand* 29, 32.

⁵² *Ibid.*

⁵³ *Education Act 1989* (NZ) s 181(b)–(d).

In addition to Indigenous rights derived from the Treaty of Waitangi, the *New Zealand Bill of Rights Act 1990* (NZ) (*‘Bill of Rights Act’*) and the *Human Rights Act 1993* (NZ) (*‘Human Rights Act’*) seek to redress social disparities. Both Acts are informed by principles of international law and provide for affirmative action to assist marginalised groups.⁵⁴

In Australia, federal government policy reflects a similar commitment to indigenous students. The National Aboriginal and Torres Strait Island Education Policy espouses equality of access to education services and equity of educational participation to Aboriginal and Torres Strait Islander people.⁵⁵ This extends to post-secondary schooling, including higher education.⁵⁶ These goals lay the foundation for the aspirational objective of achieving equitable educational outcomes whilst affirming the value of indigenous cultures. The objective of Major Goal 4 is to:

enable Aboriginal and Torres Strait Islander students to attain the same graduate rates from award courses in ... higher education, as for other Australians and also to provide all Australian students with an understanding of and respect for Aboriginal and Torres Strait Islander and contemporary cultures.⁵⁷

The Higher Education Participation and Partnerships Program (Australia) (*‘HEPPP’*) promotes these objectives by providing financial incentives to tertiary institutions to develop strategies that improve access to undergraduate courses for people from low socio-economic backgrounds. The key aim is to increase enrolment to accredited courses and support the retention and success of the students.⁵⁸ Within this framework, funding is provided to assist universities, in partnership with other organisations, to raise the aspirations of particular groups with respect to higher education.⁵⁹ The program encourages a coordinated approach by the participating institutions and the concentration of resources to most effectively target communities where matriculation to universities has historically been low. To further these objectives, the 2012–13 federal budget allocated AUD\$50 million to the HEPPP to support innovative approaches for fostering success in tertiary education for disadvantaged students, with particular emphasis on Aboriginal and Torres Strait Islanders.⁶⁰

The *Canada Act 1982 (UK)* c 11, sch B pt I (*‘Canadian Charter of Rights and Freedoms’*) proclaims a similar intent in respect of affirmative action programs⁶¹

⁵⁴ *Human Rights Act 1993* (NZ) s 73. *New Zealand Bill of Rights Act 1990* (NZ) s 19(2).

⁵⁵ Department of Education, Employment and Workplace Relations, *National Aboriginal and Torres Strait Islander Education Policy* <<http://deewr.gov.au/Indigenous/Schooling/Policyguidelines/Pages/aep.aspx>>

⁵⁶ *Ibid* Major Goal 2.

⁵⁷ *Ibid* Major Goal 4.

⁵⁸ *Ibid* Component A.

⁵⁹ *Ibid* Component B.

⁶⁰ Department of Industry, Innovation, Science, Research and Tertiary Education, *Higher Education Participation and Partnership Program* <www.innovation.gov.au>.

⁶¹ See discussion in text below under ‘Special Admission Schemes’, regarding the legal status of affirmative action programs.

for disadvantaged individuals or groups.⁶² The Charter is interpreted in a manner consistent with the multicultural heritage of Canadians.⁶³ It does not specify indigenous peoples as such, although they may fall in the category of disadvantaged groups. By extension, it has been argued that the Charter should be construed as making access to education a basic human right.⁶⁴

Finally, the statutory and policy initiatives adopted in Australia, New Zealand and Canada are consistent with, and generally reflect, the United Nations Declaration on the Rights of Indigenous Peoples.⁶⁵ Article 21(1) declares that 'Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education'.⁶⁶

VI SPECIAL ADMISSION SCHEMES

Law schools in New Zealand, Australia and Canada have almost universally adopted equity initiatives for indigenous applicants. Although controversial, it is unlikely that the legality of this form of affirmative action can be impugned as offending anti-discrimination or equality legislation. For example, the Canadian *Charter of Rights and Freedoms* states that equality provisions do 'not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin'.⁶⁷ Again, s 8(1) of the *Racial Discrimination Act 1975* (Cth) permits special measures taken for the sole purpose of securing the adequate advancement of Indigenous people.⁶⁸ Similarly, s 73 of the *Human Rights Act 1993* (NZ) provides that anything done or omitted which would otherwise constitute a breach of the Act shall not constitute a breach if it is done or omitted in good faith for the purpose of assisting or advancing persons or groups who need assistance or advancement in order to achieve an equal place with other members of the community.⁶⁹

It has been recognised that equity initiatives are necessary to counteract the social exclusion of minorities from professional schools.⁷⁰ Proponents cite public policy

⁶² *Canadian Charter of Rights and Freedoms*, s 15(2).

⁶³ *Ibid* s 27.

⁶⁴ MacAulay, above n 29, 138–9.

⁶⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007). See <un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

⁶⁶ *Ibid*.

⁶⁷ *Canadian Charter of Rights and Freedoms*, s 15 (2).

⁶⁸ *Gerhardy v Brown* (1985) 159 CLR 70. For a recent discussion, see *Maloney v The Queen* [2013] HCA 28.

⁶⁹ *Human Rights Act 1993* (NZ), s 73 (1) (a) and (b). See also *New Zealand Bill of Rights Act 1990*, s 19 (2).

⁷⁰ Jennifer Reid, 'Barriers to Maori Student Success at the University of Canterbury' (MA thesis, University of Canterbury, 2006) 117.

objectives that define successful educational outcomes in broader social terms. For example, it may be equally meritorious to admit students who will help institutions to achieve their public goals in providing future societal leaders from across a spectrum that reflects a nation's ethnic composition.⁷¹ It can also be argued that traditional entry standards preserve historical stereotypes that are typically European and male. Insofar as such standards define the norms for admission, they perpetuate an exclusionary model in respect of indigenous students.⁷²

While special admission schemes may be perceived as lowering traditional assessment standards, from another perspective, such policies serve to expand the evaluation criteria. With reference to Canadian law schools, traditional measures, such as the Law School Admission Test ('LSAT'), may have limited predictive accuracy with respect to students from a minority background. Most Canadian law schools have both general and discretionary admission categories. Academic performance and LSAT scores are the primary determinants for the general category, while other factors such as work experience or community service may be relevant to the discretionary category. The latter acknowledges that the social and educational experiences of indigenous students may differ significantly from the majority of applicants. Quotas introduced in the last 30 years or so reflect the demography of a changing society.⁷³ For example, in 1989, Dalhousie University established the Indigenous Blacks and Mi'kmaq Initiative ('IB&M program') to address perceived structural and systemic discrimination in respect of the named groups.⁷⁴ The IB&M program amended the admission category for disadvantaged applicants by including a number of places for native and black people in proportions broadly reflective of their population. Such initiatives reinforce the desire for equality in a pluralistic and multicultural society. A wide range of information is considered in order to gain an understanding of an applicant's potential. This affirms the need for a more tailored assessment of ability to succeed in academic study.⁷⁵

⁷¹ Durie, above n 48, 8–9.

⁷² Monture, above n 4, 193. In the years since this article was published, it is undoubtedly the case that most Law Schools have ceased to perpetuate the male myth in respect of law and the legal profession, and a gender balance in Law Schools is now the norm.

⁷³ The legality of equity schemes, such as quotas, as a vehicle for affirmative action is discussed above in the text to footnotes 52–69. It must also be acknowledged that this is a highly charged political issue. See, eg, Sara Hudson, 'Better Schooling, Not Uni Quotas', *The Australian* (online), 2 October 2012 <<http://www.theaustralian.com.au/opinion/better-schooling-not-uni-quotas/story-e6frg6zo-1226486129813#>>.

⁷⁴ Dalhousie University Schulich School of Law, *The Indigenous Blacks & Mi'kmaq Initiative* <http://www.dal.ca/academics/programs/professional/law/how_do_I_apply/the-indigenous-blacks---mi-kmaq-initiative.html>.

⁷⁵ For example, the University of Waikato's Admissions Committee assesses academic qualifications, relevant work experience and non-tertiary qualifications where there are no formal tertiary qualifications. See University of Waikato, *Maori @ Te Piringa-Faculty of Law* (7 January 2013) <www.waikato.ac.nz/law/maori>. For discussion of the early years of the program see Margaret Wilson, 'The Making of a New Legal Education in New Zealand: Waikato Law School' (1993) 1 *Waikato Law Review* 1.

Special admission schemes have also proliferated in Australia. The extent of such schemes is evidenced by the fact that in 2010, only 47 per cent of Aboriginal and Torres Strait Islander students entered university on the basis of prior educational attainment, compared with 83 per cent of non-Indigenous students. Thus, over half of the indigenous students gained entry through enabling or special entry programs.⁷⁶ New Zealand Law Schools offer targeted admission schemes for Maori and Pacific Island students. For example, the University of Auckland Law School admits 32 eligible Maori students to Law Part II under this scheme⁷⁷ and Victoria University of Wellington Law Faculty allocates up to 10 per cent Maori students into 200-level law courses under the Maori Admissions Process.⁷⁸

VII ACCESS PROGRAMS

A criticism of special admission schemes is that they tend to supplant traditional academic criteria with standards that are more general and impressionistic. Access programs⁷⁹ are a preferable means for determining the basis of entry to Law School. Opinions are divided as to the primary purpose of such programs. On one model, access programs assist indigenous students to develop skills necessary to undertake tertiary studies in law. Prospective students gain familiarity with the unique academic and pedagogical orientation of law school, thereby easing the transition to the first year of a law program.⁸⁰ An alternative view is that the function of access programs is to assess and screen applicants for admission to law school. Clearly, the objectives of each differ. One law academic, who clearly subscribed to the former, complained:

the problems I see with the programme arise from its nature as a screening programme. I had envisaged it as a headstart programme designed to help

See also discussion of admission programs at The University of New South Wales: Sean Brennan et al, 'Indigenous Legal education at UNSW: A Work in Progress' (2005) 6 *Indigenous Law Bulletin* 26, 27.

⁷⁶ Behrendt et al, above n 22, 7–8.

⁷⁷ University of Auckland, Faculty of Law, *Targeted Admission Scheme (Maori)* <<http://www.law.auckland.ac.nz/uoahome/for/current-students/current-undergraduate-students/cs-maori-student-support/targetedadmissionschememori>>.

⁷⁸ Victoria University of Wellington, *Faculty of Law Undergraduate Prospectus 2013* (9 January 2014), 17 <<http://www.victoria.ac.nz/law/study/undergraduate/selection-criteria#maori>>.

⁷⁹ Special Admission Schemes permit entry to degree programs with lower formal academic standards. In contrast, access programs as discussed in this article, are achieved by means of a dedicated course. Alternative models for access programs are discussed below.

⁸⁰ The University of New South Wales Nura Gili Pre-Program in Law is a good example of this model. This is an intensive 4-week residential preparatory course that provides an introduction to university life and the study of law within that environment. The course content includes an introduction to legal process, Aboriginal legal issues, Criminal Law, Legal Writing and Academic Skills. See further Nura Gili, above n 5.

people who would be entering law school at a competitive disadvantage to overcome that disadvantage. I know that the programme attempts to carry out both functions, but I think they are incompatible and the screening function comes to predominate. It results in the students being overworked and over-examined and therefore confused rather than gradually introduced to the concepts they will be using in law school.⁸¹

The function of access programs was strongly contested between different interest groups in the early days of the Dalhousie IB&M program. The Mi'kmaq community advocated that the program should be a vehicle for screening and evaluation, while the African Nova Scotian community considered that it should provide an orientation and preparation for law school. The latter argued that the program should not present a further hurdle to admission.⁸²

In addition to defining the purpose of access programs, there is also the issue of appropriate course content. The main options are either to focus on the elements of legal method and the inculcation of discipline-specific skills, or to provide a basic grounding in substantive law. Opinions are divided as to the merits of a content-based model focused on the national legal system and basic areas of law as opposed to a skills-based model directed to legal research and writing, interpreting primary legal materials, problem solving and critical thinking.⁸³ The latter model in particular encourages students to think and express themselves like lawyers.⁸⁴ These considerations will be developed in the next section where it is proposed that existing access programs should be reappraised and extended in scope and objective.

VIII PROPOSED MODEL

There is divergence in the form and content of access programs for indigenous students. Some are directed to skills preparation while others introduce one or more areas of substantive law. Most offer both. For example, the University of New South Wales pre-law program teaches both skills (academic skills and legal writing) and substantive law (through the courses Introduction to Legal Process, Aboriginal Legal Issues and Criminal Law). The University of Western Australia's Advanced Diploma in Indigenous Legal Studies combines both introductory law units taught

⁸¹ Purich, above n 34, 96.

⁸² Richard Devlin and Wayne MacKay, 'An Essay on Institutional Responsibility: The Indigenous Blacks and Micmac Program at Dalhousie Law School' (1991–1992) 14 *Dalhousie Law Journal* 296, 316–17. The article records that a compromise was struck whereby the primary focus was orientation to law, but with an assessment on a pass/fail basis.

⁸³ Brennan et al, above n 75, 27. See also the University of Saskatchewan's program for Native students as discussed below. See University of Saskatchewan, *Program of Legal Studies for Native People* <www.usask.ca/plsnp/>.

⁸⁴ Mel Thomas and Brett Farmer, 'Indigenous Law Students at the University of Western Australia' (2005) 6 *Indigenous Law Bulletin* 16, 17.

by the Faculty of Law, and Indigenous Knowledge, History and Heritage units taught by the School of Indigenous Studies.⁸⁵

There are two basic aspects to the overall objectives of such programs. Some are primarily intended to prepare students for law school by providing orientation, support and assistance with the techniques of study. Other programs serve the additional function of assessing and quantifying abilities for the purpose of admission to law school. Some programs are institution-specific, with students being offered a place at a particular law school. In limited cases, successful completion of an access program is recognised more widely, enabling students to enter a number of other law schools. The University of Saskatchewan Program of Legal Studies for Native People is notable in this regard.⁸⁶ The program was the first formal development of legal education for First Nations People in Canada. One of its proclaimed goals is to assess the capacity of native students to perform successfully in Canadian law schools.⁸⁷ Teaching is centred on methodology and skill development rather than substantive law and includes training in fundamentals such as reading and writing.⁸⁸

Features of this program should be expanded to create an access scheme that serves all national law schools. Realistically, with respect to the jurisdictions under review, this would mean one scheme applicable to Canada and another that would serve Australia and New Zealand. It may be too ambitious to propose an Australasian-wide scheme, but a separate program for each of Australia and New Zealand may be a realistic goal. This will now be explored.

A nationally accredited access program would provide a number of advantages over the present, disparate, systems. It would foster student mobility by providing transferability within the country, enabling students to attend their local, or nearest university and to undertake their law studies while enjoying the same access privileges to law schools further afield. The advent of a nationally-recognised access program with uniform standards would support that transferability. Moreover, in view of the duration of the course and the element of summative assessment, it would be appropriate to award a Certificate of Proficiency in law to those who

⁸⁵ See also Murdoch University Pre-Law Alternative Entry Course, which includes an intensive library tutorial session and substantive law (introduction to the Australian Legal System and Law of Contract). Pre-law programs may teach skills required for the study of Law through a particular law course or courses. See, for example, the University of Saskatchewan Program of Legal Studies for Native People, which teaches legal reading, writing and analysis using first-year property law as subject material.

⁸⁶ The program is conducted by the Native Law Centre, which is a department of the College of Law.

⁸⁷ The program is available to Native students who have been conditionally accepted in a Canadian Law School, with acceptance subject to successful completion of the program.

⁸⁸ See also University of Saskatchewan Program of Legal Studies for Native People, above n 83.

attain a prescribed minimum standard. This would provide a qualification for those who do not proceed to law school and may assist entry into the legal profession at an administrative level, for example, as a legal assistant. The program would require the suggested period of three months full-time study because it would not be limited to an orientation of law as an academic discipline. An essential component, as discussed below, would be skills testing through formal summative assessment. By replicating conditions and challenges of law school, the program would provide a measure of predictive accuracy for future undergraduate law studies. The simple and undeniable fact is that law school is a competitive environment and the syllabus is defined by examinations as well as formative evaluations. It is therefore appropriate to confront these realities and factor them into an assessment of aptitude for studying a law degree.

The proposed model would consist of a nationally accredited program conducted by specified law schools. The development and implementation of these programs should be undertaken in partnership with tertiary Indigenous Centres and Schools, which have particular insight into the diversity of indigenous students' educational and cultural backgrounds and their needs. Given the geographical size and number of law schools in Australia, it would be necessary for a core of law schools to offer the program, with perhaps one participating institution in Western Australia and a minimum of one in each of Queensland, New South Wales, Victoria and South Australia.⁸⁹ The objective would be to provide an accredited course for indigenous students that would be recognised by all Australian law schools. The same would apply in New Zealand. There are six law schools in New Zealand, with four in the North Island and two in the South Island. Ideally, the North Island and the South Island would each host at least one participating law school. Students who attain a specified standard would have a transferable qualification that is recognised in all law schools.

It is proposed that a nationally accredited program would be an intensive, full-time, three-month course comprising two stages. The first, lasting two months, would be exclusively skill based, directed to literacy skills, essay writing, comprehension exercises, introduction to legal method, case analysis, research techniques and interpretation of legal materials. Teaching and learning should be reinforced by regular formative assessment and progress should be monitored by summative tests, ideally every two or three weeks. It is important that those experiencing difficulties are identified at the earliest possible stage so that additional assistance can be provided. Each student's performance throughout the program should be assessed by members of the teaching group on a weekly or fortnightly basis.

⁸⁹ Inevitably, there are related social, cultural and financial issues. Such matters are beyond the scope of this article, but it may be noted that many disadvantaged Indigenous students reside in rural or remote areas and attendance at university often necessitates separation from family members and cultural groups. In addition, on a practical level, financial assistance may be required for transportation and accommodation. Some institutions, such as the University of New South Wales, provide residence on campus.

During the final month of the program, students should advance to the second phase, where acquired skills would be applied in relation to certain key areas of substantive law. It must be emphasised that the program is not directed to imparting a detailed knowledge of law. To a large extent that is secondary. The key objective is to acquaint students with the methodology of the discipline and the skills necessary to undertake formal study. The second phase is therefore concerned with applying skills in context. It is simply a progression of the first two months of learning. This phase in particular should be characterised by regular summative assessment. It is appropriate here to adopt the conventional examination format. It is not suggested that there should be a battery of final examinations. A preferable approach is to set regular short tests that are assessed and graded.

In Australia, there are a considerable number of preparatory and enabling programs to facilitate the transition to tertiary education generally and law specifically.⁹⁰ There are shared features between these programs and the proposed access scheme. These include tutorials, mentoring, introduction to substantive law, and complementary perspectives on indigenous intellectual and cultural traditions. Moreover, preparatory and enabling programs (including diploma courses), can result in admission to law school. An example of the latter is the University of Western Australia Advanced Diploma in Legal Studies, which, if completed to a satisfactory level, confers eligibility to enroll in the three year Juris Doctor (JD).⁹¹

These programs vary in content, duration and outcome. They can be distinguished from the proposed access scheme ('Model Access Scheme'). The Model Access Scheme is a structured course with a strong summative element through formal tests and examinations. Grades are awarded and the students are ranked. Whilst providing an orientation to Law School, the Model Access Scheme is intended to rigorously test and quantify academic ability. A course of three months duration is required to achieve these objectives. Although it may be thought that this is unduly long, the blunt fact is that if students cannot stay the course for three months, they are unlikely to last three-plus years. Students who achieve the required standard would be eligible for a place at law school, either at the university where they undertook the access program or elsewhere.⁹²

This regime would undoubtedly be daunting for some — perhaps many. The rigour and pace of the Model Access Scheme would of course have to be carefully assessed. It should not, for example, completely replicate the intensity of regular

⁹⁰ See, for example, the Nura Gili Pre-Program in Law at the University of New South Wales.

⁹¹ See also Murdoch University Pre-Law Alternative Entry course. Students who complete the program with at a Credit average (60 per cent or above) are offered direct entry into the Murdoch LLB program.

⁹² In terms of formal tertiary education, where the law degree is an LLB, applicants would either be accepted directly from secondary school or after completing another undergraduate course. With respect to the JD, which, in Australia, is a graduate degree, the access program would be a further pathway to Law School if their undergraduate results were insufficient.

law degree studies. For reasons discussed earlier, students would be confronting a host of challenges that are not exclusively confined to academic learning. Close and ongoing support would be required. It is here that there is a critical role for student mentors. Mentors could be drawn from the ranks of senior students in the LLB program.⁹³ Their role would be to assist in specific areas such as problem solving and provide support in certain modules such as writing workshops. Perhaps of equal importance would be the insider information and pastoral support, which puts a human face to an institutional setting. It should not be overlooked that many students will not only have had limited exposure to tertiary education, but more fundamentally the milieu in which they find themselves may be unfamiliar and intimidating. It would therefore be beneficial if a significant portion of indigenous law students were recruited to serve as mentors. This would go some way towards promoting a cultural environment where problems can be understood from an empathetic and personal perspective.⁹⁴

Cultural awareness and the visibility of Indigenous values will undoubtedly enhance the student experience. This is critical to avoid any perception that the Model Access Scheme is intended to assimilate Indigenous students. Whilst Indigenous students must of course gain familiarity with different cultural norms, this is not intended to supplant their distinct worldview. This balance is evident in existing Australian preparatory and enabling programs, which incorporate Indigenous philosophical and legal perspectives. The integration of these perspectives demonstrates how legal studies can be taught while preserving cultural identity. Such programs are designed to empower, not assimilate, the identity of Indigenous students. The Model Access Scheme should be informed with similar ideals. Its implementation will usually be best achieved by collaboration with the relevant university's department of Indigenous Studies.

The concern regarding assimilation of cultural identity can of course be expanded to wider discourse on the politics of education. In particular, it raises the argument

⁹³ There are many practical matters to be considered with respect to the Model Access Scheme. It would likely be offered during the summer. This is also the time when law students seek work experience with law firms. Thus, it may be difficult to employ top senior law students when seeking student mentors.

⁹⁴ Some institutions provide continuing support throughout an indigenous student's time at Law School. For instance, the School of Indigenous Studies at the University of Western Australia has a team of senior law students who provide ongoing mentoring and support. In addition, regular tutorials are conducted both individually and in groups. This regime continues throughout the JD program. The University of Auckland offers general mentorship, starting from enrolment, through the Uniguide scheme: University of Auckland, *UniGuide Programme* <<https://www.auckland.ac.nz/en/for/current-students/cs-student-support-and-services/cs-academic-and-learning-support/cs-uniguide.html>>. More specifically, the Auckland Law School provides targeted programs for particular groups of LLB students, such as Pasifika Academic Support Strategies (PASS), which includes tutorials and workshops. See also Susan Farruggia et al, 'The Effectiveness of Youth Mentoring Programmes in New Zealand' (2011) 40 *New Zealand Journal of Psychology* 52.

that sending the most promising Indigenous students to university will hasten the demise of alternative indigenous intellectual and cultural traditions. This must be weighed against the fact that exposure to tertiary education does not by definition harm such traditions. If anything, they may become more robust, because the brightest indigenous students can showcase their culture from an enhanced perspective, speaking to indigenous traditions whilst understanding the challenges of developing this perspective to a western mindset.

To be effective on a national level, the Model Access Scheme must be recognised by all law schools.⁹⁵ Consensus will be required to establish a uniform admission scheme for those who successfully complete the access program. Building on existing models, it would be realistic for each law school to adopt a quota, with the number of students accepted by each law school expressed as a percentage of total general student admissions. This would ensure that the number of indigenous students admitted under the scheme is proportionate to the capacity and resources of each law school.⁹⁶

The principal criterion for admission to law school would be the grades awarded during the program, with particular weighting on the tests administered during the final month. However, in addition to this basic data, a narrative report should be prepared by the instructors, which provides a critique of every student's progress throughout the program. Such reports would encourage law schools to increase the number of admissions above the minimum quota in respect of promising students who might otherwise be excluded on the basis of their test scores.

In New Zealand, there is some pressure on law schools to allocate places for Maori and Pacific Island students. It would therefore be appropriate to quantify and rank the students' performance in the proposed access program. In Australia the number of Aboriginal and Torres Strait Islander applicants to law school is comparatively low and there is no need to limit the number of available places for students in this category. It can be argued that it is unnecessary to rank students on completion of an access program in Australia because competition for places at law school is not particularly intense. However, there are benefits to formally identifying and categorising academic and skill-based accomplishments. First, this provides an important introduction to the dynamics of law school, where there is an emphasis on high academic achievement.⁹⁷ Second, an access program identifies those who are suitable for immediate admission to law school and those whose applications should be deferred. Students in the latter category would typically be diverted to a pre-law

⁹⁵ As noted in the article, in view of the program's duration and assessment regime, a formal qualification should be awarded for successful completion. A recognised qualification may also assist those who do not proceed to Law School in gaining employment as a paralegal.

⁹⁶ As stated above, admission under an access scheme should be aligned with ongoing post-admission support.

⁹⁷ Not least because the legal profession cannot accommodate every aspiring law graduate and competition for employment is therefore fierce.

bridging program offered by a number of Australian universities.⁹⁸ The ranking and grading of academic performance in the Model Access Scheme would assist that determination and also establish a benchmark for admission to law school.

There are different pathways to law school, and increasingly law degrees have different formats. In Canada students are typically admitted to law school having completed a bachelors degree, although this is not an invariable rule. Students with two years of an undergraduate degree are eligible for entry at the University of Saskatchewan, whereas three years is required at the University of British Columbia and University of Toronto. In Australia, some law schools offer a Juris Doctor, which is taught as a professional graduate degree,⁹⁹ while others offer the traditional LLB, which offers admission from secondary school as well as graduate entry. Moreover, there are variations in course structures. For example, students may choose to study the LLB alone or as a combined degree.¹⁰⁰ In New Zealand, students are admitted to Part I of the law degree,¹⁰¹ where they study one or more introductory law papers, with the balance drawn from non-law courses. This is followed by limited entry into Part II, which is the first year of the substantive law degree.

Despite these variations, it is submitted that a universal access scheme is tenable. For some, such as those gaining direct entry from secondary school, there is a particular need for orientation to the challenges of tertiary education, as well as the specific demands of a law degree. Whilst those who have studied or completed an undergraduate degree will be familiar with the university environment, the Model Access Scheme would provide a valuable orientation to the signature pedagogy of law. For undergraduate students who have not attained the requisite standard for direct admission to law school, the access scheme would perform the essential function of recognising and quantifying their aptitude for the study of law. It would of course be necessary for appropriate weightings to reflect the different educational experiences of the students. This will not be an easy task. Moreover, account must also be taken of the fact that law degrees may be perceived differently. For example, the Australian Quality Framework ranks the JD as a higher level of attainment than the LLB: an undergraduate degree is AQF level 7 whereas a postgraduate professional masters degree such as a JD is an AQF level 9.¹⁰² The content and emphasis

⁹⁸ The Aspiration Initiative, *Preparatory and Enabling Programs* <<http://www.indigenousscholarships.com.au/resources/how-do-i-get-uni/preparatory-and-enabling-programs>>. Some programs are oriented to a student's intended degree and foster the relevant skills and perspectives of that discipline. See, eg, the Wirltu Yarlu University Preparatory Program at the University of Adelaide.

⁹⁹ For example, The Australian National University, The University of Melbourne, The University of Western Australia, The University of Sydney and Monash University.

¹⁰⁰ For example, The University of Queensland, The University of Sydney, Monash University and The University of Adelaide.

¹⁰¹ Except the University of Waikato.

¹⁰² Jemina Roe, *A School Divided: Issues with JD & LLB Split System*, Australian Law Students Association <<http://www.alsa.net.au/uploads/Education2013/JD%20&%20LLB%20Factsheet%20FINAL.pdf>>.

of an access scheme will undoubtedly require adjustment to reflect these and other factors.

IX CONCLUSION

Tertiary education policies demonstrate an increasing commitment to attracting and retaining indigenous students. It has been recognised that traditional entry standards may be exclusionary to the extent that they sustain historical stereotypes and fail to reflect the unique profile of indigenous students. Special admission schemes have been adopted to promote the enrolment of indigenous students in professional schools. There is less insistence on formal educational qualifications and instead discretionary admission categories take account of diverse factors in assessing the potential to succeed. In some cases the pendulum has swung too far in favour of ad hominem assessments.

The Model Access Scheme is a preferable method for determining entry for indigenous students to law school. This program has greater predictive value than special admission schemes. Moreover, the form of instruction in the Model Access Scheme replicates the conditions and challenges of law school. The primary purpose of the program should be the assessment and screening of applicants by means of an intensive skills-based course. This should be developed as a nationally accredited program that is recognised by all law schools.

In proposing a three-month access program, it must be acknowledged that there is a financial cost that cannot easily be borne by indigenous students from low socio-economic backgrounds. There is a compelling case for government funding to put this program within reach of those who would otherwise be excluded.¹⁰³ Earlier in this article it was suggested that participation in tertiary education by all sectors of the community is beneficial to society as a whole. Failure to assist

¹⁰³ In Australia, the Department of Industry is 'committed to the Australian Government's target of reducing Indigenous disadvantage. This includes improving Indigenous higher education outcomes, and enhancing Indigenous culture and knowledge in Australian higher education.' See Australian Government Department of Industry, *Indigenous Higher Education* <<http://www.industry.gov.au/highereducation/IndigenousHigherEducation/Pages/default.asp>>. In Canada, the Department of Aboriginal Affairs and Northern Development provides Band Support funding. See Aboriginal Affairs and Northern Development Canada, *Band Support Funding* (13 June 2014) <<http://www.aadncaandc.gc.ca/eng/1100100013825/1100100013826>>. In addition, the Department of Justice's Legal Studies for Aboriginal People Program promotes the equitable representation of Aboriginal people in the legal profession by providing bursaries to Metis and non-status Indians who are enrolled in a pre-law course recognised and delivered by a Canadian university. In New Zealand funding assistance is available for educational purposes from the Ministry of Maori Development. See Te Puni Kokiri *Services and Funding* (10 December 2012) <<http://www.tpk.govt.nz/en/services/>>. The Ministry of Pacific Island Affairs has a narrower mandate, which is largely confined to policy matters. See Ministry of Pacific Island Affairs, *About Us* <<http://www.mpia.govt.nz/about-us-2/>>.

indigenous students must be offset against wider social costs. If central, state and provincial governments are unable to provide financial support for the aspirations of indigenous peoples, they must necessarily confront the social and economic costs of State dependency.

Indigenous students seeking admission to law school often face significant cultural and educational challenges. It is essential that the admission process is sensitive to the personal background of such applicants while being sufficiently robust in the assessment of their core skills and aptitude. A nationally accredited access program would be a positive initiative in this regard and the stature of the program would cause perceptions of the admission process to be reconceptualised from a concession to an achievement.

JUVENILE COURTS – AN AUSTRALIAN INNOVATION?

ABSTRACT

The Juvenile Court is usually depicted as an American invention, first established in Chicago in 1899, before spreading across the United States and into other English-speaking areas in the first decade of the 20th century. This article suggests that the Adelaide Children's Court in South Australia, which began operating informally in 1890 and gained legislative recognition in 1895, should more appropriately be called the first juvenile court. While the Adelaide Children's Court has attracted considerably less scholarly and popular attention than its United States equivalents, the South Australian model was the first to bring together elements that were subsequently identified as essential components of children's courts. The Court also exerted considerable, and again often undocumented, influence on other legislative schemes in Australia and overseas. The article argues that a close historical analysis of the Adelaide Children's Court's early years, between 1890 and 1910, reveals just how innovative the South Australian scheme was. It concludes by calling for a more expansive approach to the development of the juvenile jurisdiction.

I INTRODUCTION

In 1927 the Chinese-born American scholar Herbert Lou published his doctoral dissertation on juvenile courts in the United States. Lou's book was one of the earliest comprehensive studies of America's juvenile court system and was soon accepted as a major authority on the subject. Lou's main argument was that juvenile courts were a modern 'scientific' response to the complex problem of youthful delinquency. In the juvenile court, he believed, law worked alongside biology, sociology and psychology 'to administer justice in the name of truth, love, and understanding.'¹ In tracing the history of the courts, Lou proposed that they were underpinned by the idea of *parens patriae*; the theory that the Crown (in America the state) had an inherent welfare jurisdiction over all children. Under the juvenile court system, he suggested, the state's duty to protect was extended to offending as well as 'dependent' or neglected children.² Lou's second major contention was that juvenile courts were a uniquely American phenomenon: 'It is ... a generally accepted fact that the first juvenile court ... in the world, began in 1899 with the establishment

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¹ Herbert Lou, *Juvenile Courts in the United States* (Arno Press, 1972) 2.

² *Ibid* 3–4.

of the Chicago Juvenile Court'.³ Lou acknowledged that '[c]ertain features of the juvenile court ... developed both abroad and in some [other] American states.' Lou even identified an earlier precedent for the Court itself: 'conceding that children's courts, though not under that name, were practically provided in South Australia by ministerial order in 1889, legalised by the State Children Act of 1895.'⁴ Nevertheless, he still maintained that North America was the real, or higher, model for the separate jurisdiction concluding that '[t]he systematic development of the idea of the juvenile court ... has taken place in the United States'.⁵

Since the 1960s the theories of Lou and his contemporaries have been extensively revised. 'Social control' scholars of the 1960s and 1970s argued that, far from a benign regulatory regime, the juvenile court was an oppressive institution, established by middle-class agents to manage the urban and immigrant poor.⁶ The next generation pointed out the limits of these arguments, analysing juvenile courts from the perspectives of gender, race and postmodernism, but they too challenged Lou's contentions.⁷ Yet in one important respect Lou's foundational narrative has remained virtually intact. The vast majority of scholars have continued to assume that juvenile courts were an American invention. Studies in the United States have invariably located the source of the separate Court in Chicago in 1899,⁸ and scholars of other jurisdictions have usually pointed to American influences. Historian George Behlmer suggested that the English *Children Act 1908*⁹ was largely inspired by American models, particularly those of Chicago and New York. He acknowledged that some English reformers were aware of the South Australian model, but believed that Chicago and New York, bigger and better promoted, were more important.¹⁰

³ Ibid 19.

⁴ Ibid 19, 15.

⁵ Ibid 15.

⁶ Anthony Platt, *The Child Savers: The Invention of Delinquency* (University of Chicago Press, 1969); Christopher Lasch, *Haven in a Heartless World: The Family Besieged* (Basic Books, 1977); Steven L. Schlossman, *Love and the American Delinquent: The Theory and Practice of 'Progressive' Juvenile Justice, 1825–1920* (University of Chicago Press, 1977); Robert M. Mennel, *Thorns and Thistles: Juvenile Delinquents in the United States* (University Press of New England, 1973).

⁷ Eric C. Schneider, *In the Web of Class: Delinquents and Reformers in Boston, 1810s–1930s* (New York University Press, 1992) 2–13; Elizabeth J. Clapp, *Mothers of All Children: Women Reformers and the Rise of Juvenile Courts in Progressive-Era America* (Pennsylvania State University Press, 1995) 1–18; Ruth M. Alexander, *The 'Girl Problem': Female Sexual Delinquency in New York, 1900–1930* (Cornell University Press, 1995) 1–7; Victoria Getis, *The Juvenile Court and the Progressives* (University of Chicago Press, 2000) 2–7; David Tanenhaus, *Juvenile Justice in the Making* (Oxford University Press, 2004) xxvi – xxviii.

⁸ See for example Getis, above n 7, 9–27; Tanenhaus, above n 7, 4.

⁹ 8 Edw VII.

¹⁰ George Behlmer, *Friends of the Family: The English Home and its Guardians, 1850–1940* (Stanford University Press, 1998) 242–244. Elsewhere at 240 he states that 'the juvenile court [was] first deployed in America.'

Australian legal historians, too, have tended to downplay the significance of their local courts. In his study of Australian social welfare legislation, Brian Dickey noted that Australian states adopted the ‘American technique of the children’s court’ in the early 20th century.¹¹ In the most extensive account to date of Australian children’s courts, John Seymour was also ambivalent about South Australia. He conceded that in 1890 the colony ‘established the elements of a distinctive tribunal which would today be recognised as a children’s court,’ and that it influenced other Australian systems. However he also pointed to Massachusetts as a precedent and suggested that the jurisdiction of the Adelaide Children’s Court was unclear.¹²

Given these ambiguities, it seems worthwhile to look anew at the Adelaide Children’s Court and see what light a detailed historical analysis of its early development can shine on such arguments. Was this Court, as Lou and some Australian scholars have contended, a separate court of sorts, but whose features were derivative and whose jurisdiction was uncertain? Or was it indeed an early example of a juvenile court, but one that, as Behlmer has suggested, lacked the publicity of its more aggressively promoted American equivalents? Alternatively, has it merely suffered from lack of scholarly attention? This article examines the establishment of the Adelaide Children’s Court between 1890 and 1910, drawing primarily on the records of the South Australian State Children’s Council and contemporary legislative debates, before turning to the broader awareness of the Court and its legal influences, at home and abroad. I argue that while some of the Court’s individual attributes were derived from the United States, the Adelaide Children’s Court was Australia’s first juvenile court and indeed the first such court in the English-speaking world. The South Australian model brought together for the first time elements that were subsequently identified as the essential components of children’s courts, and its contemporary impact was considerably greater than later commentators have suggested. The South Australian legislation was the starting point for other Australian children’s courts and the philosophy of those Courts permeated the English *Children Act*. The Adelaide Children’s Court was also another important example of legal innovation in a decade already particularly noteworthy for its expansion of the role of the state in social and economic welfare,¹³ and joins the

¹¹ Brian Dickey, *No Charity There: A Short History of Social Welfare in Australia* (Allen & Unwin, 1987) 99. This argument has been reiterated in a number of more recent publications as well, see Kerry Carrington and Margaret Periera, *Offending Youth: Sex, Crime and Justice* (Federation Press, 2009) 24–5; Daniel King, Andrew Day and Paul Delfabbro, ‘The Emergence and Development of Specialist Courts: Lessons for Juvenile Justice from the History of the Children’s Court in South Australia?’ (2011) 4 *The Open Criminology Journal* 40, 40–41.

¹² John Seymour, *Dealing with Young Offenders* (Law Book Co, 1988) 77–83.

¹³ On the 1890s as a particularly radical decade in South Australian political life see Margaret Anderson and Mandy Paul, ‘In Search of a History of Social Innovation in South Australia’ in *The History and Future of Social Innovation Conference Papers* (Hawke Research Institute for Sustainable Societies, 2009) 5; Eric Richards, ‘Chapter 1 – South Australia Observed, 1836–1986’ in Eric Richards (ed), *The Flinders History of South Australia* (Wakefield Press, 1986) 21–3.

list of South Australian progressive social experiments which some historians have argued made the jurisdiction ‘exceptional’ throughout its history.¹⁴

Part II of this article looks at four stages in the development of the Adelaide Children’s Court, beginning with its executive beginnings in 1890 and subsequent legislative interventions in the 1890s and early 1900s, before turning to the influence of other contemporary Children’s Courts and the introduction of probation in the 20th century. Part III explores the circulation of knowledge about the Court and its legislative legacy in three other jurisdictions: Victoria, New South Wales and the United Kingdom. The paper concludes with a reconsideration of the ‘American innovation’ thesis.

II THE COURT

A The Early Court, 1890–1895

The establishment of a Children’s Court in South Australia was first proposed in the Way Commission’s *Destitute Act Commission Report* in 1885.¹⁵ The Way Commission, named after Chief Justice Samuel Way who chaired the inquiry, had been convened by the Bray Government in 1883 to investigate the operations of the *Destitute Persons Act 1881* (SA) (the South Australian legislation regulating state provision for impoverished adults and ‘neglected’ children).¹⁶ Part Two of the report recommended a distinctive trial system for juveniles. It suggested that all charges against children under 17, for offending or neglect, should be heard at different times from adults. In the city of Adelaide, these cases should not be conducted in the police court. Parents should be obliged to attend the proceeding and an officer of the department should also be present to enquire into the child’s home background and to make recommendations as to sentencing. In particular, a special report should be prepared if a child was to be sent to the reformatory.¹⁷ The report also

¹⁴ Whether South Australia has shown a distinctive developmental pattern in the area of social reform, stemming from its establishment as the first ‘free’ Australian colony with a large population of dissenters, has been much debated by historians, some of whom have argued that this reputation has been exaggerated. Nevertheless, South Australia does have an impressive list of ‘firsts,’ and most historians have agreed that the colony did forge ahead in social and economic legislation in the later decades of the nineteenth century. On this debate see Wilfrid Prest, ‘Preface’ in Wilfrid Prest, Kerrie Round and Carol Fort (eds), *The Wakefield Companion to South Australian History* (Wakefield Press, 2002) xi, xiv–xv; Richards, above n 13, 18–9; Anderson and Paul, above n 13, 5–7.

¹⁵ *Second and Final Report of the Commission Appointed to Report on the Destitute Act 1881* (E. Spiller, Government Printer, 1885) (*‘Destitute Act Commission Report’*).

¹⁶ *Ibid.*, xi. The suggestion originated from Caroline Emily Clark, a founding member of the State Children’s Council, see Alex C. Castles and Michael C. Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia, 1835–1986* (Wakefield Press, 1987) 214.

¹⁷ *Destitute Act Commission Report*, above n 15, xcv.

recommended changes to then current sentencing practices. While the colony had already established a boarding-out scheme for children committed to the care of the state as neglected or destitute, there was no home-based alternative for offending children.¹⁸ The Way Commission highlighted the use of probation, or monitoring in the community, already in use in Massachusetts, and urged that a similar system be adopted in South Australia. It argued that institutionalisation should be a last resort, and if a child could not be dealt with through corporal punishment or a surety, then a government officer should monitor the child at home.¹⁹ If a sentence of imprisonment was imposed, the Commission insisted that this should not be served in an adult gaol and that children should never be brought into contact with adult offenders.²⁰

Elements of this scheme began to be put into effect in 1890, initially without supporting legislation. Frustrated by the failure of amending legislation to pass Parliament in 1887 and 1888, in early 1890 the State Children's Council — the semi-independent body responsible for the management of committed children — persuaded the liberal Cockburn Government to issue a decree establishing separate juvenile hearings in the city of Adelaide. The State Children's Council Annual Report for 1890 noted that in April 'the plan of holding a court at the department for the hearing of all charges ... against girls under 18 years and boys under 16 years' was inaugurated.²¹ The Council justified the provisions as avoiding the contamination of children by adult offenders at the police court as well as 'the degraded and hardening effects of a public trial.' To further separate out youthful offenders, provision was made to remand children at the department pending hearing, rather than in a police lock-up or the Adelaide Gaol.²²

In November 1890 George Guillaume — Secretary of the Department for Neglected Children in the neighbouring colony of Victoria — travelled to Adelaide to see the new Court. He reported on its operations in his yearly departmental report. Guillaume noted that the Court was closed, with 'no outsiders present in the room,' that a departmental officer attended proceedings and that the children's situations were investigated by a government representative who then reported to the Court.²³ Initially not all children were dealt with under the new scheme. In its 1891 report the Council noted that 'efforts to secure the arraignment of children altogether apart from the police court have not been entirely successful'

¹⁸ Ibid xlvii – xlviii.

¹⁹ Ibid xlvii.

²⁰ Ibid.

²¹ South Australia, *Report of the State Children's Council for the Year ending June 30 1890*, Parl Paper No 39 (1890) 4. The distinction between the genders had its precedent in the *Destitute Act*, which also established jurisdiction over boys under 16 and girls under 18.

²² Ibid.

²³ Victoria, *Report of the Secretary of the Department of Neglected Children and Reformatory Schools for the Year 1890*, Parl Paper No 121 (1891) 70–1.

and urged the government to take action.²⁴ By 1892 it documented more success in this regard.²⁵

One of the major difficulties for the Council lay in the Court's lack of a firm legal foundation. Notwithstanding executive support, the Court's legislative basis rested, as John Seymour has argued, on a 'tangle' of existing provisions.²⁶ As in other English-speaking jurisdictions, in South Australia over the course of the 19th century, there had been a gradual extension of summary jurisdiction for children. Under amending legislation in 1884, young offenders could be dealt with summarily for most matters, and first offenders released 'on probation,' although this did not include supervision.²⁷ The *Destitute Act* of 1866–67 provided for 'neglected' children under the age of 16 to be committed to the care of the state if they were found wandering or begging, residing in a brothel, associating with criminals or prostitutes, if they had committed a criminal offence or if their parents were unable to control them.²⁸ After 1881 'destitute' children could also be committed to state care.²⁹ Section 19 of the 1886 *The Destitute Persons Amendment Act 1886* (SA) allowed cases involving neglected children to be held in closed courts.³⁰

Behind all of this, and overseeing the Court's operations, stood the State Children's Council. The Council had been created formally in 1886, when it was separated from the Destitute Board. Its mandate was to manage 'state children' and it consisted of 12 honorary officials, male and female, who supervised the operations of other paid and unpaid officials.³¹ Two of its early members were particularly influential. Caroline Emily Clark (1825–1911), a cousin of the English reformer Florence Davenport-Hill, and the very prominent Catherine Helen Spence (1825–1910) had been instrumental in the establishment of South Australia's boarding-out scheme. They went on to have a prominent role promoting other initiatives for children, including separate courts.

The State Children's Council reports began to publish information about the children processed in the new Adelaide Children's Court from 1892. The report for that year claimed that the Court dealt with 'all boys under 16 and all girls under 18' who were charged with 'any offence whatsoever' or as neglected children.³²

²⁴ South Australia, *Report of the State Children's Council for the Year ending June 30 1891*, Parl Paper No 39 (1891) 5.

²⁵ South Australia, *Report of the State Children's Council for the Year ending June 30 1892*, Parl Paper No 28 (1892) 5–6.

²⁶ Seymour, above n 12, 78.

²⁷ By the *Justices Procedure Amendment Act 1883–1884* (SA) s 13, see Seymour, above n 12, 29.

²⁸ *Destitute Act 1866–1867* (SA) ss 35 and 36.

²⁹ *Destitute Persons Act 1881* (SA) s 3.

³⁰ See Seymour, above n 12, 78.

³¹ *Destitute Persons Act Amendment Act 1886* (SA) s 2.

³² *Report of the State Children's Council for the Year ending June 30 1892*, above n 25, 6.

The Court was held in one of the departmental offices and departmental officials were present to both ‘conduct the cases’ and act as clerk of court, although children were still tried by a Magistrate.³³ In the 1891–92 year, the ‘departmental court,’ as it was called, dealt with 111 children. Fourteen were charged with criminal offences, while 30 were processed as ‘uncontrollable’, five as ‘neglected,’ 51 as ‘destitute’ and 11 as absconders from institutions. The low number of criminal offenders suggests that, despite departmental claims, many children were still appearing in the police courts. Of these 111 children, 69 were sent to the industrial schools (ie, committed to the care of the state), and 14 to reformatories. Seven children were discharged with a caution, 10 were whipped, two were fined and four absconders were ‘ordered bread and water.’³⁴ The following year 207 children appeared before the Court and the number of criminal cases rose substantially, although they were still a minority of all charges, or 71 out of 207.³⁵ In the 1893–94 year, numbers fell to 178, before rising again to 202 in 1894–95. Outcomes remained relatively consistent throughout. In the 1894–95 year, 90 out of 202 children were charged with criminal offences, and the remainder as destitute, uncontrollable or neglected. In all, 88 children were sent to the industrial schools and 35 to the reformatories. Forty-four were whipped and eight fined. Thirteen cases were dismissed and two children were discharged under the *Offenders Probation Act 1887* (SA).³⁶

B *Legislative intervention, 1895–1900*

The 1890 Adelaide Children’s Court contained most of the features that later commentators would deem distinctive markers of a juvenile court system. The Court was constituted at a separate time and place from adult hearings and was held in private, with only those directly affected by the case allowed to participate in hearings. The government welfare department was closely involved at all stages. Separate remand facilities were provided, and children sentenced to imprisonment were not sent to adult institutions but to reformatories. In themselves, many of these features had precedents. Separate hearings for children had taken place in Massachusetts from the 1870s³⁷ and many countries had developed separate institutions for young offenders prior to 1890.³⁸ Many reformers also aspired to separate remand

³³ Ibid.

³⁴ Ibid. Of the remainder, four still had warrants outstanding and one child was discharged because he was no longer a minor when charged.

³⁵ South Australia, *Report of the State Children’s Council for the Year ending June 30 1893*, Parl Paper No 123 (1893) 4.

³⁶ South Australia, *Report of the State Children’s Council for the Year ending June 30 1895*, Parl Paper No 81 (1895) 3.

³⁷ Lou, above n 1, 16.

³⁸ On the early English industrial and reformatory institutions, and their counterparts elsewhere, see Leon Radzinowicz and Roger Hood, *A History of English Criminal Law and its Administration from 1750: Volume Five – The Emergence of Penal Policy* (Stevens & Sons, 1986) 148–161, 172–181, 377–384; on Illinois see Platt, above n 6, 101–114; on Australia generally see Seymour, above n 12, 15–67.

facilities, although this was less widespread before the 20th century.³⁹ What was unique about South Australia was the combination of features. No other jurisdiction in the early 1890s had a special court that managed children's cases from pre-trial to sentence and which was held outside a court house. Even Massachusetts, the pioneer in other respects, scheduled children's cases in the lower courts. The Adelaide Children's Court still lacked two important features of a 'typical' children's court. Firstly, it lacked specially trained magistrates to hear children's cases, which later became a feature of American courts in particular.⁴⁰ Secondly, despite the recommendations of the Way Commission, the first Court did not include a probation scheme and as we have seen, its sentencing outcomes remained fairly conservative. The majority of offending children were sent to reformatories, while destitute and neglected children were customarily committed and then either sent to training institutions or foster homes.

The legislative authorisation that the Adelaide Children's Court lacked took some time to arrive, despite continual agitation by the State Children's Council for the government to establish a formal basis for the Court and to clarify the types of children who could be dealt with by the Council.⁴¹ In 1894 John Hannah Gordon, Chief Secretary in the progressive Kingston Government, introduced a State Children Bill which passed both Houses of Parliament, but lapsed at the end of 1894.⁴² In September 1895 the government, which had meanwhile introduced legislation establishing female suffrage (the first in Australia) and a new system of conciliation and arbitration,⁴³ returned to the subject. The next State Children Bill was introduced by another key reformer, Dr John Cockburn, Minister for Education, and was evidently based on State Children's Council recommendations. As well as formalising children's courts in line with existing practice, the Bill proposed an extended definition of 'neglect', to cover children selling newspapers on the streets at night, a particular bane of the Council, as well as children whose employment 'endangered life, health or safety' — an attempt to better regulate children working in the entertainment industry.⁴⁴ It also, controversially, argued that the government should have the power to detain state children until they turned 21, rather than 18. After much debate, Cockburn moved to limit this to female children, which in turn attracted criticism from advocates of equality. George Ash, member for Albert and a supporter of women's suffrage, argued that this distinction was 'unjust, as the parliament had accepted that men and women

³⁹ Radzinowicz and Hood, above n 38, 624–9.

⁴⁰ Lou, above n 1, 70–8.

⁴¹ *Report of the State Children's Council for the Year ending June 30 1891*, above n 24, 5; *Report of the State Children's Council for the Year ending June 30 1892*, above n 25, 5–6; South Australia, *Report of the State Children's Council for the Year ending June 30 1894*, Parl Paper No 94 (1894) 3.

⁴² South Australia, *Parliamentary Debates*, Legislative Assembly, 5 September 1894, 1216–7 (John Hannah Gordon), and 19 September 1894, 1413 (John Hannah Gordon).

⁴³ Anderson and Paul, above n 13, 5.

⁴⁴ South Australia, *Parliamentary Debates*, Legislative Assembly, 10 October 1895, 1774–6 (John Cockburn), 19 November 1895, 2230 (various), 19 November 1895, 2234–5 (John Cockburn).

had equal political rights,' but the amendment carried.⁴⁵ The State Children's Council campaigned strongly for the Bill, which also, of course, enhanced its own powers. It argued in the *Adelaide Register* in September 1895 that it had been swamped with 'uncontrollables,' but that the 'scope of [the Council's] operations has far outgrown the limits of its legislative authority.'⁴⁶

The *State Children Act 1895* (SA) received royal assent in December 1895, by which time it had become a comprehensive piece of legislation governing many aspects of the lives of state children. The Court provisions were contained in Part IV. Section 31 provided that the hearing of 'all complaints and informations against any child for offences, punishable, on summary conviction, before a Justice' in Adelaide and Port Adelaide should be held at 'some room or place approved of ... by the Chief Secretary and not in any police or other court house'. Outside Adelaide, children's hearings could take place in the police court but only 'at any hour other than that at which ordinary trials are taken ...'⁴⁷ A child was now defined as a boy or girl under 18,⁴⁸ and neglected, destitute and 'uncontrollable' children were all included in the scheme. Section 32 provided that the police could arrest a child suspected of being destitute or neglected without a warrant and bring the child before the Justices. Section 34 allowed parents to bring complaints against 'uncontrollable' or 'incorrigible' children. Although the Act did not state specifically that children's hearings should occur in private, this was generally understood and attracted some debate. Robert Homberg, conservative MP for Gumeracha, argued that clause 31 'provided for an absolute star chamber,' but his objection did not lead to change.⁴⁹ The Act also expanded the definitions of 'destitute,' 'neglected' and 'uncontrollable' in line with Council recommendations. A 'destitute' child was defined as a child who 'has no sufficient means of subsistence ... and whose near relatives are ... in indigent circumstances and unable to support such child'. 'Neglect' now included children under 10 who sold items in the street after 8pm, illegitimate children whose mother was dead (in the absence of other suitable guardians), children under 'unfit' guardianship and 'uncontrollable' or 'incorrigible' children.⁵⁰

As well as confirming changes to Court procedure, Part IV of the Act set up distinctive sentencing regimes, depending on the type of charge for which children appeared. Destitute or neglected children could be 'sent to an institution, to be there detained or otherwise dealt with ... until such child shall attain the age of eighteen years.'⁵¹ 'Uncontrollable' or 'incorrigible' children could either be sent to an institution, or, if they were under 14, whipped. However in a new development, they could also

⁴⁵ Ibid 2231 (John Cockburn, George Ash).

⁴⁶ 'State Children and their Guardians', *Register* (South Australia), 25 September 1895, 4–5.

⁴⁷ *State Children Act 1895* (SA) ss 31(a)–(b).

⁴⁸ Ibid s 4.

⁴⁹ South Australia, *Parliamentary Debates*, Legislative Assembly, 31 October 1895, 2016–7 (Robert Homberg).

⁵⁰ *State Children Act 1895* (SA) s 4.

⁵¹ Ibid s 33.

be released on probation, or ‘subject to the supervision of the Council until [they] attain the age of eighteen years’.⁵² Children placed on probation were to report to the Council ‘at such times and places and in such manner as the Council shall direct.’⁵³ If children failed to report on probation they could be arrested and re-sentenced.⁵⁴ Finally, ‘uncontrollable’ children could be sent to a probationary school for up to three months.⁵⁵ By contrast, probation was not formally available to offending children, for whom there were only three options. Children found guilty of any crime (apart from homicide) could be sent to a reformatory school until they turned 18. They could also be released on a parent’s security for their good behaviour until they turned 18 ‘or during such period as the Judge ... may think sufficient’,⁵⁶ or the case could be adjourned until they had been punished by a ‘near relative’.⁵⁷ Once the punishment (whipping) had taken place, the Court would dismiss the charge. Section 48 recreated the offence of absconding from an institution, punishable both by return to the institution and one month’s extra detention.⁵⁸ Children were customarily supervised until they turned 18, but, after Cockburn’s amendment, the period could also be extended for female wards until they turned 21, on the Council’s recommendation.⁵⁹

After their long campaign for legal change, the State Children’s Council celebrated the new legislation as making the Court ‘absolutely a lawful institution.’⁶⁰ Their jubilation was premature. Ironically, there was a jurisdictional challenge as soon as the Act came into effect. The problem lay in the wording of s 31, which conferred jurisdiction on the Court. Presumably in error, s 31 only provided for separate hearings for children facing summary charges, which excluded a number of common offences, like larceny, which was a felony. To the Council’s indignation, magistrates responded by having theft charges heard ‘in the justices’ room at the police court’ rather than in the departmental court.⁶¹ Perhaps it was magistrates asserting their authority against legal change driven by a welfare authority. This practice continued through 1897, 1898 and 1899, and the Council again found itself in the position of campaigning for legislative amendment. In 1899 the Council forcibly argued that ‘[a] separate court for the trial of all children is a necessary, proper and humane institution’.⁶² Between 1897 and 1899 the Council’s report included two separate sets

⁵² Ibid s 34(c).

⁵³ Ibid.

⁵⁴ Ibid s 35.

⁵⁵ Ibid s 34.

⁵⁶ Ibid s 36(b).

⁵⁷ Ibid s 36(c).

⁵⁸ Ibid ss 48 and 49.

⁵⁹ Ibid s 51.

⁶⁰ South Australia, *Report of the State Children’s Council for the Year ending June 30 1896*, Parl Paper No 81 (1896) 4.

⁶¹ South Australia, *Report of the State Children’s Council for the Year ending June 30 1897*, Parl Paper No 81 (1897) 3.

⁶² South Australia, *Report of the State Children’s Council for the Year ended June 30 1899*, Parl Paper No 63 (1899) 3.

of court statistics, one for the ‘departmental court,’ or the Adelaide Children’s Court and one for the Adelaide Police Court. In 1897, 238 children appeared before the departmental court for summary matters and 66 before the police court for felonies. In 1898, the numbers were 194 and 89 and in 1899, 149 and 114, so the departmental court was losing ground significantly. The new option of probation hardly registered. Thirty-four ‘uncontrollable’ children were charged in 1897, 16 in 1898 and 28 in 1899. In 1899 the Court only released one child on probation. The most common sentences continued to be committal to the industrial school for neglected and destitute children, and committal to the reformatory and whipping for children charged with criminal offences, in both the departmental and police courts.⁶³

C The Court in international context, 1900–1905

The Council’s agitation again eventually resulted in legal change. In October 1900, the new Holder Government introduced a *State Children’s Amendment Act*, which clarified the Court’s jurisdiction. Section 3 of the amending Act noted that ‘the provisions of s 31 (summary offences) ... shall extend to the hearing or trial before a Justice or Justices of all complaints and informations against children ... whether on summary conviction or otherwise.’ The Amendment Act attracted very little debate and was passed without amendment in the Parliament within one month of its introduction.⁶⁴ Numbers at the Departmental Court rose instantly. In the 1899–1900 year, 273 children appeared before the departmental court, 135 of them charged with criminal offences.⁶⁵ The following year 337 children appeared, with 207 offenders, and in 1901–1902, 221 offending and 171 ‘neglected, uncontrollable and destitute’ children had their cases heard in the Adelaide Children’s Court. In the 1902–1903 year numbers rose significantly again to 443, with 288 offenders, before falling back down to 325 in 1904 and 248 in 1905. The Court’s sentencing practices also began to shift, particularly regarding financial penalties, although the option of probation was still employed relatively little. Of the 188 children charged with criminal offences in 1902–1903, only 30 children were committed to the reformatories, while 71 children were whipped, 119 were fined and 60 had their charges withdrawn or dismissed, or were discharged with a caution.⁶⁶ Between 1900 and 1905 only nine children were formally sentenced to probation, although it seems

⁶³ *Report of the State Children’s Council for the Year ending June 30 1897*, above n 61, 3–4, South Australia, *Report of the State Children’s Council for the year ending June 30 1898*, Parl Paper No 92 (1898 – 1899) 3–4; *Report of the State Children’s Council for the Year ended June 30 1899*, above n 62, 3.

⁶⁴ South Australia, *Parliamentary Debates*, Legislative Assembly, 23 October 1900, 286 (John Hannah Gordon).

⁶⁵ South Australia, *Report of the State Children’s Council for the Year ended June 30 1900*, Parl Paper No 63 (1900) 3.

⁶⁶ South Australia, *Report of the State Children’s Council for the Year ended June 30 1903*, Parl Paper No 64 (1903) 4; South Australia, *Report of the State Children’s Council for the Year ended June 30 1904*, Parl Paper No 64 (1904) 4; South Australia, *Report of the State Children’s Council for the Year ended June 30 1905*, Parl Paper No 64 (1905) 10.

that other children discharged under the *Offenders Probation Act 1887* (SA) were also subject to some form of monitoring.⁶⁷ Nevertheless, the availability of probation was definitely extended during these years. Although the *State Children's Act 1895* theoretically only allowed 'uncontrollable' children to be dealt with in this way, of these nine children, three were 'neglected,' two 'destitute' and one was an offender.

This change to sentencing practices took place in an international as well as a local context. By the early 20th century, the South Australian Court was no longer alone in operating a separate children's jurisdiction. Early efforts in Ontario, Canada, from the 1890s to hear children's cases in chambers seemed to have escaped the notice of South Australian campaigners⁶⁸ but they were well aware of contemporary developments in Chicago. In 1899 the Illinois State Legislature established a new Juvenile Court in Cook County, Chicago. Other Children's Courts followed across the midwestern and eastern states, including New York in 1903. Also in 1903, legislation was enacted in Denver, Colorado, under the auspices of the colourful and persuasive Judge, Ben Lindsey.⁶⁹ The Chicago and Denver Courts became extremely well-known, and as the dominant institutions in the 'American origins' narrative, it is worthwhile comparing the main features of these Courts with those in South Australia. The *Illinois Juvenile Court Act of 1899* established jurisdiction over two classes of minors under 16, 'dependent' and 'delinquent' children (broadly speaking children who were deemed to be in need of welfare intervention) and children who had committed criminal offences, although the two overlapped.⁷⁰ The two classes were subject to very similar treatment. The Chicago Court promoted itself as a Court of Chancery, rather than one exercising criminal jurisdiction. Its first Judge, Richard Tuthill, declared that 'no child under 16 years of age shall be considered or be treated as a criminal.'⁷¹ Both dependent and delinquent children became wards of the state, and the legislation mandated that the state was obliged to provide care and discipline equal to 'that which should be given by its parents.'⁷² This included foster placements, release on probation and committal

⁶⁷ See comments in the *State Children's Report for the Year ended June 30 1905*, above n 66, 10, for the unofficial use of probation in this respect.

⁶⁸ The federal government in Canada did not legislate to establish juvenile courts until 1908, but before then some provinces had begun to separate out children's cases and hear them in chambers, see Lou, *Juvenile Courts in the United States*, above n 1, 15; Carolyn Strange and Tina Loo, *Making Good: Law and Moral Regulation in Canada, 1867–1939* (Toronto, 1997) 95–96. This development was apparently unknown (or at least not noted) across Australia, although British reformers later documented it.

⁶⁹ On Lindsey and his reputation see Paul Colomy and Martin Kretzmann, 'Projects and Institution-Building: Judge Ben B. Lindsey and the Juvenile Court Movement' (1995) 24(2) *Social Problems* 191, 197–208; Clapp, above n 7, 105–132. Clapp argues that while Lindsey was an extremely well known Judge, the Chicago judicial model was more influential.

⁷⁰ Richard S. Tuthill, 'History of the Children's Court in Chicago' in International Prison Commission (ed), *Children's Courts in the United States: Their Origin, Development and Results* (Government Printing Office Washington, 1904) 1, 2.

⁷¹ *Ibid* 1.

⁷² *Illinois Juvenile Court Act of 1899*, Ill Laws 131 §21.

to 'reform' institutions.⁷³ Although no separate Court building was set aside initially for juveniles, Chicago Court proceedings mimicked civil, rather than criminal jurisdiction. Minors were not tried but 'investigated' and hearings were informal and held at separate times from adults.⁷⁴

The Denver Court, like the Adelaide Children's Court, operated informally before gaining legislative sanction. In 1899, the Colorado state legislature passed an Act that granted the County Court new powers to deem truant children 'juvenile disorderly persons.'⁷⁵ Over the next four years Judge Lindsey used the provision to process young offenders as well, arguing that they were 'juvenile disorderly persons'. In 1903 Colorado passed *An Act Concerning Delinquent Children*,⁷⁶ which brought offending children specifically within the jurisdiction of a juvenile court. The Act defined 'delinquent children' widely as children who had committed a criminal offence; 'incorrigible' children; children associating with 'thieves, vicious or immoral persons' or 'growing up in idleness or crime'; children knowingly visiting gaming saloons or public houses and children 'wandering the streets at night-time without ... any lawful business or occupation.'⁷⁷ It also encompassed any child who 'wanders about any railroad yards or tracks' or who rode on moving trucks or trains; and children who used indecent language or who were 'guilty of any immoral conduct in any public place or about any schoolhouse.'⁷⁸ 'Dependent' children were not included for constitutional reasons, but they were processed in the Court.⁷⁹ The Colorado legislation, like the Illinois Act, declared that the juvenile court was a Court exercising chancery, or welfare, jurisdiction. The Court's guiding legislative principle was that the child's 'care, custody and discipline ... shall approximate as nearly as may be that which should be given by its parents.'⁸⁰ The Colorado Act again placed considerable emphasis on the probation system. The legislation made three dispositions available for delinquent children. Children could be sent home under the supervision of a probation officer, placed in a foster home or boarded out subject to supervision, or committed to an industrial school. Children under 14 could not be imprisoned at all.⁸¹

⁷³ Lou, above n 1, 20.

⁷⁴ Ibid.

⁷⁵ Ben Lindsey, 'The Juvenile Court of Denver,' in *Children's Courts in the United States*, above n 70, 28, 31.

⁷⁶ The text of the Act is extracted in *Children's Courts in the United States*, above n 70, 168–179.

⁷⁷ Ibid 168.

⁷⁸ Ibid.

⁷⁹ Lindsey noted that the Colorado constitution prohibited legislation dealing with more than one subject, and that dependent children were the subject of an 1895 Act which was judged sufficient to bring their cases into the juvenile jurisdiction. Lindsey himself would have preferred to have included these children in the Juvenile Court legislation, see Ben Lindsey, 'Additional Report on Methods and Results' in *Children's Courts in the United States*, above n 65, 47, 56–8.

⁸⁰ Tuthill, above n 70, 171.

⁸¹ Ibid 169–171.

The Illinois, Colorado and Adelaide Children's Courts had considerable areas of overlap. All three had jurisdiction over 'neglected,' 'dependent' or 'destitute' children, as well as children charged with criminal offences, although in South Australia the upper age limit was higher. Courts were held at separate times from adult offenders, and officials (at least theoretically) tried to make court procedures more 'child friendly.' Only in South Australia, though, did the hearings take place consistently outside court buildings. The Chicago Juvenile Court, as David Tanenhaus has described, had a rather chaotic early life. It first opened in a room in the County Court and then had temporary homes in various buildings in the business district, before returning to the County Court in 1913. A separate juvenile court was not constructed until 1923.⁸² Judge Lindsey also conducted his cases in a County Court room, albeit shifting the furniture around to make it less formal for the children appearing before him.⁸³ South Australia was also distinctive in having its cases heard in private. Chicago reformers aspired to this, but did not actually succeed in obtaining closed courts until the post-war period.⁸⁴

Where the courts differed significantly was in the philosophy underpinning their jurisdictions, and the role of probation. The American courts operated under an overarching welfare, or civil, model. 'Delinquent' children, as we have seen, were formally treated as children in need of protection, with less attention paid to guilt or innocence and more to background and association. The Adelaide Children's Court was still mandated by legislation to try a child, and sentences retained a penal element. Both Chicago and Denver also had special magistrates attached to their courts, while South Australia shared Police Court magistrates. Finally, Chicago and Denver had probation officers from the beginning, although they were initially unpaid in Chicago and overloaded in both.⁸⁵

D *The development of probation, 1906–1910*

While differing in some important ways from its American equivalents, the Adelaide Children's Court was clearly a 'juvenile court.' In some respects, indeed, it superseded its contemporaries, although there were also areas where it fell short of the latest developments. One of those areas was probation, where the American courts definitely took the lead. After 1905, however, both the Adelaide Children's Court and the State Children's Council began to prioritise this form of sentencing. In its 1905–1906 annual report, the Council noted that a paid female probation officer, Miss Cocks, had been appointed in April 1906, 'to enable special attention to be given to delinquent children in their parents' homes, so preventing their becoming a charge on the State'.⁸⁶ At the time of her appointment, there were

⁸² Tanenhaus, above n 7, 23–34.

⁸³ Lindsey, 'Additional Report,' above n 79, 80.

⁸⁴ Tanenhaus, above n 7, 49–50, 53.

⁸⁵ *Ibid* 35–6, 46–7.

⁸⁶ South Australia, *Report of the State Children's Council for the Year ended June 30 1906*, Parl Paper No 59 (1907) 11. There are more notes about the role of the probation officer in Catherine Helen Spence, *State Children in Australia: A History of Boarding*

already 35 children on probation and four more since she had assumed office, a number far exceeding those children recorded in the Court's statistics as 'released on probation'. The Council's notes on those children indicated that most of them were released on probation after committal, so they were presumably children who had been formally 'sent to the industrial schools'. Council delegates, or later the probation officer, already visited these children, monitored their school attendance, and, if old enough, helped them to find work. The Council recorded that '[o]ne girl, licensed on probation as soon as committed, and who had never before kept a situation ... was placed in service at once,' while '[a] little boy ... who had never been to school, now attends school regularly.'⁸⁷ Probation was intended to 'improve' not only the subject children, but their parents and home environments as well. The Council observed with approval that '[s]everal homes that were very dirty and untidy have shown improvement'.⁸⁸

After the appointment of the probation officer, the Council began to record more information about the children released on probation, allowing us to assess more accurately how the South Australian scheme was working. In its 1907 report, the Council noted that there were 34 children on probation as at 30 June 1906, with 40 more placed on probation over the next 12 months. Of these, six were released, 10 turned 18 and 10 were recalled. On 30 June 1907, 48 children remained subject to supervision. Most of the probation children performed well: 40 were rated 'good', and six 'fair', with only two deemed 'indifferent'.⁸⁹ Again, these numbers greatly exceeded those recorded by the Court. The Court statistics indicated that only two children were released on probation that year, both for criminal offences.⁹⁰ The 1908 figures make it clearer what was happening. The report for that year indicated that in the two years since the appointment of the probation officer (1 July 1906–30 June 1908) the Council had released 68 boys and 25 girls on probation but in the vast majority of cases this followed a period of committal in an institution ranging from one month to two years. The children were released on probation after conviction for both criminal offences (reformatory children) and for being 'uncontrollable', 'neglected', 'destitute' and under 'unfit guardianship'.⁹¹ In addition, the Council recorded a new category of child 'paroled by the Court'. 'Besides the [children on probation]' the Council noted, 'there have been 97 children placed under supervision by the Court by the simple process of remanding from time to time, and making the future depend on the report by the inspectress' — in other words, probation on a deferred sentence.⁹²

Out and its Developments (Vardon & Sons, 1907) 106.

⁸⁷ *Report of the State Children's Council for the Year Ended June 1906*, above n 86, 11.

⁸⁸ *Ibid.*

⁸⁹ South Australia, *Report of the State Children's Council for the Year ended June 30 1907*, Parl Paper No 59A (1907) 9.

⁹⁰ *Ibid.* 10.

⁹¹ South Australia, *Report of the State Children's Council for the Year ended June 30 1908*, Parl Paper No 55 (1908) 13.

⁹² *Ibid.* 11.

By 1908, therefore, Adelaide had a probation system, but one operating in a manner quite distinctive from that of courts in the United States. In the United States, probation was an alternative to imprisonment or institutionalisation, designed to keep children in their home environment as long as that home met certain standards.⁹³ Other Australian courts followed this system. In Adelaide, by contrast, probation tended to be employed after children had spent a period in an institution, when the Council (not the Court) decided which children should then be released under supervision.⁹⁴ In its annual report for 1908, the Council noted that it was examining carefully the probation statistics ‘to decide on the length of time needed to accomplish reform of character, as also if detention in an institution [first] is or is not helpful.’⁹⁵ Probation was also used by the Adelaide Children’s Court prior to institutionalisation, but here again it was deployed somewhat differently from other jurisdictions. In the United States and other parts of Australia, probation was used as a final sentence, although further sentencing options were available in the event of unsatisfactory performance. In the Adelaide Children’s Court, sentencing tended to be deferred while the child was ‘on probation’ or parole. The 1908 Court records do not show any children ‘released on probation’ as a final determination.⁹⁶ It is unclear exactly how performance under supervision was reflected in the final outcome. Presumably children who did well had their charges dismissed, and those who failed to improve were committed to institutions after all. Numbers in institutions certainly declined noticeably between 1902 and 1908. In 1902 there were 243 children in industrial, reformatory and probation schools, and 252 in 1903, but after that numbers fell every year, to a low of 190 children in 1908.⁹⁷

Reflecting the movement away from institutionalisation, in 1909 John Brice, Chief Secretary in the short-lived Peake Coalition Government, introduced another *State Children’s Amendment Act*,⁹⁸ which for the first time introduced a form of probation for all children, including offenders. Brice noted in his second reading speech that ‘the State Children’s Council had pushed for the Bill to enable it to better carry on its work’, and much of the Bill enhanced the Council’s administrative powers.⁹⁹ Section 2 of the Amendment Act further expanded the definition of a ‘neglected child’ to include ‘any child ... found in a brothel or house of ill-fame; [a]ny child under fourteen who not being on any lawful business or errand, habitually frequents public streets or places’ between 8pm and 5am; and children under 16 who were found in the bar of a public house (unless they were the child or ward of the licensee) or who ‘on more than one

⁹³ Platt, above n 6, 135; Schlossman, above n 6, 60–3.

⁹⁴ See comments in Seymour, above n 12, 106.

⁹⁵ *Report of the State Children’s Council for the Year ended June 30 1908*, above n 91, 12.

⁹⁶ *Ibid* 14.

⁹⁷ *Ibid* 13.

⁹⁸ 1909 (SA).

⁹⁹ South Australia, *Parliamentary Debates*, Legislative Assembly, 24 August 1909, 62 (John Brice).

occasion' were served with intoxicating liquor in a bar.¹⁰⁰ Section 14 provided that any member of the police force or Council could tender reports regarding neglected children and s 20 allowed courts to punish the parents of criminal or 'neglected' children. The most controversial provision was s 18, which allowed the Council to inspect the home of any illegitimate child under the age of seven without court order, a provision designed to reduce the infant mortality rate and the only provision of the Bill that attracted really vehement debate.¹⁰¹ Finally, s 21 allowed a court to 'place such child in the custody and under the care of the Council' in lieu of committal to an institution, although these children could still be placed in institutions post-release, on the Council's recommendations.¹⁰² With the exception of s 18, the Bill attracted little controversy and passed through Parliament quickly.¹⁰³

As well as formalising the Council's practices with regard to probation, the 1909 Amendment Act further clarified the jurisdiction of the Adelaide Children's Court. A new s 3 replaced s 31 of the 1900 Amendment Act, and stated that:

no information against any child in respect of any offence, whether such offence is punishable on summary conviction or otherwise ... and no information alleging that any child is a destitute, neglected or uncontrollable or incorrigible child, shall be heard in any Court, room or place within the city of Adelaide or Port Adelaide except in such ... rooms ... as are ... approved by the Chief Secretary.

This excluded decisively any possible jurisdictional overlap with the Police Court. As with the introduction of probation under the 1895 *State Children's Act*, though, these two provisions did not lead immediately to a significant change in sentencing practices. In the 1909–1910 year only eight out of 312 children appearing before the Departmental Court were 'committed to the care of the council', while 136 were sent, as before, 'to the industrial schools'.¹⁰⁴ The same year, however, 138 children were released on probation by the Council and 93 children were 'paroled' by the Court. For all these children there was still only one paid probation officer, Miss Cocks, although she evidently continued to be assisted in her duties by Council officers. The Council, according to Catherine Helen Spence, expected that the probation officer would visit the family regularly 'so that the home should be improved as well as the [child]' a task which would have been impossible for one person alone to perform for 235 children.¹⁰⁵

¹⁰⁰ *State Children Amendment Act 1909* (SA), s 2.

¹⁰¹ South Australia, *Parliamentary Debates*, Legislative Assembly, 24 August 1909, 76–97 (various).

¹⁰² *State Children Amendment Act 1909* (SA), s 23.

¹⁰³ South Australia, *Parliamentary Debates*, Legislative Assembly, 29 September 1909, 158.

¹⁰⁴ South Australia, *Report of the State Children's Council for the Year ended June 30 1910*, Parl Paper No 66 (1910) 17.

¹⁰⁵ Spence, above n 86, 106. Miss Cocks' comments, as reported in Spence's book, suggested that she visited some families at least several times over the course of a probation order, see 106–9.

Despite greater legislative support, by the end of the decade it was clear that the Adelaide Children's Court, whose role had been progressively expanded without a concurrent increase in funding, was under considerable financial strain. At an Interstate Congress of Workers Among Dependent Children, held in Adelaide in May 1909, members of the State Children's Council praised South Australian methods, but acknowledged the lack of funding for important initiatives, particularly in non-metropolitan areas. Spence argued that in the few years since the appointment of the first probation officer 'the results had been most remarkable', but that the lack of other probation officers was a 'weakness'.¹⁰⁶ Further, probation officers were only available in Adelaide. In country areas there was no-one at all 'to watch the child'.¹⁰⁷ Spence's comments highlighted one of the major limitations of the South Australian model. While Adelaide had a separate Court, paid officers and, increasingly, dedicated magistrates, country areas had nothing but separate times for hearings. Mr Gray of the Council noted that the Adelaide Court was now attended mostly by one particular magistrate, James Gordon, and in his absence 'men [who] had proved from experience [that they] were capable of dealing with children,' but the country areas were dependent on whoever attended the police courts.¹⁰⁸ One attendee, Mr Harker, recommended that all towns should have a dedicated magistrate, who 'would be a kind of father to the children of the district, and to whom the mothers could apply'.¹⁰⁹ In Adelaide the Court itself, which was still housed in the State Children's Council building, was also showing its age. In its 1909 report, the Council reported that 'more accommodation is urgently required. These premises are old and much infested with rats and ... [and] the accommodation is most inconvenient and inadequate'.¹¹⁰

III THE COURT'S LEGACY

Adelaide may have had a Children's Court, but how many people outside South Australia knew of its existence? In his discussion of English children's court legislation, George Behlmer acknowledged the South Australian Court, but thought it insignificant on the international scale, a victim of Adelaide's small size and American campaigners' more sophisticated publicity machines. He argued '[w]ith the exception of a few brief notices in English newspapers ... the Australian scheme remained far less visible than its slightly more recent counterparts in Chicago, New York and Denver'.¹¹¹ It is certainly true that the South Australian Court never gained the reputation of either Chicago or Denver internationally, though in Australia the three were often mentioned together. But to say that the Adelaide Children's Court had negligible impact outside its own borders is an under-estimation. The Court was publicised from the early 1890s, gained even wider recognition after 1900, and

¹⁰⁶ *Dependent Children: Interstate Congress of Workers* (Adelaide: W.K. Thomas, 1909) 54.

¹⁰⁷ *Ibid* 203.

¹⁰⁸ *Ibid* 49.

¹⁰⁹ *Ibid* 169.

¹¹⁰ South Australia, *Report of the State Children's Council for the Year ended June 30 1909*, Parl Paper No 70 (1909) 14.

¹¹¹ Behlmer, above n 10, 242–3.

arguably had more concrete legislative influence in Australia and England than any of the American models. Word of the new court had spread widely as early as 1892. The State Children Council's report for that year noted proudly that the Adelaide Children's Court had attracted commentary in the *Review of Reviews*; the Nebraskan *Industrial School Courier*; the *Child's Guardian*, the journal of the National Society for the Prevention of Cruelty to Children ('NSPCC'); the London *Philanthropist*; and the annual report of the Howard Association. The notice in the *Child's Guardian* was written by Benjamin Waugh, NSPCC President and a long-standing supporter of separate tribunals for children. Waugh argued that '[i]n South Australia the experiment of such a court has been tried with immense advantages to the criminal and unhappy children of the colony ... The time is well-nigh to make such a departure in the mother country.'¹¹²

The actual influence of the South Australian Court can be charted in more detail through an analysis of three comparable jurisdictions that established Children's Courts in the decade after 1900. In Victoria, a campaign for a separate Court, which began shortly after the Adelaide Children's Court was established in 1890, finally resulted in a *Children's Court Act* in 1906. In New South Wales, similar pressure led to the *Neglected Children and Juvenile Offenders Act* in 1905, which followed even more closely the South Australian example. In the United Kingdom, the Asquith Liberal Government introduced the *Children Act* in 1908, which provided for separate hearings and sentencing principles for juvenile offenders. South Australia was not the only model for any of these pieces of legislation. They all drew on their existing schemes for dealing with neglected children and young offenders, and they also looked to the American Courts for further inspiration. Nevertheless, the model of modified criminal procedure which these three Courts adopted was clearly based on that of Adelaide, reflecting both the widely circulated information about the Adelaide Children's Court and a close relationship between local reformers and South Australian campaigners like Spence.

A Victoria

The South Australian Court attracted interest in the neighbouring colony of Victoria from the moment of its establishment. On 14 November 1890, George Guillaume, Secretary of the Department for Neglected Children, gave a speech to the Australasian Charities Conference in Melbourne. Guillaume, already an advocate for separate sentencing principles for minors, the probation scheme and removing children from adult gaols, used the opportunity to advocate for a separate court for offending and neglected children. Basing his recommendations explicitly on South Australia, Guillaume suggested these children 'should ... be dealt with by a special court, presided over ... by an experienced stipendiary magistrate.' Prior to the court hearing, a Department agent should investigate the child's circumstances.¹¹³

¹¹² *Report of the State Children's Council for the Year ending June 30 1892*, above n 25, 17.

¹¹³ George Guillaume, 'Neglected Children' and 'Wards of the State' in *Proceedings of the First Australasian Conference on Charity, held in Melbourne 11–17 November 1890* (Robert S. Brain, Government Printer, 1891) 103.

In country courts, children's cases should at least be heard apart from other matters. In addition, Guillaume recommended that children always be remanded separately from adults.¹¹⁴ Guillaume reiterated his support for separate courts in his department's annual report for 1890, which 'strongly recommend[ed] the adoption of the like course for this colony.'¹¹⁵ Guillaume argued that a 'special court' for neglected and offending youth, presided over by 'special magistrates,' would spare children 'the undesirable and injurious associations of the police court, and also of the lock up or ... gaol.'¹¹⁶

Guillaume's interest in juvenile courts spurred on the establishment of a children's court reform movement, made up largely of men and women working for Melbourne's numerous private charitable organisations and youth associations, as well as a few sympathetic government officials. In August 1891 this coalition of reformers produced a report which recommended the establishment of a separate children's court in the city of Melbourne, 'where all cases of children be dealt with apart from all police court business and surroundings.' As in South Australia, in the suburbs or country areas where separate buildings were not available, children's matters should be heard before all other police court business, and again like Adelaide, the report also recommended that hearings be conducted *in camera*. Separate sentencing options were endorsed, prioritising education or monitoring at home. The report also suggested that 'lads charged with petty offences' could be whipped, either by a Court officer or parent.¹¹⁷ The location of the Melbourne Court was not determined, although the Gordon Institute, a charity specialising in work placements and leisure facilities for adolescent boys, had offered earlier in the year to host a 'little court' to hear truancy cases.¹¹⁸ Although the Victorian Government did not respond as enthusiastically as had been hoped to the proposal, successive secretaries of the Department for Neglected Children continued to agitate for change. In 1892 Guillaume's replacement, Thomas Millar, hoped that 'the very important reform lately brought into operation in South Australia, where children's cases are dealt with in a special court ... will yet receive favourable consideration.'¹¹⁹ The daily newspaper *The Age*, with its influential editor David Syme, also threw its weight behind the new court, publicising information about reformers' meetings and Juvenile Court publications.

Children's Courts did not progress further in Victoria in the 1890s, falling victim to the colony's severe financial depression and conservative governments unwilling to

¹¹⁴ Ibid 105.

¹¹⁵ *Report of the Secretary of the Department of Neglected Children and Reformatory Schools for the Year 1890*, above n 23, 21.

¹¹⁶ Ibid 72.

¹¹⁷ 'Treatment of Neglected Children – Recommendations to the Government', *The Age* (Melbourne), 4 August 1891, 6.

¹¹⁸ 'The Care of Neglected Children – Deputation to the Government', *The Age* (Melbourne), 17 February 1891, 6.

¹¹⁹ Victoria, *Report of the Secretary of the Department for Neglected Children and Reformatory Schools*, Parl Paper No 35 (1893) 4.

incur extra expenditure. Public interest in a separate jurisdiction revived after 1900, however, with Adelaide once again a key inspiration. On 11 August 1900 *The Age* published a lengthy article on ‘Juvenile Immorality.’ Charles Strong, Minister of the Australian Church, suggested that young people should be removed from ‘police courts, public houses and other places where temptation is particularly strong.’¹²⁰ In December 1900, the Victorian *Charity Review*, publication of the Charity Organisation Society, also came out in favour of children’s courts, maintaining that ‘it is not beneficial to catch a child and then propel him through the police court ...’¹²¹ The article drew attention to the establishment of a new juvenile court in Chicago, as well as the South Australian model.¹²² In March 1901, the journal *Woman’s Day*, edited by Spence’s friend and fellow campaigner, the feminist Vida Goldstein, published a letter from Spence which advocated strongly for the South Australian ‘court of quiet inquiry’, rather than the police court ‘with its low, degrading surroundings.’¹²³ The Adelaide Children’s Court was given further and very influential publicity in an article by the Melbourne journalist Alice Henry, another friend of both Spence and Goldstein. ‘A Children’s Court of Justice,’ published in *The Argus* on 12 September 1903, documented a typical afternoon’s session at the Adelaide Children’s Court, which Henry had observed on a visit to South Australia. Henry emphasised the Court’s informal setting, ‘a plain little room in a plain building’, which resembled a school room more than a court. The Court was held in private. Lawyers rarely attended and ‘desperadoes’ who might distract the child were banned.¹²⁴

Victorian reformers’ efforts were finally rewarded when the Bent Government agreed somewhat reluctantly to introduce legislation establishing children’s courts in mid-1906. The *Children’s Court Act 1906* (Vic), which passed parliament in December, decreed that ‘[a] Children’s Court ... shall be held at every place within the State of Victoria where a Court of Petty Sessions is to be held.’¹²⁵ Like the South Australia model, the Victorian Act established jurisdiction over both neglected and offending children, with an upper age limit of 17,¹²⁶ although it was more limited in some respects than its predecessor. Unlike their South Australian counterparts, Victorian children’s courts were all allowed to sit in court buildings, albeit at different times from ordinary business, and either an ordinary or ‘special’ magistrate could hear children’s cases.¹²⁷ In its sentencing provisions, however, the Victorian Act was more expansive. Section 7 allowed the government to appoint

¹²⁰ ‘Juvenile Immorality – Its Extent, Causes and Remedies’, *The Age* (Melbourne) 11 August 1900, 13.

¹²¹ *Charity Review* (Melbourne) Volume 1, No 4, December 1900, 5.

¹²² *Ibid.*

¹²³ Catherine Helen Spence, ‘Children and the State in South Australia’, *Woman’s Sphere* (Melbourne), March 1901, 59.

¹²⁴ Alice Henry, ‘A Children’s Court of Justice’, *The Argus* (Melbourne), 12 September 1903, 4.

¹²⁵ *Children’s Court Act 1906* (Vic) s 6.

¹²⁶ *Ibid* s 2.

¹²⁷ *Ibid.*

probation officers and s 10 noted that ‘any child may be released by the Court on probation’, although other sentencing options were retained. Imprisonment for children under 12 was abolished, and children over 12 could be sentenced only to a maximum of six months’ imprisonment.¹²⁸ The Act also mandated that children were to be remanded in separately from adults.¹²⁹ John Mackey, Minister for Lands, who introduced the Bill, argued that the Act was designed ‘to cure an evil which undoubtedly exists at the present time [where] children of immature age ... are hauled before the Courts, and get accustomed to the Courts and the Court procedure.’¹³⁰ South Australia was less cited in second reading speech debates than the more recent courts in Denver and New South Wales, although William Watt, Liberal MP for Essendon and a cautious supporter of the Bill, reminded his colleagues that ‘the children’s court system had [already] become firmly implanted in ... South Australia.’¹³¹

B *New South Wales*

As in Victoria, in New South Wales the establishment of Children’s Courts followed agitation by groups of charitable reformers, with the support of sympathetic politicians and government employees. The first official mention of the South Australian regime in New South Wales came in 1897, when Captain Frederick Neitenstein, newly appointed Comptroller-General of Prisons, recommended the establishment of separate tribunals for juvenile offenders in his annual prisons report. Neitenstein, formerly superintendant of the training ships *Vernon* and *Sobraon*, cited the Adelaide Children’s Court as his inspiration.¹³² The campaign for Children’s Courts in New South Wales accelerated in the early 20th century. In August 1902, an alliance of boys’ brigades and charitable institutions attended upon Bernhard Wise, Attorney-General in the reformist See Government, to request the introduction of legislation regulating street selling by minors. Wise agreed that a licensing system was necessary, and announced that he had been circulating a draft Bill dealing not only with neglected children, but the establishment of Children’s Courts. He argued that ‘based on the experience of South Australia, ... [i]t was in the highest degree desirable that children should be kept as far as possible from the tainting influence of police courts.’¹³³ Neitenstein, who was given a copy of the draft Bill in acknowledgement of his expertise in the area, was interviewed by the *Sydney Morning Herald* a few days later. As anticipated, he threw his support behind the new legislation, agreeing that ‘the establishment of courts to which children could be brought instead of to the police courts,’

¹²⁸ Ibid ss 26(1), 27(1).

¹²⁹ Ibid s 18(4).

¹³⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 28 November 1906, 3201 (John Mackey).

¹³¹ Ibid, 3207 (William Watt).

¹³² Cited in New South Wales, *Parliamentary Debates*, Legislative Council, 15 October 1902, 3362 (Bernhard Wise).

¹³³ ‘Neglected Children – Outlines of a New Bill – The Attorney-General’s Proposals – Deputation of Boys’ Brigades’, *Sydney Morning Herald*, 27 August 1902, 6.

would remove young people from ‘the contaminating influence’ of the ordinary court system.¹³⁴

In September 1902 Wise introduced the legislation into the Legislative Council. Like the South Australian Act, the new statute was entitled the State Children Bill, and in other respects also it mirrored its South Australian predecessor. The Bill, as Wise stated in his second reading speech, established ‘sole and exclusive jurisdiction over all infants, whether under this law or the common law or any statute.’¹³⁵ The Bill provided for all neglected children and juvenile offenders under 18 to be dealt with by a ‘special court’. In Sydney and large towns, this court would sit in separate premises from the police court, and would be held in private. In smaller areas, the court would sit at different times from the police court. The Bill would be administered by the State Children’s Relief Board, the government agency that dealt with applications for relief and committals to institutions, and children could only be made state wards by the children’s court.¹³⁶ Although obviously drawing on South Australia, Wise in fact cited Massachusetts as the earliest example of a separate jurisdiction.¹³⁷ Arthur Renwick, member for East Sydney prior to his life appointment to the Legislative Council, promptly interjected that there was no need to go as far as the United States for relevant models. ‘[I]n South Australia they have had these Courts for a considerable period, and it is there that we shall have to go to learn our lessons on the subject,’ he pointed out.¹³⁸ The Bill was endorsed by charitable workers,¹³⁹ but hotly debated amongst parliamentarians on both sides of politics for its extensive definition of neglect, the role of the State Children’s Council, the age limit of the jurisdiction and whether children’s courts should be heard in private.¹⁴⁰ Ultimately, the Bill failed to pass the Legislative Assembly the following year after the Opposition speaker, John Charles Fitzgerald, argued successfully that the Legislative Council was out of order for appropriating finances in the Bill.¹⁴¹

Following an unsuccessful attempt to pass similar legislation in 1903, in July 1905 Charles Wade, Attorney-General in the Carruthers Government, introduced new legislation, the Neglected Children and Juvenile Offenders Bill 1905 (NSW), this time directly into the Legislative Assembly. This Act, which passed both Houses in September 1905, was significantly modified, reducing the scope of the term

¹³⁴ ‘Neglected Children – Interview with Captain Neitenstein’, *Sydney Morning Herald*, 29 August 1902, 7.

¹³⁵ New South Wales, *Parliamentary Debates*, Legislative Council, 24 September 1902, 2931 (Bernhard Wise).

¹³⁶ *Ibid*, 15 October 1902, 3357–8 (Bernhard Wise).

¹³⁷ *Ibid*, 15 October 1902, 3362 (Bernhard Wise).

¹³⁸ *Ibid*, 15 October 1902, 3650 (Arthur Renwick).

¹³⁹ See reference to charitable agitation in *ibid*, 15 October 1902, 3354 (Bernhard Wise).

¹⁴⁰ See debates in *ibid*, 15 October 1902, 3354–67, 22 October 1902, 3643–56, 29 October 1902, 3902–12.

¹⁴¹ ‘State Children Bill – Action of the Legislative Assembly – Statement by the Attorney-General’, *Sydney Morning Herald*, 18 September 1903, 8.

‘neglect’,¹⁴² leaving control of institutions with the Minister for Public Instruction,¹⁴³ and bringing the age limit of the jurisdiction down from 18 to 16.¹⁴⁴ In its provisions for children’s courts, however, the new Act was little changed. The Act provided for the establishment of ‘special courts, to be called children’s courts’, which were to be presided over by specially trained magistrates. Children’s courts could be held in a separate building, although this was not mandatory. If held at the local police court, they were to be held at different times from other court business. Hearings were private and the courts were to be held, if possible, near to children’s remand facilities, or ‘shelters’.¹⁴⁵ The Act, again like the South Australian model, modified criminal procedure rather than attempting to incorporate American practices. The New South Wales Children’s Court had jurisdiction over two categories of youth under 16; neglected children and children charged with all summary and indictable offences except homicide.¹⁴⁶ Neglected and offending children could be released on probation, committed to the care of an asylum or suitable person, or committed to an institution. The Children’s Court had the additional power to sentence children found guilty of criminal offences ‘according to law.’¹⁴⁷ Imprisonment was not outlawed, but the Act mandated that the Minister be notified in such cases, and the Minister had the power to send that child to an institution instead.¹⁴⁸ The *Sydney Morning Herald* also strongly supported the new legislation. In January 1905 it reprinted Alice Henry’s article on the Adelaide Children’s Court,¹⁴⁹ followed by an article on the New York Juvenile Court in July 1905.¹⁵⁰

In addition to serving as a legislative model, the Adelaide Children’s Court was clearly the inspiration for the practical operation of the Sydney Children’s Court, which began sitting in October 1905. On 2 October 1905 the *Sydney Morning Herald* noted that A N Barnett, the City Coroner, had been appointed as the first ‘special Magistrate’ of the new Court, and outlined the arrangements for hearings. Like the Adelaide Children’s Court, the Children’s Court in Sydney would sit away from the police court, at Ormonde House in Paddington, the depot for neglected children. To avoid the ‘appearance of a court’, the paper noted, Mr Barnett would ‘sit in a room furnished with a table and a few chairs, but [with] no provision for a gaping public.’¹⁵¹ *Herald* journalists were also present at the opening of the Court on 3 October 1905, and noted, in accordance with the plan, that the new Court was

¹⁴² *Neglected Children and Juvenile Offenders Act 1905 (NSW)* s 4.

¹⁴³ *Ibid* s 7.

¹⁴⁴ *Ibid* s 4.

¹⁴⁵ *Ibid* ss 9–13.

¹⁴⁶ *Ibid* ss 24, 26.

¹⁴⁷ *Ibid* s 24.

¹⁴⁸ *Ibid* ss 24, 30.

¹⁴⁹ Alice Henry, ‘Juvenile Courts’, *Sydney Morning Herald*, 25 January 1905, 11.

¹⁵⁰ ‘Children’s Courts’, *Sydney Morning Herald*, 6 July 1905, 10.

¹⁵¹ ‘Children’s Courts – Magistrate Appointed’, *Sydney Morning Herald*, 2 October 1905, 10.

constituted in ‘a cosy little room at Ormonde House’.¹⁵² The magistrate sat ‘at the head of a long table’, and Dr Mackellar, President of the State Children’s Relief Board and A W Green, a boarding out officer, also attended the hearing. ‘Two or three constables in plain clothes’ and the children (standing) and their parents made up the other attendees. Barnett noted that the purpose of the Act was to ‘reclaim, assist and encourage, by kindly methods, those children who had not sinned against the civil law but whose mode of life suggested that their doing so was only a matter of time, as well as to reclaim and reform those who had broken the law ...’¹⁵³ As in South Australia, Barnett adjourned the further hearing of the case for a few days to allow a report to be prepared about the three boys who were the Court’s first subjects.¹⁵⁴ The friendly atmosphere was promptly put to the test by the escape of the three boys from custody that evening, Ormonde House not yet having special security arrangements.¹⁵⁵

C United Kingdom

England followed a similar pattern to Victoria and New South Wales. Early publicity about the new jurisdiction in the 1890s was followed by a period of hiatus. Interest in Juvenile Courts revived in the early 20th century, before culminating in legislative intervention in 1908. As we have already seen, a number of prominent British organisations had documented the existence of the new court as early as 1892. The Howard Association, England’s premier prison reform league, observed in its 1891 annual report that ‘[in providing] that juvenile offenders awaiting trial shall not be kept in lock-ups or at police courts, but in some other suitable place ... the colony [of South Australia] is in advance of the mother nation and of other nations.’¹⁵⁶ The Adelaide Children’s Court was also cited in the Howard Association’s publication of papers from the World Prison Congress, held in Paris in 1895 and attended by delegates from Europe, Britain and the Americas. In the ‘Juvenile Offenders’ section, a M. Moldenhauer described the appointment of special magistrates to hear children’s cases in Warsaw as well as arrangements made by jurisdictions in America and Australia to avoid remanding children and adults together. He observed ‘[i]n this matter, Warsaw and Massachusetts and some of the Australian colonies are in advance of Great Britain’.¹⁵⁷

The Adelaide Children’s Court gained more widespread attention after 1903, in the wake of political agitation about children’s wellbeing and national fitness that

¹⁵² ‘The Children’s Court – a Novel Experiment – opened by Mr A. N. Barnett’, *Sydney Morning Herald*, 4 October 1905, 6.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ They were found at home that evening and recaptured, although the youngest boy escaped again two days later, see *ibid* and ‘Children’s Court’, *Sydney Morning Herald*, 9 October 1905, 9.

¹⁵⁶ *Report of the State Children’s Council for the Year ending June 30 1892*, above n 25, 17.

¹⁵⁷ *The Paris Prison Congress 1895 Summary Report* (Howard Association, 1896) 11.

followed a public scandal about the poor physical condition of working-class Boer War recruits.¹⁵⁸ On 27 October 1903, *The Times* printed a letter from Florence Davenport-Hill on Children's Courts in Australia. Davenport-Hill was a prominent reformer who had campaigned since the 1860s against the confinement of young people in workhouses, and the author of the well-known *Children of the State*,¹⁵⁹ which promoted the boarding out of such children. She was also the cousin of Emily Clark, had visited Australia herself,¹⁶⁰ and had considerable knowledge about Australian developments. Davenport-Hill's letter included extracts from Henry's article, and she noted that she had written to *The Times* in the hopes that 'this clear account of [the children's court's] practical workings in another part of the Empire may aid in establishing it in the mother country.'¹⁶¹ The article sparked immediate interest amongst children's welfare campaigners across Britain. In July 1904 the English Inter-Departmental Committee on Physical Deterioration included a recommendation that juvenile offenders be dealt with in separate courts by 'specially selected magistrates.'¹⁶² The State Children's Association, a group of prominent children's charities, adopted the establishment of separate Children's Courts as a policy platform the same year.¹⁶³ In the absence of national legislation, a number of cities began to set up their own tribunals. By 1906, there were de facto Children's Courts operating in Manchester, Birmingham, Dublin, Belfast, Cork and Glasgow, amongst others, and some London boroughs scheduled children's cases at different times.¹⁶⁴ Alice Henry, who was travelling through Britain in late 1905, visited a number of these courts, reporting enthusiastically on their establishment at home. She may have provided practical advice as well.¹⁶⁵

¹⁵⁸ On this 'crisis' see Richard Soloway, 'Counting the Degenerates: The Statistics of Race Deterioration in Edwardian England' (1982) 17 *Journal of Contemporary History* 137, 137–8, 147–51; Daniel Pick, *Faces of Degeneration: A European Disorder, c. 1848–c. 1918* (Cambridge University Press, 1989) 185–6; Vanessa Heggie, 'Lies, Damn Lies, and Manchester's Recruiting Statistics: Degeneration as 'Urban Legend' in Victorian and Edwardian Britain' (2007) 63(2) *Journal of the History of Medicine and Allied Sciences* 178, 179–81.

¹⁵⁹ Florence Davenport-Hill, *Children of the State* (Macmillan and Co, 1868).

¹⁶⁰ Richards, above n 12, 17.

¹⁶¹ Florence Davenport-Hill, 'A Court of Justice for Children', *The Times* (London), 27 October 1903, 14.

¹⁶² Inter-Departmental Committee on Physical Deterioration, *Report of the Inter-Departmental Committee on Physical Deterioration*. Volume One – Report and Appendix. (Wyman & Sons, 1904) 90 (recommendation 40).

¹⁶³ 'Separate Courts of Justice for Children', *The Times* (London), 3 October 1904, 10.

¹⁶⁴ Spence, *State Children in Australia*, above n 86, 52; Diane Kirkby, *Alice Henry – The Power of Pen and Voice: The Life of an Australian-American Labor Reformer* (Cambridge University Press, 1991) 38. Behlmer, though, also notes the influence of Denver in Birmingham, see Behlmer, above n 10, 244. There is a list of the early British Children's Courts in Florence Davenport-Hill's letter, 'Children in Police Courts', *The Times* (London), 20 June 1906, 17.

¹⁶⁵ See for example Henry's report about the Children's Court in Glasgow, in 'Children's Courts', *The Australian Herald* (Melbourne), 1 December 1905, 42.

The Adelaide Children's Court was also cited as a major inspiration during the debates leading up to the enactment of the *Children Act*,¹⁶⁶ a comprehensive piece of legislation that passed Parliament in 1908 as part of the new Liberal Government's social reform initiatives.¹⁶⁷ Adelaide was, again, not the only influence on this Act. George Behlmer has noted how British reformers were influenced by the American Courts and their probation systems, especially the charismatic figure of Ben Lindsey.¹⁶⁸ Nevertheless, an openly expressed motivation behind the government's decision to legislate for a separate jurisdiction was to keep up with its former colonies. On 24 March 1908, in the Commons debate following the Bill's second reading speech, Thomas Shaw, Lord Advocate, noted (somewhat inaccurately) that juvenile hearings had precedents in the United States from 1863, Canada from 1884 and South Australia from 1895 and that '[the] example from our dominions across the seas is worth following.' He maintained that '[i]n all these cases the record is unflinching that the effect of separate treatment of the children ... has been wholly helpful.'¹⁶⁹ On 1 April 1908, Mr Maclean, MP for Bath, likewise argued that '[t]hese things had been dealt with effectually in America, even in Egypt, and certainly in Australia, and thousands of young people had been rescued from an undesirable life and surroundings.'¹⁷⁰ Perhaps partly due to the colonial imperative, the *Children Act* had bipartisan support from the beginning. Even the conservative editor of the *Times* offered his support for Children's Courts and other measures to protect children, albeit regretting 'that it should be necessary for the criminal law to meddle with such matters.'¹⁷¹ He believed that the Bill was an 'honest attempt to cut at the root of certain evils', given that '[t]he hope of the future is in the children.'¹⁷²

Although Australia was only one of the countries mentioned in these debates, like the Australian courts the new English jurisdiction modified the criminal law rather than adopting new forms of civil procedure. Part V of the *Children Act* established separate juvenile courts for young offenders. Section 111 mandated that children under 14 and young persons between 14 and 16 who were charged with criminal offences should have their charges heard 'in a different building or room' or 'on different days or at different times' from 'ordinary sittings.'¹⁷³ The courts were held

¹⁶⁶ 1908 (UK).

¹⁶⁷ On this see Behlmer, above n 10, 245; Kate Bradley, 'Juvenile Delinquency and the Evolution of the British Juvenile Courts, c. 1900–1950' (2008) 14 *History in Focus* 1, 1–8; Kate Bradley, 'The Children Act 1908: Centennial Reflections, Contemporary Perspectives' (2009) 68 *History Workshop Journal* 303, 303–5.

¹⁶⁸ Behlmer, above n 10, 244 – 245.

¹⁶⁹ United Kingdom, *Parliamentary Debates*, House of Commons, 24 March 1908, vol 186, col 1260 (Thomas Shaw). The United States example referred to Massachusetts, the Canadian presumably to Ontario, although as we have seen that was a somewhat later development.

¹⁷⁰ United Kingdom, *Parliamentary Debates*, House of Commons, 1 April 1908, vol 187, col 579 (Mr Maclean).

¹⁷¹ 'The Children's Bill – Editorial', *The Times* (London), 15 February 1908, 9.

¹⁷² 'The Children's Bill – Editorial', *The Times* (London), 3 April 1908, 11.

¹⁷³ *Children Act* 1908 8 Edw VII Ch. 67, s 111(1).

in private, although the press were admitted.¹⁷⁴ Again like its Australian predecessors, s 102 abolished any form of imprisonment for children as well as the sentence of ‘penal servitude’ for young persons, while s 107 set out a variety of sentencing options for youth, including release on probation.¹⁷⁵ Children on remand were to be held at different facilities from adults.¹⁷⁶ The *Children Act* was distinctive from its Australian equivalents in one key respect. Unlike South Australia, New South Wales and Victoria, children brought in as neglected children under the *Industrial Schools Acts*¹⁷⁷ were not specifically included in the British scheme of separate courts. They were dealt with separately in Part IV of the *Children Act*, which did not mandate that such applications should be heard in a juvenile court.

IV CONCLUSION

This article has explored two issues: whether the Court established in Adelaide in 1890 can legitimately be called the first ‘juvenile court’ in the English-speaking world and the extent of contemporary knowledge about and legislative influence of the Court. The Adelaide Children’s Court, as we have seen, was very much a work in progress in its first 20 years. From its outset it was promoted as a welfare initiative and it began operating on fairly shaky legal foundations in 1890. The first legislative intervention in 1895 created new problems even as it established a concrete basis for a separate jurisdiction. Subsequent legislative amendments in 1900 and 1909 expanded further the Court’s jurisdiction and its sentencing options, although without allocating funding commensurate with the Court’s new responsibilities. The Court shared some features with its better-known American cousins, but in other respects was quite different, particularly in its approach to criminal responsibility and the use of probation.

Difference, though, does not negate the achievements of the South Australian Court. From 1890, most charges against children in the city of Adelaide were heard at a separate, closed, court, not located in a legal building, with different procedures and sentencing options. While individual features of this Court had predecessors, it was South Australia that first combined them into a recognisable juvenile jurisdiction, almost a decade before the equivalent development in Chicago. The Adelaide Children’s Court did not gain the huge contemporary publicity of either Chicago or Denver, but it was not as obscure as some later commentaries have suggested. From a very early stage, the Adelaide Court attracted attention in other Australian colonies, Britain, parts of the United States and Europe. After 1900 it exercised a strong influence on legislative schemes in Victoria, New South Wales and the United Kingdom, so much so that these courts might be described as examples of

¹⁷⁴ Ibid s 111(4).

¹⁷⁵ Ibid s 107(c).

¹⁷⁶ Ibid ss 95, 108.

¹⁷⁷ These Acts were: the *Industrial Schools Act* 1857 20 & 21 Vict, Ch 48; *Industrial Schools Act* 1866 29 & 30 Vict, Ch 118; *Industrial Schools Act Amendment Act* 1880 43 & 44 Vict Ch 15; *Reformatory and Industrial Schools Act* 1891 54 & 55 Vict, Ch 23; *Industrial Schools Acts Amendment Act* 1894 57 & 58 Vict Ch 33.

a distinctive ‘Anglo-Australian’ model of juvenile jurisdiction. Further work could profitably be done to see what influence the Court might have had on reformers in the United States and other former British colonies, and, at home, how the legal profession and other parties reacted to this avowedly welfare legislation and the expanding role of the State Children’s Council. Even so, it is fair enough to conclude that the Adelaide Children’s Court was indeed the ‘pioneer’ of which its founders boasted.

‘GUILTY, YOUR HONOUR’: RECENT LEGISLATIVE DEVELOPMENTS ON THE GUILTY PLEA DISCOUNT AND AN AUSTRALIAN CAPITAL TERRITORY CASE STUDY ON ITS OPERATION

ABSTRACT

The overwhelming majority of defendants in Australian criminal courts plead guilty and most Australian jurisdictions include a guilty plea in their sentencing legislation as a mitigating factor. However, the application of this reduction varies significantly. In an attempt to provide a better understanding of this aspect of sentencing, this article examines the legislation and case law on guilty pleas, with a particular focus on the Australian Capital Territory. The article contextualises this discussion by examining the High Court’s position on sentence reductions for guilty pleas, as well as the New South Wales Court of Criminal Appeal’s guideline judgment in *R v Thomson; R v Houlton* (2000) 49 NSWLR 383. Recent key legislative amendments in relation to quantifying guilty pleas are then discussed, revealing the often subtle but meaningful differences in the legislation across Australia. This is followed by a case study analysis of 300 recent cases in the Australian Capital Territory Supreme Court, which provides important insight into the practical operation of the discount in a jurisdiction that has traditionally seen little sentencing research. The article concludes with some observations on future directions for policy and practice.

I INTRODUCTION

Nearly 80 per cent of defendants in Australian criminal courts plead guilty.¹ Every Australian jurisdiction except Tasmania includes a guilty plea as a mitigating factor in their sentencing legislation.² Geraldine Mackenzie

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¹ Australian Bureau of Statistics (‘ABS’), *Criminal Courts, Australia, 2011–12* (Cat No 4513.0, ABS, 2013).

² *Crimes Act 1914* (Cth) s 16A; *Criminal Law (Sentencing) Act 1988* (SA) s 10B; *Sentencing Act 1991* (Vic) s 6AAA; s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 13; *Sentencing Act 1995* (WA) s 9AA; *Sentencing Act 1995* (NT) s 5(1)(j); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 22; *Crimes (Sentencing) Act 2005* (ACT) s 35.

and Nigel Stobbs describe an offender's guilty plea as 'one of the most important mitigating factors to be taken into account by the court',³ which will 'attract a sentencing discount of up to 30 per cent, depending on the case and the jurisdiction'.⁴

This article examines the operation of the guilty plea discount in Australian state and territory courts,⁵ before presenting a case study of the legislation and case law in the Australian Capital Territory ('ACT'). In order to contextualise this analysis, Part II examines the High Court's position with respect to guilty pleas and Part III provides an overview of the New South Wales Court of Criminal Appeal's guideline judgment in *R v Thomson; R v Houlton*.⁶ Part IV details recent legislative amendments in other Australian jurisdictions in relation to quantifying guilty pleas. Part V then presents an analysis of 300 cases in the ACT Supreme Court, which provides important insight into the practical operation of the discount in a jurisdiction that has traditionally seen little sentencing research. In Part VI we conclude by making some observations on future directions for policy and practice.

There are a number of advantages to pleading guilty, both for the state and the offender.⁷ The offender may plead guilty because of a desire to express remorse for the crime, to spare complainants the further trauma of a contested trial or for the purposes of attracting a reduced sentence. The state rationale for reducing a sentence is primarily based on the purported utilitarian value of a guilty plea, in terms of the time and cost of a trial. However, this is not without controversy. As discussed further below, some consider the guilty-plea discount to discriminate against offenders who elect to proceed to trial and are ultimately found guilty as they often receive a more severe sentence.

While a reduction in sentence can be an incentive to plead guilty, there may also be disadvantages for an offender who chooses to do so. Some offenders, particularly

³ Geraldine Mackenzie and Nigel Stobbs, *Principles of Sentencing* (Federation Press, 2010) 89.

⁴ *Ibid* 90.

⁵ The position in respect of federal matters is not considered further, given such offenders account for only 1.5 per cent of defendants finalised in Australian courts in 2011–12: ABS, above n 1; ABS, *Federal Defendants, Australia, 2011–12* (Cat No 4515.0, ABS, 2013).

⁶ (2000) 49 NSWLR 383 ('*Thomson and Houlton*').

⁷ For discussion, see Geraldine Mackenzie, 'The Guilty Plea Discount: Does Pragmatism Win Over Proportionality and Principle?' (2007) 11 *Southern Cross University Law Review* 205; Sharyn Roach Anleu and Kathy Mack, 'Intersections Between In-Court Procedures and the Production of Guilty Pleas' (2009) 42 *Australian and New Zealand Journal of Criminology* 1; New South Wales Sentencing Council, *Reduction in Penalties At Sentence* (NSW Department of Justice and Attorney-General, 2009); David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 5th ed, 2011); Mirko Bagaric and Richard Edney, *Sentencing in Australia* (Thomson Reuters, 2014).

those without proper legal representation, may feel pressured to plead guilty to charges that may not be appropriate in the circumstances. A self-represented accused may not realise that there are defences available for particular offences, or that lesser charges may be more appropriate. It is also difficult to withdraw a guilty plea after it has been entered; generally, a plea entered deliberately and on an informed basis must be considered final.⁸ However, a miscarriage of justice may occur if an accused did not appreciate the nature of the plea entered, had not intended to admit guilt, there was no evidence on which he or she could be convicted, or the plea was induced by fraud or threats.⁹ Finally, it is particularly difficult to appeal a conviction that results from a guilty plea.

Arguably the biggest beneficiary of the guilty plea system is the state. Offering reductions in sentences to induce offenders to plead guilty at the earliest available opportunity ensures the criminal justice system runs as efficiently as possible. Running contested hearings for every matter would create an enormous burden on a system that already experiences significant delays. Avoiding this need means resources can be allocated more efficiently. Other benefits include providing certainty, due to a conclusive determination of guilt, and securing a conviction in cases where the complainant might otherwise withdraw and the case be abandoned.

In respect of victims, there are competing arguments: guilty pleas can save them from having to give evidence in court or make them feel they have not had an opportunity to have their day in court. In *Cameron v The Queen*, Kirby J observed that guilty pleas

may also help the victims of crime to put their experience behind them; to receive vindication and support from their families and friends and possibly assistance from the community for injuries they have suffered. Especially in cases of homicide and sexual offences, a plea of guilty may spare the victim or the victim's family and friends the ordeal of having to give evidence.¹⁰

However, where a defendant pleads guilty to a lesser charge, victims may feel their account of events has been devalued.¹¹

Discounting a sentence as a result of a guilty plea is not without contention, and, as this paper will demonstrate, there are no definitive solutions to the difficulties associated with the practical application of the discount and the conceptual framework within which it operates. Regardless, because of the benefits the system affords offenders and the state, it is likely to remain a crucial aspect of the criminal justice system.

⁸ *Maxwell v The Queen* (1996) 184 CLR 501.

⁹ *R v Boag* (1994) 73 A Crim R 35.

¹⁰ (2002) 209 CLR 339 (*'Cameron'*), 361 [67] (Kirby J) (citations omitted).

¹¹ For discussion, see Bagaric and Edney, above n 7, 303.

II GUILTY PLEAS AND THE HIGH COURT

In *Siganto v The Queen*,¹² the High Court heard an appeal against a conviction of rape from the Northern Territory Court of Criminal Appeal. The appeal arose from the sentencing judge's comments that the distress of the victim was aggravated by having to give evidence multiple times throughout the course of the trial. Counsel for the appellant argued that these comments indicated the judge treated the plea of not guilty as an aggravating factor because the victim was required to give evidence, and increased the punishment in response.¹³ Not penalising an accused who elects to go to trial has consistently been held to be of significance when determining an appropriate sentence.¹⁴ There are a number of reasons for this, the most important being that the potential for a more severe punishment may deter innocent defendants from attempting to defend themselves.¹⁵

The High Court held in *Siganto* that a sentencing judge should be punishing the offender for the crime they have committed and not for the conduct of the defence case.¹⁶ Gleeson CJ, Gummow, Hayne and Callinan JJ also noted the rationale for a reduction in sentence:

[A] plea of guilty is ordinarily a matter to take into account in mitigation; first, because it is usually evidence of some remorse on the part of the offender, and second, on the pragmatic ground that the community is spared the expense of a contested trial.¹⁷

The Court went on to indicate that the extent of the mitigation would usually vary depending on the circumstances of the case.

Incidentally, remorse is listed as a separate mitigating factor in most jurisdictions.¹⁸ This will ordinarily only result in a discount where there is some clear evidence to support it, such as a letter of apology. It has been suggested that it does not generally play a significant mitigatory role.¹⁹

The emphasis placed on the pragmatic grounds for discounting a sentence was effectively discredited by the High Court in the 2002 case of *Cameron*.²⁰ In that

¹² (1998) 194 CLR 656 ('*Siganto*').

¹³ *Ibid.*

¹⁴ *R v Gray* [1977] VR 225, 231.

¹⁵ *Siganto* (1998) 194 CLR 656, 666 [31].

¹⁶ *Ibid.*

¹⁷ *Ibid* 663–4 [22].

¹⁸ *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(f); *Sentencing Act 1991* (Vic) s 5(2)(c); s 5(2)(e); *Penalties and Sentences Act 1992* (Qld) s 9(4)(i); *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(3)(9); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(w). For discussion, see Mackenzie and Stobbs, above n 3, 92–3; Bagaric and Edney, above n 7, 310–16.

¹⁹ Mackenzie and Stobbs, above n 3, 92–3.

²⁰ (2002) 209 CLR 339.

case, the accused pleaded guilty to the offence of possession of methylamphetamine with the intent to sell or supply. The arresting officers assumed that the substance was ecstasy before analysing it, and this was reflected in the original charge. It was not until the substance had been correctly identified some time later that the offender pleaded guilty to the charge. This lengthy period between the offender's first appearance and the eventual plea was a significant factor in the sentencing judge's decision and resulted in a sentence reduction of only 10 per cent.

On appeal to the Western Australian Court of Criminal Appeal, the offender's counsel submitted that the sentencing judge erred in finding that his guilty plea was not made at an early point in the proceedings. The Western Australian legislation, discussed further below, provides that pleas made at the 'first reasonable opportunity' can attract a discount of 25 per cent.²¹ In dismissing the appeal, Pidgeon J indicated that, having regard to all the relevant factors, he was not persuaded that the sentencing judge was wrong in not reducing the sentence more than 10 per cent.²² It should be noted that in Western Australia guilty pleas for indictable offences can be entered in the Local Court before an offender is committed to a superior court for sentencing.²³ This process takes place with the prosecution having to produce minimal evidence. It is colloquially known as 'fast-tracking' pleas and generally results in a greater discount than pleas entered after committal proceedings.²⁴ Malcolm CJ suggested in *Verschuren v The Queen* that a fast-track guilty plea would generally attract a discount of between 20 to 35 per cent.²⁵

The High Court allowed Cameron's appeal, ordering that the earlier decision be set aside and the matter remitted for further hearing. In deciding the case, Gaudron, Gummow and Callinan JJ discussed whether rewarding a person for pleading guilty by reducing an otherwise appropriate sentence is ultimately discriminatory to those who elect to go to trial and test the prosecution's evidence, as they invariably receive a more severe sentence if found guilty. The Court acknowledged that this distinction between encouraging early guilty pleas and not penalising those who choose not to enter such a plea is 'not without its subtleties but it is, nonetheless, a real distinction.'²⁶ The Court determined that if the sole reason for the discount was expressed as utilitarian benefit of sparing the expense of a trial, the distinction

²¹ *Sentencing Act 1995* (WA) s 9AA.

²² *Cameron v The Queen* [2000] WASCA 286 (3 October 2000) [21].

²³ Originally this system operated under s 100 of the *Justices Act 1902* (WA). Since its repeal, the fast-track system is now codified in s 41 of the *Criminal Procedure Act 2004* (WA).

²⁴ David Field, 'Plead Guilty Early and Convincingly to Avoid Disappointment' (2002) 14 *Bond Law Review* 251, 252.

²⁵ (1996) 17 WAR 467. In the debate around the 2012 amendments to the Western Australian legislation discussed below, it was noted that '[t]he courts have developed a system in which the discount for an early plea would range somewhere between ... 20 per cent and 35 per cent of the sentence': Western Australia, *Parliamentary Debates*, Legislative Assembly, 8 November 2012, 8212c (John Quigley).

²⁶ *Cameron* (2002) 209 CLR 339, 343 [12].

would admittedly be unclear.²⁷ Instead, their Honours indicated the discount should be expressed as a willingness to facilitate the course of justice and an offender’s acceptance of responsibility for their conduct, and not because of the expense spared as a result of the plea.²⁸

Kirby J also considered the appropriate rationale for the discount in his judgment; however, in his Honour’s view, the reasoning for discounting a sentence is that it is in the public interest to provide the discount. Overall, his Honour appeared to endorse the view rejected by the majority, namely that pragmatism and the utilitarian benefit are reason enough for the discount.

Ultimately there does not appear to be any significant difference between these approaches, as both have the same result of reducing a sentence. However, given research on the overall discriminatory effect of the reduction in sentence on those who plead not guilty, adopting the approach by the majority in *Cameron* seems a more appropriate response to these criticisms.²⁹ We also suggest that the significant emphasis that each jurisdiction places on the timing of the plea is indicative of the utilitarian approach being regarded as more persuasive, given a plea will facilitate justice regardless of when it is entered, but will only have significant utilitarian value when entered early.

In this context, it is also necessary to consider the High Court’s comments in *Cameron* about the timeliness of a guilty plea, as this was the ground of appeal on which the case was heard and what ultimately persuaded the Court to find in the offender’s favour. Cameron’s counsel argued that it was unreasonable to expect him to plead guilty to the initial charge of possession with intent to sell or supply, when the illicit substance was incorrectly identified as ecstasy. The timeliness of a plea, as discussed further below, is consistently held to be of primary importance when determining how substantial a reduction in sentence an offender should receive.³⁰ However, the timing is more complicated than simply considering a chronology of when the offender entered a guilty plea. The intricacies of the criminal justice system mean there are often lengthy periods of communication and procedural matters to be addressed before an offender can reasonably be expected to plead guilty. The High Court in *Cameron* acknowledged that the question of timeliness is not one that can be answered ‘simply by looking at the charge sheet’.³¹ Rather, the question to be asked is when would it be reasonably practicable to expect the offender to have entered a plea.

The Court held that the Western Australian Court of Criminal Appeal had erred in finding that it was reasonable to expect the offender to plead guilty earlier than he

²⁷ Ibid.

²⁸ Ibid.

²⁹ See Mackenzie, above n 7, 205.

³⁰ Field, above n 24, 253. See also Bagaric and Edney, above n 7, 290.

³¹ *Cameron* (2002) 209 CLR 339, 345 [20].

did, as it was not reasonable to expect someone to plead guilty to a charge that was wrongly particularised. It was not within the offender's control that the substance had been wrongly particularised and there was minimal time between the correct identification of the substance and the offender's indication that he intended to enter a guilty plea. Therefore, the majority considered that the offender had pleaded guilty at an early point in time, following the correct charges being laid. Their reasoning indicates that this is of particular importance to ensure an offender is not actively participating in conduct that could ultimately result in an error in the court record.³² The issue of timeliness is considered further below in the context of the ACT case law.

III THE NEW SOUTH WALES GUIDELINE JUDGMENT IN *THOMSON AND HOULTON*

In 2000, the New South Wales Court of Criminal Appeal handed down its guideline judgment on guilty pleas in *Thomson and Houlton*. This decision developed four guidelines to be adopted by a sentencing judge when a discount in sentence is considered. First, the sentencing judge should explicitly state that a guilty plea has been taken into account. Failure to do so can be taken to indicate that the plea was not given weight in determining the sentence.³³ Second, the Court encouraged sentencing judges to quantify the effect of the plea by reference to contrition, witness vulnerability and the utilitarian value of the plea. However, the Court noted that it is not always possible to separate the utilitarian value of a plea from an offender's remorse.³⁴

The Court went on to say that the utilitarian benefit of a plea should be assessed in the range of a 10 to 25 per cent discount on the total sentence to be served.³⁵ Furthermore, consistent with the majority of state legislation, the primary consideration in determining where in the 10 to 25 per cent range a discount should fall is the timeliness of the plea. Although the decision predated the High Court's decision in *Cameron*, the Court recognised that what is considered an 'early plea' will be a matter for the sentencing judge. Finally, the Court stated that, in some cases, given the totality of circumstances and all other relevant factors, a guilty plea may change the *nature* of the sentence imposed (for example, a shift from a custodial to non-custodial penalty). However, the Court held that there are some circumstances where the protection of the public requires that no reduction in sentence be given, and referred to cases where an offence 'so offends the public interest' that a discount

³² Ibid 346 [24].

³³ This has been codified in some jurisdictions: *Sentencing Act 1991* (Vic) s 6AAA(1)(iii); *Penalties and Sentences Act 1992* (Qld) s 13(3); *Sentencing Act 1995* (WA) s 9AA(5).

³⁴ *Thomson and Houlton* (2000) 49 NSWLR 383, 401 [70].

³⁵ Within this range, there may be some connection between the quality of the plea in mitigation at sentencing and the quantum of the plea discount, although it would be difficult to test this empirically.

on the maximum sentence, even in light of a guilty plea, would be inappropriate.³⁶ As discussed further below, the ACT courts have been strongly influenced by this guideline judgment.

IV RECENT LEGISLATIVE DEVELOPMENTS IN RELATION TO GUILTY PLEAS

As noted above, almost all Australian jurisdictions explicitly reference guilty pleas in their sentencing legislation. This part presents a chronological review of recent key legislative developments in relation to courts quantifying guilty pleas, with some jurisdictions going so far as to prescribe the discount in the legislation itself. In *Markarian v The Queen*,³⁷ the High Court signalled its approval of an instinctive synthesis approach to sentencing, whereby the sentencing judge (or magistrate) weighs all the relevant factors to arrive at the appropriate sentence. Clearly, quantifying the discount for a guilty plea is an exception to this approach. Together with the discount for assistance to authorities, it is ‘one of only two situations where a numerical discount is often indicated by the courts’.³⁸

In 2008, Victoria introduced s 6AAA of the *Sentencing Act 1991* (Vic), which requires a court providing a discount for a guilty plea to specify the sentence it would have given in the absence of the discount (the notional sentence).³⁹ This provision was introduced following a recommendation of the Victorian Sentencing Advisory Council (‘VSAC’). The rationale was to ensure that this part of the sentencing process was more transparent and accessible.⁴⁰ However, there has been judicial

³⁶ See eg *R v Kalache* (2000) 111 A Crim R 152. For a recent example where an offender who pleaded guilty to murder nevertheless received no discount, see *R v Bayley* [2013] VSC 313 (19 June 2013). This was upheld on appeal: *Bayley v The Queen* [2013] VSCA 295 (21 October 2013).

³⁷ (2006) 228 CLR 357. For a critique, see Arie Freiberg, ‘Twenty Years of Changes in the Sentencing Environment and Courts’ Responses’ (Paper presented at the Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006). For further discussion of the intuitive/instinctive synthesis versus a more structured approach, see Dean Mildren, ‘Intuitive Synthesis or the Structured Approach’ (Paper presented at Sentencing Principles, Perspectives and Possibilities Conference, Canberra, 10–12 February 2006); Terry Hewton, ‘Instinctive Synthesis, Structured Reasoning and Punishment Guidelines: Judicial Discretion in the Modern Sentencing Process’ (2010) 31 *Adelaide Law Review* 79; Arie Freiberg and Sarah Krasnostein, ‘Statistics, Damn Statistics and Sentencing’ (2011) 21 *Journal of Judicial Administration* 72; Peter McClellan, ‘Sentencing in the 21st Century’ (Paper presented at the New South Wales Crown Prosecutors’ Conference, Pokolbin, 10 April 2012); Sarah Krasnostein and Arie Freiberg, ‘Pursuing Consistency in an Individualistic Sentencing Framework: If You Know Where You’re Going, How Do You Know When You’ve Got There?’ (2013) 76 *Law and Contemporary Problems* 265.

³⁸ Bagaric and Edney, above n 7, 287. The other factor is assistance to the authorities.

³⁹ VSAC, *Sentence Indication and Specified Sentence Discounts Final Report* (VSAC, 2007).

⁴⁰ *Ibid.*

criticism of the provision, with Buchanan JA stating in *Scerri v The Queen* that the provision has an ‘inherent artificiality’ in that it requires judges to revisit sentences that have been arrived at by instinctive synthesis and quantify the discount by stating sentences that would have otherwise been imposed.⁴¹

Also in 2008, New South Wales enacted the *Criminal Case Conferencing Trial Act* (NSW). Section 17 of the Act provided that an early plea would attract a discount of up to 25 per cent, while a late plea could obtain a discount of up to 12.5 per cent. The operation of this scheme was evaluated by the New South Wales Bureau of Crime Statistics and Research in 2010,⁴² which found only weak evidence for its effectiveness. Accordingly, the scheme was abolished by the *Criminal Case Conferencing Trial Repeal Act 2012* (NSW). For completeness, it should be noted that the New South Wales Law Reform Commission (‘NSWLRC’) recently recommended that a proposed new *Crimes (Sentencing) Act* continue to provide for a guilty plea discount in terms similar to the current provision, but that this should clarify ‘that the lesser penalty imposed must reflect the utilitarian value of the plea’ and ‘require the court to quantify the reduction in penalty given for the utilitarian value of a guilty plea, unless there are reasons for not doing so which the court must record in its reasons for sentence’.⁴³ As with Victoria, the NSWLRC’s objective in recommending this is that legislative requirements of this type allow the process to be more transparent.⁴⁴

In 2012, Western Australia passed the *Sentencing Amendment Act 2012* (WA), in an effort to codify and encourage fast-track pleas of guilty.⁴⁵ Section 9AA states that if a person pleads guilty to a charge, the court may reduce the head sentence in order to recognise the ‘benefits to the state, and any victim of or witness to the offence, resulting from the plea’. Western Australia is the only jurisdiction whose legislation specifically states the rationale for reducing a sentence, although the benefit to the state is widely recognised as a primary rationale for all jurisdictions promoting the practice.⁴⁶ Including this in the legislative provisions ostensibly allows for a degree of transparency and explanation for those who may not fully understand the reasoning for providing a discount. However, recognising the benefit of a guilty plea to ‘any victim of’ an offence is particularly interesting in light of the discussion in *Siganto*. While the High Court has held that a complainant having

⁴¹ (2010) 206 A Crim R 1, 5-6 [23] (Buchanan JA).

⁴² Wai Yin Wan et al, ‘The Impact of Criminal Case Conferencing on Early Guilty Pleas in the NSW District Criminal Court’ (Bureau Brief No 44, New South Wales Bureau of Crime Statistics and Research, 2010).

⁴³ NSWLRC, *Sentencing*, Report No 139 (2013) Recommendation 5.1. It should also be noted that the NSWLRC is currently conducting an inquiry on encouraging early pleas of guilty, and recently released a consultation paper which presents approaches in other jurisdictions and asks what models should be adopted in New South Wales to improve the rate of early guilty pleas. Submissions to the NSWLRC were due by mid-December 2013.

⁴⁴ *Ibid* 125.

⁴⁵ Explanatory Memorandum, Sentencing Amendment Bill 2012 (WA).

⁴⁶ Field, above n 24, 263.

to give evidence cannot be an aggravating factor, the inclusion of this factor in the Western Australian legislation effectively treats sparing a witness or complainant as mitigating. The distinction between these two principles, although real, can be difficult to understand, and recognising this benefit in legislation could have the effect of making the process *less* transparent. It has been held that it takes a 'very subtle mind, unusually sympathetic to the law' to understand and accept the difficulties associated with guilty pleas.⁴⁷ Adding more of these subtle distinctions could potentially create more confusion for offenders and the general public, who may not have this mindset. This is particularly true for self-represented offenders.

In addition, the 2012 amendments introduced s 9AA(4), which provides:

- If the head sentence for an offence is or includes a fixed term, the court must not reduce the fixed term under subsection (2) —
- (a) by more than 25%; or
 - (b) by 25%, unless the offender pleaded guilty, or indicated that he or she would plead guilty, at the first reasonable opportunity.

Other than the short-lived criminal case conferencing trial in New South Wales discussed above (which was limited to District Court matters in central Sydney), this represented the first time that Australian legislation had set out a specific discount to apply to all guilty pleas. It remains to be seen what impact this has on court practices.

South Australia followed suit soon after Western Australia and its legislation appears not only to be comprehensive, but potentially rather complicated. The *Criminal Law (Sentencing) Act 1988* (SA) was amended in 2012 to include two provisions directly relating to reductions of sentences. In introducing the Bill, Attorney-General John Rau stated that the primary objective of the amendment was to make transparent the discounts given to offenders pleading guilty in South Australia. Secondary objectives included improving the criminal justice system by reducing backlog and delay and encouraging those who intend to plead guilty to do so at the earliest available opportunity.⁴⁸ We suggest that this latter purpose raises some issues. If the focus is simply to reduce backlog and delay, then arguably this approach should be withdrawn once these are reduced. In any event, this approach appears to prioritise pragmatism to a greater extent than any other Australian jurisdiction, possibly at the expense of a principled approach to guilty plea discounts.

In South Australia, if an offender is sentenced in the Magistrates Court, or in relation to a matter dealt with as a summary offence and pleads guilty to an offence not more than four weeks after first appearing in court, the court may reduce the sentence by up to 40 per cent.⁴⁹ If an offender pleads guilty to an offence more than four weeks after their first appearance in court but not less than four weeks

⁴⁷ *R v Shannon* (1979) 21 SASR 442, 458 (Cox J).

⁴⁸ Explanatory Memorandum, *Criminal Law (Sentencing) (Guilty Pleas) Amendment Bill 2012* (SA).

⁴⁹ *Criminal Law (Sentencing) Act 1988* (SA) s 10B(2)(a).

before the date of trial, the court may reduce the sentence by up to 30 per cent.⁵⁰ This discount also applies if an offender pleads guilty less than four weeks before the date of trial but satisfies the court that they could not have pleaded guilty at an earlier stage of the proceedings due to factors outside their control.⁵¹ The list concludes with reference to guilty pleas in ‘circumstances other than those referred to in the preceding paragraph’, where a court may reduce the sentence imposed by up to 10 per cent if satisfied that there is good reason to do so.⁵²

The legislation also provides that even if the maximum reduction under the previous sections does not apply because the offender did not plead guilty within the relevant timeframe, the court may still reduce the sentence up to those maximum limits in certain circumstances.⁵³ This includes where an offender has not been able to plead guilty within the timeframe because the court was not sitting,⁵⁴ the court did not sit in a place where an offender could have reasonably been expected to have attended,⁵⁵ or the court was unable to hear the matter due to factors outside the offender’s control.⁵⁶ This appears to be a catch-all provision to ensure that administrative and practical matters relating to courts’ scheduling do not impact an offender’s ability to receive a discount.

The South Australian model is unique in Australia in legislating specific time frames and reductions available at each of these points. It is also unique in that it distinguishes reductions in sentences for summary offences and for those in higher courts. Section 10C relates to sentences imposed in matters other than those outlined in s 10B (including matters dealt with on indictment). For these offences, where an offender has pleaded guilty to an offence not more than four weeks after the offender first appears in court, the sentencing court may reduce the sentence by up to 40 per cent (that is, identical to s 10B). Like s 10B, under s 10C if an offender pleads guilty more than four weeks after appearing in court for the first appearance but before the offender is committed for trial, the court may reduce the sentence that it would have imposed by up to 30 per cent. However, where an offender has pleaded guilty during the period commencing ‘on the first day on which the offender is committed for trial for the offence or offences and ending 12 weeks after the first date fixed for the arraignment of the defendant’,⁵⁷ the court may reduce an otherwise appropriate sentence by up to 20 per cent. This is clearly generous, in comparison with 10 per cent discount advocated by the New South Wales Court of Criminal Appeal (and is a generous model overall; no other jurisdiction we are aware of routinely imposes discounts of 40 per cent).

⁵⁰ Ibid s 10B(2)(b)(i).

⁵¹ Ibid s 10B(2)(c).

⁵² Ibid s 10B(2)(d).

⁵³ Ibid s 10B(3)(b).

⁵⁴ Ibid s 10B(3)(b)(i).

⁵⁵ Ibid s 10B(3)(b)(ii).

⁵⁶ Ibid s 10B(3)(b)(iii).

⁵⁷ Ibid s 10C(2)(c).

The Explanatory Memorandum for the amending Bill indicated that this provision was intended as a last 'filter' to encourage offenders who would ultimately plead guilty to do so at an earlier opportunity, thus saving the time and expense of preparing for a fully contested trial.⁵⁸ In addition, in the case of applications by the offender to quash or stay the proceedings or in the instance of a ruling adverse to the offender in the course of a hearing, if the offender pleads guilty within seven days, the court may reduce the sentence by up to 15 per cent.⁵⁹ It remains to be seen how these provisions work in practice and whether other jurisdictions likewise embrace such a prescriptive model that seems to run counter to the basic concept of instinctive synthesis.

V GUILTY PLEAS IN THE ACT

The previous parts of this article have provided the context for a discussion on the guilty plea discount by examining the key High Court cases and recent legislative amendments. This part presents a case study of the legislation and case law on this issue in the ACT. There is a recognised paucity of research on sentencing practices in the ACT.⁶⁰ This is of particular concern given the legislative requirement that ACT courts take 'current sentencing practice' into consideration as a relevant sentencing factor.⁶¹ Accordingly, it is vital that the courts be informed about such sentencing practices, including the operation of the guilty plea. The part commences with a brief introduction to the *Crimes (Sentencing) Act 2005* (ACT) ('the Act'), before analysing recent decisions and calculating the discount given in 300 decisions handed down by the ACT Supreme Court over the 30 month period between January 2011 and June 2013.

A Guilty Pleas Under the Crimes (Sentencing) Act 2005 (ACT)

Section 33 of the Act provides a list of considerations that a court must have regard to when determining an appropriate sentence. Included in this list is a guilty plea by an offender.⁶² The provision also directs attention to s 35, which contains provisions relevant to the court reducing a penalty for a guilty plea. This applies to cases where an offender has not only pleaded guilty but, based on the information, the court considers that there is a real likelihood that the offender will be

⁵⁸ Explanatory Memorandum, above n 47.

⁵⁹ This section specifically relates to applications and rulings during the period commencing from the day the defendant is committed for trial and ending not less than five weeks before the commencement of the trial: see *Criminal Law (Sentencing) Act 1988* (SA) ss 10C(2)(e)(i)–(ii).

⁶⁰ For discussion, see Lorana Bartels and Simon Rice, 'Reviewing Reforms to the Law of Suspended Sentences in the Australian Capital Territory' (2012) 14 *Flinders Law Journal* 253; Lorana Bartels, 'Sentencing Statistics, Sentencing Councils and the Quest for Data in the Australian Capital Territory' in Patricia Eastal (ed), *Justice Connections* (Cambridge Scholars Publishing, 2013) 60.

⁶¹ *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(za).

⁶² *Ibid* s 33(1)(j).

sentenced to a term of imprisonment.⁶³ Under s 35(2), the court must consider five matters, namely:

- (a) the fact that the offender pleaded guilty;
- (b) when the offender pleaded guilty or indicated an intention to do so;
- (c) whether the guilty plea was related to negotiations between the defence and the prosecution, specifically about the charge to which the offender pleaded guilty;
- (d) the seriousness of the offence; and
- (e) the effect of the offence on any victims or their family, or anyone who may make a victim impact statement in relation to the offence.

The first two issues are consistent with the Australia-wide approach of considering the timeliness of the plea to be of particular importance.⁶⁴ However, the provisions relating to the strength of the prosecution's case and whether the plea is the result of negotiations are unique to the ACT. Two other features of the ACT model are also worth noting. First, like the Victorian scheme and the NSWLRC proposal, ACT courts are required to state the penalty they would have imposed but for the guilty plea.⁶⁵ Second, in September 2013, a new provision was introduced, providing for a discount where the offender has assisted in the administration of justice.⁶⁶ In the Explanatory Memorandum accompanying the Bill, the provision was described as being designed to encourage cooperation between the defence and prosecution, to ensure that a trial is focused on the real issues in dispute.⁶⁷ The provision was specifically included to allow an accused to plead not guilty but still facilitate the administration of justice by making disclosures before or during the trial. This additional discount is similar in effect to provisions in New South Wales and Queensland sentencing legislation.⁶⁸ The Explanatory Memorandum further indicated that the New South Wales case law regarding the equivalent provision would assist the ACT judiciary in the application of this discount.

1 *The Strength of the Prosecution's Case*

Section 35(4) provides that a court must not make any significant sentence reduction in light of a guilty plea if the court considers that the prosecution's case is overwhelmingly strong.⁶⁹ In determining whether s 35(4) will apply, the court must consider what constitutes an overwhelming prosecution case. A number of decisions since the enactment of the legislation have made reference to this issue without

⁶³ Ibid ss 35(1)(a)–(1)(b).

⁶⁴ Field, above n 24, 253.

⁶⁵ *Crimes (Sentencing) Act 2005* (ACT) s 37. This is similar to the provision in Victoria.

⁶⁶ Ibid s 35A.

⁶⁷ Explanatory Memorandum, *Crimes (Sentencing) Amendment Bill 2013* (ACT).

⁶⁸ *Crimes (Sentencing) Procedure Act 1999* (NSW) s 22A; *Penalties and Sentences Act 1992* (Qld) s 13A.

⁶⁹ *Crimes (Sentencing) Act 2005* (ACT) s 35(4).

going so far as to say that the case against the accused was overwhelming. In *R v Boyle and Coogan*, for example, Burns J indicated that the prosecution’s case against each of the accused was ‘strong’, however because the pleas were entered relatively early in the proceedings, the offenders were entitled to a reduction of 20 per cent.⁷⁰ Conversely, in *R v Silkeci*, Nield J indicated that the prosecution’s case was ‘strong to the point of being overwhelming,’ and as a result the offender was entitled to a discount of only 10 per cent.⁷¹

It is evident that the strength of the prosecution’s case is also relevant when the case may not be particularly strong. In *R v Fortaleza* Penfold J indicated that because the offender pleaded guilty to a case that would not have been ‘overwhelmingly strong’, the offender was entitled to an increased discount of 23 per cent.⁷² Similarly, if an offender pleads guilty to a charge that may not have been able to be proved beyond reasonable doubt, the offender may be entitled to ‘some reasonable discount over and above the ordinary plea of guilty.’⁷³

The effect of this provision in the ACT is that the prosecution’s case is often a consideration in determining the weight a plea should be given, whether or not the prosecution’s case is strong. By contrast, other jurisdictions have indicated that the strength of the prosecution’s case is not to be considered in determining an appropriate reduction. Indeed, the Queensland Court of Appeal has held that consideration of the strength of the prosecution’s case goes against the fundamental rationale for the discount, with Byrne J stating in *Bulger v The Queen*:

I remain to be convinced that this reluctance to make any allowance for guilty pleas in apparently indefensible cases is justified. If administrative expediency resulting from a guilty plea is sufficient basis for moderation in sentencing, it ought not be decisive against a lesser sentence that conviction seems certain in the event of a trial.⁷⁴

Bulger was cited by the New South Wales Court of Criminal Appeal in *Thomson and Houlton*, where it indicated that the strength of the prosecution’s case should

⁷⁰ *R v Boyle and Coogan* (Unreported, Supreme Court of the Australian Capital Territory, Burns J, 29 June 2012) [19].

⁷¹ *R v Silkeci* (Unreported, Supreme Court of the Australian Capital Territory, Nield AJ, 16 February 2011) [30].

⁷² *R v Fortaleza* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 8 February 2012) [27].

⁷³ *R v Beahan* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 21 October 2011) [19]. This is similar in effect to the common law ‘Ellis discount’ in New South Wales, whereby an offender who makes voluntary disclosures of involvement in crimes that the police had no knowledge of is entitled to a ‘significant added element of leniency’: *R v Ellis* (1986) 6 NSWLR 603.

⁷⁴ (1990) A Crim R 162, 170 (*Bulger*). His Honour went on to indicate that where the discount is lessened due to the strength of the prosecution’s case, there will be less incentive for offenders to plead guilty.

not be considered a relevant factor in determining the utilitarian value of a plea.⁷⁵ Rather, the strength of the prosecution's case should be linked only to questions of contrition or remorse.⁷⁶ Recently, the Victorian Court of Appeal stated that '[t]he strength of the Crown case is irrelevant to the discount to be allowed for the utilitarian benefit of the plea, as it does not bear upon the objective benefits of the plea'.⁷⁷ This is generally due to the proposition that it negates the remorse that may be indicated by a plea and the difficulty for the court to be aware of the strength of the prosecution's case before the evidence has been tested.⁷⁸

Therefore, the ACT approach on this issue is at odds with most other Australian jurisdictions. Indeed, it is seen by some as incompatible with present sentencing law and practice.⁷⁹ In addition to any concerns about principle, the ACT approach would also be impractical in some Australian jurisdictions, as sentencing judges are not always in a position to evaluate thoroughly the strength of the prosecution's case. For example, it would be difficult for Western Australia to include a similar provision due to its fast track system, which often requires the prosecution to show very minimal evidence before the offender is committed to a superior court for sentence.

2 *Plea Bargaining*

Under s 33(2)(c) of the Act, the court must consider whether the guilty plea was related to negotiations between the prosecution and the defence about the specific charge to which the offender has pleaded guilty. The ACT is the only Australian jurisdiction to include this concept of 'plea negotiating' in sentencing legislation. Generally speaking, Australian courts do not recognise formal plea bargaining,⁸⁰ even though guilty pleas are often the result of negotiations between the defence and prosecution as to which charges may attract a plea and therefore which charges the prosecution are more likely to proceed with.

When introducing the Crimes (Sentencing) Bill 2005 (ACT), then Attorney-General Jon Stanhope indicated that diminishing credit for pleas that are the result of negotiations with the prosecution is consistent with a number of judgments.⁸¹ However,

⁷⁵ *Thomson and Houlton* (2000) 49 NSWLR 383, 416 [137].

⁷⁶ *Ibid.* See also *R v Pajic* (2009) 23 VR 527. For discussion on the perceived differences between 'contrition' and 'remorse', see *R v Pereira* (1991) 57 A Crim R 46 (NSWCCA). See also *DPP (Cth) v Goldberg* (2001) 184 ALR 387, 395 [41] (Vincent JA).

⁷⁷ *Phillips v The Queen* (2012) 222 A Crim R 149, 158 [36] (Redlich JA and Curtin AJA, Maxwell P agreeing).

⁷⁸ Mirko Bagaric and Julie Brebner, 'The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea — I'm Pleading Guilty Only Because of the Discount ...' (2002) 30 *International Journal of the Sociology of Law* 51, 51.

⁷⁹ Bagaric and Edney, above n 7, 292.

⁸⁰ Mackenzie and Stobbs, above n 3, 92.

⁸¹ See, eg, *R v Gray* [1977] VR 225; *R v Shannon* (1979) 21 SASR 442.

he also noted that it may at times be difficult to determine whether the plea is a direct result of these negotiations. Similarly, it may be difficult to determine conclusively that negotiations with the defence influenced the prosecution’s decision not to proceed with certain charges. Because of this, the legislation was drafted with the intention of leaving the circumstances surrounding plea negotiations a matter for an individual sentencing judge to determine.⁸² The legislation does not specifically state the effect of negotiations on a plea. However, there is often a relationship between the timeliness of a plea and negotiations with the prosecution. In some situations, a plea will be considered early if it follows late negotiations with the prosecution.⁸³ Where this has occurred, the court will generally make a statement in the sentencing decision to that effect.⁸⁴ In *R v Del Solar*,⁸⁵ Refshauge J cited with approval the following passage from the New South Wales case of *R v Dib*, indicating that the effect of negotiations with the prosecution is ultimately often a question of timeliness:

In my opinion, the amount of any discount to be allowed by reason of the utilitarian benefit of a plea of guilty should not be reduced on the ground that the plea was offered in association with the abandonment by the Crown of a greater charge; and if in such a case the plea is offered as soon as the Crown indicates willingness to accept a plea to the lesser charge, it should be regarded as being made at the earliest opportunity.⁸⁶

A number of general criticisms are put forward against plea bargaining, making the inclusion of this provision somewhat controversial. Some argue that the secrecy which surrounds plea bargaining and the lack of transparency means that prosecutorial decisions are not able to be carefully scrutinised.⁸⁷ Additionally, the potential to ‘overcharge’ an offender (by charging them with numerous or more serious offences) in order to induce a guilty plea to a lesser charge is of significant concern.⁸⁸ Whether this is indicative of a need to ensure plea negotiation is more carefully regulated is beyond the scope of this discussion. However, it should be noted that, at the very least, including this as a provision for judicial consideration in sentencing ensures the process is not conducted entirely behind closed doors.

⁸² Explanatory Memorandum, Crimes (Sentencing) Bill 2005 (ACT).

⁸³ See *R v Ayres* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 13 December 2012); *R v Williams* (Unreported, Supreme Court of the Australian Capital Territory, Higgins CJ, 16 November 2011).

⁸⁴ *R v Ayres* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 13 December 2012).

⁸⁵ *R v Del Solar* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 14 March 2013).

⁸⁶ [2003] NSWCCA 117 (27 May 2003) [3] (Hodgson JA).

⁸⁷ See Asher Flynn and Kate Fitz-Gibbon, ‘Bargaining With Defensive Homicide: Examining Victoria’s Secretive Plea Bargaining System Post Law Reform’ (2011) 35 *Melbourne University Law Review* 905, 915. See also New South Wales Sentencing Council, above n 7.

⁸⁸ Flynn and Fitz-Gibbon, above n 86, 916.

B *How Does the Discount Operate in the ACT?*

The intended effect of the ACT legislation is very similar to other jurisdictions as it seeks to facilitate the discounting of sentences and provide a framework within which a sentencing judge must operate. In *Ross v Williams*, Refshauge J noted that there is a tendency in the ACT to apply percentage discounts for pleas of guilty, and that this is heavily influenced by New South Wales sentencing practice.⁸⁹ Similarly, in the recent case of *Mcdonald v Vandervalk and Wong (No 1)*, Burns J stated in relation to the New South Wales case law on guilty plea discounts:

This Court is not bound by the decisions of the [New South Wales Court of Criminal Appeal]; however the above decisions [including *Thomson and Houlton*] are strongly persuasive authority and should not be departed from unless I consider them plainly wrong. With respect, I consider them to be plainly correct.⁹⁰

The reliance of ACT judges on New South Wales jurisprudence is clearly evident when examining recent sentences from the ACT Supreme Court. The ACT courts have generally accepted the guidelines suggested by the New South Wales Court of Criminal Appeal in *Thomson and Houlton*. This is particularly true of Spiegelman CJ's reasoning that 'the absence of any reference to actual consideration of the guilty plea in the course of sentencing should, as a general rule ... lead to an inference that the plea was not given weight.'⁹¹ This passage is often cited with approval in cases where a ground of appeal is that the sentencing judge erred in not considering that the offender pleaded guilty in determining an appropriate sentence.⁹² As discussed above, the requirement that a sentencing judge make a statement in relation to discount for a guilty plea is also codified into the ACT legislation.⁹³

In relation to quantifying an appropriate discount, ACT courts have also indicated that the range of discounts suggested in *Thomson and Houlton* is appropriate (10 to 25 per cent on the head sentence and above 25 per cent for pleas entered at the earliest opportunity).⁹⁴ However, while the courts have expressly accepted these guidelines; examination of recent sentences imposed in the ACT following guilty pleas indicates that the court may be more generous with sentence reductions than the court in *Thomson and Houlton* recommended. This is particularly true of pleas entered later in the proceedings.

The ACT Supreme Court publishes all of its sentencing remarks on its website. In order to assess current sentencing practices in the ACT, we examined all sentencing remarks between January 2011 and June 2013. We identified 300 Supreme Court cases where the offender had pleaded guilty and the following analysis is based on those cases.

⁸⁹ [2012] ACTSC 168 [42].

⁹⁰ [2014] ACTSC 67 (1 May 2014) [11] (Burns J).

⁹¹ (2000) 49 NSWLR 383, 395 [52].

⁹² See, eg, *Westin v Gordon* [2012] ACTSC 44 [93].

⁹³ *Crimes (Sentencing) Act 2005* (ACT) s 37.

⁹⁴ See *R v Cooper* [2012] ACTCA 9 [49].

1 *The Timing of the Plea*

The majority of sentences identified the timing of the plea as either a plea entered early or one entered late. However, there were a number of sentences where the timing of the plea was not given significant attention in the sentencing remarks. This appears to be a matter of judicial discretion; while the legislation requires that the timing of the plea be taken into account, there is no requirement that the timing of the plea be indicated by the court. Similarly, many sentencing decisions included the specific percentage by which a sentence had been reduced. This assisted in analysing average percentages; however, the majority of these decisions did not reference the percentage by which a sentence was reduced. Rather, the majority of sentences referenced only what a sentence would have been had the offender pleaded not guilty and subsequently been convicted.

By comparing the difference between what Victorian courts refer to as the 'notional' sentence, and the actual sentence imposed we were able to calculate the percentage by which the sentence had been reduced and we determined that the average reduction for a guilty plea in the ACT was 22 per cent. Table 1 sets out the reduction in sentence by timing of plea (including pleas entered at later stages in the proceedings, pleas identified as early and instances where the timing of the plea is not stated). The significant percentage of cases where the timing of the plea is not indicated could impact on the data below. However, the sample size of cases where the timing of the plea was articulated is sufficient to provide some tentative conclusions on the impact of the timing of the plea on the discount provided.

Table 1: Reduction in Sentence, by Timing of Plea

Timing of Plea	Number of Cases	Average Reduction (per cent)
Early plea	134	24
Late pleas	102	18
Timing of plea not indicated	64	20
Total	300	22

Pleas identified by the sentencing judge as being entered early naturally attracted a more significant discount, with an average reduction of 24 per cent. Pleas entered at an identifiably late stage in the proceedings attracted an average discount of 18 per cent. In *R v Howard* the offender entered a plea on the morning of trial; Penfold J discussed the need to 'steer a careful path'⁹⁵ when dealing with sentencing discounts:

It is undeniable that there is utilitarian value in a plea of guilty ... even if the only saving is in the court time actually set aside for the trial. It is accordingly undesirable to create a situation where there is so little benefit in a late plea that

⁹⁵ *R v Howard* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 22 November 2012) [25].

a person who has not pleaded before the trial is about to commence might as well try his or her luck at trial rather than making a late plea.⁹⁶

In sentencing the offender, her Honour noted that a plea entered at an earlier stage would have attracted a discount of 28 per cent. Instead, the offender was entitled to a discount of 17 per cent. This discount is still significant compared with the 10 per cent suggested in *Thomson and Houlton*. Conversely, in *R v Ennis*, Nield AJ indicated that because the plea was entered so late in the proceedings, the offender was not entitled to anything above a 10 per cent discount.⁹⁷

2 Differences by Judicial Officer and Offence Type

Over the period under consideration, there were four permanent judges of the ACT Supreme Court (Higgins CJ, Penfold, Burns and Refshauge JJ) and one acting judge (Nield AJ). There were clear differences in the number of decisions determined by each judge. There may have also been differences in the seriousness of the cases. Subject to these caveats, there was a notable difference among the judges of the ACT Supreme Court. As set out above, in *Ennis*, Nield AJ awarded a discount of only 10 per cent for a late plea. Overall, Nield AJ offered the lowest sentence reduction, at 18 per cent (with reductions of 21 per cent for pleas entered at an early opportunity and 15 per cent for those entered at later stages). Similarly, the largest reduction in a sentence by Nield AJ was substantially lower than the largest discount given by the permanent ACT judges. The most significant discount given by Nield AJ was 25 per cent, while the largest discounts given by Penfold and Burns JJ were 33 per cent. Burns and Penfold JJ both averaged 24 per cent for pleas entered early and 17 per cent for pleas entered later. Refshauge J had an average sentence reduction of 25 per cent for pleas entered at an early opportunity and 21 per cent for those entered later. Higgins CJ, who retired in September 2013, averaged 22 per cent for pleas entered early and 17 per cent for those entered at later stages.

It is beyond the scope of this article to explore possible reasons for these differences, which may simply reflect subtle differences in the cases before each judicial officer. Generally speaking, there appears to be a reluctance to analyse sentencing practice on the basis of differences among judicial officers,⁹⁸ though anecdotal evidence from legal practitioners suggests that they are aware of individual differences in terms of severity or approaches to particular aspects of the sentencing discretion.

⁹⁶ *R v Howard* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 22 November 2012) [25].

⁹⁷ *R v Ennis* (Unreported, Supreme Court of the Australian Capital Territory, Nield AJ, 14 April 2012).

⁹⁸ Cf Don Weatherburn and Bronwyn Lind, 'Sentence Disparity, Judge Shopping and Trial Court Delay' (1996) 29 *Australian and New Zealand Journal of Criminology* 147; Tasmania Law Reform Institute, *Sentencing*, Report No 11 (2008). For a recent international study, see Susan Long, 'Examining Current Federal Sentencing Practices: A National Study of Differences Among Judges' (2012) 25 *Federal Sentencing Reporter* 6.

In a system that maintains judicial discretion, however, some variation among judicial officers is to be expected and is probably not cause for significant concern.

Of the sentences analysed, the maximum discount afforded solely on the basis of a guilty plea was 50 per cent. In *R v McKenzie*, Refshauge J reduced a sentence of imprisonment for aggravated robbery from 24 months to 12 months.⁹⁹ This was despite the plea not being made at the earliest opportunity and the prosecution’s case against the offender being ‘very strong’. His Honour indicated that the plea was evidence of real remorse and, as a result, the offender had substantial prospects for rehabilitation. While acknowledging that sentencing is an exercise in discretion and a number of factors are relevant in deciding an appropriate sentence, this reduction in sentence is significantly higher than any reduction discussed in the previous section.

Table 2: Reduction in Sentence, by Offence Type

Type of Offence	Number of Cases	Average Reduction (per cent)
Offences against the person	131	21
Theft and related offences	106	22
Drug related offences	25	22
Sexual offences	26	20
Other offences	12	20

While the average sentence reductions varied across the five judges, the discounts varied very little for different offences, as set out in Table 2. Section 35(2)(d) requires the court to take into account the seriousness of the offence, but this does not appear to have had an impact in this context, with sexual offences attracting almost the same discount as theft offences (20 per cent and 22 per cent respectively), even though the latter would generally be regarded as involving much less serious offending. On the other hand, it may be that the court assesses offence seriousness within the range of that type of offence (for example, indecent assault within the context of sexual offending more generally), rather than where the offence sits along the spectrum of all offences (for example, property offences as opposed to sexual offences).

3 *Utilitarian Value or the Facilitation of Justice?*

Our analysis of ACT cases shows an adherence to the notion that the utilitarian value of a guilty plea is the primary rationale for the discount. It appears from our analysis that the ACT Supreme Court favours Kirby J’s approach in *Cameron*: the utilitarian benefit of a plea (and sparing the cost of a trial for the public) is the

⁹⁹ *R v McKenzie* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 10 September 2010).

paramount consideration. This is evident from the number of decisions that make reference to the significant utilitarian value in a guilty plea (n=102), compared with the relatively few that discuss the concept of a willingness to facilitate the course of justice (n=19).¹⁰⁰

A late plea, particularly one entered immediately before the beginning of a trial, cannot realistically be seen as a willingness to facilitate the course of justice. Rather, pleas such as this are more likely to be viewed as an acceptance of the inevitable, or a plea for the sake of attracting the discount. The ACT Supreme Court, however, has still given significant discounts in such situations by recognising that even a late plea has some utilitarian value. In *R v Roberts*, the plea was entered on the morning of trial;¹⁰¹ nevertheless, Penfold J held that the utilitarian value of sparing the cost of a trial and the complainants having to give evidence warranted a sentence reduction of 20 per cent. In *R v Fortaleza*, where the plea was entered not long before the commencement of the trial, Refshauge J still determined that a reduction of 33 per cent was warranted.¹⁰² This discount would be considered significant even had the plea been entered at the earliest available opportunity, given the average reduction of early pleas in the ACT is 24 per cent.

Overall, the approach taken by the ACT Supreme Court is generally consistent with that recommended in *Thomson and Houlton*. While the discount for pleas entered at a later stage in the proceeding is higher than that suggested in the guideline judgment, in general the discounts fall in the recommended range. In accepting the sentencing practice of New South Wales courts, the ACT Supreme Court has also demonstrated that the utilitarian value of a plea is of more significance than the facilitation of justice. The recent amendments to the Act, allowing a court to reduce a sentence for cooperation with the administration of justice, further indicate that this is a separate consideration for the court and should not be directly related to a guilty plea.

VI REFORM

Discounting an otherwise appropriate sentence for the sole reason of a guilty plea is not without criticism. In 2014, Mirko Bagaric and Richard Edney argued that the majority position in *Cameron* ‘places semantics over reality’¹⁰³ and that there ‘is no clear *principled* criminological basis for punishing offenders who plead guilty less severely than those who elect to proceed to trial’.¹⁰⁴

¹⁰⁰ It should be noted that the cases under consideration were handed down before the introduction of a specific discount for facilitating the administration of justice, discussed above.

¹⁰¹ *R v Roberts* (Unreported, Supreme Court of the Australian Capital Territory, Penfold J, 3 November 2011).

¹⁰² *R v Fortaleza* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 16 August 2011). This is a separate decision to the case discussed above.

¹⁰³ Bagaric and Edney, above n 7, 296.

¹⁰⁴ *Ibid* 286.

In order to overcome these concerns, suggested reforms have included the creation of a 'qualified guilty plea',¹⁰⁵ which would have the effect of pleading guilty and therefore allowing for the discount, while still allowing the defendant to advance submissions that suggest innocence. If the sentencing judge is persuaded that there was a plausible chance of an acquittal, the defendant would be entitled to a discount in excess of the ordinary guilty plea discount. This suggestion is made to ensure that the utilitarian benefits of a plea are being preserved, while acknowledging that the discount can induce innocent defendants to plead guilty and, further, that not all people who plead guilty are equally guilty.¹⁰⁶

In our view, this approach is problematic for a number of reasons. Allowing a defendant to plead guilty while still maintaining their innocence endorses the criminal justice system imposing penalties on defendants who may not be guilty. This has the potential to significantly impair the integrity of the system. In addition, establishing that the defendant has a plausible defence to a charge is likely to create burdens and delays, undermining the basic utilitarian rationale for the system.¹⁰⁷ There is also the potential for even greater pressure to be placed on defendants (especially vulnerable defendants) to plead guilty because of this extra discount. Furthermore, courts have consistently held that a judge must reject an unequivocal or qualified guilty plea, that is, those that are accompanied by statements that may indicate the person is not guilty of the offence.¹⁰⁸ On the other hand, the discount for assisting the administration of justice available under both the New South Wales and ACT legislation may provide something of a middle ground in this context, by enabling defendants who wish to contest the charges against them to nevertheless obtain some benefit from facilitating the administration of justice.

Another proposal is to abolish the discount entirely, on the basis that discounting a sentence for a guilty plea imposes a deliberate penalty on defendants who plead not guilty, which is incompatible with general sentencing principles.¹⁰⁹ This argument suggests that the discount is a result of administrative factors and the desirability of expediency, both of which are unrelated to an offender or their circumstances. In addition, the discount results in lenient sentences, which cause significant public dissatisfaction with the justice system. Kathy Mack and Sharyn Roach Anleu claimed that these disadvantages are not outweighed by the practical benefit of the discount. However, they acknowledged that because the discount is so widely included in sentencing legislation and has been a matter of common law for so long, there may be some justification for a minimal discount of only 10 per cent in recognition of the plea.¹¹⁰

¹⁰⁵ Bagaric and Brebner, above n 77, 52.

¹⁰⁶ Ibid 53.

¹⁰⁷ Ibid 69.

¹⁰⁸ See *Tudman v Flower* (1996) 73 A Crim R 321; *DPP v King* (2008) 187 A Crim R 219.

¹⁰⁹ Kathy Mack and Sharyn Roach Anleu, 'Sentence Discount for a Guilty Plea: Time for A New Look' (1997) 1 *Flinders Journal of Law Reform* 123, 141.

¹¹⁰ Ibid 142.

While this approach has the benefit of ensuring that offenders are not punished more severely for choosing to go to trial, this analysis largely ignores the utilitarian value of the guilty plea discount as a way of inducing offenders to plead guilty and thus spare the cost of a trial. Mack and Roach Anleu indicate that any loss of efficiency will be minimal and that there may be other ways of ensuring that the system is not unduly burdened by an increase in contested trials. For example, such as establishing mechanisms for the prosecution and defence to identify well before trial which facts are capable of being proved beyond reasonable doubt, which charges are appropriate based on those facts and the likelihood of any conviction.¹¹¹ However, it is difficult to determine whether these mechanisms would adequately mitigate the burden on the justice system that would likely arise from an increase in the number of offenders pleading not guilty. These burdens would ultimately result in delays in a system that already experiences significant delays.¹¹²

VII CONCLUSION

There are no clear answers to the theoretical or practical difficulties posed by the guilty plea discount, but we believe that the benefits of the discount for both the individual and the state are obvious. Ultimately, the significant advantages of this system — to the offender, the victim and the state — mean that the discount afforded to those who plead guilty will and should continue to be an integral part of the criminal justice system.

What is perhaps less clear is how prescriptive courts and legislatures should be in determining the quantum and the practical operation of the discount. In relation to the former, Bagaric and Edney argued recently that '[a]ll jurisdictions should follow the New South Wales approach and set a defined discount and quantify it according to the time at which it the plea was taken'.¹¹³ They made no reference to the NSWLRC report. It may therefore be inferred that their recommendation preceded its release and they were simply endorsing the New South Wales Court of Criminal Appeal's guideline judgment in *Thomson and Houlton*. The NSWLRC recommendation would go further and enshrine this in legislation. Whether legislatures should or will follow the highly prescriptive model recently laid down by South Australia remains to be seen. It might be inferred that judicial officers would resist any intrusion on their ability to instinctively synthesise the appropriate sentence, taking into account *all* the relevant factors, including an offender's guilty plea. Certainly, the High Court has made its commitment to the instinctive synthesis approach very

¹¹¹ Ibid 143.

¹¹² Indeed, in her swearing in speech in October 2013, the new ACT Chief Justice stated that she 'would make it a priority to continue to reduce the backlog and delay that has plagued the Supreme Court in recent years': Christopher Knaus, 'New ACT Chief Justice Helen Murrell Vows to Cut Delays in Supreme Court', *Canberra Times* (online), 28 October 2013 <<http://www.canberratimes.com.au/act-news/new-act-chief-justice-helen-murrell-vows-to-cut-delays-in-supreme-court-20131028-2wapl.html#ixzz2vFrIOt3X>>.

¹¹³ Bagaric and Edney, above n 7, 303.

clear. Although Hayne J remains the only serving judge who was on the Court at the time of *Markarian v The Queen*,¹¹⁴ it has since been endorsed by every member of the current High Court.¹¹⁵

This article has discussed the operation of the guilty plea discount across Australia. Clearly there is some discrepancy, not only in regards to the legislative position, but also the practical application of the discount. The article expands on our understanding of the operation of the discount by presenting an analysis of 300 recent ACT Supreme Court cases. The approach adopted by the ACT is an important site of analysis: it demonstrates some similarities with other national practices as well as some significant differences. It also highlights some unique legislative developments in respect of the strength of the prosecution's case and plea negotiations, which may be instructive for other Australian jurisdictions. The former position runs counter to the jurisprudence in other jurisdictions, indicating that the strength of the prosecution's case should not be a relevant consideration, but perhaps it makes intuitive sense that a plea should not be rewarded as highly if it is simply an acceptance of the inevitable. It may also offer some insight as to how a sentencing judge reaches a decision in relation to the discount. On the basis of our case analysis, however, it appears that the inclusion of these provisions does not make any significant difference to sentencing practice, given the averages are similar to other jurisdictions, particularly New South Wales. Through this analysis, we hope to contribute to the research literature on one of the most significant mitigating factors considered by Australian courts, as well as shining a light on ACT sentencing practices.

¹¹⁴ (2006) 228 CLR 357.

¹¹⁵ See *Muldrock v The Queen* (2011) 244 CLR 120, 131-2 [26] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Munda v Western Australia* (2013) 249 CLR 600, 621 [59] (French CJ, Hayne J, Crennan, Kiefel, Gageler and Keane JJ); *Achurch v The Queen* (2014) 306 ALR 566, 569 [7] (French CJ, Crennan, Kiefel and Bell JJ).

*Michael Duffy**

TOWARDS BETTER DISCLOSURE OF CORPORATE RISK: A LOOK AT RISK DISCLOSURE IN PERIODIC REPORTING

ABSTRACT

Disclosure is a primary form of investor protection and is fundamental to market efficiency. Knowledge of the risks facing them is integral to the successful operation of business enterprises and is also of benefit to their investors. Whilst continuous disclosure is a policy that should provide a good basis for risk disclosure, periodic disclosure of risk has received significantly less attention. This is because periodic disclosure is more traditionally an area for disclosure in financial accounts than for management discussion and analysis. However, this may be changing, particularly due to the enactment of s 299A of the *Corporations Act 2001* (Cth) in 2004 and ASIC's more recent interpretations of that section.

I INTRODUCTION

Traditional periodic disclosure has not paid significant attention to highlighting risk factors. Despite risk being an inherent part of the business enterprise, traditional periodic disclosure has focused heavily on numerical financial reporting, to the detriment of management discussion and the analysis of the figures and the risks involved in the business. It has been internationally accepted that substantial narrative reporting, including the disclosure of risk, is important to promote investor protection.¹ There are signs that this is feeding through to Australia, evidenced by the enactment of s 299A of the *Corporations Act 2001* (Cth) in 2004. This is particularly so, given ASIC's interpretation of s 299A as mandating an Operating and Financial Review ('OFR') and its recently proposed guidance on OFRs generally.²

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¹ See, eg, Turnbull Report Institute of Chartered Accountants in England and Wales, *Internal Control: Guidance for Directors on the Combined Code* (Accountancy Books, 1999).

² Australian Securities and Investments Commission, '12-228MR ASIC Proposes Guidance for Operating and Financial Reviews' (Media Release, 17 September 2012) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2012-releases/12-228mr-asic-proposes-guidance-for-operating-and-financial-reviews/>>; see also Australian Securities and Investments Commission, *Effective Disclosure in an Operating and Financial Review* (27 March 2013) <<http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-247-effective-disclosure-in-an-operating-and-financial-review/>>.

II THE IMPORTANCE OF RISK DISCLOSURE

Risk disclosure is a subset of general disclosure. General disclosure is an important form of investor protection. Risk disclosure is a form of ‘bad news’ rather than ‘good news’ disclosure, and thus tends to weigh stock prices down rather than elevate them. Risk disclosure is necessary for the same reasons as general disclosure. Arguments for risk disclosure include those based on promoting informational efficiency in primary and secondary markets, regulation achieving fairness and confidence in markets, as well as the plausible reduction of opportunities for insider trading.³

The importance of recognising and managing risk is partly exemplified by the development of risk management as a discipline in itself. The area of risk management has evolved substantially during the last 50 years. Historically, companies have insured to deal with risk. In turn, this has gradually led to insurers taking an interest in the insured risk themselves, which has prompted businesses (sometimes with the encouragement of government) to make business premises and products safer. In the past, corporations were somewhat reactive in the area of risk management. The evolution of risk management escalated in the 1970s and 1980s, with businesses introducing or contributing to product standards and quality assurance.⁴ This can also be seen as a reaction to changes in law including the expansion of tort law beginning with the celebrated decision in 1932 of *Donoghue v Stevenson*⁵ in England, as well as the subsequent introduction of a great deal of reforming legislation.⁶ The world’s first risk management standard was AS/NZS 4360:1995 published by Standards Australia in 1995.⁷ The Canadians followed in 1997 with their standard CAN/CSA-Q850-9 7.⁸

In 1992, in the UK, *The Financial Aspects of Corporate Governance* (the ‘Cadbury Report’) was released, focusing attention on the disclosure of risk data by UK companies as part of the overall agenda of reforming UK corporate governance.⁹ It was authored by the Committee on the Financial Aspects of Corporate Governance, which was set up in response to a number of high profile corporate failures in the

³ See Mark Blair and Ian M Ramsey, ‘Mandatory Corporate Disclosure Rules and Securities Regulation’ in Gordon Walker, Brent Fisse and Ian M Ramsay (eds), *Securities Regulation in Australia and New Zealand* (LBC Information Services, 2nd ed, 1998) 55.

⁴ See, eg, British Standards Institution, Quality Standard BS 5750 (1979).

⁵ [1932] AC 562.

⁶ Such as, in Australia, the *Trade Practices Act 1974* (Cth).

⁷ Standards Australia, Risk Management Standard, AS/NZS 4360:1995 (1995) <<http://infostore.saiglobal.com/store/details.aspx?ProductID=381545>>.

⁸ Canadian Standards Association, Risk Management Guidelines, CAN/CSA Q850-97 (1997) <http://www.techstreet.com/products/944628?product_id=944628&sid=-goog&gclid=CLukoQqnMACFYIrvQodE1gArQ>.

⁹ Committee on the Financial Aspects of Corporate Governance, *The Financial Aspects of Corporate Governance*, (1 December 1992) European Corporate Governance Institute <<http://www.ecgi.org/codes/documents/cadbury.pdf>>.

UK.¹⁰ After the companies failed, it was found that various governance irregularities had gone undetected for a period of time. These failures occasioned losses for creditors of the defunct companies, including the loss of pension assets. The report committee was chaired by Adrian Cadbury and set out recommendations on the arrangement of company boards and accounting systems to mitigate corporate governance risks and failures.¹¹

In 1998, the UK Department of Trade and Industry launched the Modern Company Law Review, a review of UK company law that led to the mandatory OFR in 2004.¹² This required more extensive reporting of risk. The voluntary OFR had originally been introduced in 1993 by the UK Accounting Standards Board ('ASB') and first recognised the importance of qualitative non-financial information. It has two parts: firstly the operating review looking at operating results, profit and dividends and secondly the financial review covering items such as capital structure and treasury policy. The mandatory OFR was, however, replaced in 2006 to 'reduce the corporate red tape burden.'¹³ It was replaced with a business review to meet the mandatory European Union requirements for narrative reporting (see below).¹⁴

In 1999, the Institute of Chartered Accountants in England and Wales, in consultation with the London Stock Exchange, published *Internal Control: Guidance for Directors on the Combined Code* (the 'Turnbull Report').¹⁵ This report called for stronger internal financial controls and better monitoring of risk.¹⁶ It sought to provide a conceptual framework for companies to disclose risk and to inform directors of their obligations under the UK Combined Corporate Governance Code.¹⁷ It was focused on keeping good 'internal controls' in UK companies, having good audits and checks to ensure the quality of financial reporting and catching any fraud before it became a serious problem. A revised version of the document was released in 2005.¹⁸

¹⁰ These included Maxwell Communications, Polly Peck and Bank of Credit and Commerce International.

¹¹ Committee on the Financial Aspects of Corporate Governance, *The Financial Aspects of Corporate Governance*, (1 December 1992) European Corporate Governance Institute <<http://www.ecgi.org/codes/documents/cadbury.pdf>>.

¹² Robert AG Monks, *Modern Company Law for a Competitive Economy: The Strategic Framework* (February 1999) LENS Investment Management <<http://webarchive.nationalarchives.gov.uk/20121029131934/http://www.bis.gov.uk/files/file23279.pdf>>

¹³ Paul Grant, 'OFR Revival Hopes Sparked by International Standard' (2006) *Accountancy Age* 1, 1.

¹⁴ *Ibid.*

¹⁵ Turnbull Report Institute of Chartered Accountants in England and Wales, above n 1.

¹⁶ *Ibid* [10]–[12].

¹⁷ Financial Reporting Council, *The UK Corporate Governance Code* (2012).

¹⁸ Financial Reporting Council, *Internal Control: Revised Guidance for Directors on the Combined Code* (October 2005) Financial Reporting Council UK <<http://frc.org.uk/getattachment/5e4d12e4-a94f-4186-9d6f-19e17aeb5351/Turnbull-guidance-October-2005.aspx>>.

According to the Turnbull Report, a company's objectives, its internal organisation and the environment in which it operates are continually evolving and, as a result, the risks it faces are continually changing. A sound system of internal control, therefore, depends on a thorough and regular evaluation of the nature and extent of the risks to which the company is exposed.¹⁹ Following such evaluation, it is submitted that consideration must be given as to how such risks are to be disclosed to investors.

Though focused on internal control systems, the Turnbull Report also noted the importance of communication of these matters to shareholders:

Boards should review whether they can make more of the communication opportunity of the internal control statement in the annual report. Investors consider the board's attitude towards risk management and internal control to be an important factor when making investment decisions about a company. Taken together with the Operating and Financial Review, the internal control statement provides an opportunity for the board to help shareholders understand the risk and control issues facing the company, and to explain how the company maintains a framework of internal controls to address these issues and how the board has reviewed the effectiveness of that framework.²⁰

The Turnbull Report also provided guidance on how to deal with risk. It noted that a company's board should consider the following factors when deliberating:

- the nature and extent of the risks facing the company;
- the extent and categories of risk which it regards as acceptable for the company to bear;
- the likelihood of the risks concerned materialising;
- the company's ability to reduce the incidence and impact on the business of risks that do materialise; and
- the costs of operating particular controls relative to the benefit thereby obtained in managing the related risks.²¹

The Turnbull Report made it clear that a company's board should, in its annual report, make disclosure of the risk management systems themselves:

The annual report and accounts should include such meaningful, high-level information as the board considers necessary to assist shareholders' understanding of the main features of the company's risk management processes and system of internal control, and should not give a misleading impression.²²

In 1993 the UK Accounting Standards Board (ASB), backed by the London Stock Exchange, issued a statement recommending that large companies should include an

¹⁹ Ibid [4].

²⁰ Ibid preface 2.

²¹ Ibid [16].

²² Ibid [33].

OFR in their annual reports. The OFR would identify factors affecting past performance as well as future trading including aspects particularly subject to uncertainty. In 2003 the ASB revised its guidelines for preparing an OFR and published these factors, whilst in the same year the European Union issued a directive requiring medium and large sized companies to report on the principal risks and uncertainties facing their business and to publish relevant key performance indicators.²³ A statutory instrument was enacted in March 2005 amending the *Companies Act 1985* (UK) so that listed companies would be required by law to publish an OFR.²⁴ Just nine months later, however, the government enacted another statutory instrument, *Statutory Instrument 2005/3442* (UK),²⁵ repealing *Statutory Instrument 2005/1011* (UK) and moved to a less prescriptive approach. Nevertheless, a ‘business review’ is still required according to s 417 of the *Companies Act 2006* (UK) and this requires, amongst other things, identification of the principal risks and uncertainties facing the business, though in a less prescriptive format.²⁶ Since the new UK government came to power in 2010, there has also been discussion of reinstating of the OFR.²⁷

In the United States, the Securities and Exchange Commission (‘SEC’) has required Management Discussion & Analysis (‘MD&A’) disclosures for decades. In response to a study recommending an enhanced role for MD&A in corporate disclosure,²⁸ the SEC expanded its requirements in 1980 and said that MD&A should be a critical component of the ‘integrated information package’ to be disclosed in annual reports to shareholders, as well as in quarterly and annual securities filings.²⁹

²³ European Parliament and Council, European Parliament and Council Directive 2003/51/EC <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:178:0016:0022:en:PDF>>.

²⁴ *Statutory Instrument 2005/1011* (UK); *Companies Act 1985 (Operating and Financial Review and Directors’ Report etc.) Regulations 2005* (UK).

²⁵ *Statutory Instrument 2005/3442* (UK); *Companies Act 1985 (Operating and Financial Review) (Repeal) Regulations 2005* (UK).

²⁶ European Parliament and Council, European Parliament and Council Directive 2003/51/EC <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:178:0016:0022:en:PDF>>.

²⁷ Department for Business Innovation and Skills (UK), *The Future of Narrative Reporting – A Consultation* (August 2010) UK Government <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31440/10-1057-future-narrative-reporting-consultation.pdf>; see also Department for Business Innovation and Skills (UK), *The Future of Narrative Reporting: A New Structure for Narrative Reporting in the UK* (October 2012) Department for Business Innovation and Skills <<http://www.bis.gov.uk/assets/biscore/business-law/docs/f/12-979-future-of-narrative-reporting-new-structure.pdf>>.

²⁸ United States Advisory Committee on Corporate Disclosure, *Report to the Securities and Exchange Commission* (1977) (vol 1) 365–79.

²⁹ J W Gleason, ‘SEC Disclosure Requirements for Forward Looking or Predictive Information, With Emphasis on Projections and Management’s Discussion and Analysis’ in A K Austin (ed) *Advanced Workshop on Problems in Securities Disclosures* (New York Practising Law Institute, 1990) 400, 400.

In Australia, there is movement towards better risk disclosure, particularly with the mandating by the regulator of an OFR pursuant to s 299A of the *Corporations Act 2001* (Cth). Before considering these developments, it is useful to review the traditional basics of periodic disclosure in Australia.

III THE RUDIMENTS OF AUSTRALIAN PERIODIC DISCLOSURE AND IMPLICATIONS FOR RISK DISCLOSURE

Periodic disclosure in Australia is mandated by legislation and also by the ASX Listing Rules. All public companies (and certain other entities) must prepare a financial report and a directors' report.³⁰ Financial periods relate to either the full financial year or half-year. Whether it is the entity's financial year or half-year can be changed by resolution of the directors. A typical financial year lasts for 12 months.³¹ However, the first financial year of a company following registration may be for a period up to 18 months.³²

The current requirement for periodic disclosure is the preparation and dissemination of the 'annual report', which includes an audited financial report and a directors' report.³³ Under s 295 of the *Corporations Act 2001* (Cth), the financial report for a financial year consists of the financial statements for the year, notes to the financial statements and the directors' declaration about the statements and notes. The notes are disclosures required by the regulations, notes required by the Australian Accounting Standards Board's accounting standards ('AASBs')³⁴ and any other information necessary to give a true and fair view.³⁵

A Financial Statements

The production of annual financial statements in relation to an entity or, where required, a consolidated entity are required and governed by the AASBs.³⁶

Paragraph 8 of AASB 101 states that a financial report is comprised of a statement of financial position (formerly 'balance sheet') as at the end of the period, a statement of comprehensive income for the period, a statement of changes in equity for the period, a statement of cash flows (formerly cash flow statement) for the period, and notes comprised of a summary of significant accounting policies and other explanatory information. When an entity applies an accounting policy retrospectively, makes a retrospective restatement of items in its financial statements,

³⁰ *Corporations Act 2001* (Cth) s 292.

³¹ *Ibid* s 323D(2).

³² *Ibid* s 323D(1).

³³ *Ibid* ss 295–301.

³⁴ The AASB accounting standards governing the preparation of financial statements must be understood in light of ongoing changes and revisions to the standards.

³⁵ *Corporations Act 2001* (Cth) s 295(3).

³⁶ *Ibid* s 295(2).

or reclassifies items in its financial statements, it must also produce a statement of financial position as at the beginning of the earliest comparative period.³⁷ The principle financial documents are examined below.

B Statement of Financial Position ('Balance Sheet')

A balance sheet reflects the fact that the business entity is distinct from its proprietors. Funds provided by the proprietors ('equity' or 'proprietorship') are thus seen as a stake in the assets of the business claimed by the proprietors.³⁸ There are also funds provided by outside sources ('liabilities'), which are also a claim on the business. These are debts incurred through external financing. A popular conception of the balance sheet is the equation:

$$\text{Assets} = \text{Liabilities} + \text{Equity Capital}$$

A balance sheet lists the assets in the enterprise separate to the liabilities and equity capital. It draws a distinction between current and non-current liabilities, the former usually being payable within 12 months of the end of the last financial year. Likewise, current assets are those that would in the ordinary course of business be consumed or converted into cash within 12 months of the end of the last financial year. This includes cash and usually includes stock. Non-current assets include fixed assets used to produce income such as business premises, but may also include intangible assets, such as intellectual property and goodwill.

The balance sheet gives no information about risk, except perhaps where there is provision for doubtful debts. Generally it is assumed that liabilities will be paid and assets will keep their value.

C Statement of Comprehensive Income ('Profit and Loss Statement')

Whilst a balance sheet shows the company as at a certain date, the profit and loss statement shows the results of operating over a period. As such, it is a summary of the financial transactions occurring between the dates of the periodic balance sheets. A profit and loss statement has an appropriation statement, which shows the operating profit for the financial year as well as the balance of retained profits at the beginning of the financial year. It shows any transfers from reserves as well as transfers to reserves and payments of dividends. It then shows a final figure being the balance of profits retained at the end of the financial year or distributed as dividends.

If the closing balance of retained profits is higher than that brought forward at the start of the year then this will increase shareholder equity and will be reflected in an increase in net assets. As a statement summarising transactions during a period, this statement does little to communicate risk.

³⁷ Australian Accounting Standards Board, Accounting Standard AASB 101 <http://www.aasb.gov.au/admin/file/content105/c9/AASB101_09-07_COMPsep11_07-12.pdf>.

³⁸ Ibid.

D *Statement of Cash Flows*

Whilst a balance sheet is a snapshot in time and a profit and loss account shows whether there is a profit during the period, these documents do not disclose, for instance, whether trade debtors are paying their accounts. If not, there could be a cash flow shortage necessitating bank financing or even causing insolvency (which is assessed on whether a business can meet its debts as and when they fall due). The cash flow statement remedies this by providing a statement of cash inflows and outflows for the business for the financial period.³⁹ The statement of cash flows communicates liquidity risk.

E *True and Fair View*

Section 297 of the *Corporations Act 2001* (Cth) requires that financial statements give a 'true and fair' view of the financial performance of the company. Prior to amendments made in 1991 there was a duty placed on directors to ensure compliance with accounting standards, but this was subject to the overarching requirement that the accounts give a true and fair view. A true and fair view might arguably require warnings as to significant risk. From 1991 to 1998, as a result of the *Corporations Legislation Amendment Act 1991* (Cth), the *Corporations Law* stated that if financial statements did not give a true and fair view then the directors must add information and explanations sufficient to give a true and fair view.⁴⁰ These notes could conceivably contradict the financial statements themselves, although in most cases compliance with the accounting standards should lead to a true and fair view.

The 1998 amendments confirmed the position.⁴¹ The obligation on directors to add notes was removed, however, as the reporting obligation was instead placed on the corporate entity.⁴² Sections 297 and 305 set out the true and fair view requirement and legislative notes to these sections state that if financial statements prepared in accordance with accounting statements do not give a true and fair view, then additional information must be included in the notes. This is confirmed by ss 295(3) and 303(3)(c), which state that the notes to the financial statements include not only notes required by the accounting standards and regulations, but also any other information necessary to give a true and fair view.

Robert Austin and Ian Ramsay comment that the problem with these provisions is that if directors believe compliance with the standards in a particular case leads to the financial statements not giving a true and fair view, they are unlikely to be persuaded that the problem can be addressed by adding a reconciling note even

³⁹ *Corporations Act 2001* (Cth) s 95A.

⁴⁰ *Corporations Legislation Amendment Act 1991* (Cth).

⁴¹ *Company Law Review Act 1998* (Cth).

⁴² The effect of this is that directors do not have absolute liability for the statements. Their responsibility is to take all reasonable steps to secure compliance. This may require substantial reliance on information provided by others and there may be some scope for directors to argue delegation and reliance defences (such as those that exist in s 189 and s 190 of the *Corporations Act 2001* (Cth)).

though this may legally protect them.⁴³ They conclude that it would be wise for financial statements to cross-refer to the note wherever it appears, in the directors' opinion, that the financial statement does not give a true and fair view.⁴⁴

Today, s 297 of the *Corporations Act 2001* (Cth) is the provision requiring that the financial statements and notes for the financial year give a true and fair view of the financial position and performance of an entity and, if consolidated financial statements are required by the accounting standards, the financial position and performance of the consolidated entity be provided. These provisions date from 1998, but prior to that the requirement was that the balance sheet give a true and fair statement of the state of affairs of the company at the end of the financial year and that the profit and loss account give a true and fair view of the profit and loss of the company for the financial year. After 1998, the requirement was that the true and fair view be of the 'financial position and performance' of the company. This was intended to be wider than the old requirement, covering the same fields of disclosure but also mandating that attention be given to the company's whole operations, including cash flows.⁴⁵

The existence of significant risk factors may be relevant to the question of a true and fair view. For instance, if there is a significant risk that accounts will not be paid, due to the questionable solvency of trade debtors or if future cash flows are at risk, then this is something that might be noted in the notes to accounts, to the extent it is not described in the accounts themselves, in order to give a true and fair view. It seems also that this type of information, or some description of it, should also be included in the directors' report (see below), as s 298(1A) makes it clear that where the financial report contains additional information intended to give a true and fair view of financial performance it must also set out the directors' reasons for forming the opinion that this additional information was necessary to give a true and fair view. It is also implicit in this argument that this type of risk factor information should be included in the directors' report pursuant to the requirements of ss 299 and 299A.

F *Declaration of Solvency*

The directors' declaration states whether, in the directors' opinions, there are reasonable grounds to believe that the company can pay its debts, as well as whether the financial statements comply with accounting standards and give a true and fair view. Under s 295A, the directors give the declaration after the chief executive officer and chief financial officer have declared to the directors that financial records of the company have been properly maintained, that the financial statements and notes comply with the accounting standards and that they give a true and fair view.

The directors' declaration as to solvency clearly contemplates a warning of risk (although, in practice, if there is a significant risk of insolvency it is likely that directors would have to consider placing the company into administration).

⁴³ Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 13th ed, 2007) 548.

⁴⁴ *Ibid.*

⁴⁵ Explanatory Memorandum, Company Law Review Bill 1998 [13.31].

G *Financial Records*

Financial statements are based upon the financial records of the company kept in accordance with the requirements of s 286 of the *Corporations Act 2001* (Cth). That section requires companies to keep written financial records that correctly record and explain its transactions, financial position and performance, such that would enable true and fair financial statements to be prepared and audited. These must be kept for seven years.⁴⁶ Section 286 requires records that ‘correctly record and explain ... performance’. Austin and Ramsay note that this could include matters external to the company’s particular circumstances, such as adverse movements in commodity prices or exchange rates, but suggest that it is unlikely that the legislature intended that these be recorded by companies.⁴⁷ If it is proven that the company failed to keep financial records as required by s 286, there can be a presumption for certain purposes that the company was insolvent throughout the period of such failure.⁴⁸

IV DIRECTORS’ REPORT

In addition to the directors’ declaration, a directors’ report, pursuant to ss 298–300A of the *Corporations Act 2001* (Cth), is required. Since the introduction of the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (‘CLERP 9 Act’) directors are required to provide information that is divided into three components. These are:

- general information as required by s 299, plus additional general requirements set out in s 299A for listed companies;
- specific information as required by s 300, plus additional specific requirements set out in s 300A for listed companies; and
- a copy of the auditor’s independence declaration, as required by s 307C.

Details of the first two requirements (which may describe risk) are as follows.

A General Information

The general information required by s 299 includes:

- a review of operations and results of operations;
- details of any significant changes in the company’s state of affairs;

⁴⁶ *Corporations Act 2001* (Cth) s 286(2).

⁴⁷ Robert P Austin and Ian M Ramsay, *Ford’s Principles of Corporations Law* (Butterworths, 13th ed, 2007) 541.

⁴⁸ *Corporations Act 2001* (Cth) s 588E(4).

- principal activities of the company and any significant change in these;
- details of matters arising since the end of the year that has or may significantly affect the entity's future operations, future results or future state of affairs;
- likely developments in the entity's future operations and the expected results of those operations; and
- if the entity's operations are subject to any particular and significant environmental regulation, details of the entity's performance in relation to that regulation.

Both ss 299(d) and (e) relate to future matters and may be argued to include risk factors for the business.

There are specific offences under ss 1308 and 1309, some of which may apply to a directors' report. Offences include the making of false or misleading statements, knowingly omitting material in a manner that makes a statement false or misleading and making false or misleading statements or omission of material where the person has not taken reasonable steps to ensure accuracy. An omission to state risk factors in otherwise favourable representations may fall into this category. A breach of these sections can lead to criminal liability and injunction or damages under s 1324. It does not appear to lead to other civil liability (such as under s 1041I).

B Specific Information

Section 300 requires disclosure of various pieces of specific information. These include:

- dividends paid or recommended;
- the names of directors and their period of directorship;
- for financial years after 2004, the names of officers;
- for financial years after 2004, the names of all partners or directors of the company's auditor;
- share options given by the company;
- indemnities and insurance paid for officers;
- details of any statutory derivative action application made under s 237;⁴⁹ and
- for public companies that are not wholly owned subsidiaries of other companies, details of each director's qualifications, experience and special responsibilities and the number of board and board committee meetings attended by the director.⁵⁰

⁴⁹ Ibid s 300(15).

⁵⁰ Ibid s 300(10).

It is possible that some of this information will include express or implied information about risk. For example, details of a statutory derivative action, though impacting chiefly on the parties sued may have some reputational risk for the company.

In addition, s 300A sets out the requirements for the remuneration report of directors and senior managers, however this is not strictly relevant to risk as analysed in this article.

V CHIEF EXECUTIVE OFFICER'S AND CHIEF FINANCIAL OFFICER'S DECLARATIONS

The CLERP 9 Act also introduced the requirement that an ASX-listed company's chief executive officer and chief financial officer each provide a written declaration to the board of directors that:

- (a) the financial records of the company, disclosing entity or registered scheme for the financial year have been properly maintained in accordance with s 286; and
- (b) the financial statements and the notes referred to in paragraph 295(3)(b), for the financial year comply with the accounting standards; and
- (c) the financial statements and notes for the financial year give a true and fair view (see section 297); and
- (d) any other matters that are prescribed by the regulations for the purposes of this paragraph in relation to the financial statements and the notes for the financial year are satisfied.⁵¹

VI HALF-YEARLY REPORT

There is also the requirement of a half-yearly report, which was introduced in 1991 and also includes an audited financial report and directors' report.⁵² Under the ASX Listing Rules, companies must also provide a preliminary annual report within two months of the end of the accounting period.⁵³ This tends to predate the final annual report (which is released approximately one month after the preliminary annual report) so that the preliminary report is significantly more price sensitive.

Unlike the United States and Europe, there is no general requirement to provide quarterly reports, although this has been discussed and some companies provide this information voluntarily.⁵⁴ There are some exceptions to this general rule, such that

⁵¹ Ibid s 295A.

⁵² Ibid ss 302–306.

⁵³ Australian Securities Exchange, *Listing Rules* (as at 1 December 2013) r 4.3B.

⁵⁴ See generally Gill North, 'Periodic Disclosure Regulation: Enhancements to Enable All Investors to Make Informed Decisions' (2009) 27 *Company and Securities Law Journal* 23, 28, 30. During the 'dotcom' boom of the early 2000s,

certain type of start up companies listed on the ASX may be required to make quarterly disclosure for their first two years, under ASX Listing Rule 4.7B. Mining entities are required to make quarterly disclosure under chapter 5 of the ASX Listing Rules. In any event, the advent of continuous disclosure appears to have removed some of the pressure for quarterly reporting.⁵⁵ Similarly, surveys have suggested that quarterly reporting may involve excessive time and cost, cause an information overload and cause undue focus on short term performance.⁵⁶ On the other hand quarterly reporting may provide more timely highlighting of risk (though continuous disclosure should ideally achieve this).

VII MANAGEMENT DISCUSSION AND ANALYSIS AND S 299A REQUIREMENTS

Related to the issue of disclosure of risk is the longstanding debate in Australia about whether there should be a requirement for US-style MD&A in annual reports of listed companies.⁵⁷ The MD&A section of a company in the US and Canada typically includes a description of business operations and a description of risks and uncertainties.⁵⁸ This sort of ‘soft information’ is less verifiable yet, ironically, it is often this soft information (particularly information about earnings prospects and the risks in relation to same) that may arguably influence investors more than hard information.⁵⁹ Criticisms of annual reports and other disclosures that fail to contain MD&A include:

- failure to describe goals and strategies;
- lack of meaningful segmented disclosure;
- insufficient interpretation of financial results, especially regarding conditions likely to affect future earnings;

the ASX imposed quarterly cash flow reporting requirements and ASIC and ASX agreed that these should be continued until a company had demonstrated a positive cash flow for four quarters, given the continuing lack of compliance by many high tech companies with the continuous disclosure requirements. See Australian Securities and Investments Commission, ‘01/284 ASIC Cracks Down on Continuous Disclosure’ (Media Release, 13 August 2001) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2001-releases/01284-asic-cracks-down-on-continuous-disclosure/>>.

⁵⁵ Companies and Securities Advisory Committee, ASIC, *Report on Continuous Disclosure* (1996) Appendix 3, question 30.

⁵⁶ *Ibid.*

⁵⁷ Craig Callum and Larelle Law, ‘Soft Information Disclosure Requirements under the Corporations Law’ (2001) 29 *Australian Business Law Review* 149.

⁵⁸ J E Boritz, *Approaches to Dealing with Risk and Uncertainty* (1990) Canadian Institute of Chartered Accountants <https://docs.google.com/a/monash.edu/file/d/0B2ccgmZijI4UYTI0N2FmNmQtNDQ4OS00YzFhLTk0MjctNDYyNDk5Nzk0YzRk/edit?hl=en_US>.

⁵⁹ See generally Rob McQueen, ‘The Corporate Image – The Regulation of Annual Reports in Australia’ (2001) 1 *Macquarie Law Journal* 1, 74.

- exaggerated claims regarding future prospects which bordered on advertising;
- excessive aggregation of income statement items; and
- absence of information on stock prices and valuation data.⁶⁰

In Australia the view has been expressed that the continuous disclosure laws, given the exceptions thereto, are inadequate to ensure disclosure of soft information and that MD&A should be prescribed in periodic disclosure⁶¹. The draft second Corporate Law Simplification Bill in fact provided for an obligation to:

Discuss and analyse the matters members need to be informed about if they are to understand the overall financial position [of the entity including]:

- (a) results of operations (both overall and in key industry and geographical segments);
- (b) key strategic initiatives adopted;
- (c) major commitments entered into and sources of funding for those commitments;
- (d) Unusual or infrequent events and transactions;
- (e) Likely future developments in the business; and
- (f) Trends or events (both internal and external) that have had a significant effect or are likely to have a significant effect on the business.⁶²

These proposals were not met with unanimous support and were eventually abandoned. Nevertheless, the HIH Royal Commission, noting the recommendations of the UK Company Law Review, recommended that the Corporations Law be amended to require the inclusion of an OFR in the annual report which should be audited.⁶³ The Commissioner, Justice Neville Owen, noted in his policy recommendations:

It is imperative that all matters to be disclosed in the audit report are expressed in plain English, comprehensible to readers who lack accounting qualifications. A further approach was recommended in the UK Company Law Review. This approach required public and large private companies to publish an operating and financial review as a part of their annual report. The review would contain such information as the directors decide is necessary to obtain an understanding of the business. It would include details of the company's performance, plans,

⁶⁰ Neil Campbell, 'Compulsory Disclosure of "Soft" Information' (1993) 22(3) *Canadian Business Law Journal* 321, 324.

⁶¹ Justin Mannolini, 'Convergence or Divergence: Is there a Role for the Eggleston Principles in a Global M&A Environment?' (2002) 24 *Sydney Law Review* 336, 350.

⁶² Draft Second Corporate Law Simplification Bill 1996 (Cth) s 299(1); see Australian Parliament, *Issues Arising from the Bill* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/1996-99/2nd_simp/report/c02#300>.

⁶³ Commonwealth HIH Royal Commission, *Report of the HIH Royal Commission* (2003), Recommendation 13.

opportunities, corporate governance and management risks. The Company Law Review recommended that the auditor should review the operating and financial review. I am of the opinion that such a document, which would be the subject of audit, would significantly assist in addressing the short-comings of audited accounts presented in accordance with the historical cost convention and other standards which can impede the utility of the accounts as a transparent assessment of the financial progress of the company. Such an approach would enhance the increased audit report disclosure which I have discussed above.⁶⁴

Section 299A was inserted into the *Corporations Act 2001* (Cth) by the CLERP 9 Act in 2004 and introduced a partial MD&A approach. Section 299A required that the directors' report contain

information that members of the company would reasonably require to make an informed assessment of

- (a) the operations of the entity reported on; and
- (b) the financial position of the entity; and
- (c) the entity's business strategies and prospects for future financial years.⁶⁵

Prior to this, only a handful of companies in Australia provided MD&A narratives and these were chiefly subsidiaries of US companies and those listed on overseas exchanges.⁶⁶ One commentator noted at the time that

[p]otential investors and other interested parties are too often faced with a black hole when it comes to getting a meaningful assessment of a business' performance and prospects whether in the private or the public sector.⁶⁷

The requirement for companies to disclose a review of operations and financial condition can be seen to result from the recommendations of the HIH Royal Commission, developments in England and some influence from the US MD&A.⁶⁸ The rationale for its introduction was to address a lack of contextual information that explained the results set out in a company's financial statements. Accordingly, the review of operations and financial condition was introduced to provide stakeholders with an overview that would enable them to understand a business's performance and the factors underlying its financial position.⁶⁹

⁶⁴ Ibid 7.2.6.

⁶⁵ *Corporations Act 2001* (Cth) s 299A(1).

⁶⁶ See McQueen, above n 59, footnote 17.

⁶⁷ See McQueen, above n 59, footnote 17, quoting Scott Henderson, commenting on the question of compulsorily requiring such analyses in annual reports.

⁶⁸ See Gregory Allan, 'The HIH Collapse: A Costly Catalyst for Reform' (2006) 11(2) *Deakin Law Review* 137.

⁶⁹ Explanatory Memorandum, Corporations Amendment (Corporate Reporting Reform) Bill 2010 (Cth).

As noted, s 299A of the *Corporations Act 2001* (Cth) was inserted as part of the CLERP 9 Act.⁷⁰ According to the explanatory memorandum to that Act:

The preparation of an operating and financial review is increasingly being accepted in the world's capital markets as an integral part of good corporate governance and high quality financial reporting. As such, it is a means of providing users of financial statements with an analysis of a company's business as seen through the eyes of the directors.⁷¹

The section had regard to international developments, which may include the popularity of MD&A in the United States.⁷²

The provisions are expressed to be based upon what members of the listed entity would reasonably require to make an informed assessment of the matters therein. Austin and Ramsay note that this adoption of a 'reasonable member requirements' test for annual disclosure 'accelerates the convergence between periodic disclosure and disclosure for fundraising purposes, where the governing disclosure principle is the "reasonable investor" test under section 710.'⁷³ The wording in s 710 refers to information that 'investors and their professional advisors would reasonably require to make an informed assessment of' the investment. Similarly, the wording in s 299A refers to information that 'members of the listed entity would reasonably require to make an informed assessment of' the investment. This convergence may accelerate the reporting of risk in periodic disclosure as the reporting of risk factors is already commonplace in fundraising documents.

The explanatory statement for s 299A goes on to say that:

The content requirements for the review have been expressed in broad terms. The purpose of this is:

- to enable directors to make their own assessment of the information needs of members of the company and tailor their disclosures accordingly; and
- to provide flexibility in form and content of the disclosures as the information needs of shareholders, and the wider capital market, evolve over time.⁷⁴

Hence, there seems to be a discretion and flexibility given to directors to assess the information needs of members and contemplation of the fact that these may evolve over time.

⁷⁰ Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act No 103 of 2004.

⁷¹ Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth), [5.305].

⁷² See Thomas Hazen, *The Law of Securities Disclosure* (West Publishing, 3rd ed, 1995) 154.

⁷³ Robert P Austin and Ian M Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 13th ed, 2007) 555.

⁷⁴ Explanatory Memorandum, Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004 (Cth), [5.306].

Lastly, the explanatory memorandum brings into the picture best practice guidance by the Group of 100 Inc ('G100'), which is an association of senior finance executives from Australia's business enterprises. The explanatory memorandum states that '[i]t is expected that, in considering the issues to be addressed in their review, directors will have regard to best practice guidance such as that prepared and published by the Group of 100 Inc (G100).'⁷⁵ The G100 guidance material is also supported by the ASX for the purpose of complying with ASX Listing Rule 4.10.17 (see below). The G100 guidance may be used for the purpose of satisfying the legislative requirements. On the basis of the G100 guidance material, the issues that could be discussed and analysed in the report include:

- corporate overview and strategy;
- review of operations;
- investments for future performance;
- review of financial condition;
- risk management;
- corporate governance.⁷⁶

A ASIC Requirements under the Corporations Act 2001 (Cth) s 299A

It should be noted that ASIC requires companies to present OFRs as part of listed companies' obligations under s 299A of the *Corporations Act 2001* (Cth). ASIC interprets this section as requiring listed companies to present OFRs (also known as 'management commentary' or 'management discussion and analysis').⁷⁷ An idea of the sort of information that ASIC expects as OFR or MD&A can be gleaned from its review of 30 June 2010 financial reports and focuses for 31 December 2010. ASIC criticised the level of MD&A, noting that:

- (i) Most of the companies reviewed appear to have provided what they considered to be minimum disclosures, but which would not appear to comply with the obligation to provide information members would reasonably require.
- (ii) The OFR often lacked information and explanations that would provide users with an understanding of the drivers of an entity's performance. Instead, general descriptive comments that repeated movements evident from the financial report (e.g. revenue increased by 3%) were given, that provided users with little or no information about the specific activities, transactions and events that gave rise to the results.

⁷⁵ Ibid [5.307].

⁷⁶ Group of 100, *Guide to Review of Operations and Financial Condition* (2003) <http://www.group100.com.au/publications/g100_Review_Operations2003.pdf>.

⁷⁷ Australian Securities and Investments Commission, '10-282AD ASIC's Review of 30 June 2010 Financial Reports and Focuses for 31 December 2010' (Media Release, 22 December 2010) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2010-releases/10-282ad-asics-review-of-30-june-2010-financial-reports-and-focuses-for-31-december-2010/>>

- (iii) Most entities did not provide key performance indicators, production statistics or similar information.
- (iv) Most entities did not present the OFR information in a single section of the financial report. This could increase the focus of the company and its directors on the completeness and quality of the OFR information, and assist users of the annual report in locating the information.
- (v) Most entities provided more analysis in investor presentations or analyst briefings lodged with ASX. Directors should consider giving more detail in the OFR, which is part of the annual report. However, undue prominence should not be given to an alternative profit measure compared to the statutory profit.⁷⁸

In 2012, ASIC released proposed guidance on the OFR.⁷⁹ In the proposed guidance it was noted, in relation to general periodic disclosure under s 299, that:

While an entity's financial report provides useful information to investors about the entity's financial position and performance, it will rarely provide all the information needed to readily assess the underlying drivers of the entity's financial performance and to properly understand the reasons for the entity's results. It will also provide little, if any, information about expected future performance.⁸⁰

ASIC also noted international recognition of the importance of high quality OFRs, including the view of the International Organisation of Securities Commissions ('IOSCO') that OFRs

enable management to explain the factors that have affected an entity's financial condition and results of operations for the historical periods covered by the financial statements, as well as management's assessment of the factors and trends that are anticipated to have a material effect on the company's financial condition and results of operations in the future.⁸¹

⁷⁸ Ibid.

⁷⁹ Australian Securities and Investments Commission, '12-228MR ASIC Proposes Guidance for Operating and Financial Reviews' (Media Release, 17 September 2012) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2012-releases/12-228mr-asic-proposes-guidance-for-operating-and-financial-reviews/>>.

⁸⁰ Australian Securities and Investments Commission, *Effective Disclosure in an Operating and Financial Review* and attached draft Regulatory Guide (17 September 2012) <[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/cp187-published-17-September-2012.pdf/\\$file/cp187-published-17-September-2012.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/cp187-published-17-September-2012.pdf/$file/cp187-published-17-September-2012.pdf)>.

⁸¹ Ibid 10, quoting Technical Committee of IOSCO, *Principles for Periodic Disclosure by Listed Entities* (February 2010) <<http://www.iosco.org/library/pubdocs/pdf/ioscopd317.pdf>>.

Significantly, proposal C5 of ASIC's proposed OFR guidelines includes an analysis of business risks. It provides as follows:

We propose that the information required under s299A(1)(c) on business strategies and prospects for future financial years should focus on the areas that are likely to affect the future financial performance and position of the entity. We consider that the OFR should usually include:

- (a) an outline of the entity's key business strategies, and its plans that are a significant part of those strategies; and
- (b) disclosure of the main risks that could adversely affect the successful fulfilment of the business strategies of the entity.⁸²

The rationale for the proposal is evident in the following statement from ASIC:

We consider that a discussion about an entity's prospects for future financial years would benefit from a consideration of the risks that could affect the entity's financial position and performance.⁸³

This would, however, be subject to an exemption, where disclosure of such risks would cause unreasonable prejudice for the entity as set out in s 299A(3). Unreasonable prejudice is described in the draft regulatory guide as including the situation where disclosure would give third parties such as competitors, suppliers and buyers, a commercial advantage resulting in material disadvantage to the disclosing entity.⁸⁴ ASIC states in its proposed draft Regulatory Guide that it is likely to be misleading to discuss prospects without referring to the main risks that could adversely affect the achievement of the financial outcomes described. It states that:

Any discussion of risks should be tailored to the entity rather than using a standard description. The discussion of risks may include:

- (a) *internal risks* — for example, an entity's ability to meet future demand for its products or services, corporate restructures and cost management strategies initiated by management; and
- (b) *external risks* — for example, the economic risks affecting an entity, the impact of commodity prices, and possible legislative changes.⁸⁵

⁸² Australian Securities and Investments Commission, *Effective Disclosure in an Operating and Financial Review* and attached draft Regulatory Guide (17 September 2012) <[http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/cp187-published-17-September-2012.pdf/\\$file/cp187-published-17-September-2012.pdf](http://www.asic.gov.au/asic/pdfflib.nsf/LookupByFileName/cp187-published-17-September-2012.pdf/$file/cp187-published-17-September-2012.pdf)>13.

⁸³ *Ibid.*

⁸⁴ *Ibid.* 39.

⁸⁵ *Ibid.* 37–8.

It goes on:

Other considerations that may be relevant for disclosure of risks include:

- (a) *key risks* — identifying the key risks that are relevant to an entity. Care should be taken to avoid disclosure of an excessive number of risks. Each risk should:
 - (i) be described in its context (e.g. why is the risk important or significant, and what is its potential impact on the entity's financial results?); and
 - (ii) include any relevant associated analytical comments (e.g. is the risk expected to increase or decrease in the foreseeable future?); and
- (a) *risk aversion and risk management* — a description of the directors' level of appetite for risk, any changes in the risk appetite, and any current or planned risk management practices.⁸⁶

ASIC issued its Regulatory Guide 247, 'Effective Disclosure in an Operating and Financial Review' in March 2013.⁸⁷ Whilst not as extensive as the draft regulatory guide, in terms of mandating the identification of risk, it still goes some way in this direction.

In paragraph 247.61, ASIC states:

It is important that a discussion about future prospects is balanced. It is likely to be misleading to discuss prospects for future financial years without referring to the material business risks that could adversely affect the achievement of the financial prospects described for those years. By 'material business risks', we mean the most significant areas of uncertainty or exposure, at a whole-of-entity level, that could have an adverse impact on the achievement of the financial performance or outcomes disclosed in the OFR. Equally, it may be appropriate to disclose factors that could materially improve the financial prospects disclosed.⁸⁸

Further, in paragraph 247.62, ASIC states:

An OFR should:

- (a) only include a discussion of the risks that could affect the entity's achievement of the *financial* prospects disclosed, taking into account the nature and business of the entity and its business strategy; and
- (b) not contain an exhaustive list of generic risks that might potentially affect a large number of entities.⁸⁹

⁸⁶ Ibid 38.

⁸⁷ Australian Securities and Investments Commission, *Regulatory Guide 247 Effective Disclosure in an Operating and Financial Review* (March 2013) <<http://www.asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-247-effective-disclosure-in-an-operating-and-financial-review/>>.

⁸⁸ Ibid [247.61].

⁸⁹ Ibid [247.62].

It follows that ASIC takes the view that proper compliance with s 299A includes disclosure of the material business risks that could adversely affect an entity's financial position and performance, although this would not extend to generic risks that potentially affect a large number of entities.

B ASX Requirements on s 299A Review of Activities

The ASX Listing Rules also include discussion and analysis disclosure guidelines. Listing Rule 14.10.17 requires a review of activities and operations from the reporting period.⁹⁰ Whilst the ASX does not specify the review's required content, it states that it supports the G100 Incorporated's Guide to the Review of Operations and Financial Condition.⁹¹ Interestingly, the G100 guidance, issued in 2003, suggests detailed disclosures about risk management and states the following:

Shareholders and other users of financial reports are interested in the various risk exposures of the company and the way in which those risks are managed. The Review should contain a discussion of the company's risk profile and risk management practices if these are not dealt with elsewhere in the Annual Report. Discussion of risk management practices in relation to borrowings, interest rates and exchange rates is appropriately dealt with under treasury policy. However, a company is also subject to other risks which need to be discussed.

Disclosures about risks facing the company enable users to see the business through the eyes of directors and enable users to understand the company's risk profile and risk management strategy. All relevant aspects of risk management and mitigation, to the extent they are not already dealt with elsewhere in the Review or in the Annual Report, should be discussed. The discussion of risk and risk management should be in a manner which is consistent with how the respective risk exposures are identified and managed. The discussion should include the significant risks and uncertainties facing the company, its core businesses and segments, the strategies and processes applied for managing those risks and the potential impact of these risks on financial performance. ... The discussion of the risk profile, management and mitigation of risk other than those relating to treasury policies may include:

- legal and regulatory compliance;
- fraud;
- availability of staff and other resources;
- occupational health and safety;
- changes in technology and other operational risks;
- environmental issues; and
- product liability.⁹²

⁹⁰ Australian Securities Exchange, *Listing Rules* (1 December 2013) r 4.10.17.

⁹¹ G100, above n 76. As noted, the Explanatory Memorandum, *Corporate Law Economic Reform Program Bill 1999* (Cth) paragraph 5.308 also approved the G100 material.

⁹² G100, above n 76.

Therefore, it is not clear that the ASX requires risk factors themselves to be enumerated, though this may occur in identifying the risk profile of the company.

C Accounting Standards on Review of Activities

AASB 1039 also requires discussion and analysis to assist the understanding of members.⁹³ It provides for same for non-listed companies while noting that listed companies already have that obligation under s 299A. The accounting standards do not go so far as to require a section on risk factors or risk management.

D Extra Requirements of Periodic Disclosure: ASX Corporate Governance Principles and Risk

In March 2003 the ASX Corporate Governance Council published its *Principles of Good Corporate Governance and Best Practice Recommendations* ('the Principles'). These embodied ten principles of sound corporate governance. The Principles cover such matters as the structure of the board, independent directors, board committees, financial reporting, timely disclosure, respecting rights of shareholders, recognising and managing risk, enhanced performance, fair remuneration and recognising the interests of stakeholders. The Principles operate on an 'if not, why not' basis, which essentially means that where the principles are not complied with, the company must state in its annual report which principles are not being complied with and the reasons for the non-compliance. This is required by the ASX listing rules. The Principles were amended in August 2007 and were reduced in number to eight with Principle 8 being combined with Principles 1 and 2 and Principle 10 being included in Principles 3 and 7. They were again revised in March 2014. Of significance too for this analysis was expansion of Principle 7 to require companies to report on whether it has recognised and managed risk.

Principle 7 has been formulated to require the establishment of a sound risk management framework and periodic review of the effectiveness of that framework. The first specific recommendation is the establishment of a board risk management committee (recommendation 7.1). The second is the annual review of the entity's risk management framework (recommendation 7.2). The third is the disclosure of whether the entity has an internal audit function, and if not, disclosure of its processes for ensuring the effectiveness of its risk management and internal control processes (recommendation 7.3). The fourth is the disclosure of whether the entity has any material exposure to economic, environmental and social sustainability risks, and if it does, how it manages or intends to manage those risks (recommendation 7.4).⁹⁴ The Principles state that if the Board of a listed entity considers that a Council recommendation is not appropriate to its particular circumstances it is

⁹³ Australian Accounting Standards Board, Accounting Standard AASB 1039.

⁹⁴ Australian Securities Exchange Corporate Governance Council, *Corporate Governance Principles and Recommendations* (27th March 2014) Australian Securities Exchange <<http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf>>

entitled not to adopt it. If it does not adopt it, however, it must explain why it has not adopted the recommendation.⁹⁵

VIII CONCLUSION

The importance of internal recognition of risk is exemplified in recent decades by the development of the area of risk management. Specific external disclosure of risks to shareholders in periodic reporting is a more recent and developing phenomenon. It is important given the role of disclosure as a form of investor protection and the need to continually update investors beyond initial prospectus warnings of risk. Conventional accounting presentation does not generally mandate disclosure of specific risks, though risk may be implied in some measures and it may be that the 'true and fair view' standard will require such disclosure. The amendment of the *Corporations Act 2001* (Cth) in 2004 to include s 299A and the requirement of a review of activities encompassing prospects for future years should on the face of it lead to greater risk disclosure. This is particularly so in view of ASIC's interpretation of the section as requiring an OFR that discloses inter alia, the main risks that could adversely affect the successful fulfilment of the business strategies of the entity. Further, ASX Listing Rules require disclosure of details of risk and risk management systems as do the ASX Corporate Governance Principles. It may be concluded from these developments that the trend of regulation seems to be moving toward greater periodic disclosure of risk and risk factors.

⁹⁵ Ibid.

*John Gava**

**WHAT WE KNOW ABOUT CONTRACT LAW AND
TRANSACTIONING IN THE MARKETPLACE — A REVIEW
ESSAY OF CATHERINE MITCHELL, *CONTRACT LAW
AND CONTRACT LAW PRACTICE: BRIDGING THE GAP
BETWEEN LEGAL REASONING AND COMMERCIAL
EXPECTATION* AND JONATHAN MORGAN, *CONTRACT
LAW MINIMALISM: A FORMALIST RESTATEMENT
OF COMMERCIAL CONTRACT LAW*.**

ABSTRACT

Since Stewart Macaulay's pioneering work on the use and non-use of contract law in the market two competing schools of thought have emerged to explain the appropriate way to judge contract disputes before the courts. The first, contextualism, argues that judges, in deciding contract disputes and developing the law, should give effect to the expectations, practices and desires of the business community. The alternative, formalism, argues that since business uses law selectively it would be counterproductive if the law were anything other than predictable. The books reviewed synthesise the scholarship surrounding this debate and, in so doing, each proposes the form of judging thought to be the most suitable. In this review I will argue that when viewed against the arguments of two giants in this field, Macaulay himself and Hugh Collins, it becomes apparent that Mitchell's careful, well-explained and balanced contextualism is ultimately unpersuasive and that Morgan's formalist defence makes much more sense. I will also argue, however, that the differences between Mitchell and Morgan are ultimately tactical because both see contract law in instrumental terms. Both understand the role of contract law as being to aid and enhance market exchange but differ over how this is best achieved. I will argue that both are wrong on this point and that there are historical, constitutional and institutional reasons for not seeing contract law in instrumentalist terms.

I INTRODUCTION

Students of contract law have an advantage over those working in other areas of law. More than 40 years of empirical and theoretical work have given us a good idea, at least for commercial contracts, of how important contract law is,

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what role it plays in the market and how judges should decide cases and develop the law.¹

We owe this knowledge to the avalanche of empirical and theoretical studies carried out in response to Stewart Macaulay's 1963 seminal article 'Non-Contractual Relations in Business: A Preliminary Study'.² Macaulay had investigated the role of contract law in business transacting and found that contracts and contract law had very limited roles to play in commerce. The businesspeople that Macaulay studied preferred not to use contracts and avoided the courts as much as possible.³

This raised an important question for contracts scholars. How should contract law respond to Macaulay's demonstration that contract law does not seem to be used all that often in commerce? Jonathan Morgan, whose recent book *Contract Law Minimalism* is the subject of this review, thinks this question is 'arguably the most difficult of all questions facing contract scholars today'.⁴

Two schools of thought have developed to answer this question. The first, contextualism, argues that judges, in deciding contract disputes and developing the law, should give effect to the expectations, practices and desires of the business community. A contextualist law of contract would give primacy to standards such as good faith and unconscionability and look to business norms and practices to interpret contracts and to fill gaps where necessary. Such a law would be dynamic because it would be continually refined to give effect to changing business norms, expectations and behaviour.⁵ Catherine Mitchell's *Contract Law and Contract Practice*⁶ (the other book examined in this review) reflects this understanding of the relationship between contract law and transacting and builds on the earlier influential work, *Regulating Contracts* by Hugh Collins.⁷

¹ For developments in other areas of law and for the field of empirical legal studies more generally, see Symposium, 'The Empirical Revolution in Law' (2013) 65 *Stanford Law Review* 1195.

² Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55 ('Non-Contractual Relations').

³ For further reading see the bibliographies in the following recent works — the latter two are the subjects of this review essay: Jean Braucher et al (eds), *Revisiting the Contracts Scholarship of Stewart Macaulay: On the Empirical and the Lyrical* (Hart, 2013); Catherine Mitchell, *Contract Law and Contract Practice: Bridging the Gap between Legal Reasoning and Commercial Expectation* (Hart, 2013) ('*Contract Law and Contract Practice*'); Jonathan Morgan, *Contract Law Minimalism: A Formalist Restatement of Commercial Contract Law* (Cambridge University Press, 2013) ('*Contract Law Minimalism*').

⁴ Morgan, above n 3, 72.

⁵ R Brownsword, 'Static and Dynamic Market Individualism' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Dartmouth, 1996) 46–67.

⁶ Mitchell, above n 3.

⁷ Hugh Collins, *Regulating Contracts* (Oxford University Press, 1999).

The alternative response, formalism, argues that since business uses law selectively, that is when the law suits its purposes, it would be counterproductive if the law were anything other than predictable. In other words, if the law is continually changing to match perceived notions of business needs or expectations (perceptions that at best can only be rough and ready approximations of these needs and expectations) the law would be unpredictable and not a useful tool for these businesspeople. Formalism eschews open-ended concepts such as good faith and relies on bright-line rules and strict limits on judicial discretion.⁸ Morgan's *Contract Law Minimalism* falls within this school of thought.

What do Mitchell and Morgan add to these debates? Both attempt to synthesise the scholarship in this area and, in so doing, each propose the form of judging they think would be most appropriate. In this review I will argue that the best way to answer this question about the appropriate form of judging is to go back one step and reconsider what Macaulay and Collins had to say about contract and the market and to argue that, despite their own beliefs, both Macaulay and Collins can be best understood from a formalist perspective. When this is done it then becomes apparent that their lessons help us see why Mitchell's careful, well-explained and balanced contextualism is ultimately unpersuasive and that Morgan's formalist defence makes much more sense.

However, that is not the end of the matter because, as I will argue, the differences between Mitchell and Morgan are merely tactical because both see contract law in instrumental terms. Both understand the role of contract law as being to aid and enhance market exchange but differ over how this is best achieved. In other words, at the tactical level of deciding whether contextualism or formalism best suits the market, Mitchell and Morgan differ, but at the strategic level of determining what the role of contract law is, both agree that contract law has an instrumentalist purpose of aiding market exchange.⁹ I will argue that both are wrong on this point and that there are historical, constitutional and institutional reasons for not seeing contract law in instrumentalist terms.

II MACAULAY AND COLLINS ON CONTRACT LAW

Macaulay explained non-use of contract law by showing that reputation was the most important security for contractual performance and that the fear of losing a good reputation was, usually, far superior to costly, time-consuming recourse to law.

⁸ In this paper, as will become clear, formalism is not being used as an alternative expression for what might be called traditional legalism. However, for many writers the classical law of contract is a proxy for formalism. For the author's understanding of traditional legalism see, for example, John Gava, 'Dixonian Strict Legalism, *Wilson v Darling Harbour Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519.

⁹ For further discussion of this point see John Gava, 'Can Contract Law Be Justified on Economic Grounds?' (2006) 25(2) *University of Queensland Law Journal* 253, 262; John Gava, 'How Should Judges Decide Commercial Contract Cases?' (2013) *Journal of Contract Law* 133, 147–8.

He pointed to the institutional pressure to perform and the pride of those involved in business as strong forces operating to ensure that performance. He also noted that the companies he investigated often used contracts as bureaucratic devices to control the inner workings of complex organisations rather than primarily as tools designed to ensure performance. Macaulay emphasised not only that contract law was infrequently used; he also highlighted the negative impact that its use could have for business dealings and business relationships.¹⁰ Macaulay's analysis sparked a flood of empirical and theoretical works on the use and non-use of contract law in the market place. Macaulay's explanation for the minor, indeed, often non-existent, role played by contract law in daily commerce has been confirmed and augmented through detailed empirical and analytical studies from a variety of jurisdictions.¹¹

These findings and his analysis rest most comfortably with a formalist understanding of contract law. Macaulay shows that contract law is not that important in market transacting but that it will be used where and when it is useful or if there are no other alternatives. For Macaulay, law is normally a tool of last resort. In such circumstances it would be unwise and unnecessary to have anything other than a predictable and strictly enforced law. Attempts to make law more commercially appropriate would seem to miss the mark as such attempts would misread the needs of commerce. 'Non-Contractual Relations' is best understood as supporting a formalist view of contract law — even though Macaulay was later to advocate a contextualist role for judges.¹²

Collins added two powerful lessons, one positive and one negative, about contract law and transacting in the market. The *positive lesson* was in his explanation of the relationship between contracting and transacting in the market. Collins explained that transacting had three dimensions. The first was the business relationship between the parties: normally the most important because businesses usually rely on more than one exchange and their reputation depends, in the main, on their business relationships. The second dimension was the deal or transaction itself. Normally this is less important than the business relationship but, of course, in special circumstances the deal could take primacy where, for example, it was extraordinarily large or one of the parties was in a parlous financial state. The third and final dimension was the contract. This would normally lie dormant, as Macaulay showed, but, again, in particular circumstances the parties could and would rely on a contract and use litigation as a means of settling disputes. Collins emphasised that all three dimensions were potentially in play at all times and that there was an interrelationship between them. For example, parties to a transaction might formulate a rigid contract with firm obligations but not expect their actual business relationship to exhibit this rigidity. The contract's tough terms would be a form of insurance to guarantee against opportunism.

¹⁰ Macaulay, Non-Contractual Relations, above n 2.

¹¹ See works listed at above n 3.

¹² Stewart Macaulay, 'The Real Deal and the Paper Deal: Empirical Pictures of Relationships, Complexity and the Urge for Transparent Simple Rules' in David Campbell, Hugh Collins and John Wightman (eds), *Implicit Dimensions of Contract*, (Hart, 2003), 51–102.

Collins' schema rests very comfortably with Macaulay's analysis of contracting and transacting in 'Non-Contractual Relations'. Indeed, it would be fair to describe Collins' tripartite analysis as embodying and filling in the skeletal framework provided by Macaulay. It, too, is best understood as underpinning a formalist position because it makes clear the way in which contracts and contract law are used tactically by businesspeople when and if they suit.

Collins' other lesson is equally important, if *negative* in effect. In *Regulating Contracts*, Collins made a concerted and exhaustive argument in favour of a contextualist law of contract. He argued that the courts should take into account the learning provided by economics and sociology on market transacting in order to apply and develop a commercially apt law of contract. Mindful of his tripartite schema for understanding market transacting and the interrelationship between the business relationship, the imperatives of a business deal and the contract (if one existed), he also explained how it was important for judges to understand not only commercial expectations generally but also in any business transaction the relationship between the parties, the importance of the deal to them and what role, if any, a contract played. Elsewhere I have argued that his contextualist project failed because it demanded of judges capacities that they did not have; that it required information that often did not exist, was costly to obtain or was confidential; that it ran counter to the best evidence suggesting that parties used law tactically; and that it ignored the inequality of power in business dealing; all of which, instead, supported a formalist law of contract. Collins' explanation of what is needed for a true contextualism is persuasive because anything less will essentially amount to guesswork and the imposition on the parties of what a judge imagines the context between them to be. At the same time this careful explanation also explains why contextualism is impossible. It asks too much of judges and requires information that is costly, often not available and frequently confidential.¹³ In a nice irony, by pinpointing the contradictions, or more accurately, the impossibility of contextualism, Collins undermines his own thesis about the role of judges in commercial contract cases.

It is in the context of Macaulay's and Collins' comprehensive analyses of market transacting and the place of contract within the market that we can best understand the contributions of Mitchell and Morgan.

III CATHERINE MITCHELL – CONTRACT LAW AND CONTRACT PRACTICE

Mitchell makes clear her contextualist goal in her ambition to show

that serving commercial expectations, purposes and so on is an end point in the analysis of what contract law is for and how its success is to be judged. Here, the attempt is made to understand better what this claim might mean, whether and how it should be pursued and what reforms to contract law might be necessary to render these claims more than merely rhetorical.¹⁴

¹³ I have dealt with this issue in greater detail in John Gava and Janey Greene, 'Do We Need a Hybrid Law of Contract? Why Hugh Collins is Wrong and Why it Matters' (2004) 63(3) *Cambridge Law Journal* 605.

¹⁴ Mitchell, above n 3, 26.

Mitchell's strategy to achieve her goal is to examine the notion of 'commercial expectations' and explain why she thinks that notion is capable of being applied to commercial relationships. She does this by explaining what 'commercial expectations' could mean and examines the various ways in which the parties' own beliefs and wider sectoral norms can supply meaning to this term. Her analysis is comprehensive and she carefully explains and analyses what she calls new forms of contracting, such as network and umbrella agreements.¹⁵ She very carefully considers the debates about the sources of norms and customs that would be the basis of 'commercial expectations'. She also considers the discussion surrounding Lisa Bernstein's rigidity thesis as well as claims that legalisation of norms will crowd out the creation of such norms.¹⁶

She then explains how the current law is poor at giving effect to such expectations and, in particular, the tension that exists between the judiciary's concentration on the documents (ie, the written contract) rather than on the context surrounding the transaction associated with those very documents. She provides examples of recent significant decisions that illustrate this tension and the problems that flow, in her opinion, when the judges do not accurately appreciate the relationship between the contractual documents and the context. Her discussion of *National Westminster Bank plc v Rabobank Nederland*¹⁷ and *Baird Textile Holdings v Marks and Spencer plc*¹⁸ is illuminating but also allows Mitchell to explain the relationship between documents and context with flair and insight.¹⁹

Mitchell then explores rights-based and economic efficiency theories about contract law to see if and how her hopes for the operation of commercial expectations in law match these theories. This is done to see if there are normative, as well as practical, reasons for supporting the inclusion of commercial expectations in contract law. She finds that both could be understood as supporting her stance.²⁰ However, she suggests that since commercial expectations give effect to the social rather than the philosophical aspects of contracts, Ian Macneil's relational understanding of contract gives the best fit for incorporating commercial expectations into contracts and contract law.²¹ Finally she examines debates surrounding the capacity of the law and the courts to give effect to commercial expectations and while recognising that these institutions cannot seamlessly incorporate commercial expectations into contract, she argues that the costs of not incorporating commercial expectations is greater than the costs generated by doing so.²²

¹⁵ Ibid 27–61.

¹⁶ Ibid 63–98. For Bernstein's thesis see Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765.

¹⁷ [2007] EWHC 1056 QBD.

¹⁸ [2002] 1 All ER (Comm) 737.

¹⁹ Mitchell, above n 3, 100–36.

²⁰ Ibid 138–71.

²¹ Ibid 200–36.

²² Ibid 1–21.

Mitchell's coverage and analysis are exemplary; her choices are clearly justified and fully explained; and her conclusions are carefully considered and reasoned. While I am not persuaded by her conclusions, it is not because of any failings in her exploration of relevant materials or because of hasty or ill-conceived judgments. Reasonable people could come to different conclusions on many of the points that she considers and still accept that the different conclusions reached could be both plausible and defensible. Nevertheless, for all the strengths of her analysis, I think that Mitchell's argument is flawed in the way that all contextualist accounts are flawed.

Mitchell is quite clear in arguing for a contextualist position:

The main benefit of a relational and commercial-expectations approach to contract law is that it seeks to draw out and apply the internally generated norms of the business relationship to questions concerning the scope of contractual obligations or dispute resolution ... What relational theory demands is sensitivity to a range of contracting circumstances and a denial of the traditional binary lines along which debates are often drawn. Pragmatism, context and flexibility are the hallmarks of a relational approach to contractual agreements. There will be costs involved in developing a relational contracts law, but the institutional costs in not developing it, particularly in terms of our confidence in contract law's capacity to facilitate commercial dealing and commercial expectations in all their forms, are likely to be greater.²³

Mitchell's strategy is, in essence, the same as that proposed by Collins. This means that similar criticisms to those made of Collins' approach can be made of Mitchell's strategy. As noted above, it is important to remember that Collins has spelt out in some detail what is required of a judge who wants to pursue the contextualist path in a serious and committed, and not a half-hearted way, and, as also argued above, that what is required to do so goes far beyond the capacity of any judge.²⁴

Mitchell is not blind to such concerns but it is not clear that her careful responses adequately acknowledge what Collins has shown to be required by contextualism. For example, she notes that commercial relationships

will generally display a multidimensional governance strategy, relying simultaneously on norms of contract *and* trust. Whether these two are conflicting or mutually reinforcing, substitutes or complements, is not an issue that can be decided in the abstract, but only upon close examination of each individual commercial relationship.²⁵

²³ Ibid 265–6.

²⁴ See discussion associated with above n 13.

²⁵ Mitchell, above n 3, 96–7 (emphasis in original) (citations omitted). For further examples where Mitchell recognises the complexity of the context of contracts and, thus, the enormous difficulties facing judges, see 145–6, 155, 175–6, 182, 194–7, 213, 240, 245–6.

But she does not explain how a busy court will do this. As I have argued elsewhere, Collins recognised what would be necessary to make such a ‘close examination’ and, as I have also argued, there is very little plausibility in claims that a common law judge (or anyone else, including the parties, for that matter) will be able to do this.²⁶

Two aspects of Mitchell’s argument deserve further attention. The first is her strong insistence that it is the underlying role or purpose of contract law to meet the needs and expectations of commercial contracting parties.²⁷ In particular, Mitchell refers to new forms of contracts and their increasing complexity as demanding recognition through the development of doctrine and interpretation to reflect these new contractual realities.²⁸ The initial attractiveness of this claim, however, rests on a number of unproven assumptions. It is not clear, for example, that the best reading of contract law’s historical development is to see that development as a conscious response to the needs of commerce over the past several hundred years. What we can say for certain is that the development of contract law has consistently been the result of the settlement of those commercial disputes that came before the courts. It is, at best, a controversial claim to read the doctrinal development of the common law of contract as reflecting the conscious desire of judges to make the law fit or suit the varying needs, expectations and behaviours of commercial actors.²⁹ Contract law might reflect the hue of the mainly commercial litigants who appeared before the courts, but this is not the same as saying that the courts have actively developed contract law to suit these litigants’ expectations.

Secondly, Mitchell’s claims surrounding supposedly new forms of contracting are unconvincing. It is not entirely clear to me, for example, that ‘network’ or ‘umbrella’ contracts are new forms of contracting and transacting. The same can be said about more general claims about the increasing complexity of contracting in today’s market. When one considers the long history of market exchange in the common law world, it is as plausible to suggest that the difficulties surrounding exchange in times without instantaneous communication, where transport was difficult and risky and where law enforcement was less comprehensive than today, made transacting in, say, the 18th century, *more* complex than it is today. For all we know, even more complex transacting arrangements were created in the past to compensate for the more difficult trading environment of that time. As trade in the past survived with a doctrinally narrow law of contract, it is reasonable to ask whether claims of increasing contractual complexity are true and, if so, require a contextually reformulated law of contract. This is an area that calls out for more research and study.

The second aspect of Mitchell’s argument that calls for further attention arises from her acknowledgment that contextualism will not be cost free but that the costs of

²⁶ Gava and Greene, above n 13.

²⁷ See, for example, Mitchell, above n 3, 4–6.

²⁸ Ibid 53–62, 204–8.

²⁹ Mitchell acknowledges both scholarly and judicial criticisms of her claim. See *ibid* 204.

not following this path are potentially greater. On the face of it, this is a perfectly plausible argument. This assumes that even being an imperfect contextualist is better than not being a contextualist at all. But is this true? It is just as likely that being an imperfect contextualist is worse than not being a contextualist at all. If we go back to the argument between the contextualists and the formalists, it soon becomes apparent that one of the foundational arguments of the latter is that contextualism of any sort is likely to run counter to business desires. Would it not be the case that an imperfect contextualism will result in a decision that reflects the beliefs of neither party to a transaction? In other words, an incomplete (or inaccurate) contextualism would not and could not reflect the practices, expectations and behaviours of the contracting parties. I think that it is the case that one needs to be a totally accurate contextualist to be an effective contextualist.

Despite Mitchell's considerable efforts, her reconfigured contextualism fails to convince for the same reasons that bedevil Collins' own attempts and her thoughtful analysis only shows more strongly why contextualism cannot work.

IV JONATHAN MORGAN — CONTRACT LAW MINIMALISM

Morgan's argument is neatly and succinctly described in the preface of his recent book:

The basic theses defended here are three in number; first, that commercial contract law has a central *purpose*, namely, to provide a suitable legal framework for trade; secondly, that the nature of commercial contract law is radically *optional*, that is, it exists only as a body of default rules; and, thirdly, that when contract law is as simple, clear and strict – *formalist* – as it can be made, commercial preferences are best satisfied and its rules flourish because opting out from them is infrequent.³⁰

I do not agree with his first thesis — that contract law has as its central purpose (and justification) the role of aiding and enhancing market exchange. Morgan's second thesis might be seen as overstating the optional nature of contract law, but that is an argument about the actual architecture of contract rules and, whilst interesting, this will not be covered in this review essay. I agree with Morgan's third thesis but with the caveat that it is incomplete in its description of contract law.

Morgan commences his analysis by examining current English law to see if it can be best understood either from instrumentalist or non-instrumentalist approaches and then asks whether an instrumental approach to contract law provides a better justification for it than popular moral and promise-based theories of contract. He argues that an instrumentalist view of contract law provides the best fit with the current law and that instrumentalism provides a good justification for that law.³¹ Morgan then analyses contract law from economic, social and other non-doctrinal

³⁰ Morgan, above n 3, xiii (emphasis in original).

³¹ Ibid 1–40.

sources. These chapters are principally designed to introduce readers to the vast literature that arose following Macaulay's seminal work. They are comprehensive and are worthwhile reading even for those steeped in the literature.³² But, as Morgan indicates, the really important question is what to make of this literature, or, in other words, whether judges should adopt a formalist or contextualist approach to contract law in light of the findings of these empirical and theoretical works on the use and non-use of contract law in market exchange.³³

Morgan defines his minimalism as the contract law that commercial parties want, arguing that any other form of law will lead to widespread contracting out of unsuitable or unwanted rules.³⁴ Because of this, he rejects any role for contract law that puts moral purposes or social values in the place of its core role of aiding market exchange.³⁵ Neither, according to Morgan, should contract law absorb the variety of non-legal sanctions and processes through which commercial players have settled their disputes and arranged their transactions. Apart from being an ill-advised exercise, the limited capacity of judges and the institutional constraints on litigation render both inappropriate vehicles for importing business norms and non-legal sanctions into contract law.³⁶ Morgan also shows that the evidence that we have, whilst not conclusive, does support the view that people in business prefer a formalist, predictable contract law. Finally, Morgan compares his formalist desiderata against modern English contract law, arguing that that law's formalist characteristics have been increasingly diluted since the middle of the 20th century through what he describes as the 'creep of contextualism, discretion and regulation'.³⁷

Is his argument persuasive? Morgan has read widely in the literature and his arguments are thoughtful and well-considered. As a relative newcomer to the field, he seems to have felt the need to go back to first principles, unlike Mitchell, who was willing to enter the debate as it stood. Because of this, anyone wishing to enter this field of studies would do well to read Morgan's book. But if his first thesis is considered in detail, some problems arise.

Morgan's first thesis, that commercial contract law has a central *purpose*, namely, to provide a suitable legal framework for trade, puts him in the same company as otherwise disparate scholars, for example, Collins, Mitchell, David Campbell and Robert Scott.³⁸ As I have argued above, the differences on this point between

³² Ibid 41–86.

³³ Ibid 41.

³⁴ Ibid 89–113.

³⁵ Ibid 114–57.

³⁶ Ibid 158–72.

³⁷ Ibid 219.

³⁸ See Collins, above n 7; Mitchell, above n 3; D Campbell, 'What Do We Mean by the Non-Use of Contract' in Braucher, above n 3, 159–90; R Scott, 'The Promise and the Peril of Relational Contract Theory' in Braucher, above n 3, 105–39. I am not sure that Stewart Macaulay should be added to this list as his writings seem more welfarist than directly concerned with business needs.

authors of such varying views on contract law and its place on the market depend on a strategic congruence on the ultimate goal — aiding market exchange — and only display tactical divergence — on whether formalism or contextualism is the best way of achieving that strategic goal.³⁹

Because Morgan thinks that opting out of the formalist law that was the English law of contract has been infrequent, it is clear that he believes that that contract law has had a central role in aiding market exchange. He also believes that instrumental reasoning to that end is ‘thoroughly characteristic of English contract law.’⁴⁰ He is quite emphatic on this point:

It is not that judges ‘sometimes’ explicitly consider the effects of their rulings ... but that they *consistently* do so. This claim will not be defended in detail, since it is submitted that any English contract lawyer would recognize the truth in it.⁴¹

Morgan’s insistence on the centrality of contract law for market transacting defies Macaulay’s illustration of the peripheral role of contract law in market exchange. Indeed, it runs counter to what Morgan himself calls ‘the lawyer’s perennial fallacy of “legal centrism”.’⁴² In fact, Morgan himself provides many arguments against his own view, evidence that his otherwise common sense analysis of commercial contract law runs counter to his misguided view that the central role of contract law is to provide a suitable framework for market exchange. Instead, as will be argued below, contract law’s usefulness for commerce is accidental and not fundamental to its existence.

Morgan’s arguments that challenge his ‘legal centrism’ can be grouped under five headings. The first concerns doubts about the *capacity of judges* to create a contract law, minimal or otherwise, designed to aid market transacting. For example, Morgan notes the propensity of English judges to ascribe to contracting parties ‘a virtual caricature of atomistic/selfish/Hobbesian behaviour’, mainly because they only see parties in dispute and thus do not appreciate the norms under which most parties transact.⁴³ Judges who misunderstand the way in which commerce operates are hardly likely to produce an efficient contract law. Morgan also accepts that judges will make poor decisions when faced with socio-economic data⁴⁴ and that any attempt to give effect to ‘commercial expectations’ will founder on the problem that such expectations are ‘an uncertain guide’.⁴⁵ These difficulties are magnified by the lack of empirical data dealing with transacting and contracting in the market⁴⁶

³⁹ See above n 9.

⁴⁰ Morgan, above n 3, 5.

⁴¹ Ibid 6 (emphasis in original) (citations omitted).

⁴² Ibid 142.

⁴³ Ibid 67.

⁴⁴ Ibid 117–8, 121–2.

⁴⁵ Ibid 235.

⁴⁶ Ibid 160.

(and the procedural difficulties that would arise if litigation was changed to try to allow more data in, assuming it existed).⁴⁷ Morgan also accepts that judges are appointed because of their legal knowledge and not for any command of economics, sociology, business or day-to-day experience in the market.⁴⁸ It would be surprising if the limits on judicial capacity that Morgan acknowledges would allow judges to design a contract law whose purpose is to aid market transacting and to do so in an efficient manner.

Morgan's second argument that challenges his views about the role of contract law deals with the *complexity of the common law of contract*. As we have seen, Morgan argues that common law judges have been consciously instrumentalist and have crafted a commercial law of contract that is simple, clear and strict and whose main purpose is to aid market transacting. Yet when he criticises what he calls 'doctrinal scholars' for their excessive purity about rules, he is also willing to accept that legal reasoning in contract (and the common law more generally) is not neat and tidy but is messy and that 'life, and therefore living law, is just too complex to be reduced to classical simplicity'.⁴⁹ Of course, much the same criticism can be made of a claim that common law judges have consciously crafted a commercial law of contract that gives effect to the minimalism that Morgan espouses.

The common law is indeed messy but, as Morgan emphasises, there is an 'institutional bias towards the fairness or efficiency of their own rules'⁵⁰ when judges decide cases, especially given the fact that '[c]ontract law should stick to doing what it does best: resolving disputes.'⁵¹ The reality is that common law judges have decided contract cases with a number of forces operating on them but that the primary source for the development of common law contract rules has been a commitment to a system of rules that gives effect to the historically developed sense of institutional fairness that lies at the heart of the common law of contract. Rather than seeing judges consciously aiming to create this or that form of contract law, it is more plausible to believe that contract law has developed through judges applying a traditional conception of fairness within an overarching architecture of rules and with a hue taken from its primarily commercial litigants.⁵²

The third argument deals with the *limitations of litigation as a source for the regulation of market exchange*. If judges have consciously aimed at creating a minimalist law of contract, we must remember that they can only have done so in the context of litigation. But is litigation a good source of information for the crafting of such rules? Morgan thinks not. For example, he acknowledges that lawyers are prone to ignore what Arthur Leff has called the 'vital' questions that an

⁴⁷ Ibid 161.

⁴⁸ Ibid 166.

⁴⁹ Ibid 31 (citations omitted).

⁵⁰ Ibid 93.

⁵¹ Ibid 148.

⁵² See Gava, above n 9, for an elaboration of this argument.

economist would ask about the design or analysis of any legal rule; namely, what will it cost, who pays and who decides on the above two questions?⁵³ If, as Morgan accepts, lawyers (and judges) regularly ignore such questions, one has to be doubtful about any project that aims to create an economically efficient system of rules, minimalist or otherwise. But it is not only that lawyers are not good at asking the right questions. Litigation itself, by concentrating on particular disputes, will give a distorted picture of transacting in the market place. This, in turn, renders litigation a poor vehicle for the creation of a commercially savvy and attractive contract law. In Morgan's words:

Very rarely is contract litigation embarked upon in the course of an ongoing commercial relationship. Its sheer cost, if nothing else, is enough to sour any lingering hopes for future trading between the parties. Therefore, almost by definition, litigated contract cases are *never disputes between partners in an ongoing commercial relationship*.⁵⁴

In other words, the ingredients for the courts to have developed a commercially appropriate minimalist law of contract, in accordance with Morgan's ideas, have been a minority of unrepresentative cases. And, again, in Morgan's words:

Regulatory limitations are intrinsic in the very nature of adjudication. In summary form, they are: the submission put to the court (limited to arguments favouring one of the parties); limited socio-economic data; the court's limited capacity to comprehend any such information; the limitation of the court's 'regulatory opportunity' to the cases that are brought before it. ... Individual parties decide whether to bring an action in the first place (and whether to settle, litigate or ultimately appeal). At all stages, the parties decide what arguments and evidence to present to the court (with the aim of winning their case, not of developing the law, and certainly not of elaborating corrective justice, regulating the economy or supporting the capitalist system).⁵⁵

If we add 'the creation of a commercially appropriate minimalist contract law' to the final list of things litigation is not designed to do, we can see that Morgan's own arguments run against his thesis that the role of contract law is to aid commercial contracting through a judicially crafted and carefully constructed, commercially appropriate contract law. Litigation is a mechanism that just will not work for this task. As Morgan reminds us:

The courts are entirely at the mercy of potential litigants. They alone control which disputes (if any) reach the courtroom, and how the issue will be framed.⁵⁶

⁵³ Morgan, above n 3, 52–3, citing Arthur Leff, 'Some Realism About Nominalism' (1974) 60 *Virginia Law Review* 451.

⁵⁴ *Ibid* 84 (emphasis in original).

⁵⁵ *Ibid* 160.

⁵⁶ *Ibid* 162.

The control exerted by litigants challenges Morgan’s confident suggestion that it

seems inconceivable that judges ... [and] lawyers ... would be ignorant about the preferences of contract law’s commercial customers — or uncharacteristically mute and passive were the law seriously out of line with commercial expectations.⁵⁷

Given the unrepresentative nature of litigation driven by litigants interested in winning their own cases, it seems unlikely that litigation would be a useful mechanism for creating an appropriate form of contract law. This reservation is only reinforced when we consider Morgan’s fourth argument: the *lack of empirical data* for the judges.

For judges to craft a minimalist law of contract that fits the needs of commerce, judges will need to know what those needs are. Yet Morgan acknowledges that such empirical data are lacking and that ‘the suspicion persists that little empirical research has been done because the data are virtually impossible to collect.’⁵⁸ And, as he adds, ‘Of course, the judicial impulsion to satisfy “commercial expectations” is strong and longstanding. But reasonable expectations are an uncertain guide.’⁵⁹ In fact, Morgan accepts that ‘the likelihood is that there is no single correct answer to “what business wants”. Commercial life and requirements are too diverse.’⁶⁰

The final argument to be considered is the acknowledgment by Morgan that *unwanted rules are avoided by contracting out of them*. In his words:

The combined effect of Macneil’s and Macaulay’s research is that relational contracts flourish in spite of the discrete, formal nature of contract law. Indeed, Galanter suggests that this is the most important lesson of Macaulay’s seminal article.⁶¹

The example of privity law reform is one that makes this point clearly and it is one that Morgan clearly recognises. He notes that the moves to reform privity, which culminated in the *English Contracts (Rights of Third Parties) Act 1999* (UK), were not driven by commerce and that ‘any competent lawyer could have given rights to a third party where desired before 1999 by using a suitable device.’⁶² Indeed, it is apparent that for most of the 20th century English judges were at pains to distort fundamental rules surrounding privity to suit what they saw as the needs of business but without providing any evidence about what business really wanted or needed.⁶³

⁵⁷ Ibid xv.

⁵⁸ Ibid 52.

⁵⁹ Ibid 235.

⁶⁰ Ibid 88.

⁶¹ Ibid 124 (citations omitted), citing Marc Galanter, ‘Vision and Revision’ [1985] *Wisconsin Law Review* 647, 652.

⁶² Morgan, above n 3, 178–9 (emphasis added) (citations omitted).

⁶³ See Gava, above n 8.

One only needs to mention the complicated rules surrounding offer and acceptance or consideration, for example, to see that commerce has lived with complicated contract law rules for centuries and has done so by avoiding their impact through contracting, more or less successfully, around them.

Morgan's claim that English judges have consciously created a minimalist law of contract that satisfies the formalist desiderata is, on his arguments, implausible. It is one thing to argue, in general terms, that a formalist contract law suits business. It is an entirely different thing to believe that English (or any other) contract law consciously embodies a judicial determination to create a pure formalist law. To argue this is to ignore the lessons provided by Macaulay and Collins. To accept that formalism works best for commerce is not the same as arguing that contract law has been purposely designed by formalist judges or that it should be. Contract law has other reasons for being and its utility for the market is accidental and not designed.

V CONCLUSION

The literature generated by Macaulay's seminal article has taught us a lot about the use of contracts in the wider sphere of transacting in the market. Of course, much work remains to be done. For example, the numerous studies that have been carried out looking at the contracting practices in a variety of industries have really only touched the surface of what could and should be done. More studies across the whole gamut of market exchange in a range of countries would help solidify our knowledge of market transacting as well as provide more specific information about how particular industries operate and to what extent, if any, contract law plays a role. There is a temporal element as well. Transacting practices in industries might change over time as the industry matures or changes or if trading conditions become easier or more difficult. This means that there is a need to continually update these studies.

This information will be useful even in those parts of the market where contract law is not important, as governments can use such information in promulgating and administering industry policy.⁶⁴ For example, a recent study of contracts in the Australian wine industry showed that contracts were entered into to provide banks with security for lending money.⁶⁵ This information would help both industry and governments in the regulation and support of the wine industry. One can imagine that there is much idiosyncratic use of contracts across industries but we will never know unless the studies are undertaken. However, given their costs and the difficulty of undertaking them, it might be optimistic to believe that more than a trickle of such studies will be undertaken.

Where contract law is an option for the market players, there is much other work that needs to be done. For example, we need to find out whether, in practice, the legalisation of commercial norms by their incorporation into contract law 'crowds

⁶⁴ I have discussed the demarcation of market transacting in Gava, above n 9.

⁶⁵ Iain Fraser, 'The Role of Contracts in Wine Grape Supply Coordination: An Overview' (2003) 11 *Agribusiness Review* Paper 5, 7.

out' their spontaneous generation amongst traders.⁶⁶ There would be little point in trying to incorporate business customs, norms and expectations if in doing so the law would adversely affect the capacity of market players to generate these in their day to day transacting. Or, to take another example, studies which tried to see whether Bernstein's 'rigidity thesis' is true would add greatly to our knowledge and inform us about the desirability of contextualist judging. Bernstein has argued that transactors value the possibility of waiving contractual rights at particular times in a business relationship while still wishing to reserve the right to enforce these rights in the case of future breaches (where breaches are opportunistic, for example). If this possibility is denied them, they will more rigidly enforce their contractual rights in order not to lose them.⁶⁷ Or, finally, we need studies about how and to what extent litigation is used tactically as part of dispute resolution in the market. If, for example, it was often used for this reason, this would tell us that judges would need to be careful about using commercial norms and expectations as the parties themselves are not looking for judicial endorsement of their behaviour but, rather, as a means to strengthen their hands in a dispute. Indeed, if it were found that contract litigation were used in this way, formalist judging, with its more predictable flavour, would seem to be the sensible approach to adopt.

Mitchell and Morgan, however, are interested in looking at how judges should, in general terms, decide contract cases and develop contract law in light of the work done since Macaulay's 1963 article and it is against this general question that their books should be evaluated.

Despite their very different approaches — Mitchell espouses a contextualist approach and Morgan a formalist one — the two authors share more than might be apparent at first sight. Both view contract law instrumentally. In their eyes, as we have seen, contract law has a clear purpose: aiding market exchange. This is their shared strategic goal over whose attainment they differ tactically, with Mitchell favouring a contextualist contract law and Morgan arguing that a formalist law of contract would best help transacting in the market place. Now, as I have argued above, on the matter of tactics I think that Morgan's approach is the better one, as it promises to better reflect the way in which commerce operates. But the strategic congruence that the authors share on the purpose of contract law is another matter.

If we view contract from a historical perspective or a constitutional perspective or an institutional perspective, it becomes clear that the instrumentalist vision shared

⁶⁶ For a discussion of this notion see, eg, Mitchell, above n 3, 84–6 and Morgan, above n 3, 125–31.

⁶⁷ Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 *University of Pennsylvania Law Review* 1765 and, for a discussion of the 'rigidity thesis', see Jason Johnston, 'Should the Law Ignore Commercial Norms? A Comment on the Bernstein Conjecture and its Relevance for Contract Law Theory and Reform' (2011) 99 *Michigan Law Review* 1791; Jody Kraus and Steven Walt, 'In Defence of the Incorporation Strategy' in Jody Kraus and Steven Walt (eds), *The Jurisprudential Foundations of Corporate and Commercial Law* (Cambridge University Press, 2000).

by Mitchell and Morgan, far from being obvious, is in fact deeply controversial and, indeed, unpersuasive.

The history of contract law is one of a development of modern contract as a species of tort to a fully free standing area of law with some hundreds of years of application and development. However, it would be controversial to see it as developing in direct response to commercial needs, or any other need, for that matter. Rather, the best reading of its history is that a restricted corps of judges, trained in the common law, developed the law in relative isolation and with a heavy doctrinal influence. As argued above, it is likely that contract law has a commercial hue but this is because most of its 'customers' were involved in commerce and the disputes before the court were commercial disputes. The lessons that Macaulay and Collins have taught us — that contract law is not used much in the market and that contract law is a component of transacting with the emphasis on the business relationship and the imperatives of a deal — are as likely to have been the case three or four hundred years ago as they are today. People in the past used contract much as they use it today: sparingly, when it was useful, and always with one eye on their business reputation with existing and potential business partners, and with their other eye on the imperatives behind any particular business transaction. Macaulay and Collins show us that it would not make sense for judges to try to develop contract law to suit the practices, expectations and behaviour of those trading in the market and this, in turn, explains why the judges did not do this in the past.

However, it is not just Mitchell's contextualism that would challenge this concept of contract. While formalism is not dynamic because a formalist law is by nature static and predictable, the reality is that the common law of contract is at best a proxy for a formalist law. The law of contract is just too messy, too full of contradictions and contains too many competing lines of authority to be an ideal formalist law. There would need to be a severe makeover of contract law before it could be described as an ideal formalist law. Morgan,⁶⁸ and Alan Schwartz and Robert Scott⁶⁹ recognise this and spell out in great detail what a truly formalist law would look like. Formalism is no friend of the common law of contract as traditionally understood.

It must also be remembered that contract law is an integral part of the common law and is therefore part of the constitutional heritage of any common law country. This does not mean that it cannot or should not change. But it does mean that any change should be in conformity with our constitutional traditions. The common law has developed through that professional corps of judges and is now increasingly interwoven with the growth of the legislative state. But to, in effect, make judges become the servants of commerce through a process of applying and changing contract law to give effect to commercial expectations raises profound constitutional questions. Judges owe their fidelity to the law and the constitution (written or not in various common law countries), yet contextualism requires them to transfer

⁶⁸ Morgan, above n 3, 218–53.

⁶⁹ Alan Schwartz and Robert Scott, 'Contract Theory and the Limits of Contract Law' (2003) 113 *Yale Law Journal* 541.

that fidelity to commercial practice and morality. Contract law is more than a tool for the market: it is, instead, our historically created and constitutionally validated means of settling disputes.

Mitchell's contextualism is clearly at odds with this understanding of contract law, but, as we have seen, the reconfiguration of contract law needed to meet formalist requirements means that Morgan's vision of contract is equally a threat.

Finally, there is an institutional perspective that should not be overlooked. If contextualism is to become the guiding philosophy for judges, we have to ask how this would affect the judges in the generalist courts that feature in the common law world. Would they be expected to be contextualist judges for contract cases only and carry on normally in other areas? Or would contextualism spread to other areas of law? If so, real questions have to be asked about the capacity of our judges to decide in fashions similar to contextualism in areas such as torts, crime, equity, corporations law and the like, as well as in their role of interpreting and applying statute. Would this mean that judges have different training to enable them to judge more competently according to a new standard? Would it mean that lay people be appointed to give advice or that the rules of evidence and procedure be changed to allow contextualist judging to operate fairly and openly? The training and experience of common law judges is not, I would argue, appropriate for contextualist judging and we would have to look seriously at training, staffing and perhaps even the creation of many more specialist courts if we were to take contextualism seriously. Now, while a truly formalist law of contract need not lead to such challenges to the institutional integrity of the courts, it would nevertheless make it clear to the world that the law which is being applied is no longer the creature of the common law judges but is, instead, an artificial law created to suit business needs; in this case a completely formalist law.

Both contextualism and formalism, in their different ways, challenge our accepted historical and constitutional understandings of contract law. Neither Mitchell nor Morgan have considered these challenges and, as a consequence, have not explained why their preferred conceptions of contract law deserve to replace traditional contract law.

Catherine Mitchell and Jonathan Morgan have written impressive books. Both can be read with profit and both introduce and explain exceedingly well the debates surrounding the relationship between contract law and the phenomenon of its relative non-use in the market. Perhaps surprisingly, given that I share Morgan's position on the tactical question about which form of law would best suit business (formalism), I feel that Mitchell's position is better argued even though I think it wrong. Morgan undermines his thesis with his frankly unpersuasive argument that contract law has been designed for the use of market players and that this is as it ought to be.

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REFLECTING ON HANNAH ARENDT AND *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL*

ABSTRACT

In this essay, we offer a modern legal reading of Hannah Arendt's classic book, *Eichmann in Jerusalem*. First we provide a brief account of how Arendt came to write *Eichmann in Jerusalem* and explain her central arguments and observations. We then consider the contemporary relevance of Arendt's work to us as legal academics engaged with a variety of problems arising from our times. We consider Arendt's writing of *Eichmann in Jerusalem* as a study in intellectual courage and academic integrity, as an important example of accessible political theory, as challenging the academic to engage in participatory action, and as informing our thinking about judgement when we engage in criminal law reform. Finally, we consider the role of Arendt's moral judgement for those within government today and how it defends and informs judgement of the modern bureaucrat at a time of heightened government secrecy.

I INTRODUCTION

On 11 April 1961 the Israeli Government put the Nazi war criminal Adolf Eichmann on trial in Jerusalem. The trial was established by the Israeli prosecution as not only a trial of Eichmann, but also a bearing witness to the Holocaust itself. The prosecution called over 100 witnesses to testify, many of whom were survivors of Nazi concentration camps. For 14 weeks the trial made international headlines. One of the trial's most famous observers was the political theorist Hannah Arendt.¹ Arendt reported her observations in *The New Yorker*. These essays were then collated and published in her 1963 book *Eichmann in Jerusalem: A Report on the Banality of Evil*.²

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¹ While Arendt is sometimes described as a philosopher she explicitly rejected this title. See Hannah Arendt, *Hannah Arendt: The Last Interview: And Other Conversations* (Melville House, 2013) 1.

² Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Classics, first published 1963, 2006) (*Eichmann in Jerusalem*).

At the time of their publication, Arendt's reports and characterisation of Eichmann's crimes and the nature of Eichmann's criminality shocked, outraged and hurt many within the public, the Jewish community, the academic community and even her close circle of friends.³ Few exercised the same rational, rigorous and objective judgement that Arendt had brought to the trial of Eichmann. In 2012, the release of a new film about her reports, Margarethe von Trotte's *Hannah Arendt*, stirred again these emotive responses.

What attracts people to Arendt's *Eichmann in Jerusalem*? Some may read it to understand how the horror of the Final Solution could have ever occurred, while many read it to take lessons for humanity and society, and also themselves, in avoiding evil. We read the text, scouring it for signs or themes that can be absorbed for the benefit of our societies today. The main insight traditionally drawn from the work is Arendt's profound and counterintuitive argument that evil can be banal and that Eichmann was merely a bureaucrat doing his work in an efficient, unquestioning manner.⁴ However, while one lesson from the text concerns the potential even-handedness, the dullness and the bureaucratisation of evil, there are other poignant lessons embedded in Arendt's work.

In this essay, we write as a small community of legal scholars, from different areas of law, who wish to offer a modern legal reading of *Eichmann in Jerusalem*.⁵ First we provide a brief account of how Arendt came to write *Eichmann in Jerusalem* and explain her central arguments and observations. This essay does not seek to answer the most common questions that have engaged critics of Arendt and *Eichmann in Jerusalem*: questions about whether Arendt's historical portrayal of the Holocaust and the role of the Jewish councils in the Final Solution was accurate or whether Eichmann was, in fact, banally or radically evil. The answers to these questions are, no doubt, important and deserving of inquiry. Here, rather, we consider the contemporary relevance of Arendt's work to us as legal academics engaged with a variety of problems arising from our times. We consider Arendt's writing of *Eichmann in Jerusalem* as a study in intellectual courage and academic integrity (at a time when this appears to be waning), as an important example of accessible political theory (when theory has become convoluted and inward-looking), as a challenge to the

³ For an introduction to the controversy over *Eichmann in Jerusalem*, see Roger Berkowitz, *Misreading 'Eichmann in Jerusalem'* (7 July 2013) New York Times, <<http://opinionator.blogs.nytimes.com/2013/07/07/misreading-hannah-arendts-eichmann-in-jerusalem/>> and Adam Kirsch and Rivka Galchen, *Fifty Years Later, Why Does 'Eichmann in Jerusalem' Remain Contentious?* (28 November 2013) New York Times <http://www.nytimes.com/2013/12/01/books/review/fifty-years-later-why-does-eichmann-in-jerusalem-remain-contentious.html?pagewanted=all&_r=0>.

⁴ Bernard J Bergen, *The Banality of Evil: Hannah Arendt and 'The Final Solution'* (Rowman & Littlefield Publishers, 1998).

⁵ See also Marco Goldoni and Christopher McCorkindale, *Hannah Arendt and the Law* (Hart Publishing, 2013). This volume represents the first dedicated and coherent treatment of the many engagements that Arendt makes with the law. See also Marie Luise Knott's recent encounter with the Eichmann trial, *Unlearning with Hannah Arendt* (Other Press, 2014).

academic to engage in participatory action (rather than write for ourselves and our small research community) and as informing our thinking about judgement when we engage in criminal law reform. We consider the role of Arendt's moral judgement for those within government today and how it may defend and inform judgement of the modern bureaucrat at a time of heightened government secrecy.

II INTRODUCING *THE BANALITY OF EVIL*

The Eichmann trial marked a major shift in Arendt's thinking and provided her with a fresh and original theory of evil. When she wrote *The Origins of Totalitarianism* in 1951,⁶ Arendt used the phrase 'radical evil' to describe Nazi extermination camps (or 'death factories' as she called them).⁷ Arendt argued that '[s]uch an invention could have come only from an intention to do evil.'⁸ The concept of 'radical evil' was derived from Immanuel Kant (whose work Arendt claimed to have first read at age 12). For Kant, the noun 'evil' does sometimes require the adjective 'radical'. Radical evil is a type of evil that is rooted in an evil motivation or an intention to do evil.⁹ Kant held that radical evil is a rare and quite distinct evil that results from ignorance or incompetence.¹⁰

Having missed the Nuremberg trials,¹¹ the Eichmann trial was Arendt's first opportunity to see and listen to a Nazi official in the flesh. In response she provided an interesting and yet contestable description of Eichmann.¹² Arendt was immediately struck by how normal Eichmann appeared: he was 'not even sinister.'¹³ She described him as a superficial conformist, with no sense of personal responsibility. Arendt reported that Eichmann had nothing but banal motives.¹⁴ He wanted to move up in the Nazi bureaucracy, to be an accepted and integral part of that group and prove himself to be the perfect civil servant by obeying every order and carrying out his role in the deportation and then extermination of the Jewish people with maximum efficiency. These, Arendt argued, were not radically evil motives connected to a lust for power, revenge, hatred of the Jewish people, or anything of that nature.¹⁵

⁶ Hannah Arendt, *The Origins of Totalitarianism* (first published 1951, Harcourt, 1973).

⁷ Ibid 14.

⁸ Ibid.

⁹ Immanuel Kant, *Religion Within the Limits of Reason Alone* (Theodore M Greene and Hoyt H Hudson trans, Harper and Row, 1960) [trans of: *Die Religion innerhalb der Grenzen der bloßen Vernunft* (first published 1793)] 32.

¹⁰ Ibid.

¹¹ Ann Tusa and John Tusa, *The Nuremberg Trial* (Skyhorse Publishing, 2010).

¹² More recent biographical information casts a somewhat different light on Eichmann's agency and motivations. See eg Hans Safrian, *Eichmann's Men* (Cambridge University Press, 2009).

¹³ Lotte Kohler (ed), *Within Four Walls: The Correspondence Between Hannah Arendt and Heinrich Blucher, 1936–1968* (Harcourt, 2000) 359.

¹⁴ Arendt, above n 2, 15–16.

¹⁵ Richard J Bernstein, *Hannah Arendt and the Jewish Question* (MIT Press, 1996) 137.

Arendt had begun to formulate her alternative explanation of evil in the ten-year period between the publication of *The Origins of Totalitarianism* and the Eichmann trial. Central to her thinking was the notion of ‘thoughtlessness’, a term she described in her 1958 book *The Human Condition* as ‘the heedless recklessness or hopeless confusion or complacent repetition of “truths”, which have become trivial and empty.’¹⁶ Arendt suspected that this phenomenon was widespread and even called it *the* ‘outstanding characteristic of our time.’¹⁷

There in Jerusalem, right before her eyes, was the living incarnation of a thoughtless person. In describing Eichmann as ‘thoughtless’ Arendt did not mean that he was careless or stupid.¹⁸ Rather, Arendt believed that Eichmann lacked common sense and an ability to exercise thoughtful judgement.¹⁹ Eichmann could recite the complex details of his work and even correctly recite Kant’s categorical imperative to the three presiding German-speaking Israeli judges (a point that we take up again in the next section).²⁰ But Eichmann could neither ask himself nor think through the question that Arendt considered most essential to morality: ‘Could I live with myself if I did this deed?’²¹

Following her report on the Eichmann trial, Arendt stopped using the phrase ‘radical evil.’²² She did not deny that human beings could act from base motives and she used terms such as ‘calculated wickedness’ to describe immoral or heinous actions.²³ However, as she explained in a letter to the philosopher and historian Gershom Scholem:

It is indeed my opinion that evil is never ‘radical’, that it is only extreme, and that it possesses neither depth nor any demonic dimension. It can overgrow

¹⁶ Hannah Arendt, *The Human Condition* (first published 1958, University of Chicago Press, 1998) 5.

¹⁷ *Ibid.*

¹⁸ Dana Villa, *Politics, Philosophy, Terror: Essays on the Thought of Hannah Arendt* (Princeton University Press, 1999) 40.

¹⁹ See Judith Butler, ‘Hannah Arendt’s challenge to Adolf Eichmann’, *The Guardian* (online), 29 August 2011 <<http://www.theguardian.com/commentisfree/2011/aug/29/hannah-arendt-adolf-eichmann-banalities-of-evil>>.

²⁰ Arendt, above n 2, 135. Kant’s categorical imperative stipulates: ‘Act only according to that maxim whereby you can, at the same time, will that it should become a universal law.’ See Immanuel Kant, *Grounding for the Metaphysics of Morals* (James Wesley Ellington trans, Hackett Publishing Co, 1993) [trans of: *Grundlegung zur Metaphysik der Sitten* (first published 1785)] 14–15, 30.

²¹ Elisabeth Young-Bruehl, *Why Arendt Matters* (Yale University Press, 2009) 3. See further Hannah Arendt and Mary McCarthy, *Between Friends: The Correspondence of Hannah Arendt and Mary McCarthy 1949–1975* (Harcourt, 1995) 19, 22.

²² Seyla Benhabib, ‘Arendt’s Eichmann in Jerusalem’ in Dana Villa (ed), *The Cambridge Companion to Hannah Arendt* (Cambridge University Press, 2000) 74.

²³ Elisabeth Young-Bruehl, *Hannah Arendt: For Love of the World* (Yale University Press, 2nd ed, 2004) 369.

and lay waste the entire world precisely because it spreads like a fungus on the surface. It is ‘thought defying,’ as I said because thought tries to reach some depth, to go to the roots, and the moment it concerns itself with evil, it is frustrated because there is nothing. That is its ‘banality.’ Only the good has depth and can be radical.²⁴

For Arendt, this insight represented a ‘*cura posterior*’²⁵— a cure for her previous thinking on the nature of evil evident in her work on totalitarianism. It marked an important turning point in her own personal history and intellectual development. And yet, as we note above, her report caused many to label her a Nazi apologist and a traitor to the Jewish people. While most scholars concede that there are passages in her report that were insensitive, poorly expressed and lacked historical nuance,²⁶ Arendt never once suggested that Eichmann was innocent — she supported the death sentence handed down by the Israeli Supreme Court (although not the Court’s reasoning).²⁷ Arendt wanted people to pay attention to Eichmann’s story, and so she told his story in enormous detail so that her readers could understand how ordinary people could commit great acts of evil.²⁸

In her report, Arendt sought to identify the ‘moment’ or period of time when Eichmann chose to abandon his capacity for thinking and go along with the orders of his superiors. According to Arendt, this occurred during a four-week period beginning on 31 July 1941 after Eichmann was officially informed that the Final Solution of the Jewish question had become official Nazi policy. During those four

²⁴ Ibid. In her subsequent writing Arendt provided only further illustrations of the banality of evil rather than a thorough going argument that evil is never radical.

²⁵ Ibid 328. Two years after her report was published, and with controversy still brewing, Arendt wrote in a letter to her friend Mary McCarthy: ‘You are the only reader to understand that I wrote the book in a curious euphoria. And that ever since I did it I feel — after twenty years — light-hearted about the whole matter’: Arendt and McCarthy, above n 21, 168. See also Susan Neiman, ‘Theodicy in Jerusalem’ in Steven E Aschheim (ed), *Hannah Arendt in Jerusalem* (University of California Press, 2001) 65.

²⁶ See eg Young-Bruehl, above n 23, 339–347. While Arendt had produced a considerable volume of historical material during the writing of her three volume *Origins of Totalitarianism* she also drew heavily from Raul Hilberg’s *The Destruction of the European Jews* (Holmes & Meier, 1985). It is noteworthy that Hilberg was himself very disappointed with Arendt’s use of his research. See Raul Hilberg, *The Politics of Memory: The Journey of a Holocaust Historian* (Ivan R Dee, 2002) 148–149:

‘In constructing the linkage [between the two books] ... historians have failed to observe two significant differences between us ... she did not recognise the magnitude of what this man had done with a small staff, overseeing and manipulating Jewish councils in various parts of Europe ... the second divergence between her conceptions and mine concerned the role of the Jewish leaders in what she plainly labelled the destruction of her own people’

²⁷ Villa, above n 18, 40.

²⁸ Jochen von Lang (ed), *Eichmann Interrogated: Transcripts from the Archives of the Israeli Police* (Vintage Books, 1984). This text contains extracts from Eichmann’s 275-hour pre-trial interrogation.

weeks, Eichmann had several opportunities to observe firsthand the grisly preliminary killing operations in Poland. Eichmann testified that he was repelled by these operations but after a short time he assumed his responsibilities for transporting Jews to those same death camps.²⁹ Arendt remarks:

It is of great political interest to know how long it takes an average person to overcome his innate repugnance toward crime, and what exactly happens to him once he has reached that point ... Yes, he had a conscience, and his conscience functioned in the expected way for about four weeks, whereupon it began to function the other way around.³⁰

For Arendt, the controversy that her book generated was a vivid illustration of the thoughtlessness that she observed in Eichmann. People stopped thinking, took on received ideas about her work and acted on them without critical reflection.³¹ In other words, there was a thoughtless controversy over a description of a mass-murdering bureaucrat as a thoughtless man. What better way to illustrate the key point of her report?

III THE RESPONSES AND THE CONTEMPORARY RELEVANCE OF *EICHMANN IN JERUSALEM*

The phrase ‘the banality of evil’ is interesting and challenging. If evil is accepted as banal,³² its destruction requires vigilance and judgement by every member of society, lest we be pulled into thoughtlessness. Arendt herself provides a model for a life lived with integrity, critical reflection and moral judgement. As teachers, it is also our responsibility to develop the critical thinking and capacity for judgement of future generations. It is for these reasons that Arendt matters to us, as thinking and acting people, now.³³ In the remainder of this article, we explore five ways in which Arendt’s life and ideas in *Eichmann in Jerusalem* remain of contemporary relevance to academics, theorists, lawyers, public servants and governments.

A The First Response: Intellectual Courage and Academic Integrity

In producing her report on the Eichmann trial, Arendt demonstrated an intellectual courage that ought to inspire contemporary academics. The presentation of her report reflects an *idea* of the intellectual whose station it is to raise difficult questions publically, to confront orthodoxy and dogma and who, in the words of Edward Said, should be prepared to be ‘embarrassing, contrary, even unpleasant.’³⁴

²⁹ Arendt, above n 2, 92.

³⁰ Ibid 93, 95.

³¹ Young-Bruehl, above n 23, 328–340.

³² Books such as Jean Hatzfeld, *Machete Season: The Killers in Rwanda Speak* (Picador, 2006) specifically challenge this thesis.

³³ Young-Bruehl, above n 21, 5.

³⁴ Ibid 12.

Arendt's moral courage is to be found in her portrayal of Eichmann as banal; her remarks on the European Jewish councils and their role in the Final Solution;³⁵ and her discussion of Israel's conduct of the trial, the legal questions raised by it and the political ends to which she believed it was directed.³⁶

Arendt also understood that moral principles need to transcend abstract philosophical discussion and be realised in practice if they are to have any meaning.³⁷ In holding this position, Arendt was deeply inspired by many friends who modelled moral courage.³⁸ Arendt captures several of these figures in her 1968 book, *Men In Dark Times*. She introduced the text by noting:

Even in the darkest times we have the right to expect some illumination. [This] may well come less from theories and concepts than from the uncertain, flickering, and often weak light that some men and women, in their lives and their works, will kindle under almost all circumstances and shed over the time span that was given them on earth.³⁹

A particular source of light for Arendt was her friend and teacher, the philosopher Karl Jaspers.⁴⁰ Jaspers had stood firm and stated clearly his opposition to Nazi policy at a time of great persecution.⁴¹ He continued to criticise publically the Nazi regime while teaching in Heidelberg and was only rescued in the last days of the war as he and his Jewish wife were scheduled for deportation to a concentration camp.⁴² After the war, Jaspers held a special place in Arendt's small circle of friends. She described him as an intellectual who 'never despised the world, never retreated

³⁵ For a particularly blistering account of Arendt's handling of the role of Jewish councils in the final solution see Deborah E Lipstadt, *The Eichmann Trial* (Schocken, 2011) 212–216.

³⁶ Young-Bruehl, above n 23, 337.

³⁷ Chief amongst Arendt's influences was Immanuel Kant (see discussion above). However, see also Hans Jonas, *The Imperative of Responsibility: In Search of an Ethics for the Technological Age* (Hans Jonas and David Herr trans, University of Chicago Press, 1985) [trans of: *Das Prinzip Verantwortung*, (first published 1979)]; Reinhold Nieburh, *Moral Man and Immoral Society: A Study in Ethics and Politics* (first published 1932, Westminster John Knox Press, 2013) and Karl Jaspers, *The Question of German Guilt* (Fordham University Press, 2001).

³⁸ Arendt's humanism and the relationship between her ethics and friendship are deeply fascinating. Arendt quotes Cicero in saying: 'I prefer before heaven to go astray with Plato rather than to hold true views with his opponents': *Between Past and Future* (Penguin Classics, 2006) 221. See also Danielle Celermajer, 'The Ethics of Friendship' in Andrew Schaap, Danielle Celermajer and Vrasidas Karalis (eds), *Power, Judgement and Political Evil: In Conversation with Hannah Arendt* (Ashgate, 2010) 55.

³⁹ Hannah Arendt, *Men in Dark Times* (Mariner Books, 1968) ix.

⁴⁰ See Hannah Arendt and Karl Jaspers, *Correspondence 1926–1969* (Mariner Books, 1993).

⁴¹ Young-Bruehl, above n 21, 7.

⁴² Ibid.

into himself' but with a 'sovereign naturalness' and a certain 'cheerful recklessness' exposed himself to 'the currents of public life, speaking out with consistent reasonableness on public issues.'⁴³

A point of contrast from Jaspers was Arendt's first important teacher, Martin Heidegger.⁴⁴ As a young woman, Arendt watched her 'once life-transforming professor'⁴⁵ join the Nazi party and position himself as the 'philosopher king' of the Third Reich.⁴⁶ Later in life, Arendt re-established contact with Heidegger and watched him retreat further from the public sphere and 'pour scorn' on the idea that human beings are by nature political animals. To Arendt, Heidegger's 'sarcastic, perverse-sounding statement: The light of the public obscures everything'⁴⁷ represented the embodiment of irresponsibility toward the public sphere — a space that, she argued, was the only place where truth could emerge.⁴⁸

That Arendt chose to focus her final (and uncompleted) book on her friends reveals something of the urgent philosophical claim that she introduced in *Eichmann in Jerusalem*: that the most powerful way to combat evil is through the practice of politics. People should gather together and collectively build a form of life in which the worth of each is made essential. Political action, according to Arendt, is the only way that truth could emerge⁴⁹ and her intellectual courage should be a source of inspiration for academics today, if we are to avoid the spectre of totalitarianism in our own time.

B *The Second Response: Arendt and Participatory Action Research*

Arendt dedicated an entire part of *Eichmann in Jerusalem* to the deportation of the Jewish people and the responses of the neighbouring European countries to the revelation of Germany's crimes.⁵⁰ She included descriptions of these events in Denmark and Italy. The actions taken within these countries embody moments of human fearlessness and bravery. As we look for lessons about actions and attitudes to avoid, here we read about what made some societies and the people within them maintain their humanity.

The chapter on the deportation of Jews from Western Europe considers the action of the Danes and Italians and the courage of their action.⁵¹ The Danish stories of bravery are about the dock workers who went on strike, refusing to repair German

⁴³ Arendt, above n 39, 77.

⁴⁴ Hannah Arendt and Martin Heidegger, *Letters: 1925–1975* (Harcourt, 2003).

⁴⁵ Young-Bruehl, above n 21, 7.

⁴⁶ *Ibid.*

⁴⁷ Arendt, above n 39, ix.

⁴⁸ Young-Bruehl, above n 21, 7. Arendt's most detailed elaboration on the public sphere can be read in above n 16.

⁴⁹ Young-Bruehl, above n 21, 7.

⁵⁰ Arendt, above n 2, 172–180.

⁵¹ *Ibid.*

ships;⁵² the Danish police, who were willing to obstruct the Germans;⁵³ and the King, ‘who stood ready to receive’⁵⁴ the Jewish population. Evil may indeed be banal, but, in contrast, Arendt described Denmark’s reaction to the protection of its Jewish population as ‘*truly amazing*’.⁵⁵ The stories about the Italians described a different strategy and a different bravery: ‘The Italians never offer public opposition to Nazi plans. They humor the Nazis, saying they will do it tomorrow. But they do not comply’.⁵⁶ As Arendt noted, the ‘Italian humanity, moreover, withstood the test of the terror that descended upon the people during the last year and a half of the war’.⁵⁷ What lessons can be drawn from Arendt’s reporting of these humane actions, and how can these lessons be translated into a legal academic’s life?

Denmark and Italy can be read as embodying two contrasting examples: a public and private response to evil, respectively. This division has been central in subsequent analysis by political philosophers, such as Iris Marion Young, in order to assess and compare the relative merits of the political responses to evil. According to Young, ‘To be political, action must be *public*, and aimed at the possibility or goal of collective action *to respond to and intervene in historic events*’.⁵⁸ For Young it was only the Danish that succeeded, politically, in their response to evil as their government and society publicly rejected the deportation.

The insistence on a public response to evil may well be an accurate recommendation for a political ideal. However, it is also possible to read the Danish and Italian response as examples of a more personal and less idealised lesson. It is clear that the Danish and Italian experiences as recounted by Arendt reveal a *common* personal response to evil. Individuals within both societies personally acted against and withstood the Nazi action in relation to deportations. In relation to both countries, Arendt describes neither the country nor their citizens as merely following orders. If we are reading Arendt for *individual personal instruction*, one lesson could be ‘to take action’,⁵⁹ purposeful free human action. The importance of a personal lesson stands, regardless of one’s ‘good luck’ in being born in an ideal public and politically responsible Denmark or ‘bad luck’⁶⁰ in being born in Italy. Regardless of

⁵² Ibid 172.

⁵³ Ibid 173.

⁵⁴ Ibid 174.

⁵⁵ Ibid 172 (emphasis added).

⁵⁶ Ibid 176–180; Iris Marion Young, *Responsibility for Justice* (Oxford University Press, 2011) 89.

⁵⁷ Arendt, above n 2, 179.

⁵⁸ Young, above n 56, 89.

⁵⁹ On the reading of the centrality of action to Arendt’s work see Jan Klabbbers, ‘Possible Islands of Predictability: The Legal Thought of Hannah Arendt’ (2007) 20(1) *Leiden Journal of International Law* 1, 6: ‘the political world revolves around a concept of action’.

⁶⁰ The importance of taking your circumstances as you find them, and acting within them, is highlighted by Arendt’s recounting of Eichmann’s extraordinary defence as to his actions — a defence based in part on luck. Arendt, above, n 2, 175.

your political circumstances, the personal response should be to act in whatever way you can.

How does one translate this concept of ‘personal action’ into an academic legal context?⁶¹ One way is through participatory-action research (‘PAR’), which has an accepted place in the social sciences but less so in law.⁶² The basis of PAR is engagement. PAR has a rich history and embodies a range of complex and sometimes divergent approaches.⁶³ The approach centres on action by the researcher, gaining knowledge through different methods by encouraging movement beyond traditional ideas of knowing and reducing the gap ‘between those who have social power over the process of knowledge generation and those who have not’.⁶⁴ PAR is a process of ‘liberation’⁶⁵— not in the sense of revealing a ‘truth’ that would risk replicating social forms of knowing, but through the individual researcher acting within the world.

The most egalitarian expression of the idea of acting in the world is that ‘[l]eaving one’s office and venturing into the field transforms one’s core assumptions regarding one’s subject of study’:⁶⁶ not forever, but for a while. This can be illustrated by reflecting on Arendt’s work itself.⁶⁷ Had Arendt not travelled, seen, observed, there is a real question as to whether she could have evoked the central thesis of her work: the *banality* of evil. In her office, evil may well have remained powerful and ever present. She took action; Arendt was within the world observing it. PAR can translate to whatever area of study an academic may be undertaking.

The concept of reading Arendt for signs of PAR is not original and has been explored, for example, by Bridget Somekh: ‘Arendt’s insight of plurality ... provides us with our most reliable organizing principle, as well as her understanding that it is *through our actions that we make meanings rather than through words*.’⁶⁸

⁶¹ Bridget Somekh, *Action Research: A Methodology for Change and Development* (McGraw-Hill Education, 2005) 26.

⁶² However there are elements of participatory approaches in the movement to new legal realism. See Victoria Nourse, and Gregory Shaffer, ‘Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?’ (2009) 95 *Cornell Law Review* 61.

⁶³ See the overview of approaches in Peter Reason and Hilary Bradbury, *Handbook of Action Research* (Sage Publications, 2006).

⁶⁴ Norma R A Romm, *New Racism: Revisiting Researcher Accountabilities* (Springer, 2010) 317–318 citing M A Rahman, ‘The Theoretical Standpoint of PAR’ in O Fals-Borda and M A Rahman (eds), *Action and Knowledge: Breaking the Monopoly with Participatory Action Research* (Apex Press, 1991) 13, 14.

⁶⁵ *Ibid.*

⁶⁶ Nourse and Shaffer, above n 62, 85 quoting Gregory Shaffer, ‘A Call for a New Legal Realism in International Law: The Need for Method’ (Legal Studies Research Paper Series, Research Paper No 09-02, University of California, Irvine School of Law, 6 January 2009) 8, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1323912>.

⁶⁷ Somekh, above n 61.

⁶⁸ *Ibid* 26 (emphasis added).

Reading Arendt provides us with a powerful example of how PAR can be achieved in academic life. *Eichmann in Jerusalem* is primarily itself brave humane action involving witnessing and travelling by Arendt, and we simply gain access to this great *action* through words.

C The Third Response: Eichmann in Jerusalem as Theory

For a book that launched a ‘civil war’ among intellectuals, that bitterly divided its readers and led to a kind of excommunication of Arendt,⁶⁹ *Eichmann in Jerusalem* is, in some respects, a benign text. The book is not, and does not purport to be, a detailed and fully developed work of legal, political or moral theory. For Arendt, the book is first and foremost a trial report, and draws from, as its main source, the trial transcript.⁷⁰ However, *Eichmann in Jerusalem* is not *only* a trial report; if it were it is inconceivable that it would have led to such significant and sustained controversy. Rather, the genius of the work is in the way it uses the form and style of the report to demand of the reader an engagement with deep and confronting issues of theory.

That a piece largely written as a series of essays in *The New Yorker* should be capable of creating such significant cultural waves challenges us to think not only about the public role of legal and political theory, but the way in which the *form* of the presentation of theory affects the performance of that role.

1 The Form and Style of Theory

To the modern reader of *Eichmann in Jerusalem*, the accessible, journalistic style is captivating and readable; the work is perfectly capable of being digested in a couple of sessions. Arendt’s mixture of ‘social analysis, journalism, philosophical reflections, psychology, literary allusion and anecdote’ constitutes a disregard for conventional scholarship and academic norms.⁷¹ Such a style is beguiling and is particularly foreign when contrasted with the staid and structured conventions of academic writing, especially the writings of legal philosophy.

Modern ‘legal philosophy’⁷² has become increasingly unreadable, an ‘impenetrable thicket’⁷³ accessible only to ‘a shrinking audience within the academy’.⁷⁴ It is

⁶⁹ Elon, ‘Introduction’, in Arendt, above n 2, i.

⁷⁰ Arendt, above n 2, 280.

⁷¹ *Ibid* xi.

⁷² For a discussion of the significance of this difference of nomenclature between ‘jurisprudence’ and ‘legal philosophy’ see Roger Cotterrell, ‘Why Jurisprudence Is Not Legal Philosophy’ (Legal Studies Research Paper No 169/2014, Queen Mary University of London, 24 January 2014) available at <<http://ssrn.com/abstract=2384615>>.

⁷³ Raymond Wacks, *Understanding Jurisprudence: An Introduction to Legal Theory* (3rd ed, Oxford University Press, 2012) xvii.

⁷⁴ Richard Cosgrove, *Scholars of the Law: English Jurisprudence From Blackstone to Hart* (New York University Press, 1996) 10, quoted in Neil Duxbury, ‘The Narrowing of English Jurisprudence’ (1997) 95 *Michigan Law Review* 1990, 1996.

largely a discipline that operates in a ‘small, hermetic — and rather incestuous — universe’,⁷⁵ a discipline that fails ‘to communicate its ideas to those outside its own caste’.⁷⁶ The enterprise of jurisprudence has been transmuted into ‘a confined arena of debate, policed not by criteria of social or legal significance but by canons of technical sophistication in argument.’⁷⁷ Such an approach to theory excludes all but the most dedicated disciple.

In stark contrast, Arendt invites the reader in, creating a narrative that is engaging and accessible. Of course, part of the style and tone is attributable to the origin of the book as reports for *The New Yorker* and the broad readership that would be its audience there.

However, it is a mistake to think that its style can simply be reduced to this issue of audience. Rather, the work is a powerful example of the use of narrative to challenge the reader; it is more a parable than a simple report. *Eichmann in Jerusalem* is properly a work of theory, if entirely atypical in its form. In developing a conception of ‘thoughtless’ evil, in exploring the role of the criminal trial (as opposed to the show trial),⁷⁸ issues of intent in criminal law,⁷⁹ the role of international tribunals⁸⁰ and the significance of the original kidnapping of Eichmann,⁸¹ Arendt offers profound insights into issues of legal, political and moral theory. Much of this theory is not explicitly addressed except in the Prologue and Postscript of the text. However, it is a mistake to think that this is an afterthought or that it can be excised from the previous discussion. Rather, it is the unavoidability of the moral concerns, the difficulties posed by Eichmann’s banality and the terrifying nature of his crimes that give intensity to the concerns of legal and moral theory. The narrative style makes the portrayal of Eichmann fascinating, challenging and difficult to dismiss. This in turn poses a most uncomfortable challenge for the reader, who is forced to engage, actively and personally, in the theoretical issues. The conclusions Arendt reaches are compelling because they are revealed as such a natural part of the narrative. They are confronting for the same reason.

If *Eichmann in Jerusalem* had been put forward as a traditional work of legal or moral theory, there is little doubt that the piece would not have created a fraction of the controversy. The narrative style demands an engagement from the reader that is rarely present in the rarefied and parochial discourses of academic philosophy. Modern jurisprudence and philosophy more generally tend to exclude argumentative

⁷⁵ Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press, 2007) 2.

⁷⁶ Cosgrove, above n 74.

⁷⁷ Cotterrell, above n 72, 7.

⁷⁸ Arendt, above n 2, 8, 298.

⁷⁹ *Ibid* 277.

⁸⁰ *Ibid* 261.

⁸¹ *Ibid* 263–4.

engagement, rather than ‘encouraging the challenge of different perspectives.’⁸² The stylistic norms and protocols of such theory ‘divide, limit and insulate it from an outward-looking curiosity’,⁸³ collapsing into a ‘sharpshooter’⁸⁴ approach to analysis that focuses on abstract technical problems. Legal philosophy, in particular, has become focused not on ‘juristic experience in all its practical complexity, ethical ambiguity and contextual specificity’⁸⁵ but upon abstract problems defined by philosophical interest.

Arendt’s work is a direct challenge to such a parochial and isolationist approach.⁸⁶ It revels in the important moral and political dilemmas that surround the *practice* and *experience* of theory. Moreover, the narrative style presents those dilemmas in a manner that invites a response from the reader without restricting such engagement to an elite core of theorists. It is this very democratisation of theory that allowed the work to have the impact that it did. Had Arendt utilised a more traditional academic form, her conclusions may have been intellectually controversial, but they would not have been captivating in the same way. Her style is beguiling precisely because of its contrast with academic protocols: it is arguable that it is *because* of its form, rather than despite it, that the work succeeds in being a significant work of public theory.

2 *The Purpose of Theory and the Narrative Form*

Eichmann in Jerusalem challenges the thoughtful theorist to consider what it is that makes a successful work of theory; indeed, what is the role and purpose of legal and moral theory? Without getting into a detailed examination of the role of jurisprudence,⁸⁷ at least one role of theory is to provide practical guidance for conduct

⁸² Cotterrell, above n 72, 9.

⁸³ Ibid 13.

⁸⁴ Ibid 9–10; As Sean Coyle notes, legal philosophers ‘have extracted innumerable technical satisfactions from their exploration of the weaknesses of each other’s positions’: Sean Coyle, ‘Legality and the Liberal Order’ (2013) 76 *Modern Law Review* 401, 404.

⁸⁵ Cotterrell, above n 72, 13–14

⁸⁶ Many theorists are increasingly aware of these critiques, even as they struggle to break free from the conventions. Jeremy Waldron, for example, notes that many of the debates in modern jurisprudence tend ‘to be flat and repetitive ... revolving in smaller and smaller circles among a diminishing band of acolytes. Worse still, they are in danger of becoming uninterestingly parochial from a philosophical point of view, as we distance ourselves from the intellectual resources that would enable us to grasp conceptions of law and controversies about the law other than our own conceptions and our own controversies, and law itself as something with a history that transcends our particular problems and anxieties’: Jeremy Waldron, ‘Legal and Political Philosophy’ in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, 2002).

⁸⁷ For a useful discussion of the various roles of jurisprudence, see William Twining, ‘Some Jobs for Jurisprudence’ (1974) 1 *British Journal of Law & Society* 149; William Twining, ‘Academic Law and Legal Philosophy: The Significance of Herbert Hart’ (1979) 95 *Law Quarterly Review* 557, 575.

and to inform concrete decisions. Jurisprudence thus becomes an ‘exploratory enterprise’ serving to support an ongoing, ever-changing juristic practice,⁸⁸ and to make sense of experience.⁸⁹ If this role is accepted, then the accessibility of a theory becomes intertwined with its usefulness and its ultimate merit. There is a normative imperative for good theory to be clear and accessible. If at least part of the purpose of legal theory is to inform and engage broadly, then accessible and engaging work is not only stylistically but functionally preferable to logically precise yet impenetrable work. Seen in this way, works of theory that may be disparaged as works of academic legal philosophy may be the most successful and enlightening jurisprudentially. The work of jurists such as Lon Fuller and Karl Llewellyn would fall into this category.⁹⁰ Fuller’s famous tale of King Rex⁹¹ is not simply a way of alerting us to a range of settled understandings, but a *story* with a narrative logic of its own.⁹² That narrative form, approachable and clear, contributes greatly to the success of Fuller’s point. Similarly, Ronald Dworkin’s image of Judge Hercules and the ‘chain novel’ concept of integrity,⁹³ capture the mind of the reader in a way in which more abstract theorists such as Joseph Raz, Matthew Kramer or HLA Hart may fail to do.

Arendt took this approach a step further, not merely using an image or parable as part of a theory, but expanding that narrative to subsume the entire work. In doing so, Arendt used this narrative form to draw the reader inevitably to confront conclusions they would otherwise be reluctant to contemplate. Arendt has not set forth a fully developed legal or moral theory in *Eichmann in Jerusalem*, and in that respect it may be described as not a book *of* legal theory. However, it is very much a book *for* theory. Through the narrative form, Arendt forces the reader to confront unavoidable problems of moral, legal and political theory.⁹⁴ She invites, and indeed demands, the reader to contemplate and reflect upon basic moral matters. She succeeds in presenting her conclusions precisely because she does not hide behind a façade of academic protocols. Her readers are obliged to engage in theory irrespective of whether or not they are steeped in learning of the leading theorists. Her conclusions are compelling because they are broadly accessible.

The lessons of *Eichmann in Jerusalem* extend beyond its substantive conclusions, to force us to consider the role of style and form in academic writing, most particularly in works of theory. The success, in terms of impact, controversy and longevity

⁸⁸ Cotterrell, above n 72, 2.

⁸⁹ Ibid 14.

⁹⁰ Ibid 15.

⁹¹ See Lon Fuller, *The Morality of Law* (2nd ed, Yale University Press, 1964) 33–41.

⁹² Nigel Simmonds, *Central Issues in Jurisprudence* (4th ed, Sweet & Maxwell, 2013) 247.

⁹³ Ronald Dworkin, *Law’s Empire* (Hart Publishing, 1998) 239–54.

⁹⁴ Many of the legal issues involved in the Eichmann trial were examined a few years prior to that trial with respect to the Nuremberg trials in the celebrated Hart/Fuller debate: See HLA Hart, ‘Positivism and the Separation of Law and Morals’ (1957) 71 *Harvard Law Review* 593; Lon L Fuller, ‘Positivism and Fidelity to Law: A Reply to Professor Hart’ (1957) 71 *Harvard Law Review* 630.

of Arendt's work asks us to re-examine our existing conventions in a way that few other works do.

D *The Fourth Response: Reading Arendt as a Criminal Lawyer*

By declaring Eichmann to be ordinary, banal and uninteresting, Arendt could be said to have exercised moral courage as a public intellectual. We all found her impressive in this manner. Again and again we were reminded of the civil function of the academic as contrarian.

Arendt's finding of banality is broadcast from the outset as it is built into the title of her book, making it memorable and polemical. Eichmann, she claimed, was not intrinsically or 'radically' evil, a moral monster utterly set apart from other people. In court she found him 'superficial', 'thoughtless',⁹⁵ self-justifying and unable to appreciate the moral gravity of his conduct and so she refused to condemn and denounce him in the usual manner. She failed to express out-and-out abhorrence and repugnance for the man himself, whom she found instead to be a bland and colourless rule-follower.⁹⁶

Implicitly, her message was that ordinary people who attend almost exclusively to the formal rules of their society, at the expense of their moral content, might do as he did and remain ordinary.⁹⁷ Arendt's interpretation of Eichmann meant that she herself could be found wanting in judgement: insufficiently damning of him and too critical of those of us who could be like him, if we held too closely to the formal obligations created by legal rules and reflected too little on their moral meaning.⁹⁸ Thus she swept her reader into the zone of responsibility and blurred the distinction between Eichmann and those who were judging him.

Arendt was expected to express disgust for Eichmann and to describe him as radically evil. Further, Eichmann himself was meant to express disgust for himself and his actions and be riven by remorse. Criminal law looks for this in its subjects and will give it formal expression in reduced sentences.⁹⁹ But, as Arendt explained, Eichmann was too insubstantial a person to respond in this manner. He could not understand, properly condemn or appropriately regret his own actions, and his lawyer implicitly failed to tutor him sufficiently in the expression of the right emotional responses. Emotional elements were thus apparently missing from the judgements made by both Arendt and Eichmann.

⁹⁵ Arendt, above n 2, 15–16.

⁹⁶ For a broad discussion of these points see also Raimond Gaita, *Breach of Trust: Truth, Morality and Politics* (Black Inc, 2004) 43–48.

⁹⁷ There is possibly a message here for us all in the modern university.

⁹⁸ The conformist and the ritualistic rule follower have been well described by American sociologist Robert K Merton in *Social Theory and Social Structure* (Free Press, 1968).

⁹⁹ See Steven Tudor, *Remorse: Psychological and Jurisprudential Perspectives* (Ashgate Publishing, 2010).

The expectation and desire for an expression of deep disgust from both the author and her subject is understandable: her of him; him of himself. But on the grounds of intellectual honesty, as the careful and analytical observer she strove to be, Arendt persisted with her candid account of this man in court. As such, it is more measured and complex than simply a reaction of raw disgust in the face of radical evil. What she documented instead was a man who engages in bureaucracy when he should be seeing, feeling and understanding his grand-scale participation in the exercise of human cruelty and murder.

Arendt's perverse refusal to condemn Eichmann in the expected manner (with a sustained display of heartfelt disgust) poses interesting questions for the criminal lawyer, especially about the role of emotion. Is right-feeling, right-emotion, a required part of legal judgement, or, in this case, our judgement of both Arendt, as commentator, and Eichmann, as criminal? If so, as lawyers should we conclude that Arendt failed in this respect?¹⁰⁰ More pointedly, as legal scholars, do we have an authoritative role to play in evaluating such emotions and their regulation in saying that some emotions should be legally endorsed and others denounced? If we say that the right emotion is wanting in Arendt, are we succumbing to popular sentiment, which seems to demand hatred of the evil-doer? Should criminal law be guiding the community towards more civil responses or giving expression to community outrage? Arendt seems to counsel against the expression of rage, ultimately finding it of little value.

In the past decade, the emotion of disgust, especially when linked with anger and hatred, has come under scrutiny for its role and significance in criminal law; this new legal interest may have a direct bearing on our reading of Arendt. While disgust was once treated as a raw and reliable emotion, a useful indicator of the intolerable nature of a person or their actions, which could be legitimately recognised and employed by law,¹⁰¹ it is now treated with greater circumspection. More particularly, in relation to the partial defence to murder of provocation, disgust has come under the legal spotlight and is being subjected to evaluation and indeed re-evaluation.¹⁰²

Raw and extreme disgust, that which could provoke fatal violence and so attract a provocation defence, is now being critically examined for its social content and meaning.¹⁰³ Disgust for a homosexual who offers a sexual advance, thus apparently provoking a lethal response, has been fully condemned. It no longer supports even

¹⁰⁰ On the relationship between emotion, reason and moral judgement see the extensive writings of Martha Nussbaum. For example, *Political Emotions: Why Love Matters for Justice* (Belknap Press, 2013).

¹⁰¹ See Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1959). Devlin viewed disgust for the homosexual in this way.

¹⁰² The landmark article by Dan Kahan and Martha Nussbaum on law and the emotions interestingly prefigured these changes. See Dan Kahan and Martha Nussbaum 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Columbia Law Review* 331.

¹⁰³ See Thomas Crofts and Arlie Loughnan 'The Good, The Bad and the Ugly' (2011) 37 *Criminal Law Journal* 23.

a partial excuse for killing, as it has in the past.¹⁰⁴ So too has disgust and violent rage directed at the adulterous wife been rendered illegitimate by criminal law. The complete abolition of this defence in Victoria was an explicit response to these new legal evaluations of the role of disgust.¹⁰⁵ The objects of disgust were re-evaluated and the disgust itself was also deemed an unacceptable legal emotion, certainly from the point of view of the law of homicide. Other Australian jurisdictions are amending the defence in response to similar concerns. These can be regarded as civilising moves.

Disgust is a powerful emotion, one that is tempting to exploit by governments that seek to appear decisive and full of moral resolve. There is nothing like having someone to hate.¹⁰⁶ Criminal lawyers are increasingly concerned about the manner in which governments manipulate and engineer disgust and fear within the community to gain support for unprincipled criminal lawmaking directed against certain, broadly defined classes of person, as a way of garnering popularity with the electorate. The loosely labelled ‘paedophile’ is an easy target; community hatred is easily engineered and traditional legal rights thus suspended.¹⁰⁷ So too with ‘bikies’¹⁰⁸ and street ‘hoons’ — fear and hatred are easily mobilised.¹⁰⁹ Criminal legal scholars have been highly critical of the legal uses of disgust and have called for more measured and responsible lawmaking that does not rely on an appeal to raw and often uninformed emotion.¹¹⁰

Beyond the discipline of law, there is a fascinating literature, highly compatible with these new legal concerns about disgust. From neuroscience, psychology and also

¹⁰⁴ See especially the High Court decision of *Green v The Queen* (1997) 191 CLR 334 and then the more recent judicial objections to *Green v The Queen* (2010) 207 A Crim R 148 in *The Queen v Hajistassi* (2010) 107 SASR 67.

¹⁰⁵ See Victorian Law Reform Commission, *Defences to Homicide*, Final Report (2004). The recent NSW Select Committee Report on the partial defence of provocation similarly condemns these violent responses: see Select Committee on the Partial Defence of Provocation, Parliament of New South Wales, *The Partial Defence of Provocation* (2013) xii.

¹⁰⁶ To James Fitzjames Stephen, ‘hatred’ for the criminal was the right and proper response of the community and for criminal law: *Liberty, Equality and Fraternity* (Liberty Fund, 1874) 22. For Patrick Devlin, the proper emotion was ‘disgust’: above n 101, 18.

¹⁰⁷ For example South Australia Police recently published on its website the pictures, names and addresses of wanted child sex offenders who have failed their reporting duties. See *Wanted Child Sex Offenders* (28 August 2014) South Australia Police <<https://www.police.sa.gov.au/your-safety/crime-prevention-and-security/wanted-child-sex-offenders>>.

¹⁰⁸ See *Serious and Organised Crime (Control) Act 2008* (SA).

¹⁰⁹ See the early work of Stanley Cohen. See especially Stanley Cohen, *Folk Devils and Moral Panics* (MacGibbon and Kee, 1972).

¹¹⁰ The most influential modern legal critic of overcriminalisation is Douglas Husak. See especially Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008).

from Western Buddhism there is a growing scholarship on the potentially destructive and also misleading nature of such negative emotions.¹¹¹ Disgust and anger are certainly indicators of a subject's evaluation of a person or action. They supply important information about the moral assessment of the object. But proper moral judgement, it is said by scholars from a variety of disciplines, entails an assessment of the reasons for disgust and when those reasons are examined, disgust may appear unhelpful and may indeed dissipate.

Arendt herself seems to undergo the sort of moral and intellectual journey urged by these students of the emotions. She expects to, and is expected to, face and find 'radical evil' and to meet it with disgust. Her proper moral response thus will be to cast Eichmann outside the realm of the knowable. She finds instead a tedious bureaucrat wanting in basic human feeling, but he is not entirely beyond comprehension. She develops a measured and thoughtful response which goes beyond the visceral. Over the course of the trial, she implicitly evaluates her own disgust, finds it uninformative as a generalised response and so begins to make sense of something more ordinary and pedestrian. This more detached and analytical approach she knows will prove far less palatable.

The legal defence of provocation once acknowledged deep disgust and gave it a moral and legal role to play in homicide law. With this defence, the objects of disgust have been re-evaluated — not so with Eichmann. But the emotion itself has also been subject to evaluation and found unhelpful as a way of both moderating responsibility and exercising moral and legal judgement. Arendt too comes to find it unhelpful and then no doubt braces herself for her critics.

E The Fifth Response: Evaluating Leaking as Modern Judgement

Whistleblowers, leakers and hackers — famous modern incarnations include Aaron Swartz, Edward Snowden and Chelsea (Bradley) Manning — engage in civil disobedience, breaking governmental strictures of secrecy, because they have *judged* the morality of the government's system and found it lacking. As such, modern conversations on Arendt's call to 'judgement' return to their position time and time again.¹¹² But how can one judge their actions? Modern leakers are both lionised and

¹¹¹ Antonio Damasio, *The Feeling of What Happens: Body and Emotion in the Mapping of Consciousness* (Mariner Books, 2000); Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (Back Bay Books, 2007); Iain McGilchrist, *The Master and His Emissary: The Divided Brain and the Making of the Western World* (Yale University Press, 2012); Daniel Goleman, *Destructive Emotions: A Scientific Dialogue with the Dalai Lama* (Bantam, 2004).

¹¹² See, eg, Peter Ludlow, 'The Banality of Systemic Evil', *The New York Times* (online), 15 September 2013 <http://opinionator.blogs.nytimes.com/2013/09/15/the-banality-of-systemic-evil/?_php=true&_type=blogs&_r=01>; Roger Berkowitz, *The Banality of Systems and the Justice of Resistance*, (20 September 2013) Hannah Arendt Center <<http://www.hannaharendtcenter.org/?p=11692>>; Roger Berkowitz, *The Conscience of Edward Snowden* (21 June 2014) Hannah Arendt Center <<http://www.hannaharendtcenter.org/?p=13420>>.

condemned and offered little protection by the legal system. Often, academic and public judgement rests on subjective responses to the content of the revelations, whether the individual *agrees* with the surveillance of government or the war in Iraq. Arendt's strong judgement of Eichmann, her criticism not of the 'radical evil' that drove his actions, but his complacency within the bureaucracy about its actions and motives, provides us with an important moral framework with which to judge and defend the actions of modern leakers.

For Arendt, Eichmann's 'thoughtlessness' was not that he was an unthinking bureaucrat, a clerk, blindly following orders. Rather, it was that he failed to think about the larger framework in which those orders had been given. He took great pride in his ability to go above and beyond in achieving the orders that were given. He did, in her words 'his best to make the Final Solution final'.¹¹³ Eichmann wanted, above all things, to belong to a movement and follow, with his entire being, the ideals of that movement. He was able to suppress his own judgements about the evils being perpetrated toward the Jewish people and his own repulsion at the reality of the Final Solution, because obedience was demanded by the ideal to which he had pledged himself. He was 'sacrificing an easy morality for a higher good'.¹¹⁴ This led Eichmann to claim during his trial that his superiors abused his qualities: 'the subject of a good government is lucky, the subject of a bad government is unlucky. I had no luck.'¹¹⁵

For Arendt, however, the subject has agency and must judge the government's actions. The judgement is not of others, but of oneself. Arendt thus provides us with an important, individualised conception of judgement that provides the source for our judgement of the actions of modern leakers.

Rahul Sagar postulates that individuals *more likely* to leak are the so-called 'moral crusaders', ideologues convinced of their own righteousness.¹¹⁶ According to public choice theorist James Buchanan, the most dangerous individuals are the zealots who believe they act in the public interest, as they impose their will under the pretext of helping others.¹¹⁷ Individuals act in their self-interest and it is only their exposure to the pressures of other self-interested persons that allows equilibrium to be achieved between these interests.

Arendt recognises the necessity of strength of individual conviction, the strength of character that allows an individual to judge. She embraces and does not condemn the

¹¹³ Arendt, above n 1, 146.

¹¹⁴ Berkowitz, above n 3.

¹¹⁵ Arendt above n 2, 175.

¹¹⁶ Rahul Sagar, *Secrets and Leaks: The Dilemma of State Secrecy* (Princeton University Press 2013) 150–1.

¹¹⁷ See interview with James Buchanan in 'F**k You Buddy', *The Trap*, Episode 1, 11 March 2008. See also James M Buchanan, 'Politics Without Romance: A Sketch of Positive Public Choice Theory and its Normative Implications' in James M Buchanan and Robert D Tollison (eds), *The Theory of Public Choice II* (University of Michigan Press, 1984) (first published *IHS-Journal* 1979) 11.

judge. She wrote in her notes: ‘For conscience to work, either very strong religious belief — extremely rare. Or pride, even arrogance. If you say to yourself in such matters, who am I to judge? You are already lost.’¹¹⁸

Edward Snowden’s own explanation of his actions in leaking the details of government surveillance programs, predominantly those conducted by the United States National Security Agency, reflects Arendt’s call for thought and judgement. He describes his attempts to talk to people within the organisation about his concerns of abuse of power. He found that ‘people tend[ed] not to take them very seriously and move on from them’.¹¹⁹ But Snowden could not walk away: ‘The more you’re told it’s not a problem until eventually you realize that these things need to be determined by the public and not be somebody who was simply hired by the government.’¹²⁰

Snowden’s judgement was that the public ought to be told the truth of the extent and nature of that program to allow the people to exercise judgement as part of their rights within a democratic system. The potential difficulty, however, is that by making these systems public, their utility may be undermined. Critics argue that Snowden betrayed the system and by doing so undermined its ongoing operation and ability to protect the public.¹²¹

There is undeniably a democratic ‘good’ in starting public discussion of government action; decisions can be made about whether the people think what is being undertaken in their name is appropriate. As David Williams wrote:

The ultimate danger of executive secrecy in a much-governed country is that it denies the knowledge essential for an informed public opinion and that it inhibits effective scrutiny and criticism of the government and the administration.¹²²

But it is never this simple. What if the people *want* the surveillance and the heightened security it may provide? Snowden’s actions may have actively undermined the government’s ability to restart the program; sometimes security demands secrecy.

¹¹⁸ Young-Bruehl, above n 21, 339.

¹¹⁹ Glenn Greenwald, Interview with Edward Snowden (Hong Kong, video interview for *The Guardian*, 6 June 2013). Video available at: <<http://www.theguardian.com/world/video/2013/jun/09/nsa-whistleblower-edward-snowden-interview-video>>.

¹²⁰ Ibid. See also Gabriel Rodriguez, *Edward Snowden Interview Transcript FULL TEXT: Read the Guardian’s Entire Interview With the Man Who Leaked PRISM* (9 June 2013) Policy Mic <<http://www.policymic.com/articles/47355/edward-snowden-interview-transcript-full-text-read-the-guardian-s-entire-interview-with-the-man-who-leaked-prism>>.

¹²¹ See, eg, reported remarks of former US Ambassador John Bolton in John Dempsey, ‘Bolton, NSA Leaker Edward Snowden is Guilty of Treason’ 89 *WLS* (10 June 2013) <http://www.wlsam.com/common/page.php?pt=Bolton%3A+NSA+leaker+Edward+Snowden+is+guilty+of+treason&id=45663&is_corp=0>.

¹²² David Williams, *Not in the Public Interest: The Problem of Security in Democracy* (Hutchinson, 1965) 9.

Should Snowden's judgement on the immorality of the system also have been a judgement that others (the public) would also make that same judgement if they were given the opportunity to do so? Must the leaker in a democratic system exercise not only their own judgement, but predict the exercise of the judgement of others? Here is the dilemma for the leaker. These judgements often require the balancing of incomparable goods. They are made in the context of power and politics. The embrace of Snowden as a whistleblowing hero of democracy was not universal. By many, including the United States government, he was judged as a traitor. He now lives in exile, with a warrant issued for his arrest on charges of espionage, theft and conversion of government property. He is taking ultimate public responsibility for his actions, for his judgement.

Arendt's judgement provides us with a more satisfactory way of assessing the actions of the leaker that does not depend on views about the actions involved. Arendt's call for judgement is that of the individual. She does not shy from a situation where individuals make their *own* moral decisions as to whether they will comply with state regulation, exercising their *own* judgement on the overall direction of the state's trajectory. The individual who fails to do so may receive the blessing of a particular legal regime, but the individual has fallen victim to the temptingly safe banality of evil.

IV CONCLUDING THOUGHTS

In *Eichmann in Jerusalem*, Arendt poses a fundamental challenge to us as academics and intellectuals. Arendt invites us to be contrarian, to question social norms and assumptions, to confront taboo. Arendt's actions and words urge us, by example, to use our position as academics to engage with the world and be unafraid to judge what we observe. However, not all criticism or questioning is brave. Arendt was unusually fearless in that she knew full well that she risked alienation from within her own community. This is an important test for the academic; if critique is only a means of enhancing professional reputation or cementing relationships within one's discipline, then (while it may be valuable) it is not akin to the bravery of Arendt. Academic courage entails a willingness to take those risks that expose the academic to personal detriment, be it harsh criticism, social censure, ridicule or indeed hostility. It is a rare virtue.

Arendt prompts us to examine our own scholarly lives, to reflect and consider whether our work lives up to our personal moral determinations. Beyond ourselves, she offers us a way to judge the actions of others placed in morally difficult circumstances, especially those who feel that they can no longer comply with existing law. In *Eichmann in Jerusalem*, Arendt challenged existing academic conventions on both form and substance, and so expanded the very possibilities of strong dialogue, dispute and even disobedience to law.

HONEYSETT v THE QUEEN (2014) 311 ALR 320: OPINION EVIDENCE AND RELIABILITY, A STICKING POINT

I INTRODUCTION

In *Honeysett v The Queen*,¹ the High Court of Australia considered the admissibility of opinion evidence under Part 3.3 of the *Evidence Act 1995* (NSW) (*Evidence Act*). This case note examines the Court's decision in *Honeysett* and assesses the approach taken by the Court in interpreting s 79(1) of the *Evidence Act*. It probes the reluctance of the Court to read reliability into a determination of admissibility under s 79(1) and considers the treatment of new and developing areas of specialised knowledge. The broader procedural implications of the Court's determination are also evaluated, taking account of the 'uneasy alliance'² between law and science and adversarial doctrine.

II OPINION EVIDENCE

The *Evidence Act 1995* (NSW) is in most respects uniform with the *Evidence Act 1995* (Cth). The two Acts are drafted in identical terms except in so far as differences are identified by appropriate annotations to the texts and minor drafting variations are required by virtue of one Act being a New South Wales Act and the other being a Commonwealth Act.³ Part 3.3 of the *Evidence Act* governs the admissibility of opinion evidence at trial.

An opinion is 'commonly taken to mean' an inference drawn from observed and communicable data.⁴ Under s 76(1) of the *Evidence Act*, evidence of an opinion 'is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.' However, the legislation provides several exceptions to this exclusionary rule. Expert evidence may be adduced pursuant to s 79(1), provided the two conditions of admissibility elucidated in the case law are met.⁵ First, a witness must

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¹ (2014) 311 ALR 320 (*Honeysett*).

² National Research Council, Committee on Identifying the Needs of the Forensic Sciences Community, *Strengthening Forensic Science in the United States: A Path Forward* (National Academies Press, 2009) 86.

³ See, eg, *Evidence Act 1995* (NSW) ch 1.

⁴ *Lithgow City Council v Jackson* (2011) 244 CLR 352, 359 [10]; See also *Allstate Life Insurance Co v Australia & New Zealand Banking Group Ltd [No 5]* (1996) 64 FCR 73, 75.

⁵ *Honeysett* (2014) 311 ALR 320, 325 [23]; *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588, 602 [32] (*Dasreef*); *R v Tang* (2006) 65 NSWLR 681, 712 [134].

have ‘specialised knowledge based on the person’s training, study or experience’.⁶ Secondly, the opinion must be ‘wholly or substantially based on that knowledge’.⁷

Distinct from ‘common knowledge’, ‘specialised knowledge’ is knowledge outside that of persons who have not acquired an understanding of the subject matter by way of training, study or experience.⁸ Such knowledge ‘connotes more than subjective belief or unsupported speculation [and] applies to any body of known facts or to any body of ideas inferred from such facts or accepted as truths on good grounds’.⁹ For the purposes of s 79(1), it is therefore sufficient if an opinion is substantially based on specialised knowledge acquired through training, study or experience.¹⁰

III BACKGROUND

A Facts

On 17 September 2008 a robbery took place at the Narabeen Sands Hotel in New South Wales. Disguised and armed, three robbers entered the premises after the close of trading. Wielding a pink-handled hammer, Offender One wore dark attire and gloves, and shrouded his head and face in a white covering. Whilst three employees were present at the time of the break-in, witness testimony describing Offender One was ‘necessarily vague’.¹¹ Two witnesses did, however, liken Offender One’s head covering to a white t-shirt. The robbers fled in a getaway vehicle identified as an Audi RS4. Fatefully, the pink-handled hammer was left behind at the scene.

Heavily reliant upon DNA evidence, the prosecution case was largely circumstantial. The police recovered a stolen Audi RS4 on 25 November 2008, finding a sports bag and a white t-shirt inside. Analysis of DNA samples taken from both the hammer and the t-shirt matched the DNA profile of the appellant.¹² Closed-circuit television cameras (‘CCTV’) had also recorded the robbery. Over objection, the prosecution adduced evidence of anatomical characteristics common to both the appellant and Offender One from Professor Maciej Henneberg, an anatomist. Admitted as an item of circumstantial evidence to ‘support a conclusion of identity’,¹³ Professor Henneberg’s opinion was based on repeated viewing of both the CCTV imaging and images of the appellant. Following a trial in the District Court of NSW, the appellant was convicted of armed robbery.

⁶ *Evidence Act 1995* (NSW) s 79(1).

⁷ *Ibid.*

⁸ *Honeysett* (2014) 311 ALR 320, 325 [23].

⁹ *Ibid*; *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 590; *R v Tang* (2006) 65 NSWLR 681, 712 [138].

¹⁰ *Honeysett* (2014) 311 ALR 320, 325–6 [24].

¹¹ *Ibid* 322 [6].

¹² *Ibid* 322 [8].

¹³ *Ibid* 329–30 [40].

The appellant appealed against his conviction to the NSW Court of Criminal Appeal, challenging the admission of Professor Henneberg's evidence under s 79(1) of the *Evidence Act*.¹⁴ The appeal was dismissed. The Court of Criminal Appeal held that the evidence had been rightly admitted as it was opinion evidence based on specialised knowledge derived from Professor Henneberg's training, study or experience.¹⁵ In the alternative, it was held Professor Henneberg's evidence was admissible on the basis that his repeated viewing of the images had rendered him an 'ad hoc' expert.¹⁶

Granted special leave to appeal to the High Court on 14 March 2014, the appellant asserted that the Court of Criminal Appeal erred in finding the evidence of Professor Henneberg fell within the s 79(1) exception.

B Decision

The Court delivered a unanimous judgment. French CJ, Kiefel, Bell, Gageler and Keane JJ held that it was an error of law to admit Professor Henneberg's evidence.¹⁷ The Court determined that his opinion was not wholly or substantially based on his specialised knowledge within s 79(1) of the *Evidence Act*.¹⁸ The order of the Court of Criminal Appeal was therefore set aside and the appeal allowed. The appellant's conviction was quashed and a new trial ordered.¹⁹

IV SPECIALISED KNOWLEDGE

Every man gets a narrower and narrower field of knowledge in which he must be an expert in order to compete with other people. The specialist knows more and more about less and less and finally knows everything about nothing — Konrad Lorenz²⁰

The submission of expert opinion evidence is a regular feature of judicial proceedings both in Australia and abroad. Experts in medicine, geology, architecture and engineering frequently proffer opinion evidence at trial. Expert evidence is not, however, limited to these orthodox areas of professional expertise.²¹ In criminal matters, forensic science experts are routinely called upon to give evidence relating to an array of disciplines.²² These disciplines include toxicology, firearms, trace

¹⁴ *Honeysett v The Queen* [2013] NSWCCA 135.

¹⁵ *Ibid* [66] (Macfarlan JA).

¹⁶ *Ibid* [60].

¹⁷ *Honeysett* (2014) 311 ALR 320, 331 [46].

¹⁸ *Ibid*.

¹⁹ *Ibid* 331 [49].

²⁰ Larry Collins and Thomas Schneid, *Physical Hazards of the Workplace* (CRC Press LLC, 2001) 107.

²¹ *R v Robb* (1991) 93 Cr App R 161, 164.

²² National Research Council, above n 2, 86.

evidence, controlled substances, blood pattern analysis, biological screening, crime scene investigation and impression evidence.²³

Owing to advances in digital technology, modern forensic science methods increasingly ‘individualise’ particular types of evidence.²⁴ In *Honeysett* Professor Henneberg identified forensic identification as within his specialised knowledge, namely the comparison of individuals based on the inspection of images (‘body mapping’).²⁵ A form of circumstantial identification evidence, facial and body mappers are ‘restricted to the language of similarity’.²⁶ Analysts assess anatomical similarities between two or more persons by identifying any number of individual characteristics.²⁷

A qualitative method of assessing relevant similarities and differences between images, body mapping is a field of expert analysis of ‘fairly recent origin’.²⁸ It is generally accepted that facial and body mapping employ three techniques: photoanthropometry, morphological analysis and photograph superimposition.²⁹ As yet, however, there is no credible explanation or body of research that explains how facial and body mappers surmount issues of image distortion, lighting discrepancies, varied camera angles, lenses and blurriness or low image quality.³⁰ It remains unclear why those images that purport to present similarities are preferred to those that tend to indicate otherwise.³¹

Whilst advances in science and new techniques may serve to enhance modern methods of crime detection,³² the probative value of resultant evidence is subject to the reliability of the technique.³³ Distinct from analytical disciplines, novel methods such as facial and body mapping are highly subjective, open to expert interpretation.³⁴ The requirement under s 79(1) that an expert possess specialised knowledge

²³ Ibid 38; Ian Freckelton and Hugh Selby, *Expert Evidence: Law, Practice, Procedure and Advocacy* (Thomson Reuters, 2nd ed, 2002) 53–4.

²⁴ National Research Council, above n 2, 43. Shoe and tire impressions, dermal ridge prints, toolmarks and handwriting are apposite examples. Unique markings acquired in a random fashion by a source item are purportedly transmitted from that item to the evidence under examination and subsequently matched.

²⁵ *Honeysett* (2014) 311 ALR 320, 323 [11].

²⁶ Gary Edmond, ‘Specialised Knowledge, the Exclusionary Discretions and Reliability: Reassessing incriminating expert opinion evidence’ (2008) 31(1) *University of New South Wales Law Journal* 1, 31.

²⁷ *Honeysett* (2014) 311 ALR 320, 324 [17]; *Morgan v The Queen* (2011) 215 A Crim R 33, 56 [124].

²⁸ *R v Jung* [2006] NSWSC 658, [55].

²⁹ *R v Tang* (2006) 65 NSWLR 681, 685 [17].

³⁰ Edmond, above n 26, 33.

³¹ Ibid 32.

³² *R v Clarke* [1995] 2 Cr App R 425, 429–430.

³³ Ibid 431.

³⁴ National Research Council, above n 2, 87.

is important for grounding admissibility. It provides information that facilitates ‘the rational evaluation of expert opinion evidence.’³⁵ However, the ‘utility of being experienced or qualified in the application of an untested technique is unclear’.³⁶

As acknowledged by the Australian Law Reform Commission, ‘new and developing knowledge poses a difficulty’³⁷ for the reception of expert opinion evidence at trial. For the purpose of applying s 79(1), it must be determined ‘at what point in the development of the learning is there an area of expertise’.³⁸ Absent demonstrable evidence of specialised knowledge, evidence given by an expert is merely opinion ‘based on impressions, speculation and guesses’.³⁹ Where areas of expertise are progressed or developed in novel ways, trained professionals are ostensibly testifying in areas ‘beyond their actual expertise or beyond the collective ability of any recognisable field or identifiable sub-discipline’.⁴⁰

There is precedent to suggest that facial and body mapping do not constitute ‘specialised knowledge of a character which can support an opinion of identity.’⁴¹ In *R v Tang*, opinion evidence premised on body mapping was characterised as a ‘bare ipse dixit’.⁴² The protocols used by the expert in that instance were neither identified nor explained. Evidence given at trial instead indicated that the prosecution expert had ‘developed a previously established area of forensic anatomy into a new area’ through her own innovation and process.⁴³

Similarly, in *Morgan v The Queen*,⁴⁴ ‘body mapping’ evidence given by Professor Henneberg — the same expert called upon in *Honeysett* to give evidence — was deemed inadmissible. Justice Hidden was critical of a ‘lack of research into the validity, reliability and error rate of the process’ applied.⁴⁵ It was not apparent on the evidence that Professor Henneberg’s anatomical expertise equipped him to take account of garmented limbs and features.⁴⁶

³⁵ Gary Edmond and Mehera San Roque, ‘Before the High Court: *Honeysett v The Queen*: Forensic Science, ‘Specialised Knowledge’ and the Uniform Evidence Law’ (2014) 36 *Sydney Law Review* 323, 330.

³⁶ *Ibid* 339.

³⁷ Australian Law Reform Commission, *Uniform Evidence Law*, Report No 102 (2005) 287.

³⁸ *Ibid* 287.

³⁹ Edmond and Mehera San Roque, above n 35, 335.

⁴⁰ Edmond, above n 26, 7.

⁴¹ *R v Tang* (2006) 65 NSWLR 681, 714 [146].

⁴² *Ibid* 714 [146].

⁴³ *Ibid* 709 [123].

⁴⁴ (2011) 215 A Crim R 33.

⁴⁵ *Morgan v The Queen* (2011) 215 A Crim R 33, 59 [138].

⁴⁶ *Ibid* 60 [141]. See also [138]: the court noted that Professor Henneberg’s erroneous use of the product rule in his hypothetical statistical calculation, were matters ‘properly to be taken into account in assessing the reliability of his evidence as an expert.’

Despite this, even if the views of a witness are ‘unproven and not accepted by others’, that witness will likely be considered a qualified expert if their view is not otherwise ‘scientifically established as false’.⁴⁷ This approach ensures ‘developments in scientific thinking [are] not kept from the Court, simply because they remain at the stage of hypothesis’.⁴⁸ It does, however, ‘assume that juries, as well as judges, are able to assess expert evidence like any evidence’.⁴⁹ As stated by Dyson Heydon, ‘where the discipline of the expert is of a kind beyond the ordinary experience of the lay public, or where its scientific sub-stratum requires specialist skills to understand or test ... the court is going close to entrusting its process to the expert’.⁵⁰

At the first instance, the circumstantial identification evidence in *Honeysett* was deemed to have such ‘significant probative value’ as to warrant its inclusion.⁵¹ Professor Henneberg’s observations were one of the circumstances upon which it was open for the jury to draw a ‘conclusion of guilt’.⁵² Yet, without objective methods of scrutiny and assessment, it is unlikely a trier of fact will be placed to evaluate evidence produced by novel or unconventional technique and method.⁵³ This conceivably hamstrings the Court’s ability to accurately weigh the probative value of unorthodox expert evidence against the prejudicial effect anticipated from its admission.

Whilst a great deal of confidence is thus invested in an expert’s training, study or experience,⁵⁴ every form of testimony is susceptible to error.⁵⁵ No forensic method has been shown to have the capacity to support, with a significant degree of certainty, conclusions about ‘individualisation’.⁵⁶ Where a particular study is not so advanced, there is greater risk of inaccurate representation of sources.⁵⁷ Ipse dixit and ‘educated guesses’ are inappropriate when proffering opinion based on new or unique forms of evidence.⁵⁸ The risk of injustice posed by unsatisfactory expert evidence is not insignificant.⁵⁹ There is a danger that greater weight will be assigned to the opinion evidence than can rationally be sustained.⁶⁰

⁴⁷ *Commission for Government Transport v Adamcik* (1961) 106 CLR 292, 306; J D Heydon, *Cross on Evidence* (LexisNexis, 9th ed, 2013) 962. See also *Gilham v The Queen* (2012) 224 A Crim R 22 and *Wood v The Queen* (2012) 84 NSWLR 581.

⁴⁸ *R v Harris* [2006] 1 Cr App R 5, [270].

⁴⁹ J D Heydon, above n 47, 975.

⁵⁰ *Ibid* 975.

⁵¹ *Honeysett* (2014) 311 ALR 320, 330 [41].

⁵² *Ibid*.

⁵³ Adam Wilson, ‘Expert Opinion Evidence: The Middle Way’ (2009) 73(5) *Journal of Criminal Law* 430, 446.

⁵⁴ Edmond and San Roque, above n 35, 332.

⁵⁵ Wilson, above n 53, 436.

⁵⁶ National Research Council, above n 2, 87.

⁵⁷ *Dawson v Lunn* [1986] RTR 234, 238.

⁵⁸ Edmond, above n 26, 54.

⁵⁹ *Dasreef* (2011) 243 CLR 588, 611 [59] (Heydon J).

⁶⁰ Edmond, above n 26, 13.

V RELIABILITY

Experience without theory is blind, but theory without experience is mere intellectual play — Immanuel Kant⁶¹

The *Honeysett* appeal was widely touted as an opportunity for the Court to ‘read reliability into s 79(1)’.⁶² However, the Court held that a consideration of whether an opinion requires ‘independent means of validation’⁶³ before it may be found to be based on ‘specialised knowledge’ was beyond the scope of the appeal. Australian courts have typically avoided introducing ‘an extraneous idea such as reliability’⁶⁴ into the application of s 79(1). Owing to this narrower textual interpretation of s 79(1), judicial inquiry has instead been directed at establishing ‘specialised knowledge’.

However, s 79(1) mandates a ‘demonstrable link’ between expert opinion evidence and specialised knowledge.⁶⁵ Judge Blackmun’s oft-cited formulation of ‘knowledge’ in *Daubert v Merrell Dow Pharmaceuticals Inc* necessitates a ‘body of known facts’ or a ‘body of ideas inferred from such facts or accepted as truths on good grounds’.⁶⁶ More is required than ‘subjective belief or unsupported speculation’.⁶⁷ Eschewing reliability appears inconsistent with this formulation.

Given reliability mandates neither absolute certainty nor infallibility, the Court’s ostensible hesitation — manifest in its ‘focus of attention on the words “specialised knowledge”’⁶⁸ — is somewhat unfounded. The prosecution or defence need only provide ‘good grounds or a credible basis for believing that on the balance of probabilities a technique or approach is reliable’.⁶⁹ A precondition to admissibility of expert opinion evidence, a test of reliability has been readily adopted and applied in the United States,⁷⁰ Canada⁷¹ and the United Kingdom.⁷²

⁶¹ Gerard Drennan, Sara Casado and Louise Minchin ‘Dilemmas and Ethical Decision-Making’ in Zoe Ashmore and Richard Shuker (eds), *Forensic Practice in the Community* (Routledge, 2014) 40, 40.

⁶² Edmond and San Roque, above n 35, 325.

⁶³ *Honeysett* (2014) 311 ALR 320, 330 [42].

⁶⁴ *R v Tang* (2006) 65 NSWLR 681, 712 [137].

⁶⁵ *Ibid* 715 [152].

⁶⁶ (1993) 509 US 579, 590; *R v Tang* (2006) 65 NSWLR 681, 712 [138] (Spigelman CJ); *Honeysett* (2014) 311 ALR 320, 325 [23].

⁶⁷ *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 590.

⁶⁸ *R v Tang* (2006) 65 NSWLR 681, 712 [137].

⁶⁹ *R v Gilmore* [1977] 2 NSWLR 935, 939–40.

⁷⁰ *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 590; *Kumho Tire Co v Carmichael* (1999) 526 US 137, 148.

⁷¹ *R v Trochym* [2007] 1 SCR 239; *R v DD* [2000] 2 SCR 275; *R v J-LJ* [2000] 2 SCR 600.

⁷² *R v Luttrell* [2004] 2 Cr App R 31; *Dawson v Lunn* [1986] RTR 234; *R v Harris, Rock, Cherry and Faulder* [2006] 1 Cr App R 5.

In 2011 the British Law Commission recommended that a test of sufficient reliability be applied to expert opinion evidence.⁷³ Opinion is sufficiently reliable and admissible when it is ‘soundly based’.⁷⁴ According with proposed criteria, opinions based on unjustifiable assumptions, improper or inappropriate methods and procedures or flawed data are inadmissible.⁷⁵ Absent sufficient scrutiny, opinion based on an untested hypothesis is also excluded.⁷⁶ Whilst forensic scientific opinion evidence necessarily involves a ‘subjective interpretive element’,⁷⁷ its admissibility must be tested against objective standards. If seeking to draw reliable inferences and conclusions from a proffered opinion, it follows that the opinion itself must meet a reliability threshold.⁷⁸

Where expert opinion is premised on novel experimentation, method or technique, that general foundation material ought to be subject to adequate scrutiny. In order to establish that expert opinion is premised on specialised knowledge, the expert’s reasoning processes must be exposed.⁷⁹ Opinion evidence ‘requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached’.⁸⁰ As contended by Heydon J in *Dasreef*:

Opinion evidence is a bridge between data in the form of primary evidence and a conclusion which cannot be reached without the application of expertise. The bridge cannot stand if the primary evidence end of it does not exist.⁸¹

At common law in South Australia, expert opinion evidence is admissible where a person possesses special knowledge or experience ‘which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience’.⁸² There is no reason to think that the expression ‘specialised knowledge’ in s 79(1) ‘gives rise to a test which is in any respect narrower or more restrictive than the position at common law’.⁸³

⁷³ British Law Commission, *Expert Evidence in Criminal Proceedings in England and Wales*, Report No 325 (2011) 58–60. This test encompasses both scientific and non-scientific expert opinion evidence.

⁷⁴ *Ibid* 61.

⁷⁵ *Ibid*.

⁷⁶ *Ibid*.

⁷⁷ *Ibid* 60.

⁷⁸ *Ibid*.

⁷⁹ *Ocean Marine Insurance Association (Europe) OV v Jetopay Ltd Ltd* (2000) 120 FCR 146, 150 [18], 151 [23].

⁸⁰ *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, 743 [85] (Heydon JA).

⁸¹ *Dasreef* (2011) 243 CLR 588, 622 [90].

⁸² *R v Bonython* (1984) 38 SASR 45, 46–7 (King CJ); *HG v The Queen* (1999) 197 CLR 414, 432 [58] (Gaudron J).

⁸³ *HG v The Queen* (1999) 197 CLR 414, 432 [58] (Gaudron J); See also *Velevski v The Queen* (2002) 187 ALR 233, 253 [82]; *Osland v The Queen* (1998) 197 CLR 316, 338 [53] (Gaudron and Gummow JJ).

As conceded by the majority in *Dasreef*, ordinarily an expert's evidence must explain how their field of specialised knowledge applies to the 'facts assumed or observed so as to produce the opinion propounded.'⁸⁴ Such information about methodological limitations, selection biases and distortions enables the court to contextualise the processes applied by a particular expert.⁸⁵ However, a reasoned explanation of the application of the specialised knowledge to the circumstances of the case will be 'useless unless the assumed facts involved in that reasoning are facts which, if the evidence is accepted, are capable of being proved by it.'⁸⁶

If the techniques and processes used by experts go untested, it is impossible to 'know if the opinions expressed by those with extensive training, study or experience are more accurate than the impression of ordinary citizens.'⁸⁷ Absent formal evaluation, the proficiency of an analyst is unknown. A trier of fact is instead forced to evaluate the plausibility of the opinion, any formal study undertaken by the expert, the expert's general experience or impressions of demeanour and credibility. However, these considerations do not equate to knowledge and are aptly characterised as 'distractions'.⁸⁸

Expert opinion that is unreliable or of unknown reliability should not be aggrandised, particularly in circumstantial cases such *Honeysett*.⁸⁹ Admitting expert evidence on the basis that it furnishes the trier of fact with necessary identification evidence tends to 'displace (and trivialise) issues of reliability'.⁹⁰ An apt example, the case of *R v Jung* concerned the reception of facial mapping evidence, exhibited under the general appellation of 'definitive resemblance'.⁹¹ Despite concessions made on the voir dire that no person in Australia had validated the expert's methods and that the expert did not keep records of her measurements, her opinion was admitted on the basis that it was within a field of specialised knowledge.⁹² Astonishingly, agreement at trial that morphological analysis is beleaguered by the fact that photographic angles can alter and distort facial features had no bearing on admissibility.⁹³

Evidentiary reliability could be assessed against the five criteria set out in *Daubert*.⁹⁴ The Court might consider whether the technique or process can be tested, the likely rate of error, whether appropriate practice standards have been applied, whether the technique has general acceptance and whether the technique has been described

⁸⁴ *Dasreef* (2011) 243 CLR 588, 604 [37].

⁸⁵ Edmond, above n 26, 43.

⁸⁶ *Dasreef* (2011) 243 CLR 588, 639 [132] (Heydon J).

⁸⁷ Edmond and San Roque, above n 35, 337.

⁸⁸ *Ibid* 341.

⁸⁹ Edmond, above n 26, 43.

⁹⁰ *Ibid* 42; See, eg, *Honeysett* (2014) 311 ALR 320, 329–30 [40].

⁹¹ *R v Jung* [2006] NSWSC 658, [26].

⁹² *Ibid* [55].

⁹³ *Ibid* [9], [55].

⁹⁴ *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 593–4.

in publication. Indeed, the ‘frailties’⁹⁵ of novel opinion have led Canadian courts to endorse the *Daubert* criteria, unwilling to allow ‘too easy an entry’ for untested evidence.⁹⁶ The case of *R v Trochym* held that ‘reliability is an essential component of admissibility.’⁹⁷ Whilst the degree of evidential reliability will necessarily vary according to circumstance, the admission of insufficiently reliable evidence is ‘likely to undermine the fundamental fairness of the criminal process’.⁹⁸

VI LAW AND SCIENCE

Science is facts; just as houses are made of stones, so is science made of facts;
but a pile of stones is not a house and a collection of facts is not necessarily
science — Henri Poincaré⁹⁹

The relationship between law and science is perhaps best characterised as an ‘uneasy alliance’.¹⁰⁰ Courts have long lamented the ‘partiality’¹⁰¹ of expert witnesses, sceptical of the manner in which parties screen and select consultant experts. Those experts willing ‘to bend their science in the direction from which their fee is coming’¹⁰² and act as advocates for the party calling them have been staunchly criticised. In *Honeysett*, the Court concluded that Professor Henneberg’s opinion was merely based on a ‘subjective impression of what he saw when he looked at the images.’¹⁰³ Yet, presented as having relevant expertise, his evidence ‘gave the unwarranted appearance of science’.¹⁰⁴

The so-called ‘CSI Effect’ has seen jurors come to expect and accept forensic evidence as conclusive.¹⁰⁵ This is of particular concern where methods of identification with ‘questionable epistemological provenance’¹⁰⁶ found the opinions so given. Indeed, if counsel then petitions the jury — as was the case in *Honeysett* — to accept such evidence because it is a ‘reliable science’ and is ‘something that [can be] explained’,¹⁰⁷ jurors may be more inclined to adopt incomplete and flawed understandings of the evidence.

⁹⁵ *R v J-LJ* [2000] 2 SCR 600, [28]–[29].

⁹⁶ *Ibid* [28]–[29]; *R v DD* [2000] 2 SCR 275.

⁹⁷ *R v Trochym* [2007] 1 SCR 239, 260 [27].

⁹⁸ *Ibid*.

⁹⁹ Henri Poincaré, *Science and Hypothesis* (Walter Scott Publishing Co Ltd, 1905) 157.

¹⁰⁰ National Research Council, above n 2, 86.

¹⁰¹ *Dasreef* (2011) 243 CLR 588, 609 [56] (Heydon J).

¹⁰² *Indianapolis Colts Inc v Metropolitan Baltimore Football Club Ltd* (1994) 34 F (3d) 410, 415 (Posner J).

¹⁰³ *Honeysett* (2014) 311 ALR 320, 330 [43].

¹⁰⁴ *Ibid* 330 [45].

¹⁰⁵ National Research Council, above n 2, 48.

¹⁰⁶ Edmond, above n 26, 7.

¹⁰⁷ *Honeysett* (2014) 311 ALR 320, 330 [40].

Professor Henneberg was supplied with a disc containing the CCTV footage and a separate envelope with two discs containing images of the appellant.¹⁰⁸ Whilst this process is accepted as standard practice, when an expert is sent photographs and asked to comment, the implication is obvious.¹⁰⁹ The tacit expectations placed upon forensic identification experts may bear upon their analysis and opinions, particularly when an expert is using novel or untested techniques.¹¹⁰ Experts who venture opinions outside of their field of specialised knowledge may also ‘invest those opinions with a spurious appearance of authority’.¹¹¹ Given the highly selective nature of facial and body mapping, subsequent identification evidence is rendered susceptible to manipulation.

Inferring a test of reliability into s 79(1) will therefore go some way in mitigating what the courts have labelled the ‘white coat effect’.¹¹² It will ensure ‘weak, speculative and unreliable opinion[s]’¹¹³ are fully tested and examined at trial. Any ‘beguiling scientific garb, which may conceal the blemishes within’, will be negated.¹¹⁴

VII OPINION EVIDENCE AND ADVERSARIALISM

Justice cannot be for one side alone, but must be for both — Eleanor Roosevelt¹¹⁵

Courts invest substantial confidence in procedural safeguards such as cross-examination, rebuttal experts, direction and warnings.¹¹⁶ However, there is nothing to suggest that even the most vigorous cross-examination ‘consistently or meaningfully exposes the very real limitations’ of novel opinion evidence.¹¹⁷ Given that there are few objective standards or guidelines by which to assess emerging forensic science methods, the party objecting to neoteric opinion evidence has limited capacity to unpack its foundation. The Australian Law Reform Commission explained:

[W]here the reliability or credibility of the evidence is such that its weight is likely to be overestimated by the tribunal of fact because of an inability to test the evidence by cross-examination or for some other reasons, then these may be considerations relevant to the decision to exclude or limit the use of the evidence.¹¹⁸

¹⁰⁸ Ibid 323 [13]–[14].

¹⁰⁹ Edmond, above n 26, 32.

¹¹⁰ Ibid.

¹¹¹ *HG v The Queen* (1999) 197 CLR 414, 429 [44] (Gleeson CJ).

¹¹² *Morgan v The Queen* (2011) 215 A Crim R 33, 59 [65].

¹¹³ Edmond and San Roque, above n 35, 324.

¹¹⁴ Heydon, above n 47, 961.

¹¹⁵ Eleanor Roosevelt, *The Autobiography of Eleanor Roosevelt* (Harper Publishing, 1961).

¹¹⁶ Edmond, above n 26, 22; *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 596; National Research Council, above n 2, 10.

¹¹⁷ Edmond, above n 26, 37.

¹¹⁸ Australian Law Reform Commission, above n 37, 565.

As contended by Gary Edmond, ‘structural symmetry is not the same as substantial fairness’.¹¹⁹ To allow the tender of unreliable evidence or evidence of unknown reliability and then rely wholly upon adversarial or accusatorial court process ‘carries the risk of giving [the evidence] a foothold in the record’.¹²⁰ Whilst jury directions are considered ‘appropriate means of attacking shaky but admissible evidence’,¹²¹ they will be of limited utility where an advocate makes a misleading, but ultimately persuasive, presentation.¹²² It is therefore incumbent on the opposing party to challenge the testimony of an expert and ensure their opinions are ‘properly grounded, well reasoned and not speculative’.¹²³

Where the prosecution adduces expert evidence, the defence is placed at a considerable disadvantage. Irrefutable critiques can be ‘parried on the basis that they are [otherwise] motivated’.¹²⁴ The practical need to discredit opinion evidence also imposes sizeable resource burdens on the defendant. Rather than establish a ‘prophylactic’ test of reliability, the submission of untested opinion evidence transmits the ‘responsibility of demonstrating unreliability onto the defence’.¹²⁵

This operates in stark contrast to established principles of criminal law: that the evidential and persuasive burdens of proof are borne by the prosecution.¹²⁶ A consequence of the presumption of innocence, this so-called ‘golden thread’¹²⁷ of criminal law is somewhat abrogated by the inordinate onus placed on the defence to demonstrate unreliability. Owing to the Court’s reluctance to formally read reliability into s 79(1), it falls largely to the defence to challenge the supposed imprimatur of experts called by the prosecution. In this way the defence is impelled to subsume the trial court’s traditional gatekeeping function,¹²⁸ scrutinising expert testimony to ensure the principles and methods so applied are ‘reliable and applied reliably to the facts of the case’.¹²⁹

VIII CONCLUSION

The unanimous judgment in *Honeysett* does not evince flagrant ‘judicial disinterest in the reliability of expert opinion evidence’,¹³⁰ but rather highlights the Court’s

¹¹⁹ Edmond, above n 26, 37.

¹²⁰ *Dasreef* (2011) 243 CLR 588, 636 [123] (Heydon J).

¹²¹ National Research Council, above n 2, 10.

¹²² *Ibid* 236.

¹²³ *Ibid* 94; Edmond, above n 26, 39.

¹²⁴ Edmond, above n 26, 38.

¹²⁵ *Ibid* 39.

¹²⁶ *Woolmington v DPP* [1935] AC 462.

¹²⁷ *Ibid* 7 [7] (Sanky J).

¹²⁸ National Research Council, above n 2, 94.

¹²⁹ *Ibid* 95.

¹³⁰ Edmond, above n 26, 1.

preoccupation with discerning specialised knowledge. The Court's reluctance to read reliability into s 79(1) of the *Evidence Act*, also intimates great 'confidence'¹³¹ in Australia's adversarial and accusatorial systems.

Yet in emerging disciplines, expert opinion will likely be of unknown reliability. Without recourse to objective methods of scrutiny, a tribunal of fact — applying its ordinary knowledge and experience — will be unable to evaluate novel or unconventional techniques in a comprehensive manner.¹³² This risks such evidence being afforded more weight than can rationally be sustained.¹³³ Inferring reliability into admissibility standards for expert evidence merely extrapolates dictum, which conflates 'knowledge' with a 'body of ideas inferred from such facts or accepted as truths on good grounds'.¹³⁴

Developing the s 79(1) test will protect against the 'perceived infallibility of forensic science'¹³⁵ and minimise error in the interpretation of evidentiary information.¹³⁶ It will also regulate case-by-case appraisal of the evidential bases of expert opinion.¹³⁷ A further safeguard against possible miscarriages of justice, a test of reliability will ensure the standards governing admissibility of expert evidence in Australia are au courant and sufficiently scrupulous.

¹³¹ National Research Council, above n 2, 10.

¹³² Wilson, above n 53, 446.

¹³³ Edmond, above n 26, 13; *Pownall v Conlan Management Pty Ltd* (1995) 12 WAR 370 (FC); Heydon, above n 47, 973.

¹³⁴ *Daubert v Merrell Dow Pharmaceuticals Inc* (1993) 509 US 579, 590; *R v Tang* (2006) 65 NSWLR 681, 712 [138] (Spigelman CJ); *Honeysett* (2014) 311 ALR 320, 325 [23].

¹³⁵ Wilson, above n 54, 430.

¹³⁶ National Research Council, above n 2, 236.

¹³⁷ Heydon, above n 47, 970.

*Jerome Squires**

GOOGLE SPAIN SL v AGENCIA ESPAÑOLA DE PROTECCIÓN DE DATOS (EUROPEAN COURT OF JUSTICE, C-131/12, 13 MAY 2014)

I INTRODUCTION

In *Google Spain SL v Agencia Española de Protección de Datos*,¹ the European Court of Justice ('the Court') held that European data protection law applies to search engines, such as Google, and gives individuals the right to have links removed from search results, provided certain conditions are met. *Google Spain* has been heralded as a landmark decision because the Court's expansive approach to the rights of data subjects amounts to judicial recognition of the 'right to be forgotten.'² This case note suggests that the Court erred in its interpretation of art 6(1)(c) of *Directive 95/46*,³ a provision central to the right to be forgotten, and that its approach to rights and interests is largely unexplained and unjustified.

II FACTS

In March 2010 Mr Costeja Gonzalez, a Spanish citizen, complained to the Agencia Española de Protección de Datos (the Spanish data protection agency — 'AEPD') that links to newspaper articles concerning the auction of his house to pay social security debts appeared in Google search results for his name.⁴ The complaint was directed against the newspaper, *La Vanguardia*, and Google Spain and Google Inc. The newspaper articles were published in 1998 and Mr Costeja Gonzalez argued that, since the debts had been resolved many years ago, reference to them was now irrelevant.⁵ The AEPD rejected the complaint against *La Vanguardia* on the grounds that it was legally obliged to publish the notices, but upheld the complaint against Google and ordered that it remove the links to the newspaper articles from the search results. Google Inc and Google Spain brought actions against that decision before the Audiencia Nacional (Spain's high court).⁶

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¹ (European Court of Justice, C-132/12, 13 May 2014) ('*Google Spain*').

² See, eg, Lorna Woods, *Google Spain: Freedom of Expression and the Right to be Forgotten* (13 May 2014) Human Rights Centre <<http://blogs.essex.ac.uk/hrc/2014/05/13/google-spain-freedom-of-expression-and-the-right-to-be-forgotten/>>.

³ *Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* [1995] OJ L 281/31, art 6(1)(c) ('*Directive*').

⁴ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [14]–[15].

⁵ *Ibid* [15].

⁶ *Ibid* [18].

III ISSUES

The Court considered three main groups of questions referred to it by the Audiencia Nacional. The first group concerned whether the territorial scope of the *Directive* extends to Google Inc, the operator of the search engine, given its subsidiary, Google Spain, does not undertake search-related activities but instead sells advertising. The second concerned whether the *Directive* applies to search engines, such as Google Search, that is whether a search engine's activities involve the processing of personal data and whether the search engine operator is the controller of that processing. The third question concerned the scope of a data subject's rights under the *Directive*.

IV DECISION

The Court held that, upon the request of a data subject, a search engine operator is obliged to remove search results that involved processing data in a way that is non-compliant with the *Directive*.⁷ Significantly, the Court differed from the opinion of the Advocate-General on two main issues: whether Google was the 'controller' of the processing of personal data and whether issues of freedom of expression arose.⁸ The Advocate-General took a more policy-driven approach that recognised the *Directive* predated the appearance of search engines and considered the implications of requiring search engines to balance interests on a case-by-case basis.⁹ He concluded that Google was not a controller because it is not 'aware' of the personal data on third party websites and does not intend to process that data in any 'semantically relevant way'.¹⁰ Unlike the Court, he considered balancing the rights to data protection and privacy with the right to freedom of expression and concluded that recognising a right to be forgotten 'would entail sacrificing pivotal rights such as freedom of expression and information'.¹¹

A Material Scope of the Directive

The Court held that the operations of a search engine involve the 'processing of personal data' within the meaning of art 2(b) and that the operator of the search engine must be regarded as the 'controller' in respect of that processing within the meaning of art 2(d).¹² It noted that it was not contested that the information processed by search engines includes personal data.¹³ A search engine's operations involve processing because it "collects" such data which it subsequently "retrieves",

⁷ Ibid [94].

⁸ The Advocate-General gives a non-binding advisory opinion before the Court gives judgment.

⁹ *Google Spain SL v Agencia Española de Protección de Datos* (European Court of Justice, C-132/12, 25 June 2013), [26]–[31], [133].

¹⁰ Ibid [83].

¹¹ Ibid [133].

¹² *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [41].

¹³ Ibid [27].

“records” and “organises” within the framework of its indexing programmes, “stores” on its servers and, as the case may be, “discloses” and “makes available” to its users in the form of lists of search results.¹⁴ All of the quoted terms are referred to in the art 2(b) definition of ‘processing’.¹⁵ The operator of a search engine is the controller of that processing because it ‘determines the purposes and means’ of the processing and this is how ‘controller’ is defined by the *Directive*.¹⁶ In coming to its conclusion on these issues, the Court emphasised that a search engine is ‘liable to affect significantly, and additionally compared with that of the publishers of websites, the fundamental rights to privacy and to the protection of personal data.’¹⁷ This is because a search engine makes a ‘more or less detailed profile’ of a data subject accessible to users upon the search for a data subject’s name.¹⁸

B *Territorial Scope of the Directive*

The territorial scope of the *Directive* extends to the processing of personal data ‘carried out in the context of the activities of an establishment of the controller on the territory of the Member State.’¹⁹ It was undisputed that Google Spain was an establishment because it ‘engages in the effective and real exercise of activity through stable arrangements in Spain’.²⁰ The Court noted that the words of art 4(1)(a) could not be interpreted restrictively because of the *Directive*’s objective of rights-protection.²¹ The Court held that the processing was carried out in the context of the activities of an establishment because of the inextricable link between the activities of the establishment and those of the controller.²² The establishment, Google Spain, renders the search engine economically profitable by selling advertising, and the search engine is the means enabling those advertising activities to be performed.²³ Hence the *Directive*’s territorial scope extends to Google’s data processing.²⁴

C *The Right to be Forgotten*

The Court took an expansive approach to interpreting a data subject’s rights under the *Directive*. In coming to its conclusion, the Court stated that the data subject does not need to establish that the inclusion of the personal information in search results

¹⁴ Ibid [28].

¹⁵ Ibid.

¹⁶ Ibid [32]–[33].

¹⁷ Ibid [38].

¹⁸ Ibid [37].

¹⁹ *Directive* [1995] OJ L 281/31, art 4(1)(a).

²⁰ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [49].

²¹ Ibid [53].

²² Ibid [56].

²³ Ibid.

²⁴ Ibid [60].

is prejudicial.²⁵ Nor does it matter that the information is lawfully published on third party websites and is not also erased from those websites.²⁶ The Court noted that art 12(b), which grants data subjects the right to obtain from the controller, ‘as appropriate, the rectification, erasure or blocking of data’,²⁷ is not restricted to circumstances where the data are incomplete or inaccurate.²⁸ This circumstance is ‘stated by way of example and is not exhaustive’;²⁹ data subjects also have the right where the data processing is otherwise non-compliant with the *Directive*. This includes where the data are inadequate, irrelevant or excessive in relation to the purposes of the processing.³⁰ The assessment of whether data processing is compliant with the *Directive* has a temporal dimension: it is assessed ‘in the light of the time that has elapsed’.³¹ This temporal dimension mirrors the temporal nature of memory and forgetting: hence the ‘right to be forgotten’.

The Court also stated, but did not explain or justify, that a data subject’s rights ‘override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject’s name.’³² However, the Court did qualify this general rule: this is not the case ‘if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having ... access to the information in question.’³³

V ANALYSIS

A *A Purposive Approach to Adequacy, Relevance and Excess*

Under the *Directive* a data subject has a right to have information erased from search results, not only because it is inaccurate, but also when its processing is otherwise non-compliant with the *Directive*.³⁴ The Court emphasised that processing can be non-compliant with the *Directive* because the data are inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they are collected and/or processed and in the light of the time that has elapsed.³⁵ Although the Court repeated the wording of art 6(1)(c) numerous times throughout its judgment, it largely ignored the fact that the concepts of adequacy, relevance and excess are assessed *in*

²⁵ Ibid [96].

²⁶ Ibid [88].

²⁷ *Directive* [1995] OJ L 281/31, art 12(b).

²⁸ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [70].

²⁹ Ibid.

³⁰ Ibid [92].

³¹ Ibid [93].

³² Ibid [97].

³³ Ibid [99].

³⁴ Ibid [72] and [92].

³⁵ Ibid [93].

relation to the purposes of the data processing.³⁶ The Court did not state or analyse the purposes of the data processing when considering art 6(1)(c). Earlier in its judgment, the Court suggested that the purposes of data processing (in the search engine context) are ‘the service of a search engine’³⁷ and ‘the operation of the search engine’.³⁸ If these are the purposes of the data processing, it is difficult to understand how personal data could be inadequate, irrelevant or excessive in relation to these purposes.

‘The operation of the search engine’ is incredibly broad: a search engine operates by crawling the web, indexing data and using algorithms to find information and rank results.³⁹ A search engine has no problem with ‘excessive’ information, including information constituting personal data; indeed, the concept of ‘excessive’ is inapposite in the context of a search engine because search engines operate most effectively when they index as much information as possible. It is similarly difficult to see how personal data could be inadequate or irrelevant in relation to the operation of a search engine. Google Search is in the business of determining whether information is relevant: it is the most popular search engine in the world because it is the most effective at delivering results relevant to a user’s search query. Of course, being relevant to a user’s search query may be different to being relevant in relation to the purposes of the data processing, that is the operation of the search engine, but it is questionable whether a court can determine what information is inadequate or irrelevant for the operation of a business that it knows almost nothing about.

B *The Philosophical Ideal*

Despite the wording of art 6(1)(c), the Court appears to have understood the requirement of ‘adequate, relevant and not excessive’ in relation to the assessment of the data subject’s present identity and character and not in relation to the purposes of the data processing. This approach reflects an attempt to make it fit with the philosophical ideal of the right to be forgotten and is closer to the approach of Viktor Mayer-Schönberger, an early and influential proponent of the right to be forgotten.⁴⁰ The Court evinced this misunderstanding of art 6(1)(c) in paragraph 98 of its judgment, where it stated:

it should be held that, having regard to the sensitivity for the data subject’s private life of the information contained in those announcements and to the fact that its initial publication had taken place 16 years earlier, the data subject establishes a right that that information should no longer be linked to his name by means of such a list.⁴¹

³⁶ *Directive* [1995] OJ L 281/31, art 6(1)(c).

³⁷ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [55].

³⁸ *Ibid* [58].

³⁹ Google, *How Search Works* <<http://www.google.com/insidesearch/howsearchworks/thestory/>>.

⁴⁰ Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press, 2009).

⁴¹ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [98].

This paragraph, combined with the preceding paragraphs that failed to consider the purposes of data processing in relation to art 6(1), suggests that the Court believes that the information is irrelevant, in part, because it is 16 years old. This may make it irrelevant to the applicant's present identity and character, but would not make it irrelevant in relation to the operation of the search engine. Subsequent media⁴² and academic commentary⁴³ has failed to appreciate that 'adequate, relevant and not excessive' are not discrete concepts but relational ones, and relational to the purposes of the data processing. Likewise, Google itself asks data subjects applying for the removal of links for 'an explanation of why the inclusion of that result in search results is irrelevant, outdated, or otherwise objectionable':⁴⁴ the purposive dimension has been jettisoned. How this has affected the evaluation of more than 150,000 requests for removal is unclear.⁴⁵ The rights to the protection of personal data found in the *Directive* are quite different to the philosophical idea of the right to be forgotten. The right to be forgotten, in theory, is about relevance to a person's present identity and/or character, not about relevance to the purposes of data processing. However, the fact that the Court did not actually decide whether the applicant had a right to have the information erased — this was for the referring court to decide — may mean this misunderstanding of art 6(1)(c) cannot be attributed to the Court. If this is so, the above analysis is still useful because it distinguishes the philosophical idea of the right to be forgotten from the rights found in the *Directive*.

C Life, Liberty and the Protection of Personal Data?

The Court characterised the rights of a data subject as fundamental rights that 'override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information.'⁴⁶ The Court's approach raises three questions: first, why do the rights of a data subject override these other interests? Second, why are the other interests characterised as mere interests rather than as rights? Third, why are rights relating to data processing fundamental? The Court neglected to justify its general rule that a data subject's rights override other interests. Nor did it explain why there is an exception to the general rule in the case of data subjects who play a role in public life. The Court stated only that in these cases the interest of the general public is 'preponderant.'⁴⁷ The point here is not that this exception cannot be justified; rather, it is

⁴² See, eg, 'The Right to be Forgotten: Drawing the Line', *The Economist* (London), 4 October 2014.

⁴³ See, eg, Steve Peers, 'The CJEU's Google Spain Judgment: Failing to Balance Privacy and Freedom of Expression', *EU Law Analysis* (13 May 2014) <<http://eulawanalysis.blogspot.co.uk/2014/05/the-cjeu-google-spain-judgment-failing.html>>.

⁴⁴ Google, *Search Removal Request Under Data Protection Law in Europe* <https://support.google.com/legal/contact/lr_eudpa?product=websearch>.

⁴⁵ Google, *European Privacy Requests for Search Results* <<https://www.google.com/transparencyreport/removals/europeprivacy/?hl=en>>.

⁴⁶ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [97].

⁴⁷ *Ibid.*

that the Court should have provided the justification. It should have done so because the language of the *Charter* is absolute: ‘*Everyone* has the right to protection of personal data concerning him or her.’⁴⁸

In regards to question two, the Court failed to recognise that ‘the interest of the general public in having access to ... information’⁴⁹ is one facet of the *right* to freedom of expression. This is confirmed by considering both the text of art 11 of the *Charter of Fundamental Rights of the European Union* and an argument from analogy. Art 11 states that ‘[e]veryone has the right to freedom of expression. This right shall include *the freedom* to hold opinions and *to receive and impart information and ideas without interference by public authority* and regardless of frontiers.’⁵⁰ The Court would understand that the right to freedom of expression means that the general public should have access, free from government interference, to unmodified search results upon a search for ‘democracy’. The same right is at stake when ‘democracy’ is substituted for the name of a data subject. Despite these considerations, freedom of expression (art 11) is conspicuously absent from the judgment.

Finally, the Court’s characterisation of the rights relating to data processing as ‘fundamental’ is odd. On the one hand, it is easily justified: art 8 of the *Charter of Fundamental Rights of the European Union* provides for rights relating to the protection of personal data.⁵¹ On the other hand, the nature of the rights and their interaction with other, more-established, rights suggest that they are not fundamental, at least as a matter of theory. The data processing rights include the right to have accurate but irrelevant information removed from search results; the corollary is a positive obligation on others to remove the results. Erasing such information from search results on the grounds that it is irrelevant to a person’s current identity and character reflects a poor assessment of the public’s ability to understand identity and judge character. It suggests that people cannot properly evaluate information when they are forming an understanding of another’s identity or judging their character; it implies that they cannot take into account the age of the information, the reliability of its source and the fact that people change. Furthermore, why should you have resort to the coercive powers of the state if another makes information about you more easily accessible? Mr Costeja Gonzalez could have instead utilised his own right to freedom of expression by creating a blog briefly addressing the out-of-date newspaper articles. This response would have been indexed by Google and appeared alongside the newspaper articles in search results. And, unlike litigation, it would not have resulted in the information being memorialised in a judgment of the Court and subsequent media attention.

⁴⁸ *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389, art 8.

⁴⁹ *Google Spain* (European Court of Justice, C-132/12, 13 May 2014), [97].

⁵⁰ *Charter of Fundamental Rights of the European Union* [2010] OJ C 83/389, art 11 (emphasis added).

⁵¹ *Ibid* art 8.

D Data Protection in Australia

Although the same result could not be reached by Australian courts for reasons of jurisdiction,⁵² and differences in the substantive law,⁵³ the decision of *Google Spain* is of significant interest to Australian policymakers, lawyers and jurists for three reasons. First, privacy law has recently undergone significant reform in Australia,⁵⁴ and the publication of the Australian Law Reform Commission ('ALRC') report in June 2014 on *Serious Invasions of Privacy in the Digital Era* suggests that more reform is possible.⁵⁵ The ALRC considered,⁵⁶ but did not recommend,⁵⁷ the introduction of a new Australian Privacy Principle ('APP') that empowers individuals to have their personal information destroyed or de-identified. This was in the context of the ALRC recognising the problem of 'digital eternity' that has influenced the development of the right to be forgotten in Europe.⁵⁸ However, the ALRC's proposed APP is distinguishable from the rights in the *Directive* because it is directed at 'personal information that the individual had provided to the entity'⁵⁹ rather than personal information that an entity is processing, regardless of its source.

Second, the decision of *Google Spain* is, fundamentally, a decision about the scope and nature of rights: the right to privacy and the right to the protection of personal data. Rights jurisprudence is of international significance, particularly when the rights concerned are in their infancy (the right to the protection of personal data) or under threat from technological change (the right to privacy). Furthermore, the *Privacy Act* is intended, in part, 'to implement Australia's international obligation in relation to privacy'⁶⁰ (its obligations under the *International Covenant on Civil and*

⁵² Like *Google Spain SL*, *Google Australia Pty Ltd* does not own, control or direct the operations of *google.com* or *google.com.au*. It is the American-based *Google Inc* that owns and operates these domains. Although the *Privacy Act 1988* (Cth) ('*Privacy Act*') has extra-territorial application by virtue of s 5B, *Google Inc* would likely lack the requisite 'Australian link' because it was not incorporated in Australia and does not carry on business in Australia. Hence the *Privacy Act* would not apply to *Google Inc*.

⁵³ A comprehensive answer to the question of whether a search engine's operations (crawling the web, indexing data and using algorithms to rank results) are subject to the *Privacy Act*'s APPs would require consideration of whether a search engine 'collects' or 'holds' 'personal information' (all terms defined in the *Privacy Act*) and whether it 'uses' or 'discloses' such information (terms not defined in the *Privacy Act*). A briefer answer is that, unlike the *Directive*, the *Privacy Act* does not contain a mechanism allowing individuals to request destruction or de-identification of personal data.

⁵⁴ The *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth) commenced operation in March 2014.

⁵⁵ Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

⁵⁶ *Ibid* [16.44]–[16.45].

⁵⁷ *Ibid* [16.51].

⁵⁸ *Ibid* [1.1], [16.44].

⁵⁹ *Ibid* [16.45].

⁶⁰ *Privacy Act* s 2A(h).

Political Rights), so its purpose is analogous to that of the *Directive* vis-à-vis the *Charter of Fundamental Rights of the European Union*.

Finally, the *Privacy Act* contains similar language and concepts to the *Directive*. Although it does not contain the concepts of ‘data processor’ and ‘data controller’, the *Privacy Act* does require an APP entity to ‘take such steps (if any) as are reasonable in the circumstances to ensure that the personal information that the entity uses or discloses is, *having regard to the purpose of the use or disclosure, accurate, up-to-date, complete and relevant*.’⁶¹ APP 13.1 provides that individuals have a right to the correction of personal information if this requirement is not met.⁶² Like art 6(1)(c) of the *Directive*, the *Privacy Act* imposes a requirement that is relational to the purposes of the data use or disclosure. Hence it will be interesting to see whether Australian courts properly recognise the relational aspect of the data integrity requirement.

VI CONCLUSION

Peter Fleischer, Google’s Global Privacy Counsel, has observed that the right to be forgotten is ‘like a Rorschach test ... people can see in it what they want.’⁶³ In *Google Spain* the Court went further than this and saw in the *Directive* what they wanted: a right to be forgotten that corresponds to the philosophical ideal. In doing so, the Court jettisoned the relational nature of the requirement that data be adequate, relevant and not excessive, and failed to explain or justify its approach to rights and interests.

⁶¹ Ibid sch 1 cl 10.2 (emphasis added).

⁶² Ibid sch 1 cl 13.1.

⁶³ Peter Fleischer, *The Right to be Forgotten, Or How to Edit Your History* (29 January 2012) <<http://peterfleischer.blogspot.com.au/2012/01/right-to-be-forgotten-or-how-to-edit.html>>.

*Margaret White AO**

***JURISPRUDENCE AS PRACTICAL REASON:
A CELEBRATION OF THE COLLECTED ESSAYS
OF JOHN FINNIS***

**EDITED BY MARK SAYERS AND ALADIN RAHEMTULA
SUPREME COURT LIBRARY, 2013**

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John Finnis attended Oxford University (University College) as a Rhodes Scholar for South Australia from 1962 to 1965 where his doctoral thesis supervisor was H L A Hart whose highly influential *The Concept of Law* had been published the previous year.¹ Finnis' thesis topic was an examination of judicial power with particular reference to Australian federal constitutional law.

Finnis taught briefly in other institutions including at University of California, Berkeley, and later as Head of Law at the University of Malawi on secondment from Oxford from 1976 to 1978. But he was, essentially, an Oxford man. He progressed from law tutor at University College from 1966 to Rhodes Reader in the Laws of the British Commonwealth and the United States from 1972 to 1989 and was elected Professor of Law and Legal Philosophy in 1989, holding that chair until his recent retirement.

In 2011 Oxford University honoured Finnis with a five volume collection of selected essays and other of his papers covering 50 years in both academic and public forums. The Supreme Court of Queensland has marked this important event with a small volume of essays and recollections, edited by Mark Sayers, a legal philosopher and barrister in practice in Queensland and Aladin Rahemtula OAM, former Queensland Supreme Court Librarian, deep thinker and long-time admirer of Finnis' work. The editors hope that this celebration will rekindle a more systemic interest in legal philosophy in this country and a recognition of the usefulness of natural law thinking in the resolution of the big and difficult questions, such as end-of-life decisions, abortion and same-sex marriage.

The essays and reflections have been contributed by Australian former students of Finnis (with the exception of Sayers whose doctoral thesis, however, was on

* Master of the Supreme Court of Queensland 1990, Judge of the Supreme Court 1992, Judge of Appeal 2010–2013.

¹ (Oxford University Press, 1961).

natural law theory in jurisprudence). Lest it be suggested that there are no links with Queensland to support this publication (if links be thought necessary) Finnis provided important constitutional law advice to the Queensland government in the late 1970s and early 1980s when it was contemplating certain constitutional ventures. These are discussed by Anne Twomey in *The Chameleon Crown: The Queen and Her Australian Governors*² and *The Australia Acts 1986: Australia's Statutes of Independence*.³

Each of the five essayists has written on one of the five Oxford volumes which are arranged thematically. Sayers has provided a useful overview in his synopsis as well as an essay on the papers in Volume I, *The Foundation of Public Reason: Jurisprudence as Practical Reason*. There are two shorter reflections by former doctoral students: Bishop Anthony Fisher OP of Parramatta (recently appointed Archbishop of Sydney) and Justice Susan Kenny of the Federal Court of Australia. The book concludes with a sweetmeat by Finnis: *Rethinking Shakespeare*. He has contributed (with Patrick Martin) much valuable scholarly research and thinking on recusant Elizabethan history over the past decade or so. This essay revisits an article that he and Martin wrote for *The Times Literary Supplement* in April 2003 under the title *Another Turn for the Turtle: Shakespeare's Intercession for Love's Martyr* (the first part of the title Finnis describes as esoterically clever – not a fault from which he suffers – which was added by the editors). An untitled poem by Shakespeare appeared in 1601 in the collection *Love's Martyr* and has generated a considerable literature speculating about its underlying meaning and the audience to whom it was addressed. This essay serves as an introduction to those unfamiliar with Finnis' writing and demonstrates his accessibility and that new factual discoveries can lead to important fresh insights into what might be thought to have been a thoroughly ploughed paddock.

Finnis is regarded as one of the most influential legal philosophers of the 20th century together with H L A Hart, John Rawls and Ronald Dworkin. His *Natural Law and Natural Rights* published by Oxford in 1980 (revised in 2011) set the stage for a priori thinking as a basis for the resolution of practical ethical questions. While grounded in the natural law thinking of Aristotle and Aquinas, it is, in truth, based on the deployment of practical reason quite independent of any particular, or any, religious content. Although an important part of his life, it would be facile to pigeon-hole him as a Catholic philosopher, his adopted faith. Finnis has engaged in widely watched public debates with other contemporary philosophers, such as Peter Singer, from both sides of the Atlantic. Some can be accessed on YouTube, as can some of his public lectures.

Justice J G Santamaria of the Victorian Court of Appeal attended Oxford University in the middle 1970s and writes of the prevailing philosophical milieu of moral scepticism and moral relativism and the unfriendly soil upon which any attempt to

² (Federation Press, 2006).

³ (Federation Press, 2010).

revive 'natural law' thinking would then fall. The papal encyclical *Humanae Vitae*⁴ had concluded against the compatibility of artificial contraception and Christian marriage. In that year Finnis had published an article in the *Law Quarterly Review* analysing the role of reason in the definition and evaluation of human action as it related to the natural law basis of the encyclical.⁵ This had captured Santamaria as a student in Melbourne and he went on to study legal philosophy with Finnis at Oxford. His essay looks at the development of Finnis' ideas about practical reason in the context of the Hart/Fuller and Hart/Devlin debates, so stimulating for those studying law and jurisprudence in the 1960s, about the proper province of law, and its intersection with morality. There is much here to inform the discussion about the law's role in contemporary society today.

Ray Campbell, Director of the Queensland Bioethics Centre and the John Paul II Centre for Family and Life, was guided privately by Finnis in his studies at Oxford after he had completed his licentiate at the Gregorian University in Rome. He discusses Finnis' action theory in the context of the abortion/craniotomy cases and aspects of human identity.

Sayer's essay concerns the distinction between practical reason as used by citizens seeking a manner of living 'amidst the diversity of life in the public forum' where Finnis' natural law theory operates and the popular understanding of morals where it does not, or at least, not necessarily.

It is likely that the reader not trained in philosophy will find Bryan Horrigan's contribution the most accessible of the essays. He is presently the Dean of Monash Law School. His lengthy essay is an important contribution to practical jurisprudence in this country. After a synopsis of Volume III of the Collected Essays (*Human Rights and Common Good*) he applies Finnis' theory to the 'everyday work of Australian courts and lawyers' discussing the philosophical grounding of human rights, for example, for refugees, abortion, euthanasia and voluntary suicide. Horrigan adds to the debate on the usefulness of a bill or charter of rights referring to Finnis' Maccabean Lecture in Jurisprudence in the mid 1980s, the lead essay in Volume III. His inclusion of Finnis' thinking repays replication here for it gives a flavour of his elegant and measured style:

Foregoing a justiciable bill of rights means accepting some real risks of injustices. But adopting a bill of rights, in any form now practicable, means accepting a time-bound text which downgrades some human rights by its flawed craftsmanship and its failure to envisage more recent challenges to justice – flaws magnified by the [European Court of Human Rights'] interpretative methods. It also means accepting into our country's institutional play of practical reasoning and choice a new, or greatly expanded, element of make-believe, and new or ample grounds for alienation from the rule of law.⁶

⁴ Pope Paul VI, *Humanae Vitae* (25 July 1968).

⁵ John Finnis, 'Natural Law in *Humanae Vitae*' (1968) 84 *Law Quarterly Review* 467.

⁶ Mark Sayers and Aladin Rahemtula (eds), *Jurisprudence as Practical Reason: A Celebration of the Collected Essays of John Finnis* (Supreme Court Library, 2013) 78.

In this context, Horrigan discusses the High Court decision in *Momcilovic v The Queen*⁷ and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Jonathan Crowe, Associate Professor in the TC Beirne School of Law, University of Queensland, has reviewed Volume IV of the Collected Essays drawing out themes and emphasising some of the distinctive features of Finnis' contribution to the philosophy of law, writing under the title *Normativity, Coordination and Authority*. In his essay he compares the work of Michael Detmold and Finnis, both graduates of the University of Adelaide, the former some four or so years later and a foremost natural law writer. This contribution will be of particular interest to readers familiar with contemporary legal philosophy literature and debate.

The final essay has been contributed by Justin Gleeson SC, Solicitor General of the Commonwealth of Australia, and a student at Oxford in the mid-1980s. Volume V is assembled under the heading *Religion and Public Reason*. Gleeson reflects upon Finnis' Catholicism and its importance to his writing, teaching, thinking and living. He emphasises Finnis' devotion to reasoned discourse. In Australia where much of public debate is strident, far from respectful of other points of view and quite trivial, Gleeson writes:

[T]here is a persistent resonance and clarity of thought which comes through a sustained reading of these essays of Finnis, one that brings back to mind the brilliant, dedicated, generous and insightful mind that snared but never forced his vision on his students and colleagues in Oxford. Finnis took and still takes, as seriously as one can, the command of the Aristotelian Thomistic tradition that, within a community of right – thinking and well intentioned persons, there should be scope for argument, debate and persuasion; there should be recognition that there are differences between right and wrong no matter what difficulty in discerning those differences; and that it is by adhering to the discerned path of right ... that something fundamentally human is played out.⁸

Above all, Finnis emerges from these pages as an exemplar to which all teachers might aspire:

[C]lear, precise and critical thinking was what Finnis sought to inspire and did inspire. Never was his guidance narrow or dogmatic ... this was [his] gift ... to ... [his] students ...⁹

I have no doubt that those who read this elegant collection will be drawn to look at Finnis' contribution to philosophy even if it is no more than listening and watching him lecture on YouTube. And will be the better for it.

⁷ (2011) 245 CLR 1.

⁸ Sayers and Rahemtula, above n 6, 107.

⁹ Ibid 104.

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In preparing manuscripts for submission, authors should be guided by the following points:

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