

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

I INTRODUCTION

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

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

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

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

* Honours LLB candidate, Adelaide Law School; Student Editor of the *Adelaide Law Review* (2019).

** LLB candidate, Adelaide Law School; Student Editor of the *Adelaide Law Review* (2019).

¹ Herodotus, ‘The Third Book, Entitled Thalia’ in EH Blakeney (ed), *The History of Herodotus*, tr George Rawlinson (JM Dent & Sons, 1st ed, 1910) vol 1, 210, 221 [23].

² John Lennon and Paul McCartney, ‘When I’m Sixty-Four’, *Sgt. Pepper’s Lonely Hearts Club Band* (Parlophone, 1967).

³ See, eg, *Royal Commission into Aged Care Quality and Safety* (Letters Patent, 6 December 2018); Trevor Ryan, Bruce Baer Arnold and Wendy Bonython, ‘Protecting the Rights of Those with Dementia Through Mandatory Registration of Enduring Powers? A Comparative Analysis’ (2015) 36(2) *Adelaide Law Review* 355.

[L]aw, being society's relational rules and principles that govern and control all exercises of power, must have a character and form that is adapted to, and suited for, application to law's *human* task.⁴

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

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

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

II A SHIFT IN METHODOLOGY

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

⁴ JLB Allsop, 'The Rule of Law is Not a Law of Rules' (Quayside Oration, Perth, 1 November 2018) (emphasis in original).

⁵ See generally JJ Bray, 'The Juristic Basis of the Law Relating to Offences Against Public Morality and Decency' (1972) 46(3) *Australian Law Journal* 100.

⁶ PM Nichols, 'A Student Defense of Student Edited Journals: In Response to Professor Roger Cramton' (1987) 36(6) *Duke Law Journal* 1122, 1128–32.

⁷ See Richard S Harnsberger, 'Reflections About Law Reviews and American Legal Scholarship' (1997) 76(4) *Nebraska Law Review* 681, 691.

A From 'What Is'...

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

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

Head Injuries

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

⁸ MC Harris and JR Crawford, "The Authorities and Powers Vested in Him": The Discretionary Authority of State Governors and the Power of Dissolution' (1969) 3(3) *Adelaide Law Review* 303; D St L Kelly, 'The South Australian Law Reform Committee' (1970) 3(4) *Adelaide Law Review* 481; Alex C Castles, 'Legal Status of UN Resolutions' (1967) 3(1) *Adelaide Law Review* 68; Horst K Lucke, 'Arrangements Preliminary to Formal Contracts' (1967) 3(1) *Adelaide Law Review* 46.

⁹ AR Carnegie, 'Bailment and Contract in English Law Today' (1967) 3(1) *Adelaide Law Review* 7.

¹⁰ JR Mansfield, 'Personal Injuries: Survey of Recent Awards in South Australia' (1970) 3(4) *Adelaide Law Review* 487, 487.

¹¹ *Ibid.* See also MC Harris, 'Personal Injuries: Survey of Recent Awards in South Australia' (1967) 3(1) *Adelaide Law Review* 84.

very painful, uncontrollable spasms in the arm, and has to wear a splint in bed to stop the fingers curling up.¹²

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

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

B ... To 'What Ought to Be'

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

It appears in *Victoria Park* ... that there could be no remedy in English law: not defamation because nothing defamatory was said or written, not assault because

¹² MC Doyle, 'Personal Injuries: Survey of Recent Awards in South Australia' (1968) 3(2) *Adelaide Law Review* 221, 221.

¹³ *Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon* (2017) 349 ALR 534 ('*Re Canavan*').

¹⁴ Kyriaco Nikias, 'Dual Citizens in the Federal Parliament: *Re Canavan, Re Ludlam, Re Waters, Re Roberts [No 2], Re Joyce, Re Nash, Re Xenophon* (2017) 349 ALR 534' (2018) 39(2) *Adelaide Law Review* 479.

¹⁵ *Ibid* 479.

¹⁶ JJ Bray, 'Possible Guidance From Roman Law' (1968) 3(2) *Adelaide Law Review* 145.

¹⁷ Michael Kirby, 'John Jefferson Bray: A Vigilant Life, by John Emerson' (2016) 37(2) *Adelaide Law Review* 537.

¹⁸ (1937) 58 CLR 479 ('*Victoria Park*').

there was no contact between the defendants and the plaintiff, not nuisance because nothing escaped from the property of the defendants on to the property of the plaintiff. Rather the defendants trapped the reflections that had escaped from the property of the plaintiff but the plaintiff had no proprietary right in such reflections. *Clearly this would have been an iniuria ...* It is surely preferable that there should be some general principle under which acts of this nature can be comprehensively dealt with instead of leaving them without remedy unless they can be fitted into one of a limited number of pigeonholes constructed between the fourteenth and eighteenth centuries.¹⁹

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

By sheer luck, the first issue consulted when conducting research on this point was 36(1), published in 2016, which exemplifies the *Review*'s methodological development and commitment to prescriptive and critical legal scholarship. In an article discussing the 'limited' law in South Australia,²¹ Lucy Line, Claire Wyld and David Plater make an explicit plea for the reform of pre-trial defence disclosure. Transcending the divide between critical analysis and prescriptive method, they go so far as to suggest potential sanctions for noncompliance, including

adverse comment or inference on the defence's noncompliance being made by the judge and/or prosecution to the jury, a factor to take into account in sentencing, wasted costs orders against an accused and/or their lawyer, staying or adjourning the proceedings to allow the defence to comply with disclosure orders and/or for the prosecution to gather further material, exclusion of the undisclosed evidence to be led, professional disciplinary action against the lawyer involved and even a finding of contempt against the accused and/or their lawyer.²²

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

¹⁹ Bray (n 16) 158 (emphasis added).

²⁰ Fred Rodell, 'Goodbye to Law Reviews' (1936) 23(1) *Virginia Law Review* 38, 43; Michael Tilbury, 'Why Law Reviews?' (2003) 25(1) *Sydney Law Review* 21, 23–5.

²¹ Lucy Line, Claire Wyld and David Plater, 'Pre-Trial Defence Disclosure in South Australian Criminal Proceedings: Time For Change?' (2016) 37(1) *Adelaide Law Review* 101, 105–6.

²² *Ibid* 129–30 (citations omitted).

I'm going to tell you what your religion says ...

Playing the feminist card ...

But others are doing it ...

You might have a bomb under there [and] ...

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

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

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

C *The Review as Global Citizen*

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

²³ Renae Barker, 'Rebutting the Ban the Burqa Rhetoric: A Critical Analysis of the Arguments for a Ban on the Islamic Face Veil in Australia' (2016) 37(1) *Adelaide Law Review* 191, 197, 201, 205, 208, 212.

²⁴ Michael Kirby, 'Tradition and Diversity' (Speech, Supreme Court Judges' Dinner, 12 February 2004).

²⁵ Barker (n 23) 217.

²⁶ By way of example, a span of 86 pages in volume 4(2) contains the following articles, which are limited to a solely Australian (or South Australian) focus: MP Ellinghaus, 'Uncertainty of Contract: Some Recent Developments' (1972) 4(2) *Adelaide Law Review* 365; MC Harris, 'A Critical Analysis of the Composition, Hearing Procedures, and Appellate Structure and Powers of South Australian Administrative Tribunals' (1972) 4(2) *Adelaide Law Review* 389; Anthony P Moore, 'Australasian Regulation of Deceptive Selling Practices' (1972) 4(2) *Adelaide Law Review* 423.

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

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

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

III A CHANGING WORLD; A CHANGING REVIEW?

The *Adelaide Law Review* was born into a changing world. In 1965, Sydney hosted the Third Commonwealth and Empire Law Conference. This was hosted by the Law Council of Australia, whose executive was comprised entirely of men, with the exception of ‘Miss’ Roma Mitchell, appointed Vice-President in July of that year.³¹ The organisation of the conference included a ‘Ladies Committee’, members of which were tasked with duties of great importance including ‘[f]lowers and [d]ecorations’ and ‘[e]ntertainment of [w]ives’.³² Mitchell, of course, would soon go on to become the first female judge of a superior court in Australia.³³ Yet when she was beginning her career as junior counsel, she did not take part in criminal trials for fear ‘that juries might be embarrassed by the presence of a wom[a]n while hearing the type

²⁷ Michael I Jeffery QC and Xiangbai He, ‘Going Beyond Mitigation: The Urgent Need to Include Adaptation Measures to Combat Climate Change in China’ (2012) 33(1) *Adelaide Law Review* 79, 92.

²⁸ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 162 (entered into force 16 February 2005) (*Kyoto Protocol*).

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

³⁰ *Ibid* 306.

³¹ Commonwealth and Empire Law Conference, *Record of the Third Commonwealth and Empire Law Conference, Sydney—Australia 25th August—1st September, 1965* (Law Book, 1966) viii.

³² *Ibid* xi.

³³ Len King, ‘The Judicial Career of Dame Roma Mitchell’ (2000) 22(1) *Adelaide Law Review* 1.

of evidence commonly heard in the criminal courts'.³⁴ The trajectory of Mitchell's career is a testament of the changing role of women within the law. In a similar vein, tracing the development of the *Review's* scholarship over the past 40 volumes is an effective way to track the journey of the law in South Australia, and indeed the nation as a whole, with regard to three marginalised demographics: women, Indigenous Australians, and the queer community.

A *The Feminist Review*

Women and the *Review* share a somewhat checkered history. In its first volume, the *Review* contained only one article by a woman — Enid Campbell's consideration of the growing role of women in positions 'thought to involve an element of public trust'.³⁵ She noted that it was only a time 'not ... distant from the present' in which women were barred from standing for Parliament, or from judicial and other public offices.³⁶ Indeed, even the question of whether the word 'person' legally encapsulated women was an issue not long settled.³⁷ In the early years, while articles did feature topics such as abortion³⁸ and family law concerns,³⁹ the typical author was male, and these issues were viewed through the male lens.

Following South Australia's partial decriminalisation of abortion in 1969, the *Review* published an intervention on the topic by John Finnis, which, among many bold claims, questioned whether legal abortions may cause 'a fall in the birthrate so great that the population [would] begin to decline quite rapidly'.⁴⁰ With the benefit of hindsight, one might consider this concern to have been slightly overblown. Thankfully, we appear to have moved on from this era — and as the State looks to remove abortion from the criminal law altogether,⁴¹ this look at the history of the debate may well be a positive reflection of how far we have come.

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

³⁴ Ibid 2.

³⁵ Enid Campbell, 'Women and the Exercise of Public Functions' (1961) 1(2) *Adelaide Law Review* 190, 190.

³⁶ Ibid.

³⁷ Ibid 191–2.

³⁸ John Finnis, 'Abortion and Legal Rationality' (1970) 3(4) *Adelaide Law Review* 431.

³⁹ HK Lücke and D St L Kelly, 'Recognition of Foreign Divorces: The Time Factor' (1968) 3(2) *Adelaide Law Review* 178; Editors, 'Matrimonial Causes' (1964) 2(2) *Adelaide Law Review* 237.

⁴⁰ Finnis (n 38) 453.

⁴¹ Attorney General's Department, 'Law Reform Institute to Consider Abortion Law Reform' (Media Release, Government of South Australia, 26 February 2019) <<https://www.agd.sa.gov.au/newsroom/law-reform-institute-consider-abortion-law-reform>>; The University of Adelaide, 'Abortion Law Ready for Reform' (Media Release, 26 February 2019) <<https://law.adelaide.edu.au/system/files/media/documents/2019-02/Media%20Release%20SALRI%20Abortion%20Law%20Reform.pdf>>.

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

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

In 1995, the *Review* published a special issue to commemorate the centenary of women’s suffrage in South Australia.⁴⁶ Articles in this edition considered gender bias in citizenship relating to the ability of women to commence civil actions⁴⁷ and the accessibility of alternative dispute resolution to women.⁴⁸ More recently, articles in the *Review* have questioned the law’s treatment of neurodivergent women in equity, specifically in cases of unconscionability⁴⁹ and examined the issue of gender inequality within New Zealand university hierarchies.⁵⁰ This turn to equality within the *Review* is made possible by the ever increasing number of women in the legal profession, and serves only to benefit the diversity and quality of the *Review*’s

⁴² Law Reform Committee of South Australia, *Women and Women’s Rights* (Report No 11, 1970).

⁴³ Ann C Riseley, ‘Sex, Housework and the Law’ (1981) 7(4) *Adelaide Law Review* 421.

⁴⁴ J Greene, ‘A Provocation Defence for Battered Women Who Kill?’ (1989) 12(2) *Adelaide Law Review* 145.

⁴⁵ South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (Report, April 2017) pt 6, 44–55.

⁴⁶ ‘Editorial’ (1995) 17(1) *Adelaide Law Review* 1.

⁴⁷ Regina Graycar and Jenny Morgan, ‘Disabling Citizenship: Civil Death for Women in the 1990’s’ (1995) 17(1) *Adelaide Law Review* 49.

⁴⁸ Kathy Mack, ‘Alternative Dispute Resolution and Access to Justice for Women’ (1995) 17(1) *Adelaide Law Review* 123.

⁴⁹ Brooke Murphy, ‘Neurodivergent Women in “Clouded Judgment” Unconscionability Cases: An Intersectional Feminist Perspective’ (2018) 39(1) *Adelaide Law Review* 37.

⁵⁰ Amanda Reilly, ‘Voice and Gender Inequality in New Zealand Universities’ (2013) 34(1) *Adelaide Law Review* 81.

publications. Promoting further diversity in the law, in both legal scholarship and the profession as a whole, should continue to be encouraged.

B *Indigenous Australians and the Law*

A year after the *Review* celebrated the grant of suffrage to women in South Australia with its special issue, Stella Tarrant reminded readers that, for some Aboriginal women across Australia, the right to vote was not guaranteed until 1962.⁵¹ Thus, the intersections between these once ignored identities can be seen. The articles by Andrea Mason and Irene Watson in this special issue of the *Review* provide an important perspective in this regard, in that the law not only impacts women differently, but impacts different women differently. This may seem obvious now, but it is only through these diverse contributions that we begin to see the law beyond the black letter.

Throughout its history, the *Review* has witnessed a number of significant Australian legal milestones. The historic result of the 1967 referendum shifted the power to make laws with regard to Aboriginal Peoples into the Commonwealth Parliament's hands. Yet at the time, this was not mentioned in the *Review*. In 1997, the legal issues arising from this examined by John Williams and John Bradsen in an article⁵² published in anticipation of the High Court's decision in *Kartinyeri v Commonwealth*.⁵³ Williams and Bradsen concluded that

[t]he status of being an outsider, in the constitutional sense, for Aboriginal Australians was overcome in 1967. It would be a perversion of the hopes and aspirations of the people of Australia if thirty years later we celebrated their contribution to our constitutional history by suggesting that s 51(xxvi) is a means by which yet another round of dispossession may be visited upon Australia's indigenous people.⁵⁴

The continuing impact of the referendum, and decisions like *Kartinyeri*, remain pertinent in the push for constitutional change. The *Uluru Statement From the Heart* puts it explicitly: 'In 1967 we were counted, in 2017 we seek to be heard.'⁵⁵

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

⁵² John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19(1) *Adelaide Law Review* 95.

⁵³ (1998) 195 CLR 337 ('Kartinyeri').

⁵⁴ Williams and Bradsen (n 52) 140.

⁵⁵ Referendum Council, *Uluru Statement From the Heart* (26 May 2017) <<https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-from-the-heart>>.

With the passage of time, the issues facing Indigenous Peoples in the law gained greater prominence, both in society as a whole, and in the pages of the *Review*. In 1977, Stephen Lendrum drew attention to South Australia's colonial history and the Coorong Massacre.⁵⁶ This history is revisited by Irene Watson in this special issue of the *Review*, demonstrating the ongoing impact of these events on legal thought today.

Perhaps the most significant, and certainly one of the most famous, changes to strike the Australian legal landscape was the decision in *Mabo v Queensland (No 2)*⁵⁷ where the High Court swept aside the historical doctrine of terra nullius. *Mabo* led to the passage of the *Native Title Act 1993* (Cth), which would not have been possible without the success of the 1967 referendum. Shortly after the decision was handed down, the *Review* published a book review of *Mabo: A Judicial Revolution*, agreeing with the conclusion that the case 'raises just as many questio[n]s as it answers'.⁵⁸ One pertinent finding addressed in the *Review* is the idea that *Mabo* demonstrates a shift in Australian law from the domestic towards the international; 'greater reliance being placed upon African, Indian, Canadian and New Zealand jurisprudence to reach legal conclusions'.⁵⁹ Is it coincidence that it took an inward look at the foundations of our Australian nation for legal scholars to look outward and recognise the importance of diversity? The turn to the international within the *Review* coincides with a greater willingness to use a wider range of authority to modernise the common law.

Native title was but one Indigenous legal issue on the minds of the *Review's* authors at this time. The disadvantages faced by Aboriginal and Torres Strait Islander Peoples in their interactions with the criminal law system were, and continue to be, a challenging issue. In 1998 the impact of one seemingly mundane, procedural element of this system — the decision to adjourn a trial — on Aboriginal youth was considered.⁶⁰ Three years later, Christopher Charles analysed the sentencing of Aboriginal offenders in the Supreme Court of South Australia, concerned that outdated, offensive stereotypes such as that of the 'noble savage' were continuing to play a role in sentencing considerations.⁶¹ So long as the damning truth of Indigenous overrepresentation within the criminal justice system remains, these issues will continue to be of relevance. This issue is insightfully explored in Justice Martin Hinton's contribution to this special issue of the *Review*.

⁵⁶ SD Lendrum, 'The "Coorong Massacre": Martial Law and the Aborigines at First Settlement' (1977) 6(1) *Adelaide Law Review* 26.

⁵⁷ (1992) 175 CLR 1 (*Mabo*).

⁵⁸ David Wright, 'Mabo: A Judicial Revolution: Edited by MA Stephenson and Suri Ratnapala (Book Review)' (1993) 15(2) *Adelaide Law Review* 297, 300.

⁵⁹ *Ibid* 298.

⁶⁰ Joy Wundersitz and Fay Gayle, 'Disadvantage and Discretion: The Results for Aboriginal Youth in Relation to the Adjournment Decision' (1988) 11(3) *Adelaide Law Review* 348.

⁶¹ Christopher Charles, 'Sentencing Aboriginal People in South Australia' (1991) 13(1) *Adelaide Law Review* 90, 90.

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

C *Queering the Review*

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

⁶² Heather Douglas, ‘This is Not Just About Me: Indigenous Students’ Insights About Law School Study’ (1998) 20(2) *Adelaide Law Review* 315.

⁶³ *Ibid* 317.

⁶⁴ Peter Devonshire, ‘Indigenous Students at Law School: Comparative Perspectives’ (2014) 35(2) *Adelaide Law Review* 309.

⁶⁵ *Ibid* 314.

⁶⁶ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.

⁶⁷ See, eg, Australian Human Rights Commission, ‘Human Rights Explained: Case Studies: Complaints About Australia to the Human Rights Committee’ (Web Page, 12 December 2012) <<https://www.humanrights.gov.au/our-work/education/human-rights-explained-case-studies-complaints-about-australia-human-rights>>.

⁶⁸ George Selvanara, ‘Gays in Private: The Problems With the Privacy Analysis in Furthering Human Rights’ (1994) 16(2) *Adelaide Law Review* 331.

⁶⁹ *Ibid* 337.

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

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

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

⁷⁰ Riseley (n 43) 448.

⁷¹ *Ibid* 448, n 176.

⁷² Liam Elphick, ‘Sexual Orientation and “Gay Wedding Cake” Cases Under Australian Anti-Discrimination Legislation: A Fuller Approach to Religious Exemptions’ (2017) 38(1) *Adelaide Law Review* 149.

⁷³ *Ibid* 193.

⁷⁴ Michael Kirby, ‘Marriage Equality: What Sexual Minorities Can Learn From Gender Equality’ (2013) 34(1) *Adelaide Law Review* 141.

⁷⁵ Theodore Bennett, ‘Transsexualism and the Consideration of Social Factors Within Sex Identification Law’ (2013) 34(2) *Adelaide Law Review* 379.

⁷⁶ Jennifer Levi, ‘Transgender Jurisprudence: Dysphoric Bodies of Law’ (2003) 24(1) *Adelaide Law Review* 99.

fluidity' to school children.⁷⁷ While the legal issues raised in this area may be seen by many as complex, the *Review* offers an opportunity to explore these questions and give greater prominence to the experiences of gender diverse people within the law, as it has done for the queer community as a whole.

D *Into the Future*

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

IV CONCLUSION

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

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

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

⁷⁷ See Benjamin Law, 'Moral Panic 101: Equality, Acceptance and The Safe Schools Scandal' (2017) 67 (September) *Quarterly Essay* 1.

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

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

