



# Griffith Journal

of Law & Human Dignity

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# GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

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# ADDRESSING THE NEEDS OF THOSE WHO HAVE EXPERIENCED ABUSE IN CARE AS CHILDREN: IMPLICATIONS OF FINDINGS FROM THE ROYAL COMMISSION\*

HON JUSTICE PETER MCCLELLAN AM\*\*

*The Royal Commission into Institutional Responses to Child Sexual Abuse has been instrumental in “changing the conversation” around sexual abuse. Our public hearings in particular have brought widespread attention to the nature and extent of institutional child sexual abuse, and have helped to reduce the stigma associated with it. The following article is based on an address given at the Association of Children’s Welfare Agencies National Conference in Sydney on Monday 15 August 2016. It shows that a profound change in public attitudes towards children has taken place — from a time when the norm of “children should be seen but not heard” prevailed, to today’s increasing acceptance of a child’s special vulnerability to harm. With greater recognition that children should participate in decisions that affect them, and that they deserve equal protection, institutions are reforming and internalising “child-safe” practices. We are at an important point in the social history of children in Australia.*

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\* Editor’s note: The following article is a written publication of an address provided by the Hon Justice McClellan AM at the Association of Children’s Welfare Agencies National Conference in Sydney on Monday 15 August 2016. As a consequence, this article does not conform to general *Journal* standards with concern to referencing and format. Respectively, the speech is confined to the date it was given and does not include more recent developments.

\*\*The Hon Justice McClellan AM is the Chair of the Australian Royal Commission into Institutional Responses to Child Sexual Abuse, and a Judge of Appeal in New South Wales. Prior to this, he was the Chief Judge at Common Law of the Supreme Court of New South Wales, having been appointed to that position in 2005. He holds degrees in both Arts and Law from the University of Sydney.

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## I INTRODUCTION

On 26 September 1924 in Geneva an event of great significance occurred. The League of Nations adopted the first international human rights document concerned specifically with the rights of children: *The Geneva Declaration of the Rights of the Child* of 1924. Through that document humanity declared formally, and for the first time, that it ‘owes to children the best that it has to give’.

The 1924 Declaration was later to form the basis of a more comprehensive document: *The Geneva Declaration of the Rights of the Child* of 1959.<sup>1</sup> Proclaimed by the General Assembly of the League’s successor, the United Nations, the preamble to the declaration affirmed that children were entitled to those rights set down for all people in the *Universal Declaration of Human Rights*,<sup>2</sup> while recognising that ‘the child by reason of his physical and mental immaturity, needs special safeguards and care’.<sup>3</sup>

The Geneva declarations were later embedded into the Preamble of what has become the most ratified treaty in the world: *The Convention on the Rights of the Child*.<sup>4</sup> Through this document the rights of children are articulated far more comprehensively and with

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<sup>1</sup> *Declaration of the Rights of the Child*, GA Re 1386(XIV), UN GAOR, 14<sup>th</sup> Session, 841<sup>st</sup> Plen Mgt, Agenda item 64, Supp No 16, Un Doc A/4354, (20 November 1959).

<sup>2</sup> Ibid Preamble para 2.

<sup>3</sup> Ibid Preamble para 3.

<sup>4</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

a greater level of sophistication than ever before. Whereas the length of the 1924 Declaration is roughly half a page and is comprised of five principles, the 1990 Convention is an extensive document made up of over 50 articles setting out the obligations of State parties.

The Australian Government ratified the *Convention on the Rights of the Child* in December 1990. The adoption of the Convention has both symbolic significance and practical consequences in Australia. It has been a critical step in our society, being prepared to look at the manner in which the obligations owed to children have been met, acknowledge wrongdoing, and provide practical means to redress those wrongs and assist in the healing of those who have suffered.

The growing willingness to recognise the rights of children has occurred against a background of profound social change. When the Royal Commission first sat on 3 April 2013 I said:

Australians of recent generations have lived through a period of rapid change across many aspects of society. Many changes can be identified. One which is important for the work of this Royal Commission is our preparedness to challenge authority and the actions of those in power in areas where would not previously been contemplated. We have seen significant changes in the manner in which power is distributed throughout the community. The women's movement and the fact that women now hold positions of responsibility in government and business are markers of many of the changes which have occurred. These changes have brought with them a need and capacity to reflect on the functioning of institutions and the behaviour of individuals within those institutions.

A picture is emerging for us that although sexual abuse of children is not confined in time — it is happening today — there has been a time in Australian history when the conjunction of prevailing social attitudes to children and an unquestioning respect for authority of institutions by adults coalesced to create the high-risk environment in which thousands of children were abused.

The societal norm that “children should be seen but not heard”, which prevailed for unknown decades, provided the opportunity for some adults to abuse the power which their relationship with the child gave them. When the required silence of the child was accompanied by an unquestioning belief by adults in the integrity of the carer for the

child, be they youth worker, teacher, residential supervisor or cleric, the power imbalance was entrenched to the inevitable detriment of many children. When, amongst adults, who are given the power, there are people with an impaired psycho-sexual development, a volatile mix is created.

Although the primary responsibility for the sexual abuse of an individual lies with the abuser and the institution of which they were part, we cannot avoid the conclusion that the problems faced by many people who have been abused are the responsibility of our entire society. Society's values and mechanisms which were available to regulate and control aberrant behaviour failed. This is readily understood when you consider the number of institutions, both government and non-government, where inadequate supervision and management practices have been revealed and acknowledged by contemporary leaders of those institutions. It is confirmed by the development, in recent years, of regulatory control by government over many institutions which provide for children, and the development of education programs and mechanisms by which problems can be more readily brought to attention. The most obvious is Working With Children regulations, but there are many others. I am sure that we all hope that from the tragic personal stories and institutional failures revealed in our public hearings the community will be reminded that both individual institutions and governments failed in their responsibility for children. Where once silence was demanded, a child's complaint, however tentative in its communication, must be heard and given an appropriate response. Whatever the nature of the institution and however its members are respected by the community we must all accept that there may be members of trusted institutions who fail in their duty towards children. The power of the institution must never again be allowed to silence a child or diminish the preparedness or capacity of adults to act to protect children.

## II ROYAL COMMISSION UPDATE

The Royal Commission has now held 42 public hearings. Public hearings have a significant role in driving institutional and regulatory change. Many institutions who have not themselves been the subject of a public hearing have already responded to the problems revealed in similar institutions and have implemented change or reviews intended to improve the safety of children in their care.

Hearings have been held in every state in Australia. We will soon commence our 43<sup>rd</sup> public hearing — an inquiry into the response of Catholic Church authorities in the Maitland-Newcastle region to allegations of child sexual abuse by clergy and religious.

The Commissioners have now listened to the personal stories of more than 5500 survivors in private sessions. For those of you who are not aware, a private session with one of our Commissioners provides an opportunity for a survivor, or a survivor's family member, to tell their story of abuse in a protected and supportive environment. It is the primary way for the Commissioners to bear witness to the abuse and trauma inflicted on children who suffered sexual abuse in an institutional context.

A further significant component of work is our research and policy development program. This has had the assistance of national and international experts across many disciplines. The program has four broad areas of focus: prevention, identification, response, and justice for victims.

As of July, the Commission has published 26 research reports and two consultation papers. We have released 11 issues papers and received over 850 submissions in response to those papers.

We have also released two final reports: our Working with Children Checks Report was released in August 2015 and contains 36 recommendations; and our Redress and Civil Litigation Report was released in September 2015 and contains 99 recommendations.

I have now referred over 1600 matters to authorities, mainly police, with a view to the possible prosecution of an offender. Many have resulted in charges and arrests. We have been advised that over 60 prosecutions have commenced as a result of these referrals.

### III A ROYAL COMMISSION FOR ALL OF AUSTRALIA

The Royal Commission which I chair is a Commission for all of Australia. It is, in fact, seven Royal Commissions. We have a letters patent from the Commonwealth and from every state in Australia.

This national focus is of significance. If we are to start by accepting, as I believe we must, that all Australian children deserve to be equally protected, then the challenges of federalism become immediately apparent. An almost inevitable consequence of multiple



parliaments, and multiple bureaucracies, is that across the jurisdictions inconsistent law and policy emerges.

Inconsistency is problematic not only in relation to protecting children from abuse. Similar challenges emerge for survivors in their attempts to pursue justice through the criminal or civil law or through alternative redress mechanisms.

In an oft-quoted passage, Justice Brennan has observed that '[i]nconsistency is not merely inelegant' but suggests 'an arbitrariness which is incompatible with commonly accepted notions of justice'.<sup>5</sup>

Consistency has emerged as a key theme in the final reports we have already published.

In relation to Working with Children Checks, the present position is that each state and territory has its own scheme. The schemes are inconsistent, complex, and operate independently of each other. The consequence is that children are being afforded different levels of protection depending on the state or territory in which they are located. I have previously described the lack of a national framework for Working with Children Checks as 'a blight upon the communities' efforts to provide effectively for the protection of children'.

In our report we recommended a national approach. That approach would involve the establishment of a centralised database. The effect would be one accreditation which would operate across jurisdictions. We also identified a set of standards so that key aspects of Working with Children Checks regimes are dealt with in the same way. There would be consistency with respect to who requires a check and how a person's records are accessed.

In relation to redress, the fundamental need identified in the report is for a single national redress scheme to be established by the Australian Government but funded by the institutions in which survivors were abused. A national scheme fulfils a key requirement necessary to ensure equal justice for survivors; it ensures that survivors would be treated equally regardless of the institution, or place in Australia, in which they were abused.

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<sup>5</sup> *Re Drake and Minister for Immigration and Ethnic Affairs* (No 2) (1979) 11 FLR 203.

Regulation and oversight of institutions is a further area in which consistency emerges as an important issue.

#### IV REGULATION AND OVERSIGHT

Our terms of reference require us to inquire into, among other things, 'what institutions and governments should do to achieve best practice in encouraging the reporting of, and responding to, reports or information about allegations, incidents or risks of child sexual abuse and related matters in institutional contexts'.

Across Australia there are a range of oversight bodies that monitor aspects of child welfare, in particular the welfare of children in the care and protection system. These include Ombudsmen Offices, Reportable Conduct Schemes, Children's Commissions, Community Visitors Schemes, Child Advocates and Children's Guardians, and Crime and Misconduct Commissions.

There are also various regulatory mechanisms in place in Australia. The larger regulatory bodies include non-government schools accreditation boards, early childhood and care regulators, and medical sector regulators. These bodies also have different features across jurisdictions.

The Commission is concerned with examining what these different approaches to the regulation and oversight of institutions that exist amongst the jurisdictions means for the protection of children. Accordingly, we have commissioned research on this issue which we intend to publish in due course.

I can share with you today some preliminary findings from that research undertaken for the Royal Commission by Professor Ben Mathews of the Queensland University of Technology. In relation to the six types of oversight bodies mentioned previously, Professor Mathews found there is a great deal of variation in the presence, nature, scope, and power of these bodies. The exception is Ombudsmen's Offices which are largely similar. Several of these bodies or mechanisms do not exist in every jurisdiction and no Australian state or territory has a dedicated Children's Ombudsman. Differences in these bodies arise from differences in their constitutive legislation. That legislation sets out the parameters within which each body operates. In addition, State and Territory Governments invest more heavily in some agencies than others. Some of these bodies,

will as a result, have features and resourcing that allows for greater oversight of relevant institutions. Currently New South Wales is the only jurisdiction to have a reportable conduct scheme. And Queensland appears to have the most extensive community visitors' scheme. With the exception of the reportable conduct scheme, which is focused on institutional child sexual abuse, the research appears to indicate that, overall, there does not appear to be either frequent or wide-ranging engagement by oversight bodies with matters concerning institutional child sexual abuse.

Preliminary findings regarding regulatory bodies covering non-government schools, early childhood education and care, and the medical sector have some common positive elements, such as criminal history checks. However, they approach some important areas, such as staff training about child sexual abuse, very differently.

There are related concerns in respect of the regulation of smaller organisations such as sporting, cultural, arts, and recreation groups. These organisations are largely self-regulated but there are large numbers of children involved in their activities. Recent data shows that in NSW alone, in the 12 months prior to April 2012, almost 539 000 children aged between the ages of five and 14 participated in at least one sport outside of school hours. There is a risk of child sexual abuse occurring in any of these institutions although this risk will vary depending on the context. Our recent public hearings into performing arts centres (Case Study 37) and sporting clubs and institutions (Case Study 39) have focussed on these issues. We will be publishing our reports on these cases studies in the coming months.

#### V REGULATION AND OVERSIGHT OF OUT-OF-HOME CARE

Inconsistencies between the states' and territories' regulation and oversight systems also exist in relation to out-of-home care. This is despite the adoption of the National Standards for Out-of-Home Care. Across the country there are different service provider accreditation systems, mandatory reporting requirements, and complaint management systems. This means that children receive different levels of protection, care, and support depending on their circumstances and geographical location.

Following our Consultation paper on out-of-home care issued in March 2016, we are considering the following issues:

- Should core oversight functions be conducted by a body external to, and independent of, the relevant jurisdiction's lead department and all service providers?
- Should independent oversight of complaints handling be conducted by a body independent of the lead department and all service providers? That is, should a 'reportable conduct scheme' be implemented in each jurisdiction?
- Should there be nationally consistent minimum standards for assessing and authorising all carers?
- Should the accreditation of all government and non-government out-of-home care providers be to a nationally consistent minimum standard?
- Should there be a body that is responsible for assessing and granting applications for accreditation, independent of the relevant jurisdiction's lead department?
- Should the accreditation body retain ongoing responsibility for monitoring accredited providers to ensure their continued compliance with the conditions and standards of their accreditation?
- Should all carers be reassessed on a regular basis?
- Should there be a register of carers in each jurisdiction, containing relevant information about all applicant and authorised carers?

The current approach to regulation and oversight, in the out-of-home care space and more broadly, appears to be far from consistent. If our goal, as a society, is to do our best to protect all children from child sexual abuse then these inconsistent systems are impossible to justify. The safety of a child should not depend on the state or territory in which they reside. There can be little doubt that there is time for greater uniformity in relation to regulation and oversight mechanisms across the nation.

## VI OUT-OF-HOME CARE

Out-of-home care is an area of central concern to the Royal Commission. It will not come as a surprise to you that of all the categories of institutions identified by people who have had private sessions with us, out-of-home care is the largest. Our latest analysis

indicates that 43 per cent of victims in private sessions reported sexual abuse in out-of-home care. However, it is important to understand that this category includes historical care institutions such as orphanages and homes that no longer exist, as well as contemporary out-of-home care environments such as foster care.

There were more than 43 000 children in out-of-home care in 2014 in Australia. There has been an 82 per cent increase nationally in the number of children in care over the past decade. We have heard concerns that the current out-of-home care system does not adequately protect children from sexual abuse, or respond as well as it should when abuse occurs. We know that children in out-of-home care are at a heightened risk of sexual abuse.

The task of preventing and responding to child sexual abuse in out-of-home care has often been limited to sexual abuse perpetrated by foster carers, residential care staff, and professionals. Notwithstanding the importance of remaining vigilant about this risk, two other forms of child sexual abuse require more attention in order to properly protect children in care. These are child sexual exploitation and child-to-child sexual abuse.

Child exploitation is concerned with when children are coerced or manipulated into engaging in sexual activity in return for something such as alcohol, money, or gifts. The perpetrator often initially grooms children for this abuse online. The sexual exploitation of children in care, particularly residential care, is a serious problem in out-of-home care. It raises a number of issues including:

- The lack of coordinated and cross-sector protocols, procedures, and responses particularly among out-of-home care service providers, child protection services, and the police
- The lack of preventative measures, such as strategies for when children are missing from their placement; and the enforcement of social media policies and education within out of-home care, child protection services, and the police
- The need to address the barriers to children disclosing sexual exploitation

We have heard in public hearings that child-to-child sexual abuse is a serious and common problem in contemporary out-of-home care.

We have been informed that when a child first enters care, trained professionals need to make thorough assessments and placement matching decisions. We understand that children with sexually harmful behaviours, their carers and their families, need adequate and timely access to specialised trauma-informed services and support programs.

Evidence before the Commission suggests that placement and treatment options for children need to be identified, strengthened, and implemented in every state and territory, to address the complex needs of children with sexually harmful behaviours.

We have been told that more needs to be done to better protect children from, and respond to, issues of child-to-child sexual abuse in out-of-home care. We are specifically considering:

- The shortage of home-based care for children with sexually harmful behaviours
- Inappropriate matching of these children with other vulnerable children in residential and home-based care
- The insufficient treatment responses for children across Australia who display sexually harmful behaviours
- The lack of policies, procedures, and/or best practice guidelines for preventing and responding to child-to-child sexual abuse in out-of-home care
- The lack of nationally consistent accreditation and professional development training for counsellors working in this field
- The shortage of expert advice and assistance for foster and kinship/relative carers
- Carers receiving insufficient information about the child's background
- The lack of nationally consistent identification and terminology in relation to child-to-child sexual abuse in out-of-home care, and the resulting impacts on data collection and knowledge

All these issues were explored in detail in our recent consultation paper on out-of-home care. We have published 55 submissions in response. They are currently being

considered and will help inform our final recommendations, which will be published in December next year.

## VII CHILD-SAFE ORGANISATIONS

A key aspect of the work of the Commission is to identify what makes an institutions “child-safe”.

The concept of “child-safe” would be familiar to most of you. However, if placed in the social history of institutionalised care of children, it is relatively recent. The idea of a child safe organisation emerged in Australia in the last decade in response to increased community awareness of the vulnerability of children to harm, including children in care of institutions. This awareness arose partly in response to high profile cases of, and public inquiries into, child maltreatment in institutional settings.

Through our work we have been repeatedly presented with examples of institutions failing to keep children safe from abuse. We have identified problems in leadership, governance, and culture. We have seen problems with implementing child-safe policies. We have seen problems with complaint handling and identifying the needs of vulnerable children, amongst others.

Over some months, we have worked to identify specific elements that organisations should adopt in order to be child-safe. This has involved an extensive analysis of available research and evidence. We identified a preliminary list of elements which we considered fundamental to a child-safe institution. We had these elements tested in a research study that obtained feedback from a panel of 40 Australian and international experts. This group included academics, children’s commissioners and guardians, regulators and other child safe industry experts and practitioners. The panel agreed that the elements we had identified were relevant, reliable, and achievable. The research study, ‘Key Elements of a Child Safe Organisation Research Study — Final Report’, will be published on our website in due course.<sup>6</sup>

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<sup>6</sup> This Final Report is now available, see: Kylie Valentine et al, ‘Key Elements of a Child Safe Organisation Research Study — Final Report’ (Report, University of New South Wales, June 2016) <<http://childabuseroyalcommission.gov.au/getattachment/5d988506-a260-4b7a-b5bc-4f5555f2d2ca/Key-Elements-of-Child-Safe-Organisations>>.

The Royal Commission's final report will include an entire volume on making institutions child safe. However, by publishing this research study and disseminating the child safe elements now, institutions can work on strengthening their child safe practices without having to wait for our final recommendations.

The 10 elements that we have identified are:

- Child safety is embedded in institutional leadership, governance, and culture
- Children participate in decisions affecting them and are taken seriously
- Families and communities are informed and involved
- Equity is promoted and diversity respected
- People working with children are suitable and supported
- Processes to respond to complaints of child sexual abuse are child focused
- Staff are equipped with the knowledge, skills, and awareness to keep children safe through continual education and training
- Physical and online environments minimise the opportunity for abuse to occur
- Implementation of child safe standards is continually reviewed and improved
- Policies and procedures document how the organisation is child-safe

We are now considering the best way to implement these child-safe elements. This must involve consideration of the role of the Commonwealth, State and Territory governments in the implementation of child-safe elements, and in ensuring ongoing commitment to them. While we have not finalised our recommendations, we have identified a number of relevant factors. Child-safe standards should be nationally consistent, and that there should be some form of compliance mechanism. Compliance should be monitored and enforced.

#### VIII LISTENING TO, AND BELIEVING, CHILDREN AND YOUNG PEOPLE

Society's shifting attitudes towards children have come to value the importance of giving children and young people a voice. Article 12 of the *Convention on the Rights of the Child*



requires State parties 'to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child'.<sup>7</sup> As I identified earlier, taking children seriously and allowing them to participate in decisions that affect them is an important element of what makes an institution child-safe.

Children who are empowered are more likely to disclose harm. Early and safe disclosure is critical. As we have learnt, the trauma caused by being silenced or disbelieved can be as impactful as the abuse itself.

The Royal Commission has been listening to young children and young people. We have conducted 60 private sessions with people aged under 25, and a number of young people have taken part in our roundtables on schools and child safe organisations. Young people have given evidence in public hearings, including one into out-of-home care, and more recently, into performing arts centres. We have engaged with multicultural youth advocates. Commissioners have hosted workshops with young people to discuss safety in organisations. The voice of children and young people is apparent through our work and will be prominent in our final recommendations.

In line with this commitment, and to complement our work on child safe organisations, we have commissioned special research into children's views of safety.

We have published the report, 'Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns'.<sup>8</sup> This research was conducted by the Australian Catholic University in partnership with Griffith University, the Queensland University of Technology, and Southern Cross University.

The study involved 10 focus groups with 121 children and young people conducted in a range of institutional settings including out-of-home care, schools, youth activities, and childcare centres. As well as including the direct views of children themselves, the study was guided by three children and young people's reference groups who advised the research team on methodology and analysis.

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<sup>7</sup> *Convention on the Rights of the Child*, above n 4, art 12.

<sup>8</sup> Tim Moore et al, 'Taking Us Seriously: Children and young people talk about safety and institutional responses to their safety concerns' (Report, Institute of Child Protection Studies, Australian Catholic University, August 2015) <<https://www.childabuseroyalcommission.gov.au/getattachment/33a95fc9-0e8d-41da-ac9f-31f625794d4f/Taking-Us-Seriously>>.

Interestingly, when it comes to defining safety, children and young people differentiate between “being safe” and “feeling safe”. They assess safety differently from adults by relying more on initial immediate reactions to a person, place or experience, rather than their past experience. Children and young people generally agreed that institutions were safer when the institution focused on helping children and young people. This is demonstrated in the way adults interact with children; things children can do there; and signs that children are welcome. For example, child-friendly posters, pictures, and play areas.

Children also said institutions were safer when they valued their participation. This is demonstrated in the way adults and children interact, and the value the institution places on understanding children’s fears, concerns, needs, and wishes. It is also demonstrated by having mechanisms in place for children to complain, shape strategies, and provide feedback.

Children and young people believed institutions were safer when they provided a safe physical environment. Children felt most safe in ordered and child-friendly environments. They valued physical signs such as fences, security cameras, cameras, and locks. They felt the best way of determining whether the environment is safe is to observe how children behave there.

Children and young people felt institutions were safer when they proactively protected children and young people from unsafe people and experiences. This included identifying issues early and informing children of potential threats and hazards. It included actively communicating with children and their safety concerns, and employing safe and trusted adults. In addition, it included being open to monitoring by an external agency.

Finally, they felt institutions were safer when they employed safe and trusted adults. This included adults who are available when children and young people need them, and who are able to talk about sensitive issues. It included adults who prioritise children’s needs and concerns over the needs of other adults and institutions. It also included adults who do what they say they will do.

Earlier this year, we released a report that explores how children and young people with disability view their safety and safety needs within institutions. This research is

particularly important. To date, research in the child sexual abuse context has paid little attention to the perspectives of children from this cohort.

The study involved 22 children and young people aged between seven and 25, all of whom have a cognitive impairment; many with multiple impairments. Six family members and 10 professionals were also interviewed individually and in small groups. Researchers used a range of creative research methods to develop an understanding and experience of personal safety in institutions. This included photo elicitation, pictorial mapping, story-boards and walk-along interviews.

Not surprisingly, the report found that children and young people expressed being safe as: feeling safe and secure; being protected; not being hurt; not trusting strangers, and having some control of their situation. It found that families and professionals seek to build a sense of safety by providing a loving foundation, and building capacity and confidence. They also create safety by building networks and taking action on behalf of children and young people. Factors that help children and young people with disability and high support needs feel and be safe included being in a secure space. For most, this was home. Other factors included having friends and feeling known and valued.

However, children and young people said it can be very hard to know what is safe or unsafe. Few remembered learning about safety, either at school or anywhere else. Things that made it difficult for them to feel and be safe included the impact of having experienced various forms of abuse, and peer pressure. Being under-supported through transitions also made it difficult for them to feel and be safe.

Further, families and professionals viewed children's and young people's understanding of safety as limited. They shared concerns about how the ways in which service systems operate make it very difficult for these particular children and young people to identify trustworthy and untrustworthy people in their lives. We will be publishing research into the views of safety of children in residential care, in due course.

#### IX POSITIVE IMPACTS OF THE ROYAL COMMISSION

A significant amount of momentum has been created as a result of this Royal Commission. Change has been taking place at individual, organisational, and community levels. Many people who have shared their story either in a private session or in a public

hearing have reported feeling unburdened and empowered as a result. Some have described the experience as a positive step towards healing and recovery. Many organisations that have been charged with the care of children have taken positive steps towards righting wrongs of the past. Since the commencement of the Royal Commission, we have witnessed dozens of apologies from institutions big and small.

Bravehearts have reported a significant increase in the number of participants in the workshops and training programs they conduct. In the 2010/11 financial year Bravehearts trained 375 people on how to better identify and respond to child sexual abuse and other harm. The number of participants has increased in each year since 2011. In the 2014/15 financial year, Bravehearts trained 3127 people. Bravehearts founder Hetty Johnson attributes this increase to the impact of the Royal Commission.

The Royal Commission has been instrumental in “changing the conversation” around sexual abuse. Our public hearings in particular have brought widespread attention to the nature and extent of institutional child sexual abuse. In doing so, we have helped reduce the stigma associated with it. Karen Willis, the chief executive of Rape and Domestic Violence Services Australia, has said that the Royal Commission has helped remove the shame felt by victims of child sexual abuse. She says more people are calling the Rape and Domestic Violence Service as a result.

Heartfelt House provides support to adult survivors of childhood sexual abuse, their family and friends on the north coast of NSW. Executive Director Vicki Atkins says the demand on the service has tripled since the Royal Commission was announced. By November 2014, calls to Adult Survivors of Child Abuse (‘ASCA’) — now called the Blue Knot Foundation helpline — quadrupled since the start of the Royal Commission only the year before. President Dr Cathy Kezelman said the Royal Commission had encouraged more people to come forward.

Our work is leading to significant legislative change. In June this year, ACT Chief Minister Andrew Barr introduced a reportable conduct scheme to the Legislative Assembly — a law designed to force institutions to report abuse complaints to an independent authority. According to media reports, Mr Barr told the Assembly: ‘The Royal Commission has shown that there are still too many dark places within institutions to hide those who would harm children, and there are still those who draw the blinds

rather than face the embarrassment or damage that illumination may bring'.<sup>9</sup> The ACT Ombudsman will be given new powers of oversight and scrutiny of internal investigations, essentially allowing it to prevent abuse complaints from being swept under the carpet.

In New South Wales this year the Government passed legislation removing time limitations on civil claims for child sexual and serious physical abuse. The changes will apply to past child abuse as well as child abuse that occurs in the future. The impact of this legislative change is significant. It removes barriers to civil justice for people who have suffered abuse and acknowledges the many years it can take for people to summon the courage to disclose their abuse. The Queensland Government has recently announced that it intends to introduce legislation to remove the statute of limitations for victims of child sexual abuse in institutions, such as schools. Limitation periods for child sexual abuse survivors were abolished in Victoria in 2015.

Whilst our work has generated a momentum for change, we must be aware that the Royal Commission will come to an end. Registrations for private sessions close in six weeks. We have finalised our public hearing schedule. Our work finishes in December next year. Until then we ask that you remain engaged with our work. There will be further opportunities to be involved in our policy and research initiatives over the next 12 to 18 months. We hope you will take the opportunity to respond to our consultation paper on records and record keeping to be released in August.

We expect to publish our consultation paper on criminal justice issues in September. We also expect to release further issues papers, and invite submissions on them. We also plan to hold a research symposium later this year. As researchers, educators, policy makers, advocates, front line workers, and clinicians who are committed to improving the lives of children, it will be up to you to build on the legacy of the Commission and keep up the momentum for change.

We are at an important point in the social history of children in Australia. This Royal Commission represents a once in a lifetime opportunity to acknowledge that we, the entire Australian community, failed to care for so many of our children. A failure that has

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<sup>9</sup> Christopher Knaus, 'Scheme set to prevent cover-up of institutional child abuse in ACT', *Canberra Times* (online), 10 June 2016 <<http://www.canberratimes.com.au/act-news/scheme-set-to-prevent-coverup-of-institutional-child-abuse-in-act-20160609-gpf85z.html>>.

had often devastating consequences. It also represents an opportunity; the opportunity for us as a nation to commit to the promise made in the 1924 Geneva Declaration — to give to children the best that we have to give.

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# THE ISSUE OF DRIVING WHILE A RELEVANT DRUG, $\Delta^9$ -TETRAHYDROCANNABINOL, WAS PRESENT IN SALIVA: EVIDENCE ABOUT THE EVIDENCE

LAURENCE E MATHER\*

*With the lawful use of medicinal cannabis becoming a closer reality across most of Australia, the matter of roadside testing and driving impairment will be of immediate concern to patients undergoing cannabinoid pharmacotherapy. Under current roadside testing laws, the same issues will pertain to the medical patient, who wishes or needs to drive, as to the 'recreational' cannabis user. While there is abundant public domain, scientific and medical literature, as well as published expert opinion, exploring the epidemiological, chemical and pharmacological research evidence of cannabis ingestion and driving, this paper analyses the evidence from roadside testing that is being used to support the notion that a driver may be 'impaired' or 'driving under the influence' of cannabis. By and large, the evidence undeniably shows that cannabis ingestion can impair driving. This paper however, comes to the pharmacological opinion that the current roadside testing of saliva/oral fluid for  $\Delta^9$ -tetrahydrocannabinol (THC), without other evidence, provides a poor predictor of impairment. This paper thus intends to stimulate re-evaluation of the present pharmacological criteria under which users of cannabis might be judged legally.*

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## I INTRODUCTION

In January 2016, an eminent Australian barrister discussed the issues raised when a person driving a motor vehicle is roadside tested and found positive for ingestion of cannabis (marijuana, marihuana).<sup>1</sup> The opinion also alluded to the extension of this legislation to future Australian medical patients who, having reasonably and lawfully ingested cannabis as part of their pharmacotherapy,<sup>2</sup> will inevitably face the same legal standards as those who have ingested cannabis ‘recreationally’. Furthermore, the opinion goes on to claim that the underlying drug driving laws are grossly unfair and are not based on data or scientific knowledge.<sup>3</sup> This opinion, thereby, calls into question not only the fairness of the laws, but also the very evidence supporting the roadside drug testing procedures, based on the testing of saliva/oral fluid, that underpin the present laws.<sup>4</sup>

<sup>1</sup> Greg Barns, ‘Australia’s Drug Driving Laws are Grossly Unfair’, ABC News (online), 29 January 2016 <<http://www.abc.net.au/news/2016-01-29/greg-barns-drug-driving-laws-are-unfair/7116994>>.

<sup>2</sup> See generally Laurence E Mather et al, ‘(Re)introducing Medicinal Cannabis’ (2013) 199(11) *Medical Journal of Australia* 789; Laurence E Mather et al, ‘The Issue of Medicinal Cannabis in Contemporary Australia’ (2015) 3(2) *Griffith Journal of Law and Human Dignity* 287.

<sup>3</sup> Barns, above n 1.

<sup>4</sup> The terms ‘oral fluid’ and ‘saliva’ are often used interchangeably for the fluid of the mouth. The composition of mixed saliva when sampled from the oral cavity is complex. This fluid contains the watery secretions from the salivary glands along with many solutes such as cellular and food debris, microorganisms, etc, and additionally, responds in secreted volume to stimulation through chewing,

The views presented in this paper are of a research pharmacologist, not a forensic pharmacologist. The purpose of this paper is to stimulate discussion about the quality of such evidence as used in roadside testing of cannabis ingestion. The cited evidence draws upon published expert opinion, as well as epidemiological, chemical and pharmacological research reported in the scientific and medical literature. Because of the voluminous literature on this topic, the cited references are not exhaustive. Additionally, in various places, some pertinent scientific principles are presented, hopefully in an intelligible manner.

## II PHARMACOLOGICAL PRINCIPLES AND CANNABIS TESTING

Fundamental pharmacological principles (for almost any drug) propose that, within individuals, drug effect will be related in a 'graded response' manner to the drug dose, normally up to a maximum effect. After administration, the drug dose eventually equilibrates (not equalises) throughout the body fluids and tissues, and its degree of dilution in the body is reflected in the drug blood concentrations. The pharmacological effects are reflected in the relevant drug (or a relevant metabolite) concentrations in the receptor-containing 'biophase'.<sup>5</sup> After equilibration, sampled biofluid concentrations (almost always blood, plasma or serum)<sup>6</sup> of the drug can act as a proxy for those in the biophase, and thereby allow greater insight into drug responses than can be gained from the drug dose alone. This is relevant because an element of this paper discusses whether saliva/oral fluid provides a reliable proxy for the biophase of cannabis. The corresponding biological variability between individuals to doses of drug will be related in a 'quantal response' manner over a range of drug doses, this time describing the fraction of the particular population responding with some predefined effect.

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various chemicals, etc. Thus, as mentioned in the ensuing discussion, 'oral fluid' is the standard term in the present context.

<sup>5</sup> That is, the site of action or the milieu containing the parts of normal or deranged physiological or biochemical elements with which the drug interacts to produce the pharmacological effects attributed to that drug.

<sup>6</sup> Plasma and serum are the cell-free portions of blood. However, the measured drug concentrations within a defined blood specimen may differ quite markedly depending upon the extent of the drug's distribution into the blood cells and its affinity for the various proteins dissolved in the cell-free phase. In the case of THC, the blood concentration is nearly one half of the corresponding plasma or serum concentration due to the minimal uptake of THC into the blood cells. Serum is similar to blood but with clotting-factor proteins removed. This may seem like pharmacological minutia, but it affects many quantitative aspects of pharmacology. The various measures are used in particular contexts, including the evidence cited in this paper. Unless required for such context, the general term 'blood, etc' is used in this paper.

While variability within and between individuals derives from many temporal, constitutional, anatomical, physiological and biochemical sources, recent research incorporating genetic factors is allowing greater insight into the predictability. However, the intrinsic variability in how the body handles the drug becomes magnified by unpredictability in the rate and extent of systemic drug absorption associated with the mode of administration. This is typically referred to as pharmacokinetic variability.<sup>7</sup> The essential point is that the relationship between drug dose and the resultant time course of biofluid (particularly blood, etc) drug concentrations can be complex, and such drug concentrations are the primary determinants of drug effects. Moreover, the same drug doses or biofluid drug concentrations of drugs do not necessarily produce the same levels of pharmacological effects. This is referred to as pharmacodynamic variability,<sup>8</sup> and is typically reflected by the drug concentrations associated with the same effects differing between individuals, and even within individuals.

Cannabis is typically a variable mixture of chemical constituents, some of which are pharmacologically active.<sup>9</sup> Cannabis grown and prepared for medicinal purposes and/or research purposes normally has appropriate regulatory controls and analysis.<sup>10</sup> Many laboratory research studies of cannabis determine biofluid concentrations of THC, the principal psychoactive constituent, after ingestion of some form of cannabis, often after smoking a cannabis cigarette with a known THC content. These typically show marked

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<sup>7</sup> That is, what the body does to the drug in a quantitative sense.

<sup>8</sup> That is, what the drug does to the body in a quantitative sense.

<sup>9</sup> Cannabis, being a natural plant product, consists of many hundreds of phytochemical substances of which some hundred have chemical structures recognisably similar to THC, collectively referred to as cannabinoids. Both the actual and relative amounts of these substances vary with many influences, including the strain of the cannabis plant, the plant parts harvested, and methods of processing after harvesting. THC is the most studied substance, being recognised as having a variety of salutary pharmacological effects, and being the principal psychotropic substance. The potential therapeutic activity of cannabidiol (CBD) is also well recognised and it is the second main substance of pharmacotherapeutic interest. There is evidence that CBD can antagonise psychotropic effects of THC, but it is not presently known whether such effects pertain with cannabis used for pharmacotherapeutic purposes. Many other phytocannabinoids, such as the acid precursors of THC and CBD, cannabivarin, cannabigerol, etc are currently under investigation for possible pharmacotherapeutic uses and many will presumably enter clinical use at some time in the future, either alone or in some selectively enriched form of cannabis. Cannabis typically also contains several hundred non-cannabinoid substances, of which many, as judged by laboratory experiments, may contribute to the therapeutic and other pharmacological effects attributable to 'cannabis'. For further discussion, see Ethan B Russo, 'Taming THC: Potential Cannabis Synergy and Phytocannabinoid-Terpenoid Entourage Effects' (2011) 163(7) *British Journal of Pharmacology* 1344.

<sup>10</sup> See, eg, Justin Thomas Fishedick et al, 'Metabolic Fingerprinting of Cannabis Sativa L., Cannabinoids and Terpenoids for Chemotaxonomic and Drug Standardization Purposes' (2010) 71(17) *Phytochemistry* 2058; S M Crowther, L A Reynolds and E M Tansey (eds), *The Medicalization of Cannabis* (The Trustee of the Wellcome Trust, vol 40, 2010).

variability of the biofluid (blood, etc) THC concentration-time profiles despite apparently the same experimental conditions. A large body of research is focused on THC and its relationships to driving impairment as if THC is the sole active ingredient of cannabis, which it is not. Nonetheless, there is substantial research evidence underpinning both the epidemiological and the chemical-pharmacological basis of 'driving under the influence of cannabis' legislation. This evidence, mainly based on THC and various tests used to represent driving skills, supports the proposition that cannabis/THC ingestion can cause acute driver impairment, and that this is associated with an increased risk of a motor vehicle crash.<sup>11</sup>

Various controlled laboratory research studies performed in healthy volunteer subjects who use cannabis for 'recreational' purposes have found a reasonably consistent dose-blood, etc-THC concentration-impairment relationship.<sup>12</sup> However, the same conclusions have not been well supported from opportunistic studies performed by the comparison of fatal and non-fatal road traffic crashes where, for example, Andrews et al notes that:

Equating impairment to blood cannabinoid concentrations is not straightforward: a clear dose-response relationship has not been established, unlike for alcohol. The pharmacology of cannabis makes it difficult to interpret cannabinoid concentrations, both in life and in postmortem blood samples.<sup>13</sup>

Additionally, this paper is concerned with roadside testing for cannabis ingestion, and it is argued that the principle of using oral fluid for cannabis/THC testing is problematic. Oral fluid is an artefactual medium, rather than a body fluid pool such as blood, etc that contains drug concentrations in equilibrium with those in the biophase. It is argued that whereas blood, etc provides a reasonable proxy for the pharmacological effects of cannabis/THC, oral fluid THC concentrations may be associative with, but are not causative of, the pharmacological effects attributed to THC.

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<sup>11</sup> Mark Asbridge, Jill A Hayden and Jennifer L Cartwright, 'Acute Cannabis Consumption and Motor Vehicle Collision Risk: Systematic Review of Observational Studies and Meta-Analysis' (2012) 344(536) *The BMJ* 1.

<sup>12</sup> See, eg, David M Schwoppe et al, 'Psychomotor Performance, Subjective and Physiological Effects and Whole Blood  $\Delta^9$ -Tetrahydrocannabinol Concentrations in Heavy, Chronic Cannabis Smokers Following Acute Smoked Cannabis' (2012) 36(6) *Journal of Analytical Toxicology* 405.

<sup>13</sup> Rebecca Andrews et al, 'Cannabinoid Concentrations Detected in Fatal Road Traffic Collision Victims Compared With a Population of Other Postmortem Cases' (2015) 61(10) *Clinical Chemistry* 1256, 1260–1261 (citations omitted).

## III LABORATORY AND ROADSIDE TESTING METHODOLOGY

The main biofluids used in testing for drugs include blood, plasma or serum, oral fluid, expired air/breath, and occasionally urine and hair. Each sample offers various advantages and disadvantages in the context of research and of roadside testing. Blood, plasma, or serum samples are the most informative and are used extensively in laboratory and clinical pharmacological research. However, their sampling requires specialist techniques and the process is relatively invasive. Urine and hair samples can be informative but have limited applicability to roadside testing. Expired air/breath is a special case and is useful only where analytes, such as alcohol, have significant vapour pressure. Oral fluid, being the biofluid matrix of the present instance, is discussed in greater depth.

Standard testing methodology involves rigid definitions as to the qualitative (for what substance) and quantitative (how much of that substance) performances. Detection can be non-specific (responding to whatever substance is presented), selective (responding to substances with particular properties), or specific (for a unique substance). Most biological research and forensic laboratory methods include techniques to extract the analyte(s) from the biofluid matrix and/or concentrate them to improve detectability. This is usually followed by a gas-liquid chromatography (GLC) or high performance liquid chromatography (HPLC) procedure to separate the analyte(s) from other extracted components, preceding their detection  $\pm$  quantitation, normally by mass spectrometry (MS). Methods based on GLC-MS and HPLC-MS, that offer both specificity and the highest sensitivity, are widely used in forensic and research studies involving cannabis, as well as in confirmatory testing of roadside samples.

Immunoassay screening methods are commonly used for roadside screening for various “drugs of abuse”, including THC, and are specified by different criteria: numbers of analyte true positives, false positives, true negatives and false negatives after confirmatory GLC-MS or HPLC-MS testing. However, the performance specifications of commercially available devices used for THC screening may differ markedly.<sup>14</sup> Immunochromatographic (component separating) devices operate by diffusion of the oral fluid sample mixed with labelled antibodies that target and bind to specific drugs if

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<sup>14</sup> Anna Molnar, *Detecting and Quantifying Cannabinoids in Oral Fluid* (PhD Thesis, University of Technology, Sydney, 2015) 24.

present in the fluid sample,<sup>15</sup> and sometimes several drugs are tested for concurrently. The sensitivity (Limit of Detection, LOD) or cut-off for negativity, varies according to the kit, as does the specificity. An abundance of such validated methods is also found in the scientific literature, including many methods for THC testing that are used by various research and forensic laboratories.<sup>16</sup> Research evidence obtained in 'recreational' cannabis-using volunteer subjects demonstrates that cannabis/THC ingestion can diminish performance accuracy in a variety of psychomotor dominant tasks, including those simulating various aspects of motor vehicle control, and in the Standard Field Sobriety Test (SFST).<sup>17</sup> Roadside testing for cannabis/THC thus ought to be capable of providing a useful predictor of any such diminished performance, rather than just providing evidence of ingestion.

Although blood, etc concentrations of a drug can be useful proxies for the relevant 'biophase' concentrations, with modes of rapid systemic delivery, particularly intravenous and transpulmonary (inhaled into the lungs), there is often a marked and highly variable mismatch (hysteresis) between the times-courses of drug effects and the blood, etc concentrations until equilibration occurs. Hysteresis depends on many factors, including how and when the blood sampling is performed, as well as the properties of the drug. This has equally been observed with inhaled THC.<sup>18</sup> Hysteresis complicates the interpretation of effects from measured drug biofluid concentrations alone, mainly in the first several hours after drug ingestion. Thereafter, the time course

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<sup>15</sup> Antibodies, being any of a large variety of proteins normally present in the body, or produced in response to an antigen, act to neutralise their target, thus producing an immune response.

<sup>16</sup> See, eg, Olaf H Drummer, 'Drug Testing in Oral Fluid' (2006) 27(3) *Clinical Biochemistry Review* 147; Oscar Quintela et al, 'A Validated Method for the Detection of  $\Delta^9$ -Tetrahydrocannabinol and 11-nor-9-Carboxy- $\Delta^9$ -Tetrahydrocannabinol in Oral Fluid Samples by Liquid Chromatography Coupled with Quadrupole-Time-of-Flight Mass Spectrometry' (2007) 31 *Journal of Analytical Technology* 157; Robert F X Klein, 'Analysis of Marijuana by Liquid Chromatographic Techniques: A Literature Survey, 1990–2015' (2015) 12(1–4) *Microgram Journal* 1.

<sup>17</sup> See, eg, Wendy M Bosker et al, 'Medicinal  $\Delta^9$ -Tetrahydrocannabinol (Dronabinol) Impairs On-the-Road Driving Performance of Occasional and Heavy Cannabis Users But is Not Detected in Standard Field Sobriety Tests' (2010) 107(10) *Addiction* 1837; Wendy Miranda Bosker, *Where the Drug Meets the Road: Actual Driving, Psychomotor Performance and Roadside Drug Screening Methods in Cannabis and Ecstasy Users* (PhD Thesis, The University of Maastricht, 2011); Rebecca Lynn Hartman, *Drug Policy Implications of Inhaled Cannabis: Driving Skills and Psychoactive Effects, Vaporized Pharmacokinetic Disposition, and Interactions with Alcohol* (PhD Thesis, University of Maryland, 2015).

<sup>18</sup> See, eg, Edward J Cone and Marilyn A Huestis, 'Relating Blood Concentrations of Tetrahydrocannabinol and Metabolites to Pharmacologic Effects and Time of Marijuana Usage' (1993) 15(6) *Therapeutic Drug Monitoring* 527; A Weinstein et al, 'A Study Investigating the Acute Dose-Response Effects of 13 mg and 17 mg  $\Delta^9$ -Tetrahydrocannabinol on Cognitive-Motor Skills, Subjective and Autonomic Measures in Regular Users of Marijuana' (2008) 22(4) *Journal of Psychopharmacology* 441; N A Desrosiers et al, 'Smoked Cannabis' Psychomotor and Neurocognitive Effects in Occasional and Frequent Smokers' (2015) 39(4) *Journal of Analytical Toxicology* 251; David M Schwoppe et al, above n 12.

of drug, blood and effect occur essentially in parallel (pseudoequilibrium). The maximum measured biofluid drug concentration ( $C_{\max}$ ) is the most obviously affected metric, often occurring at a time well different to the maximum drug effect ( $E_{\max}$ ). Various pharmacokinetic-pharmacodynamic models have been proposed to account for this observation, and some have been proposed for THC,<sup>19</sup> but it seems that none have yet been developed specifically for THC and driving impairment.

#### IV ORAL FLUID TESTING OF “DRUGS OF ABUSE”

All Australian states and territories have now instituted roadside (and certain workplace) oral fluid testing for methamphetamine, methylenedioxymethamphetamine (MDMA) and THC based upon Australian Standard 4760. Oral fluid has the advantage that it can be simply and non-invasively collected for preliminary roadside testing, and then be referred to the forensic laboratory for further definitive testing. As elaborated below, oral fluid is useful for supposing the past ingestion of a drug, but has reliability limitations in predicting the acute pharmacological effects of a drug.

Studies from the 1970s suggested that salivary concentrations might present a non-invasive sampling proxy for ‘unbound’ (or ‘free’ or ‘dialysable’) blood concentrations of drugs in the context of research and pharmacotherapy on the premise that these are deemed to more closely resemble biophase concentrations. Accordingly, guidelines for understanding the relationship between blood, etc and saliva drug concentrations were formulated based on the known physicochemical characteristics of the drug and the anatomical, physiological and biochemical characteristics of saliva.<sup>20</sup> However, its usefulness was found to be more limited than anticipated, mainly because of unpredictable inter- and intra-individual variability. For example, a research study of that period (on erythromycin) concluded that ‘[t]he correlation between pharmacokinetic parameters estimated from serum and saliva was poor...indicating that estimates obtained from saliva are not useful predictors of the corresponding serum

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<sup>19</sup> See, eg, Zheng Guan et al, *IV-25 Zheng Guan Population PK/PD Modeling to Compare Cannabinoid Receptor Antagonists in the THC Challenge Test* (2012) Population Approach Group in Europe <<http://www.page-meeting.org/?abstract=2330>>; Jules A A C Heuberger et al, ‘Population Pharmacokinetic Model of THC Integrates Oral, Intravenous, and Pulmonary Dosing and Characterizes Short-and Long-Term Pharmacokinetics’ (2015) 54(2) *Clinical Pharmacokinetics* 209.

<sup>20</sup> M Danhof and D D Breimer, ‘Therapeutic Drug Monitoring in Saliva’ (1978) 3(1) *Clinical Pharmacokinetics* 39.

pharmacokinetic constants.’<sup>21</sup> Saliva sampling was largely abandoned in pharmacotherapy research only to become progressively re-introduced over the past decade by the forensic quest for a convenient, non-invasive sampling matrix to test for “drugs of abuse”.

With some notable exceptions, such as anticoagulants, drugs rarely act by being in the blood. As discussed above, the blood ‘pool’ acts as a conduit for drug delivery to, and removal from, the tissues, including the biophase. The important point is that drugs typically distribute between blood, serum or plasma, blood cells, and tissues, in a rational manner so that sample-able blood drug concentration measurements may be used as a reasonable proxy for biophase concentrations and thus pharmacological effects. Drugs may diffuse from blood into saliva/oral fluid, but their overall concentrations are phenomenology, responding to extrinsic and intrinsic stimulation. Oral fluid is not a body ‘pool’ with an anatomically defined distribution, and the oral fluid concentrations of drugs need bear no rational relationship to the amount of that substance present in the body; moreover, unlike drug blood concentrations, they do not have an intrinsic role in driving the attributed pharmacological effect.

#### V THC TESTING AND THE LAWS

At the outset, it is unequivocally acknowledged that drug-impaired driving presents a serious threat to public safety, and that many drivers involved in motor vehicle crashes do test positive for particular drugs. As in many countries, Australian states and territories administer laws intended to deter non-medical use of illicit drugs, principally methamphetamine, MDMA, cocaine, diamorphine (heroin) and cannabis. The Australian states and territories also administer laws, with some differences in the wording but with the same specific intent, to deter driving under the influence of these drugs (DUID laws). It has been reported that the proportion of fatalities from fatal crashes involving a driver/rider with illicit drugs, including cannabis, present in their system in New South Wales was 16 per cent in 2013.<sup>22</sup> Thus, the intent of such laws, to prevent fatalities, is

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<sup>21</sup> K L Austin et al, ‘Intersubject and Dose Related Variability After Intravenous Administration of Erythromycin’ (1980) 10(3) *British Journal of Clinical Pharmacology* 273, 278.

<sup>22</sup> Evan Walker et al, ‘Drug Driving in NSW: Evidence-Gathering, Enforcement and Education’ (Paper presented at the Australasian Road Safety Conference, Gold Coast, Australia 14–16 October 2015) 2.



obvious. The present analysis is focussed entirely on cannabis, and whether or how other drugs are subject to the same issues, has not been assessed.

It is not argued that THC detected in oral fluid is not reasonable evidence of cannabis/THC ingestion, although second-hand contamination by THC is recognised and needs to be ruled out. Nor is it argued that ingested cannabis/THC cannot impair driving, as there is abundant evidence that it can, although the intensity and duration of any such impairment after acute cannabis consumption is not well defined. It is, however, argued that present Australian drug driving laws involving cannabis, and purportedly used as road safety measures, are based on an 'all-or-none' roadside test for the presence of THC in oral fluid, and that the result of this test, in isolation, is an unsound indicator of meaningful acute 'impairment' or of being 'under the influence'.

It is also argued that the result of such an oral fluid test is essentially artefactual, and the result may or may not be a reasonable predictor of any directly related acute pharmacological effect, notably impairment of driving ability. A more familiar analogy might be that of measured cholesterol levels in blood as part of 'heart attack' prevention strategies. A finding of a high cholesterol does not mean that the person will have a heart attack, and a finding of low cholesterol does not mean that the person will not have a heart attack; the blood cholesterol level is but one factor that needs to be considered in an overall risk assessment strategy. However, the present THC–oral fluid testing issue is more complex than this simple analogy because the pharmacological effect (impairment) is not caused by, or even directly related to, the presence of the THC concentration in oral fluid, whereas the cholesterol in the blood is causally related to the risk.

In February 2016, with the Australian Federal Parliament passing the Narcotic Drugs Amendment Bill 2016 (Cth), a first step for the lawful use of medicinal cannabis occurred,<sup>23</sup> and other laws concerning the regulation of its cultivation, manufacturing and supply have begun to follow.<sup>24</sup> However, it remains up to the individual states to decide on the details of if/how the drug will be allowed, prescribed, and dispensed, and

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<sup>23</sup> Ian Freckelton, 'Medicinal Cannabis Law Reform in Australia' (2016) 23(3) *Journal of Law and Medicine* 497.

<sup>24</sup> See, eg, *Access to Medicinal Cannabis Act 2016* (Vic); Penny Timms, 'Medicinal Marijuana to Become Legal to Grow in Australia — But How Will it Work?', ABC News (online), 29 October 2016 <<http://www.abc.net.au/news/2016-10-29/medicinal-marijuana-to-become-legal-explainer/7975194>>.

for whom. As of November 2016, medicinal cannabis can be prescribed under strict conditions in New South Wales and Western Australia, with Victoria, Queensland, Tasmania, and probably South Australia and the Australian Capital Territory, to follow in 2017. With the lawful medicinal use of cannabis, the inevitability of patients violating DUID laws will occur, and this could have potentially far-reaching impacts on their amenity and welfare. This would be of particular concern for those patients receiving cannabis pharmacotherapy using vaporised or oral transmucosal dosage forms because such patients will, due to locally deposited dosage, almost certainly return positive screens for cannabis if their medication contains more than trace quantities of THC. Indeed, one locally conducted pilot study has already confirmed the detectability of THC in the oral fluid of healthy volunteer subjects simulating cannabis pharmacotherapy.<sup>25</sup>

Over the past decade or so, considerable research effort has been applied to determining the effects of cannabis/THC on the impairment of driving, mainly in the context of 'recreational' cannabis. If societal attitudes about the legal use of 'recreational' cannabis change, as is occurring, for example, in various parts of the United States of America, then it is relevant to consider whether existent laws should be re-examined, as they form the basis of the legal framework also applied to users of medicinal cannabis. Whereas most expert reviewers indicate general agreement about the roadside and laboratory research findings, the interpretation and application of such findings in the context of road crash risk remains problematical. Two expert opinions, formulated from different perspectives after consideration of the evidence, are relevant and are quoted here.

In their review of the first large-scale study in America designed to estimate the risk associated with alcohol and drug positive driving, Compton and Berning commented:

There is evidence that marijuana use impairs psychomotor skills, divided attention, lane tracking, and cognitive functions. However, its role in contributing to the occurrence of crashes remains less clear. Many studies, using a variety of methods have attempted to estimate the risk of driving after use of marijuana. The methods have included experimental studies, observational studies, and epidemiological studies. While useful in identifying how marijuana affects the performance of driving tasks, experimental and

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<sup>25</sup> See Anna Molnar et al, 'The Detection of THC, CBD and CBN in the Oral Fluid of Sativex® Patients Using Two On-Site Screening Tests and LC-MS/MS' (2014) 238 *Forensic Science International* 113.

observational studies do not lend themselves to predicting real world crash risk...Caution should be exercised in assuming that drug presence implies driver impairment. Drug tests do not necessarily indicate current impairment.<sup>26</sup>

In a comprehensive review of the present American DUID laws, Larkin Jr, acknowledging the legalisation of nonmedical or 'recreational' cannabis in some states, wrote that:

punishing someone for a positive THC result merely penalizes him for having used marijuana within the last month, not for driving while under its influence. Even if there were indisputable proof that a person drove within four hours of having inhaled marijuana, the mere presence of THC in the blood cannot by itself justify the inference that a person was impaired. The effect of inhaled marijuana on a user's driving skills varies from person to person based on a host of individual factors: the absorption, distribution, metabolism, and excretion rate of THC; the quantity of past marijuana usage; THC tolerance; the time when a person last inhaled or ingested marijuana; the time since a person last ate, as well as the fat content of his meal; and individual smoking techniques...The bottom line is this: We cannot presently undertake roadside marijuana testing in the same way that we perform alcohol testing...Any particular level could be overinclusive or underinclusive...Society needs to be able to identify far better than it now can which drivers may be impaired by marijuana so that the medical marijuana and recreational initiatives do not increase the mortality that alcohol-impaired driving already imposes.<sup>27</sup>

## VI EVIDENCE IN MEDICAL PATIENTS

As noted above, most of the prospective chemical-pharmacological research on cannabis and driving is performed in essentially healthy young adult volunteers who use cannabis for 'recreational' purposes, generally seeking conclusions based on (nominal) dose and frequency of use. Most retrospective epidemiologic studies of motor vehicle crashes measure THC in drivers' biofluid samples, including some taken post-mortem (and these have additional problems of post-mortem drug biofluid re-equilibration and losses). These, too, tend towards young, predominantly male, adults, who are known to be prone to risk-taking behaviours. Compared to typical research volunteers or forensically tested

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<sup>26</sup> Richard P Compton and Amy Berning, 'Drug and Alcohol Crash Risk' (Research Note, National Highway Traffic Safety Administration, 2015) 1, 4 (citations omitted).

<sup>27</sup> Paul J Larkin Jr, 'Medical or Recreational Marijuana and Drugged Driving' (2015) 52(453) *American Criminal Law Review* 453, 494–515 (citations omitted).

subjects, medical patients are likely to be relatively older and have co-morbidities.<sup>28</sup> Many will be driving vehicles legally, despite any limitations caused by their pathophysiological conditions and concomitant medications, along with other legal medications not subject to driving roadside testing, and any tolerance that may modify the respective dose-effect relationships.

Whereas 'recreational' cannabis users may consume the substance with the intention of experiencing psychotropic effects, medical patients reportedly eschew such effects.<sup>29</sup> Typically using incremental dosage to titrate dose to desire effect, the medical patient experience is analogous with the 'patient-controlled analgesia' paradigm used for managing pain after surgery.<sup>30</sup> Newhart discussed this difference in her thesis,<sup>31</sup> pointing out that drug experiences are created from a combination of 'drug, set, and setting'<sup>32</sup> not just the drug itself, and that this is true of the effects of all drugs, whether they are used for 'recreational' or medical purposes.<sup>33</sup> In the latter, this also encompasses any 'placebo effect'<sup>34</sup> with the essential purpose to 'live a normal life and meet their social obligations',<sup>35</sup> not to get high, but 'to find an optimal dose in which the high was diminished but the medical effects were still experienced.'<sup>36</sup>

## VII ORAL FLUID SAMPLE TESTING FOR "CANNABIS"

In Australia, roadside testing for THC (and/or methamphetamine and/or MDMA) normally consists of three stages: a first screen is performed with a commercial immunochromatographic assay kit; if positive, a second screen is performed with another commercial immunochromatographic kit; a third stage normally involves

<sup>28</sup> M A Ware, H Adams and G W Guy, 'The Medicinal Use of Cannabis in the UK: Results of a Nationwide Survey' (2005) 59(3) *International Journal of Clinical Practice* 291, 292.

<sup>29</sup> Ethan B Russo, 'Current Therapeutic Cannabis Controversies and Clinical Trial Design Issues' (2016) 7(309) *Frontiers in Pharmacology* 1, 2.

<sup>30</sup> See, eg, L E Mather and H Owen, 'The Scientific Basis of Patient Controlled Analgesia' (1988) 16 *Anaesthesia and Intensive Care* 427; H Owen, L E Mather and K Rowley, 'The Development and Clinical Use of Patient Controlled Analgesia' (1988) 16 *Anaesthesia and Intensive Care* 437; A Woodhouse and L E Mather, 'Patient-Controlled Analgesia (PCA) for Postoperative Pain Relief: What Have We Learnt and Where Do We Go From Here?' (1997) 3 *Analgesia* 1.

<sup>31</sup> Michelle Renee Newhart, *From "Getting High" to "Getting Well": Medical Cannabis Use Among Midlife Patients in Colorado* (PhD Thesis, University of Colorado, 2013).

<sup>32</sup> Ibid 133–173.

<sup>33</sup> Ibid 134.

<sup>34</sup> Ibid 135.

<sup>35</sup> Nicky Britten, *Medicine and Society: Patients, Professionals and the Dominance of Pharmaceuticals* (Palgrave Macmillan, 2008) 57.

<sup>36</sup> Newhart, above n 31, 157.

subsequent definitive laboratory analysis of the samples using GLC-MS or HPLC-MS for the greatest precision, sensitivity and specificity.<sup>37</sup> Numerous academic research papers describe the performance of the various laboratory assays and immunochromatographic kits for detection and/or measurement of cannabinoids/THC and their metabolites in biofluids, as well as the performance of various oral fluid sampling devices. The presence of THC in oral fluid is taken as an indication of recent cannabis use, and its detectability diminishes over a period of many hours, depending on the amount of THC ingested and the frequency of use. Typically, THC will remain detectable for around 12 hours in infrequent, 'recreational' users, and around 30 hours in frequent users. As noted elsewhere, oral fluid THC concentrations may correlate with blood, etc concentrations, however, they are rarely individually predictable per se.<sup>38</sup>

Individuals who have smoked, vaporised or used an oral spray of cannabis invariably have their oral mucosa contaminated with residues from the dosage, producing oral fluid THC concentrations totally unrepresentative of concurrent blood concentrations. In various research studies of volunteering cannabis smokers, one study with nabiximols (Sativex®), an orally sprayed medicinal cannabis preparation, found that maximum oral fluid THC concentrations ranged from 1323–18 216 ng/ml, being up to 67 per cent the strength of the applied dose.<sup>39</sup> Similarly high oral fluid THC concentrations have been found after smoking a single cannabis cigarette.<sup>40</sup> Such concentrations, which are hardly pharmacologically meaningful, would, of course, 'wash away' over time, but at highly variable times, typically hours. Similar conclusions have also been found in some studies for CBD after ingestion of Sativex®.<sup>41</sup> CBD is mentioned specifically because there is

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<sup>37</sup> This summary provides a generalised overview of the roadside testing process; it is not always easy to obtain the actual procedures and performance specifications used by local authorities.

<sup>38</sup> See, eg, Sarah M R Wille et al, 'Evaluation of  $\Delta^9$ -Tetrahydrocannabinol Detection Using DrugWipe5S® Screening and Oral Fluid Quantification After Quantisal™ Collection for Roadside Drug Detection Via a Controlled Study With Chronic Cannabis Users' (2015) 7(3) *Drug Testing and Analysis* 178; Trudy Van der Linden, Peter Silverans and Alain G Verstraete, 'Comparison Between Self- Report of Cannabis Use and Toxicological Detection of THC/THCCOOH in Blood and THC in Oral Fluid in Drivers in a Roadside Survey' (2014) 6 *Drug Testing and Analysis* 137.

<sup>39</sup> Dayong Lee et al, 'Can Oral Fluid Cannabinoid Testing Monitor Medication Compliance and/or Cannabis Smoking During Oral THC and Oromucosal Sativex Administration?' (2013) 130(1–2) *Drug and Alcohol Dependence* 68, 72.

<sup>40</sup> See, eg, Marilyn A Huestis and Edward J Cone, 'Relationship of  $\Delta^9$ -Tetrahydrocannabinol Concentrations in Oral Fluid and Plasma After Controlled Administration of Smoked Cannabis' (2004) 28(6) *Journal of Analytical Toxicology* 394.

<sup>41</sup> See, eg, Anna Molnar et al, above n 25.

respectable evidence that it can oppose various effects of THC,<sup>42</sup> whilst having no significant psychomotor impairing effects of its own.<sup>43</sup> These studies do not, of course, invalidate oral fluid as a medium for detecting cannabis ingestion, but they do not give confidence in predicting resultant pharmacological effects from the THC concentrations. Other studies have reported on the duration of detectability of THC after smoking a cannabis cigarette. Primarily, its detectability is a function of the performance specifications of the testing system; clearly a lower cuff-off level determines a greater proportion of positives than the higher cut-off.<sup>44</sup> Other research indicates the variability of the THC oral fluid to blood, etc ratio between individuals.<sup>45</sup>

Much of the reported research testing of cannabis makes comparisons between volunteer users typically classified as 'regular', 'chronic' or 'heavy' in contrast to 'occasional' users. The data obtained from 'regular' users of 'recreational' cannabis indicate detectability (by GLC- or HPLC- based techniques) that can track the presence of the pharmacologically inactive end metabolite of THC (THC-COOH) for some 30 days after ingestion,<sup>46</sup> presumably being produced from THC that is slowly washed out from fatty stores.<sup>47</sup> In another influential study, for example, the coefficient of variation ( $R^2$ ) of blood THC concentration from oral fluid was found to be 0.122, indicating a very low predictability, and thus a very low predictability of psychomotor performance, as opposed to high predictability of detection of cannabis ingestion.<sup>48</sup>

Thus, the principal issues focus on whether the oral fluid concentration of THC alone is sufficient evidence to justify a conclusion of significant psychomotor impairment and/or impaired driving ability, given the probability of sample contamination from dosage residues, of individual misrepresentation by oral fluid of the THC blood

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<sup>42</sup> Sagnik Bhattacharyya et al, 'Opposite Effects of  $\Delta$ -9-Tetrahydrocannabinol and Cannabidiol on Human Brain Function and Psychopathology' (2010) 35(2) *Neuropsychopharmacology* 764, 769.

<sup>43</sup> John M McPartland et al, 'Are Cannabidiol and  $\Delta$ 9- Tetrahydrocannabinol Negative Modulators of the Endocannabinoid System? A Systematic Review' (2015) 172(3) *British Journal of Pharmacology* 737, 746.

<sup>44</sup> Matthew N Newmeyer et al, 'Cannabinoid Disposition in Oral Fluid After Controlled Cannabis Smoking in Frequent and Occasional Smokers' (2014) 6(10) *Drug Testing and Analysis* 1002, 1009–1010.

<sup>45</sup> See, eg, Wendy M Bosker and Marilyn A Huestis, 'Oral Fluid Testing for Drugs of Abuse' (2009) 55(11) *Clinical Chemistry* 1910.

<sup>46</sup> Mateus M Bergamaschi et al, 'Impact of Prolonged Cannabinoid Excretion in Chronic Daily Cannabis Smokers' Blood on Per Se Drugged Driving Laws' (2013) 59 *Clinical Chemistry* 519, 519.

<sup>47</sup> Alexander Wong et al, 'Fasting and Exercise Increase Plasma Cannabinoid Levels in THC Pre-Treated Rats: An Examination of Behavioural Consequences' (2014) 231(20) *Psychopharmacology* 3987, 3987.

<sup>48</sup> V Vindenes et al, 'Detection of Drugs of Abuse in Simultaneously Collected Oral Fluid, Urine and Blood From Norwegian Drug Drivers' (2012) 219(1) *Forensic Science International* 165, 168.

concentrations,<sup>49</sup> and of antagonism to psychotropic effects of THC by concurrently ingested CBD.<sup>50</sup> One recent Australian study is noteworthy.<sup>51</sup> Here, 21 heavy cannabis users admitted to a Melbourne detoxication unit had their blood and oral fluid THC (and the end metabolite THC-COOH) concentrations measured by HPLC-MS daily, over seven days of abstinence.<sup>52</sup> Any impairment, if present, was not mentioned, but the subjects were abstemious during the tested period.<sup>53</sup> The concentration results showed marked inter-individual variability and unexpected intra-individual variability. For example, in the nearest (first or second) samples, the THC blood concentrations varied in these abstemious subjects from 1–13 ng/ml whilst the corresponding oral fluid concentrations varied from not detectable (in 6 of the 21 subjects) to 16 ng/ml, and the respective relative maximum blood and oral fluid concentrations ranged from 13–1 ng/ml after 31 hours in one subject to 6–16 ng/ml also at 31 hours in another subject.<sup>54</sup> Thus, variability is great, and predictability is poor. The authors concluded that:

The implications for forensic practitioners who have to interpret THC toxicology from the witness box are challenging. THC kinetics in heavy users appears to be highly variable and there is no easy interpretation which will allow a useful estimation of time of use from a single measurement.<sup>55</sup>

Forensically tested subjects include those selected randomly, those suspected of actual driving violations and those tested post-mortem after a fatal crash. In such cases, dosing and sampling variables are normally far from controlled, and documentation normally far from complete. This typically leads to wide-ranging and non-specific statements:

Epidemiologic data show that the risk of involvement in a motor vehicle accident (MVA) increases approximately 2-fold after cannabis smoking...Nearly two thirds of US trauma center admissions are due to motor vehicle accidents (MVAs), with almost 60% of such

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<sup>49</sup> See, eg, J G Ramaekers et al, 'Cognition and Motor Control as a Function of  $\Delta^9$ -THC Concentration in Serum and Oral Fluid: Limits of Impairment' (2006) 85(2) *Drug and Alcohol Dependence* 114.

<sup>50</sup> See, eg, A W Zuardi et al, 'A Critical Review of the Antipsychotic Effects of Cannabidiol: 30 Years of a Translational Investigation' (2012) 18(32) *Current Pharmaceutical Design* 5131; Tibor M Brunt et al, 'Therapeutic Satisfaction and Subjective Effects of Different Strains of Pharmaceutical-Grade Cannabis' (2014) 34(3) *Journal of Clinical Psychopharmacology* 344; Francesca Indorato et al, 'The Therapeutic Use of Cannabinoids: Forensic Aspects' (2016) 265 *Forensic Science International* 200; John M McPartland et al, above n 43.

<sup>51</sup> Morris S Odell et al, 'Residual Cannabis Levels in Blood, Urine and Oral Fluid Following Heavy Cannabis Use' (2015) 249 *Forensic Science International* 173.

<sup>52</sup> Ibid 174–175.

<sup>53</sup> Ibid 173.

<sup>54</sup> Ibid 176–177.

<sup>55</sup> Ibid 179.

patients testing positive for drugs or alcohol...Alcohol and cannabis are the drugs most frequently detected.<sup>56</sup>

In a widely cited research study performed in healthy volunteers with smoked cannabis cigarettes containing known amounts of THC,<sup>57</sup> the proportion of observations showing impairment of performance test skills related to driving progressively increased as a function of serum THC concentration, with a threshold of impairment occurring with serum concentrations between 2–5 ng/ml, and with significant impairment at serum concentrations between 5–10 ng/ml.<sup>58</sup> However, serum concentrations are assessed at the roadside only by oral fluid estimates. These authors also found that the THC concentrations in oral fluid were much higher than those in serum, and that the THC oral fluid to serum ratio decreased to eventually become essentially constant;<sup>59</sup> indeed, they found that there was a strong linear relation ( $r = 0.84$ ) between log-transformed THC concentrations in serum and oral fluid.<sup>60</sup> However, their data show that variability in the ratio was 10–30-fold.<sup>61</sup> Furthermore, they reported that:

Regression analysis indicated linear relations between changes in performance impairment and log-transformed THC levels in both serum and oral fluid. However, the associated correlations were always rather low, in the range of 0.15–0.40. The lack of a strong association seems to indicate that serum THC cannot be taken as an accurate predictor of the magnitude of performance impairment.<sup>62</sup>

Without question, this study showed that THC in oral fluid was a valid marker of recent ingestion of cannabis. However, if used forensically with oral fluid providing such a variable estimate of the serum THC concentration, and with the serum THC concentration providing such a variable estimate of the performance impairment, is it not unreasonable to conclude that the oral fluid THC provides a variable estimate of the performance impairment?

Increasing numbers of research studies are being performed using acute impairment measures in various psychometrics, including skills in driving vehicle simulators. This

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<sup>56</sup> Rebecca L Hartman and Marilyn A Huestis, 'Cannabis Effects on Driving Skills' (2013) 59(3) *Clinical Chemistry* 478, 478–79 (citations omitted).

<sup>57</sup> J G Ramaekers et al, above n 49.

<sup>58</sup> Ibid 114.

<sup>59</sup> Ibid 119.

<sup>60</sup> Ibid 118.

<sup>61</sup> Ibid 120.

<sup>62</sup> Ibid 119.



literature also broadly indicates increasing impairment with increasing THC concentrations in biofluids, but it is, so far, difficult to interpret as to where there is a reasonable cut-off corresponding to 'probably not impaired'. In comparison, useful information about alterations to the driving ability of medical patients having cannabis pharmacotherapy comes from observational reports, and these clinical studies are more pertinent because of the longer duration of routine treatments.<sup>63</sup> For example, in one recent report of adverse events in 77 patients with multiple sclerosis having 6 months of Sativex® for pharmacotherapy of spasticity, improved ability occurred in 5, no changes in 71, and only 1 had loss of ability; after 12 months, data from 57 patients indicated improvement in 2 and no change in 55.<sup>64</sup>

In the same context, Dr William Notcutt of James Paget University Hospital in the UK, one of the most experienced clinicians with medicinal cannabis in Europe, concluded his co-authored chapter in a major textbook about medicinal cannabis with a Questions and Answers section.<sup>65</sup> One of the questions, 'Can you drive when using medicinal cannabinoids?'<sup>66</sup> yielded the following answer:

Different countries will have different attitudes and laws concerning driving and the use of cannabis (whether used recreationally or medicinally). Most will have yet to produce appropriate advice to patients. In the UK it is for patients to determine their own fitness to drive and it may be the disease itself or the therapy or other medication that hinders this. Most patients manage this decision satisfactorily...However, it also seems likely that any impairment is probably well within the range of (or lower than) what is currently produced by other pharmaceutical agents which are commonly used for similar

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<sup>63</sup> See, eg, Donald E Greydanus et al, 'Cannabis: Effective and Safe Analgesic?' (2014) 7(3) *Journal of Pain Management* 209; T Rekand, 'THC: CBD Spray and MS Spasticity Symptoms: Data From Latest Studies' (2014) 71(1) *European Neurology* 4; M Freidel et al, 'Drug- Resistant MS Spasticity Treatment With Sativex® Add- On and Driving Ability' (2015) 131(1) *Acta Neurologica Scandinavica* 9; William G Notcutt, 'Clinical Use of Cannabinoids for Symptom Control in Multiple Sclerosis' (2015) 12(4) *Neurotherapeutics* 769;

Ó Fernández, 'THC: CBD in Daily Practice: Available Data from UK, Germany and Spain' (2016) 75(1) *European Neurology* 1.

<sup>64</sup> Celia Oreja-Guevara et al, 'Observational Safety Study of THC: CBD Oromucosal Spray (Sativex) in Multiple Sclerosis Patients with Spasticity' (2015) 5(184) *Clinical and Experimental Pharmacology* 2161, 2163.

<sup>65</sup> William Notcutt and Emily L Clarke, 'Cannabinoids in Clinical Practice: A UK Perspective' in Roger Pertwee *Handbook of Cannabis* (Oxford University Press, 2014) 415, 421–424.

<sup>66</sup> *Ibid* 423.

conditions (including opiates, benzodiazepines, tricyclic antidepressants, baclofen, etc).<sup>67</sup>

In other studies of motor traffic crashes, THC was the most frequently found drug in the first large-scale, case controlled, study of motor vehicle crashes in America to include drugs other than alcohol.<sup>68</sup> Compared to other drugs, the estimated relative risk rates reported from a crash risk study, it appears that THC is associated with a significantly elevated risk of crashing (by about 1.25 times).<sup>69</sup> Similarly, the use of any illegal drugs is associated with a significant increase in the risk of crashing (by 1.21 times).<sup>70</sup> However, the authors pointed out that:

These unadjusted odds ratios must be interpreted with caution as they do not account for other factors that may contribute to increased crash risk. Other factors, such as demographic variables, have been shown to have a significant effect on crash risk. For example, male drivers have a higher crash rate than female drivers. Likewise, young drivers have a higher crash rate than older drivers. To the extent that these demographic variables are correlated with specific types of drug use, they may account for some of the increased crash risk associated with drug use.<sup>71</sup>

The authors concluded that:

This study of crash risk found a statistically significant increase in unadjusted crash risk for drivers who tested positive for use of illegal drugs (1.21 times), and THC specifically (1.25 times). However, analyses incorporating adjustments for age, gender, ethnicity, and alcohol concentration level did not show a significant increase in levels of crash risk associated with the presence of drugs. This finding indicates that these other variables (age, gender, ethnicity and alcohol use) were highly correlated with drug use and account for much of the increased risk associated with the use of illegal drugs and with THC.<sup>72</sup>

Recently published statistical research (that reanalysed previously reported data) concluded that various previous estimates of odds ratios of cannabis driving risks had

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<sup>67</sup> Ibid 423–424 (citations omitted).

<sup>68</sup> Compton and Berning, above n 26, 1.

<sup>69</sup> Ibid 4.

<sup>70</sup> Ibid 8.

<sup>71</sup> Ibid 4.

<sup>72</sup> Ibid 8.

been over-estimated.<sup>73</sup> Another laboratory research study in chronic cannabis smokers found prolonged neurocognitive impairment to various laboratory tasks, only partially recovered over three weeks of continuously monitored abstinence after smoking cannabis.<sup>74</sup> Several possible explanations include that such impairments arose from withdrawal from daily cannabis use, or from residual THC concentrations in blood;<sup>75</sup> alternatively, that prolonged impairment may have resulted from cumulative lifetime intake and reflect persistent changes in psychomotor functions in chronic cannabis smokers.<sup>76</sup>

From studies on cannabis detection in 'recreational' users, it has been reported that their oral fluid concentrations progressively decreased and median concentrations fell from 218 (range 28.4–2354) ng/ml 1 hour after smoking, to 71.1 (7.5–350) ng/ml after 2 hours in chronic, frequent smokers, as compared to 93.6 (48.4–561) ng/ml to 78.3 (23.4–1080) ng/ml within the same interval in occasional smokers;<sup>77</sup> and that 13.5 hours after smoking, 100 per cent of 24 specimens were still THC positive with median concentrations of 2.8 (0.8–18.4) for frequent and 1.8 (0.8–34.5) ng/ml for occasional cannabis smokers.<sup>78</sup> Median THC last detection times for frequent and occasional smokers were >30 (13.5–>30) and 27 (21–>30) hours respectively, documenting no significant differences ( $p = 0.067$ ) up to 30 hours.<sup>79</sup> In all of these metrics, the variability is large, and the predictability is poor. Such variability includes that due to contamination from the ingested cannabis, as well as that inherent in all other parts of its physiological distribution, the specimen collection and measurement.<sup>80</sup>

Given that any impairment will be more related to THC in plasma and not oral fluid, how can one assess impairment from THC measured in oral fluid alone? Surely any

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<sup>73</sup> Ole Rogeberg and Rune Elvik, 'The Effects of Cannabis Intoxication on Motor Vehicle Collision Revisited and Revised' (2016) 111(8) *Addiction* 1348. For subsequent discussion on this research see Hallvard Gjerde and Jørge Mørland, 'Risk for Involvement in Road Traffic Crash During Acute Cannabis Intoxication' (2016) 111(7) *Addiction* 1492; Ole Rogeberg and Rune Elvik, 'Response: Cannabis Intoxication, Recent Use and Road Traffic Crash Risks' (2016) 111(8) *Addiction* 1495.

<sup>74</sup> Wendy M Bosker et al, 'Psychomotor Function in Chronic Daily Cannabis Smokers During Sustained Abstinence' (2013) 8(1) *Public Library of Science* 1, 5.

<sup>75</sup> *Ibid* 5–6.

<sup>76</sup> *Ibid* 6.

<sup>77</sup> Sebastien Anizan et al, 'Oral Fluid Cannabinoid Concentrations Following Controlled Smoked Cannabis in Chronic Frequent and Occasional Smokers' (2013) 405(26) *Analytical and Bioanalytical Chemistry* 8451, 8454.

<sup>78</sup> *Ibid*.

<sup>79</sup> *Ibid*.

<sup>80</sup> *Ibid* 8452.

correlation between oral fluid THC after cannabis smoking and pharmacological effects would be temporal due to comparable detection windows, rather than a causal relationship. The relevant question is: does the minimum detectable level of THC by the current standard roadside screen accurately (or even reasonably) define a driver, who has ingested cannabis, at risk of causing a road traffic crash beyond that of a driver without a minimum detectable THC level? Additionally, what cut-off level is reasonable to impose under more informative conditions? A fairer means to define a threshold level of meaningful impairment would need to be drawn from the probability of impairment as a function of THC blood-related concentration. This proposition reflects the suggestions made by prominent Australian cannabis policy researchers who concluded:

Given the limited scientific evidence for a per se level of THC the Australian drug testing regimes lack evidential support. The illegality of cannabis has prompted a 'zero tolerance' approach in Australia with any detectable amount of the drug tested constituting an offence. On this policy, the definition of a per se level is irrelevant because road safety benefits are secondary to enforcement of drug laws.<sup>81</sup>

#### VIII DRUG-DRIVING LAWS AND THE UNEASY ANALOGY OF CANNABIS WITH ALCOHOL

Although current drug-driving laws in Australia, as elsewhere, have been informed by alcohol-driving research, there are some marked dissimilarities between alcohol and cannabis/THC that merit further consideration with respect to driving impairment. Roadside testing procedures for alcohol have evolved to deter the driving of motor vehicles whilst under impairment (or risk of impairment) after the consumption of alcohol. These procedures have been accepted by society for several decades and are supported by extensive epidemiological and pharmacological evidence demonstrating that the risks of driving impairment and road crash are related to the dose of alcohol, and that the resultant body burden of alcohol that can be assessed from its readily measured concentrations in expired air/breath (and/or biofluids).

Alcohol is the same unique chemical substance (ethyl alcohol, ethanol) regardless of ingested form, and is typically consumed in knowable doses of 10s of grams. Roadside testing is satisfactorily performed on breath samples because alcohol is a volatile

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<sup>81</sup> Wayne Hall and Ross Homel, 'Reducing Cannabis- Impaired Driving: Is There Sufficient Evidence for Drug Testing of Drivers?' (2007) 102(12) *Addiction* 1918, 1918 (citations omitted).

substance and the combination of its high vapour pressure and large doses permit readily measurable quantities in breath. A dose-biofluid/breath alcohol concentration-impairment relationship (a graded response) has been agreed from vast research evidence. In Australia, an offence is caused by driving a motor vehicle whilst exceeding a lower threshold breath (and/or biofluid) alcohol concentration that has been deemed, after research, to be associated with impairment. Whereas in some countries, a similar threshold THC concentration-impairment (graded response) approach has been adopted for cannabis, in Australia, driving a motor vehicle and returning a positive test result for THC (all-or-none response) causes an offence, and no demonstration of influence or driving impairment is required.

Other research, also framed in this context of 'recreational' cannabis use, indicates that cannabis (THC) and alcohol may be additive in their influence on psychomotor performance and driving impairment.<sup>82</sup> For example, Hartman et al found on one test considered to be a sensitive vehicular control indicator that, allowing for inter-subject variability, blood THC concentrations of 3.2, 8.2 and 13.1 ng/ml produced similar impairments to 0.02, 0.05 and 0.08 g/210L breath alcohol concentrations respectively.<sup>83</sup> Regarding DUID laws, the authors of this study propose that '[c]hosen driving-related THC cut-offs should be considered carefully to best reflect performance impairment windows'<sup>84</sup> and suggest that their 'results will help facilitate forensic interpretation and inform the debate on drugged driving legislation.'<sup>85</sup>

While cannabis also may be ingested in a variety forms, the composition and doses of its various pharmacologically active components, including THC, are normally unknowable and depend on many factors, including the chosen mode of administration (whether smoked, or inhaled, or swallowed by mouth), with the resultant doses typically in the range of sub-milligrams to 10s of milligrams. The marked differences between alcohol and THC in chemical and physicochemical properties give rise to marked differences in pharmacokinetic properties. Whereas alcohol is totally water soluble and rapidly distributes throughout the body, THC and the principal cannabinoids are virtually water

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<sup>82</sup> See, eg, Rebecca L Hartman et al, 'Cannabis Effects on Driving Lateral Control With and Without Alcohol' (2015) 154 *Drug and Alcohol Dependence* 25.

<sup>83</sup> Ibid 28.

<sup>84</sup> Rebecca L Hartman et al, 'Controlled Cannabis Vaporizer Administration: Blood and Plasma Cannabinoids With and Without Alcohol' (2015) 61(6) *Clinical Chemistry* 850, 850. Note the use of the term 'cut-offs' in this literature.

<sup>85</sup> Ibid.

insoluble but are highly fat soluble, and this affects their body distribution by favouring their rapid and extensive uptake into fatty tissues, with slow release back into the blood, typically over periods measured in days to weeks.

The overall elimination of alcohol can be described by a capacity-limited model, with a high maximum rate of metabolism, and a biological half-life of a few to several hours.<sup>86</sup> In contrast, THC pharmacokinetics and pharmacodynamics are determined by the mode of administration, but with an overall biological half-life in the order of days to weeks due to the very slow rate of washout from body fat pools.<sup>87</sup> This is reflected by findings of traces of THC in blood for up to a month after ingestion of cannabis.<sup>88</sup> Clearly, with modern techniques allowing greater sensitivity, longer and longer durations of detection are possible, until long after the pharmacological effects have dissipated. With any drug, including THC, detector sensitivity is normally the limiting factor in any analysis; the lowest LOD will be reached despite an abundance of molecules of the substance being present in biofluids.

#### IX SOME CONCLUSIONS

The question fundamental to this paper, and to the issue of DUID laws, ultimately asks whether, after cannabis ingestion and positive roadside oral fluid testing, is the individual 'cannabis-impaired, or, just cannabinoid positive?'<sup>89</sup> Cannabis is presently being treated as an illegal drug substance, not a medicine to be used by medical patients. As written, for example, in NSW legislation, the offence is to drive a car with 'prescribed *illicit* drug present in oral fluid, blood or urine.'<sup>90</sup> Should cannabis be made a legal drug, a plain English reading of the Act suggests that 'illicit' would no longer pertain. Additionally, it is noted in sub-s (5) of the Act, that protection appears to be afforded to

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<sup>86</sup> See, eg, N H Holford, 'Clinical Pharmacokinetics of Ethanol' (1987) 13(5) *Clinical Pharmacokinetics* 273; Åke Norberg et al, 'Role of Variability in Explaining Ethanol Pharmacokinetics' (2003) 42(1) *Clinical Pharmacokinetics* 1.

<sup>87</sup> See, eg, Stig Agurell et al, 'Pharmacokinetics and Metabolism of  $\Delta^1$ -Tetrahydrocannabinol and Other Cannabinoids With Emphasis on Man' (1986) 38(1) *Pharmacological Reviews* 21; Franjo Grotenhermen, 'Pharmacokinetics and Pharmacodynamics of Cannabinoids' (2003) 42(4) *Clinical Pharmacokinetics* 327; Alexander Wong et al, above n 47.

<sup>88</sup> Mateus M Bergamaschi et al, above n 46, 519.

<sup>89</sup> John P Bederka Jr, 'Marijuana-Impaired, or, Just Cannabinoid Positive?' in James T O'Donnell II and James J O'Donnell III (eds), *O'Donnell's Drug Injury* (Lawyers & Judges Publishing Company, 4<sup>th</sup> ed, 2016).

<sup>90</sup> *Road Transport Act 2013* (NSW) s 111(1) ('the Act') (emphasis added). In NSW at least, 'prescribed illicit drug' means '(a) delta-9-tetrahydrocannabinol (also known as THC), (b) methylamphetamine (also known as speed), (c) 3,4-methylenedioxymethylamphetamine (also known as ecstasy)': at s 4.

the offence deemed by the presence of morphine in a person's blood or urine, in that it is a defence to a prosecution for an offence against sub-s (3):

It is a defence to a prosecution for an offence against subsection (3) if the defendant proves...the presence in the defendant's blood or urine of morphine was caused by the consumption of a substance for medicinal purposes...or if from a codeine-based medicine purchased from a pharmacy that has been taken in accordance with the manufacturer's instructions.<sup>91</sup>

This suggests some room for adaption towards cannabis. Until more becomes known, it is suggested that the lawful use of cannabis by patients should be preceded by medical practitioner counselling about the relevant effects of cannabis, along with a 'fitness to drive' medical assessment, as described under Austroads Medical Standards For Licensing.<sup>92</sup>

As related above, an oral fluid drug concentration measure is not causative of any pharmacological effect; it may correlate with some pharmacological effect, but then again it may not. A blood, plasma or serum measure would present a more reasonable case, if calibrated to exclude the lower portions of the dose-response relationship where uncertainty is greatest. In this regard, the analogy of alcohol is pertinent. Moreover, various reports indicate that even amongst seasoned 'recreational' users, most have insight as to their degree of mental impairment and would judge their ability to drive accordingly. Medical patients reportedly achieve the desired effects to live a normal life and to meet their social obligations.

This paper, prepared by a pharmacologist not trained in the law, is intended to stimulate re-evaluation of the criteria under which users of cannabis might be judged legally. It presents the opinion that, based on the available evidence, the issue of driving while a relevant drug, THC, was present in saliva, is not well-addressed by the current roadside testing of saliva/oral fluid for THC. It forms the opinion that, on pharmacological grounds, it is not possible to infer impairment from the roadside testing of THC in oral fluid alone.

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<sup>91</sup> Ibid sub-ss (5)–(6).

<sup>92</sup> Austroads and National Transport Commission, 'Assessing Fitness to Drive for Commercial and Private Vehicle Drivers: Medical Standards for Licensing and Clinical Management Guidelines' (Health Professional Resource, 5<sup>th</sup> ed, October 2016) 117.

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# A PERSONAL EXPERIENCE WITH SUFFERING PATIENTS: BRINGING HOME THE ASSISTED DYING DEBATE

RODNEY SYME\*

*This manuscript details the author's experiences with the assisted dying debate in Australia. As a practiced physician and end-of-life counsellor, Dr Rodney Syme speaks about his commitment to respecting the dignity and autonomy of his patients. He advocates for the de-criminalisation of assisted dying, arguing that existing Australian legislation is based upon outdated perspectives, not adequately informed by the voices of suffering patients. Ultimately, this manuscript speaks to our universal humanity, requesting that we privilege a patient's right to control their death over our blind preference for the preservation of a painful life.*

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## I INTRODUCTION

Since the time Marshall Perron's Rights of the Terminally Ill Bill was proposed in 1995, there has been a vigorous "debate" about euthanasia in Australia. Just what has been in debate has never been entirely clear, due to differing interpretations of language. Even the understanding of the classical word "euthanasia" has been subjective and vague. What might be a "good death" for one person might be a "bad death" for another, which is one reason why the eminent bio-ethicist Margaret Pabst-Battin coined the term 'least

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worst death'.<sup>1</sup> In the Netherlands, where the birth of modern assistance of dying developed, the Government's Rummelink Commission adopted a very strict definition in order to carefully study practices and outcomes.<sup>2</sup> They made it clear that the term 'euthanasia' was only applicable to ending of life with the explicit request of a person, and that it was a medical action with the specific intention of ending life. If ending of life occurred without consent, it was defined as non-voluntary euthanasia. These definitions did not include the reason for the action (the relief of suffering), nor the circumstance (unbearable suffering). It was a useful definition for statistical purposes, but did not tell the whole story, and allowed 'euthanasia' to be described as intentional killing.

The Rummelink Commission clearly differentiated the provision of medication for the person to end their own life as "assisted suicide". Euthanasia has come to be understood in practice as the delivery of a lethal injection which quickly terminates life. From the outset, an anaesthetic model of intravenous sedation followed by muscle relaxants to stop breathing was adopted, and assisted suicide was actually very uncommon. After some years of covert practice, the Dutch Government, in consultation with the Dutch Medical Association, agreed in 1984 not to prosecute doctors, provided certain criteria of good practice were adhered to. In 2002, a formal law was passed to give statutory protection to doctors who, with due care, responded to explicit requests from persons with unbearable and enduring suffering. Suffering was the issue, not any specific illness or stage of illness. The person did not have to be terminally ill.

This step was based on a belief that law should be guided by reality, rather than perpetuate legal fictions. Medical practitioners were already practicing these behaviours in an effort to uphold their patients' autonomy. Decriminalisation and regulation allowed for safe, consistent procedures to be followed. This inevitably increased the control suffering people had over the quality of their deaths, and allowed doctors to act without fear of prosecution. In Australia, the law has not developed in this way at all.<sup>3</sup> Suicide was decriminalised in the 1960s, but aiding and abetting suicide remained a crime. Exactly what this phrase means in a medical context has never been

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<sup>1</sup> Margaret Pabst Battin, 'The Least Worst Death' (1996), 22(3) *Journal of Medical Ethics* 183.

<sup>2</sup> Paul J Van der Maas et al, 'Euthanasia and Other Medical Decisions Concerning the End of Life' (1991) 338(8768) *The Lancet* 669.

<sup>3</sup> The law does vary to some extent across jurisdictions, but although my reflections are based primarily off my experiences as a physician in Victoria, I believe my insights apply to the Australian context generally.

clear, since to my knowledge only one doctor has ever been charged with this offence (Daryl Stephens in Western Australia), and that was for concocted reasons.<sup>4</sup> A jury took less than 10 minutes to find him not guilty. Australian law does nothing to protect doctors who are involved on a day-to-day basis with end-of-life decisions, and thus participate in actions which may (or actually do) hasten death. I am not aware of any special defence for doctors if they deliberately hasten death, even by a few minutes. If they can foresee that their actions could cause death, they could technically be engaging in murder.

Such actions are theoretically criminal were it not for the assumed relevance of the British Court decision of Justice Devlin in 1957 in *R v Adams*.<sup>5</sup> Dr Adams had given morphine injections to his stroke patient and the police alleged that he had deliberately intended to cause her death. Justice Devlin famously stated ‘the giving of drugs to an elderly patient to alleviate pain was lawful even if incidentally it shortened the patient’s life’. It has been accepted in the broader sense that if a doctor’s intention is to relieve pain and suffering, the incidental and even foreseen consequence of hastening death is excused. This judicial decision, although from a British court, has been generally accepted to apply to Australian jurisdictions. A form of legal “double effect” (based on the doctor’s expressed intention to relieve suffering), has allowed Australian doctors to “ease dying” with relative impunity.

No Australian doctor has been charged with murder or attempted murder in the last 60 years. Published surveys of medical practice reveal that doctors do assist patients to die, largely on a “wink wink, nod nod” basis, using large doses of narcotics like Adams.<sup>6</sup> Much of this happens in the security of the home, though specialists may oblige in hospitals. Nevertheless, all it takes for trouble to ensue is one complaint from a disgruntled relative or a morally challenged colleague or nurse for referral to the Medical Board, or possibly investigation by police and prosecution, to occur. It is no wonder that doctors are extremely cautious in talking openly about such matters, and that evidence for practices that hasten death are rarely reported.

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<sup>4</sup>For more information on the circumstances, see Robin Bowles, *What Happened to Freeda Hayes?* (Pan Macmillan Sydney, 2002).

<sup>5</sup> *R v Adams* [1957] Crim L R 365.

<sup>6</sup> See, eg, Charles D Douglas et al, ‘The Intention to Hasten Death: A Survey of Attitudes and Practices of Surgeons in Australia’ (2001) 175(10) *Medical Journal of Australia* 511.

In the UK, in 2000, Dr Harold Shipman was prosecuted and found guilty of murdering 15 elderly patients. The police alleged that he had killed over 300 people, mostly elderly women living alone, and it was intimated that he acted for profit. Regrettably, Shipman died without ever uttering a single word of explanation for his actions, so it is unknown whether he was acting out of compassion or from greed, or whether his patients made requests to him for assistance. Shipman's activities over a long period of time were only investigated when a relative made a complaint, in this case fully justified, but that is all it takes, one complaint from a concerned relative, nurse or doctor for an investigation to occur.

Now many UK GPs are wary of giving dying patients terminal doses to relieve their suffering. Geriatrician Min Stacpole says 'Shipman has had a negative effect on the quality of dying'.<sup>7</sup> If doctors are in fear of prosecution for providing compassionate and humane assistance to their dying patient, they will not do so. Who suffers? — not the doctor. Does the fact that only one doctor has been prosecuted in Australia in 60 years give comfort? Hardly, if the protection rests on a single judicial statement in another country and on subjective notions of intention. Dr Stephens suffered two years of anxiety, damage to his practice, his finances and his marriage. It is remarkable that some Australian doctors do take these risks on behalf of their patients — they do so with a legal vulture perched on their shoulder.

## II GRIM STATISTICS, GRIM DEATHS

What do we know of doctors' practices around assistance in dying in Australia? Very little, beyond the anonymous information published by bio-ethics researchers.<sup>8</sup> This reveals that a small number of doctors acknowledged practicing 'euthanasia' and 'assisted suicide'. Most surveys show that a majority of doctors support legalisation of assistance in dying (which includes both the above practices). But how these doctors assist their patients is actually a mystery. It is certainly not comparable to euthanasia in the Netherlands (intravenous sedation for deep sleep, followed by muscle relaxant to stop breathing) or assisted suicide (quick-acting oral barbiturate after anti-emetic

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<sup>7</sup> Maggie Ferguson, 'How to Have a Good Death', *The Economist: 1843* (online), January/February 2016 <<https://www.1843magazine.com/features/how-to-have-a-good-death>>.

<sup>8</sup> See, eg, David A Neil et al, 'End-of-Life Decisions in Medical Practice: A Survey of Doctors in Victoria (Australia)' (2007) 33 *Journal of Medical Ethics* 721.

preparation). I think it is highly unlikely that a Dutch style euthanasia has ever occurred in Australia. Given that quick-acting barbiturates cannot be prescribed in Australia, the use of such medication by physicians is also likely to be uncommon. However, such drugs can be obtained from overseas countries and brought into Australia for medicinal use, probably more commonly without medical supervision than with it.

Unfortunately, assistance in dying in Australia, covert as it is, is not uncommonly attempted using combinations of drugs which are quite unsuitable. Roger Magnussen's book *Angels of Death*,<sup>9</sup> surveys a number of assisted deaths in the HIV/AIDS communities of Australia and the west coast of USA, and reports a number of badly botched attempts, but ultimately ugly deaths, due to the use of indiscriminate cocktails of drugs, which were quite unsuited to a dignified and secure end-of-life procedure. Compassionate intent was no compensation for ignorance and lack of the proper drugs. It is constantly reported that people die tragically from overdoses of narcotics, sedatives, and anti-depressants, though whether by accident or intent is not always evident. The doses ingested are rarely known and the manner of their dying is also obscure, as they usually die alone. Suffice to say that the use of such drugs to end life is fraught with uncertainty, much depending on the tolerance that develops when these drugs have been in long-term use. This is particularly so with opioids. In the absence of the ability to prescribe quick-acting barbiturates, assisted dying by oral means is highly precarious. As a consequence of the above, it should be clear that euthanasia or assisted suicide as practiced in the Netherlands is probably rare in Australia.

And can we rely on the Coroner's statistics for enlightenment? Certainly not, because when a person who is close to death takes an overdose of barbiturate, there will be no overt indication that this has happened, and thus no reason for referral of the death to the Coroner. I am convinced that, on many occasions like this, when the certifying doctor may have some suspicion of suicide, no referral is made — the matter is "let go through to the keeper". Most doctors will make no judgment about the action, will not want to embarrass the distressed family with a police interview, see no reason to delay funeral proceedings, and would regard the real cause of the death as the disease causing the intolerable suffering. I am aware of a number of circumstances where local doctors

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<sup>9</sup> Roger S Magnusson, *Angels of Death: Exploring the Euthanasia Underground* (Melbourne University Press, 1<sup>st</sup> ed, 2002).

have been aware that an overdose was planned, and turned a blind eye to the actual cause of death.

This of course raises the intriguing question as to whether such hastened deaths should be described as “suicide”. There is a world of difference between a dying person ending their life after careful thought, and discussion with their family and doctor, in order to relieve their suffering, and a violent suicide of a healthy person without any discussion and in circumstances where appropriate assistance might have avoided such a death. It is cruel and unnecessary to subject the former to society’s stigma regarding suicide (itself unfortunate) — the concept of rational suicide should be recognised and an exception made in its description and aftermath. The Coroner is in a cleft stick in these matters. The law mandates an investigation if the death is reported (no death certificate signed) and toxicology reveals the presence of *Nembutal* in the blood.<sup>10</sup> Even though the dying person was at death’s door, a Coroner’s investigation must take place, with the police involved to interview anyone who might have been present when death occurred or might have knowledge of the matter. Experienced police officers are effectively going through the motions, collecting information rather than pursuing prosecution.

The South Australian Coroner confirmed his experience with tragic suicides of ill elderly persons in a letter to Marshall Perron. He wrote:

[T]his is a subject for politicians who are quite capable of ascertaining the facts and publishing them in the Parliaments if they wish to do so ... Any politician who cared to inquire of any coroner could quickly become acquainted with at least an anecdotal idea of the extent of the issue.<sup>11</sup>

Despite what I believe is significant inaccuracy in the Coroner’s statistics on suicide in the elderly and terminally ill, Victorian Coroner John Olle nevertheless described to the Victorian Parliamentary Committee of Inquiry into End of Life that between 2009 and 2013, 240 cases of suicide were reported in which there was evidence that the deceased had experienced an irreversible deterioration in physical health due to disease or

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<sup>10</sup> *Nembutal* is a brand of pentobarbitone, a form of quick-acting barbiturate discussed earlier in the paper.

<sup>11</sup> Dying with Dignity Victoria, Submission No 623 to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices*, July 2015, 16.

injury.<sup>12</sup> Most of these deceased were suffering from multiple diseases — 50 per cent had cancer, 10 per cent had diabetes, 10 per cent had arthritis, 8 per cent had cardiovascular diseases, 5 per cent had Parkinson's disease, and 4 per cent had Huntington's disease. 74 died of poison, 64 by hanging, 34 by firearms, 19 by a threat to breathing, 13 by a motor vehicle accident, and 8 by a rail accident.<sup>13</sup> Grim statistics, grim deaths, and note that up to 50 per cent may not have had a terminal illness. Intolerable suffering is not confined to terminal illness. Advanced incurable illnesses may have intolerable suffering that can last far longer than that of a terminal illness.

### III MY EXPERIENCE WITH SUFFERING PATIENTS

I have had a particular interest in end-of-life matters for over 40 years. I have made an intense study of the bio-ethical literature around end-of-life, and the palliative care literature since 1996 when I became aware of terminal sedation. I have counselled well over 1500 people about their end-of-life concerns. I have attended seven *World Right to Die* conferences which involve meeting and talking with ethicists, legislators, and doctors who function in the jurisdictions of Belgium, the Netherlands, Switzerland, and Oregon, where assistance in dying is practised, and also Canadians who have so resoundingly argued the case for reform in their Supreme Court, and in ethics bodies, with the Canadian Medical Association and in their Parliament. This research and experience in counselling has convinced me of three important, self-evident truths — first, that dying may be associated with intolerable and unrelievable suffering that may escalate towards the end; second, that some suffering will only end with death; and third, that doctors have an ethical duty to relieve suffering and respect their patient's autonomy. This leads me to the conclusion that a doctor may sometimes be faced with the necessity to hasten death, if requested by his patient, in order to relieve suffering — and to uphold a patient's human dignity.

Unfortunately, the current legal environment in Australia, somewhat hypocritically, does not reflect the same commitment to patient autonomy when it comes to assisted dying. Whilst a strong focus is placed on a patient's right to life, including a firm stance

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<sup>12</sup> Coroners Court of Victoria, Submission No 1037 to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices*, 20 May 2016.

<sup>13</sup> Ibid 3.

against forceful treatment or refusal of treatment, a patient's control over the end of their life is not respected under law. This inconsistency violates a patient's autonomy at a point where it will never feel so important — when taking control over death means taking control over their life. In part, this may stem from a failure to prioritise the experiences and insights of patients making end-of-life decisions. My experience talking with, and assisting, a number of persons has lead me to question the credentials of many who commentate in the Australian "euthanasia" debate, and that includes the debates in our Parliaments. I would venture to suggest that the vast majority of commentators have no idea of what takes place in an assisted dying by oral medication. They have never seen it and probably never talked to anyone who has. They usually speak from the personal experience of only one, occasionally more, dying relatives or friends. They speak from emotion (which may be good) but also from ignorance (which is bad). They have usually not taken the trouble to study the large amount of empirical research evidence about assisted dying. They almost always introduce the subject with a comment such as "this is a very difficult and controversial matter".

I can only say that the difficulty exists in the mind of the commentator, for by the time a suffering person has had a sensitive dialogue with their family and their willing doctor, and they have reached a decision that they can go no further, there is no difficulty, only an extraordinary calmness which has to be seen to be believed. It is true that determining when is the time to say goodbye is the most difficult part of that decision, but once that decision is made, a relaxed calmness ensues, provided they have control. I have always believed that it is critically important that family and/or friends should be aware of such discussions, brought into an understanding of why such a serious decision is being made, helped to an acceptance of that necessity, and given the opportunity to share in the experience of a loved one dying. It is a profound experience, one that most people will treasure and never forget. It has a power to transcend grief. I do this because of the importance of saying goodbye and so that no-one will have to die alone, even though it opens up the possibility that a grieving relative may make a complaint. Suffice to say that has never happened.

There is no more powerful demonstration that a suffering person can go no further than that they take their own action to end that suffering, by ending their own life. They take that responsibility upon themselves, and do not pass it on to their doctor. It is ultimately

their responsibility, unless they are physically incapable of implementing their wishes; in that case, and in my opinion, only that case, the doctor has a responsibility to more actively assist by an injection. Placing the control directly in the hands of the suffering person is the greatest safeguard that an unwanted death will not occur.

#### IV SHORT REFLECTIONS ON THE VICTORIAN PARLIAMENTARY INQUIRY

A good debate should be an informed debate when sound argument based on fact is presented. This took place at the recent Victorian Parliamentary Inquiry. It was notable that the only institutional voices raised in opposition to change were those of the Australian Christian Lobby, the Catholic Archdiocese of Melbourne, the Australian Catholic Bishops Conference, the Australian Family Association, and Palliative Care Australia.<sup>14</sup> Cardinal George Pell has proudly stated that 55 per cent of palliative care in Australia is provided by the Catholic Church.<sup>15</sup> I believe palliative care's foundational philosophy of not hastening death condemns some of its patients to prolonged, unwanted suffering. Law Professor Margaret Otlowski gave evidence to the Parliamentary Inquiry. She has indicated that it is absolutely clear from the outcomes in lay mercy-killing cases that the prosecutorial process treats these cases differently to other killings.<sup>16</sup> Sometimes juries do not convict despite the overwhelming evidence and judges bring down non-custodial sentences.

Retired Supreme Court Justice John Coldrey gave further evidence that the law needed to be changed. He said 'these cases don't sit comfortably in a court setting. The person goes out into society labelled a murderer when their motive has been compassion and love. I'd like to see a regime where people who act in this way are not put at risk of criminal charges'.<sup>17</sup> I'd like to see a system where laypersons are not put at risk, because they can obtain advice and if necessary assistance from their protected doctor. Most of the Inquiry members travelled to the Netherlands, Switzerland, Canada, and Oregon to obtain first-hand evidence of the function of assisted dying legislation in those

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<sup>14</sup> Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices Final Report* (2016) 213.

<sup>15</sup> See, eg, Jane Cadzow, 'Our Man in Rome', *Sydney Morning Herald* (online), 16 June 2012 <<http://www.smh.com.au/lifestyle/our-man-in-rome-20120610-204wh.html>>.

<sup>16</sup> Margaret Otlowski, Submission No 841 to Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into End of Life Choices*, July 2015, 175.

<sup>17</sup> Above n 14, 175–6.



countries. The Inquiry found, as did the Supreme Court of Canada,<sup>18</sup> that the arguments put against assisted dying lacked substance, and determined that the status quo in Victoria was not sustainable. They recommended that the government legislate for assisted dying with clear safeguards — the manner of assistance was for oral administration by the suffering person, with a lethal injection only allowed if that person was not capable of self-administration. My only criticism of the recommendations in the Victorian Parliamentary Inquiry is that it confined assistance to people with weeks or months to live. By so doing, it ignored the very compelling evidence of the Victorian Coroner that intolerable suffering driving people to end their own lives was not confined to the terminally ill. The recommendation is discriminatory against people with advanced incurable illness.

#### IV CONCLUSIONS: A BENIGN CONSPIRACY?

In 1968 in Victoria, Justice Menhennitt ruled that an abortion was not illegal if it was performed to protect the life or health of a pregnant woman.<sup>19</sup> This judicial decision changed the practice of law without changing the statute (this did not happen for another 40 years) by protecting doctors from prosecution. I have argued that providing medication which gives a person with intolerable and unrelievable suffering control over the end of their life is a very significant palliative act which relieves psychological and existential suffering. I have openly admitted to providing *Nembutal* to such a patient, hoping to provoke a similar judicial outcome around assisted dying as occurred with Menhennitt and abortion. I did so because Parliaments have for years dismissed attempts to address this issue. My efforts to have this issue tested in Court have been in vain, leading me to suggest there is a “benign conspiracy” on the part of the prosecutorial authorities to also avoid this issue.

Hopefully, at last, the Victorian Parliament, faced with a comprehensive, thorough, well-researched and penetrating report from its Upper House Committee of Inquiry will pass legislation that is already so strongly supported by the community. I believe this legislation could provide patients with the means to exercise control over their suffering, and to ultimately live their final days on their own terms.

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<sup>18</sup> *Carter v Canada (Attorney General)* [2015] 1 SCR 331.

<sup>19</sup> *R v Davidson* [1969] VR 667.

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# THE ROLE OF THE CORPORATE MEGA-FIRM

JOSHUA KROOK\*

*This article discusses the role of the corporate mega-firm in shaping the dreams, aspirations, and ambitions of Australian law students. In sum, I argue that students begin law school with clear social and moral convictions and leave as apolitical, passive enforcers of the law, unable to question the legal rules and principles they have been taught. Instead of pursuing careers in social justice and other areas of public advocacy, students are taught to believe that corporate law and corporate work are the only models of success. In the face of an onslaught of corporate messaging, advertising and media, it is difficult for students to retain a sense of their own moral compass. By the end of their degrees, law students often begin to rationalise a newly market-centric outlook on life, resulting in the loss of a new generation of public advocates to corporate positions.*

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## I INTRODUCTION

One of the most overlooked aspects of legal education is the role that the corporate mega-firm plays in swaying the ambitions of students away from social justice, charity, and public service towards work in the corporate sector. In this article I discuss how corporate law firms have utilised a combination of advertising, media, and social events in order to pressure law students into believing that corporate law and corporate work are the only models of a student's future success. The question remains whether the influence of the corporate law firm is too significant in Australian law schools, and whether anything can be done to limit this influence within the wider neoliberal economic climate in Australia today.

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## II THE MEGA-FIRM'S INFLUENCE

Most Australian law schools have seen a proliferation of corporate-sponsored career fairs, parties, socials, networking events, sports, libraries and buildings, speaking events, mootings and other law school skills competitions, never mind long lists of clerkship presentations by the major firms themselves. One law dean, David Dixon, admitted that his 'university is dominated by publicity from the big law firms' and that students feel like failures if they do not get a summer clerkship at one of these firms.<sup>1</sup> Students are confronted with endless advertising by the big firms and some become 'captivated by the glamour of corporate lawyering' as a result.<sup>2</sup> Law is no longer viewed as a job, profession or "calling" in this sense, but as a lifestyle choice — a gatekeeper to weekly office sports, drinks, parties, and pork belly canapés. Some students, who face the intensity of these PR and advertising campaigns, come to appreciate certain perks of the job. These often include an 'office with a spectacular view, original artworks, lavish entertainment and high salaries',<sup>3</sup> and this overshadows any potential alternative career pathway.

Financial incentives, coming from the corporate law firms themselves, are not explicitly used to control a student's choice of career directly, but such incentives are said to be a guiding hand by which students generally make a decision.<sup>4</sup> This is not particularly surprising given the wider economic context of neoliberalism in Australia today. Within a neoliberal economic system, students are often trained to think like entrepreneurs and consumers of education instead of beneficiaries of education who view the workplace as the heart of authentic knowledge and devoting much of their time to economic considerations.<sup>5</sup> Instead of feeling motivated by public service, knowledge accumulation, or intrinsic satisfaction, students are trained to think about the prospects of attaining lifelong employment in an upward transcendence towards the richest positions in society — to positions like those offered by the major law firms.

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<sup>1</sup> Nicola Berkovic, 'Uni Helps Pupils Think Outside Box', *The Australian* (online), 31 January 2014 <<http://www.theaustralian.com.au/business/legal-affairs/uni-helps-pupils-think-outside-box/story-e6frg97x-1226814211915>>.

<sup>2</sup> Margaret Thornton, *Privatising the Public University* (Routledge, 2012) 47.

<sup>3</sup> Ibid.

<sup>4</sup> Susan Braedley and Meg Luxton, 'Competing Philosophies: Neoliberalism and the Challenges of Everyday Life' in Susan Braedley and Meg Luxton (eds), *Neoliberalism and Everyday Life* (McGill-Queen's University Press, 2010) 3, 10.

<sup>5</sup> Thornton, above n 2, 2–4.

What is ignored is the large underbelly of students, on some estimations the majority, who feel misled by this culture of “prestige” and inevitability around the practice of law that is fostered by the major law firms and their PR departments. There are extensive online forum threads in Australia asking ‘How to Improve Prospects for Law Grads’ where students and former students complain that ‘the sooner the prestige wears off and the reality of law as compared to other professions sets in, the better.’<sup>6</sup> Many law students raise concerns about the lack of knowledge available on alternative career paths while law schools remain dominated by advertising from the select few firms.<sup>7</sup> Other students raise concerns about the lack of demand for law graduates in the major firms once they graduate, despite the presence of excessive corporate advertising during their time at university.<sup>8</sup> In 2015, it was revealed that there were ‘14 600 graduates entering a legal jobs market comprising just 66 000 solicitors.’<sup>9</sup> Noting the current lack of graduate jobs, Nick Abrahams, partner of a Sydney law firm, joked ‘perhaps the answer is that rather than going to law school to become a lawyer, go to law school so you can open a law school.’<sup>10</sup>

As a result of these trends, a popular genre of law student confessionals has crossed the Pacific, and Australian law students have begun writing rants online in a similar vein to their American cash-strapped debt-riddled counterparts. Marie Iskander, then a final year law student, writes:

Despite being reluctant about pursuing a clerkship, because I didn’t feel drawn towards private law, I was convinced by peers, older lawyer friends and, of course, HR from the big law firms that ‘this is the right path’ and ‘what do you have to lose?’<sup>11</sup>

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<sup>6</sup> ‘How to Improve Prospects for Law Grads’ on *Whirlpool Forums* (13 December 2013) <<http://forums.whirlpool.net.au/forum-replies.cfm?t=2193169&p=4>>.

<sup>7</sup> Ibid.

<sup>8</sup> Neil McMahon, ‘Law of the Jungle: Lawyers Now an Endangered Species’, *The Sydney Morning Herald* (online), 11 October 2014 <<http://www.smh.com.au/national/newscustom/law-of-the-jungle-lawyers-now-an-endangered-species-20141011-114u91.html>>.

<sup>9</sup> Edmund Tadros and Kate Walsh, ‘Too Many Law Graduates and Not Enough Jobs’, *Australian Financial Review* (online), 22 October 2015 <<http://www.afr.com/business/legal/too-many-law-graduates-and-not-enough-jobs-20151020-gkdbyx>>.

<sup>10</sup> McMahon, above n 8.

<sup>11</sup> Marie Iskander, ‘The Ugly Truth About Being a Law Student’, *Lawyers Weekly* (online), 4 October 2013 <<http://www.lawyersweekly.com.au/opinion/14765-The-ugly-truth-about-being-a-law-student>>.

In this way, law students have begun to prioritise the views of the job market above and beyond the study of ethics and morality. A recent study of first year University of New South Wales ('UNSW') students found that the surveyed law students were more interested in marks than students from any other faculty.<sup>12</sup> The same students saw 'employers [as] interested in marks and not in their personal code of ethics or ... social or leadership abilities'.<sup>13</sup> Studies at the Australian National University and UNSW showed that many law students viewed their friendships as 'networking' opportunities, rather than as a form of companionship.<sup>14</sup> Other studies showed that law students prioritised working in large, corporate firms as opposed to working in firms with less financial reward or with a focus on social justice.<sup>15</sup> The literature paints a stark picture of law students becoming detached from social justice and ethics in their degrees, and beginning to focus instead on marks, networking, and career opportunities.<sup>16</sup> The risk is that, once they graduate, social-justice orientated students will get 'swallowed up [by the big firms] ... drawn in by the tempting income'.<sup>17</sup> They will end up stuck between a rock and a hard place.<sup>18</sup>

The corporate seduction and media messaging used to encourage students to go against their desires to help others, or contribute to charity and society more broadly, is hardly indicative of a supposedly "prestigious" or "honourable" profession. Indeed, in many ways, encouraging students to forgo charitable or publicly interested pursuits is dishonorable and should be called out for what it is. Once-a-week pro bono placements

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<sup>12</sup> Massimiliano Tani and Prue Vines, 'Law Students' Attitudes to Education: Pointers to Depression in the Legal Academy and the Profession?' (2009) 19(1) *Legal Education Review* 3, 24–25.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid; Molly Townes O'Brien, Stephen Tang and Kath Hall, 'Changing Our Thinking: Empirical Research on Law Student Wellbeing, Thinking Styles and the Curriculum' (2011) 21(1/2) *Legal Education Review* 149.

<sup>15</sup> Judy Allen and Paula Baron, 'Buttercup Goes to Law School: Student Wellbeing in Stressed Law Schools' (2004) 29(6) *Alternative Law Journal* 285, 286–288.

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<sup>17</sup> Joshua Krook, 'Clerking Mad', *Honi Soit* (online), 12 May 2014 <<http://honisoit.com/2014/05/clerking-mad/>>.

<sup>18</sup> Jeena Cho, 'Quitting Someone Else's Dream', *Above the Law* (online), 13 July 2015 <<http://abovethelaw.com/2015/07/quitting-someone-elses-dream/>>.

are not a supplement for becoming a public advocate. Law firms should not be rewarded for discouraging students from actually doing something charitable in the world.

Social justice students that do “sell out” often rationalise their own decision by saying that they will only work in corporate law a short while, or that they need the money to pay off their debts, or that they are going to actively avoid the worst aspects of the corporate world because they are somehow *different*.<sup>19</sup> I am not arguing here that students have lost their free will upon graduation. Rather, I argue that law students are guided and manipulated to some extent during their degrees and then utilise their free will to rationalise that loss of autonomy. The overall trend is towards a kind of “surface cynicism” — a recognition of the problem inherent in a lot of the systems that students are involved in, followed by a resignation of powerlessness, or an active justification of the system based on other largely irrelevant factors.

If the corporate world is unethical or antithetical to their original intentions, this is merely another part of adulthood, where adulthood is viewed as a long process of taking on responsibility after responsibility (defined as the act of doing something uncomfortable or unwanted). Responsibility here is not about virtue or morality, but about the resignation to the negative aspects of life, a kind of stoic defeatism, of the kind Seneca would be proud of when he uttered, ‘be happy with what you have.’<sup>20</sup> Freedom of thought (or constant questioning, scepticism, and so on) is antithetical to this view of adulthood, and is often associated instead with the mind of a young child — the kind who always asks the question “why?”. Students who stop asking why tend to start justifying why their life is the way it is. “Why go into corporate law?” is possibly the most profound question a social-justice orientated student can ask themselves, on that seemingly inevitable precipice.

William Deresiewicz in his book *Excellent Sheep* discusses how students feel trapped by the system around them, and invariably start to feel ‘self-indulgent’ if they follow any

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<sup>19</sup> Debra J Schleef, *Managing Elites: Socialization in Law and Business Schools* (Rowman & Littlefield, 2005) 74–75.

<sup>20</sup> L Annaeus Seneca, *Minor Dialogues: Together with the Dialogue On Clemency* (Aubrey Stewart trans, George Bell and Sons, 1990).



social justice or non-corporate career paths.<sup>21</sup> He poses that all these paths are self-indulgent and goes on to say:

As opposed to what? Going into consulting isn't self-indulgent? Going into finance isn't self-indulgent? Going into law, like most of the people who do, in order to make yourself rich, isn't self-indulgent? It's not okay to study history, because what good does that really do anyone, but it is okay to work for a hedge fund. It's selfish to pursue your passion, unless it's also going to make you a lot of money, in which case it isn't selfish at all.<sup>22</sup>

Deresiewicz strikes at the very heart of today's neoliberal paradigm — that a student is not selfish for going into corporate law to make money, but is selfish for going into social justice, perhaps at a personal loss or opportunity cost. It is this attitude that lies at the heart of the hesitation of students from pursuing charitable public service in law, where in reality, there is nothing “self-indulgent” about such service.

The Chief Executive of the New South Wales Law Society talks starkly of the need to inform law students about the current state of the legal market before they begin a law degree, so that they can make a more informed choice between corporate law and other careers which they are potentially giving up.<sup>23</sup> Informing students more directly about their choices is one way of combating the influence of the corporate firms, but it is unclear how this can occur while students are receiving the never-ending onslaught of glossy pamphlets from the major firms and university career departments. A single man cannot stop a tsunami, however much he might shout at it to cease and desist. The dominance of the major firms makes it very difficult for students to rationalise in their own independent way and to come to their own independent conclusions about the role they wish to play in the world.

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<sup>21</sup> William Deresiewicz, *Excellent Sheep: The Miseducation of the American Elite and the Way to a Meaningful Life* (Simon and Schuster, 2014) 95.

<sup>22</sup> Ibid.

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### III CONCLUSION

The corporate mega-firm is playing a larger role than ever before in shaping the dreams, ambitions and realities of law students. Everywhere students turn they are pressured into seeking jobs within the corporate world and are guided by incentives coming from those firms and university career departments. Although the current system can produce some independent thinkers, social justice activists and public servants, there is some evidence, as I have outlined above, that the current system turns students away from such pursuits. It is unclear at this stage what can be done about the influence of the corporate firm aside from simply informing students of the reality of the current job market, their place within it, and the fact that they have the freedom to make their own choice. Presenting students with alternative career pathways and alternative careers fairs might be one other way of counteracting prevailing forces. However, it must be admitted that within a neoliberal economic system, there is very little that institutions can do without systemic cultural change.

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# INVESTIGATING 7-ELEVEN: WHO ARE THE REAL BAD GUYS?

MICHAEL FRASER\*

*The illegal wage scandal at 7-Eleven Australia made national headlines in 2015 when it was revealed that foreign workers were being underpaid and exploited. I spent three years investigating this misconduct and along the way accumulated a unique insight into those who carried out exploitative practices and those it affected. This personal narrative discusses the challenges faced by workers and how these challenges, fears, and barriers were overcome. While workers often speak of being subjected to threatening behaviour, I have also explored the experiences of current and former franchisees, including the bullying, intimidation and racial discrimination delivered at the hands of the Head Office. Why would otherwise good people go to great lengths to engage in exploitative practices and how did mass underpayment happen to tens of thousands of foreign workers for so long without it becoming public knowledge? These questions form the basis of this personal narrative.*

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## I NARRATIVE

Australia takes prides in being a multicultural nation that embraces all genders, races and creeds. I have always appreciated that.

Prior to discovering mass-underpayment and wage fraud in 7-Eleven stores, I had been assisting disaffected Telstra customers. I recall a Caucasian masonry worker complaining to me that I should investigate 7-Eleven for discriminating against the employment of “white” people, as he had applied for work on a number of occasions and was never considered. At the time, I didn’t give it much thought. Little did I know that six months later my investigation into 7-Eleven would begin.

My three-year investigation into 7-Eleven came about after I moved directly next door to a 7-Eleven in 2012, which I would frequent and, as a result, formed close connections with the staff. In particular, there was a remarkable man named Narasimha Rao Pendem (known as Sam) who was from India, had three degrees, and appeared to work a never-ending shift.

When Sam was on shift, the store was alive and he was so well loved by the local community that he would take photos with the customers and was treated like a local celebrity. I formed a special bond with Sam and was moved by his desire to do good things and his love for our country. He wanted to marry and bring his wife to Australia. He talked about his passion for photography and how he was saving up for an \$800 camera so that he could take photos of trees, flowers and spider webs, and things that he saw beauty in. After some time, I would joke with him and suggest that he must be very wealthy due to all the hours that he worked — morning, night, weekday, weekend, he was there.

I was surprised by Sam’s response when he told me that he was getting a flat rate of \$12 per hour. At the time, I didn’t know how much he should be getting and nor did Sam, however, he was pretty sure he was being paid about half of what he was entitled to.

Upon learning this information, I was particularly disturbed because I would often observe his employer, the franchisee, driving one of two new luxury cars and relaxing with his wife in a local cafe. I asked Sam if he had raised questions about his pay with his boss. Sam told me that he had asked for a \$1 per hour pay rise, but the franchisee told

him that money was very tight and that if he didn't like the pay he was getting, he could "go elsewhere". Around the same time, to add insult to injury, the franchisee felt the need to consult Sam on the purchase of a new Mercedes — which would be his third car — asking Sam if he had any suggestions.

After hearing all of this, and caring about Sam as much as I did, I felt compelled to help him lodge a complaint with the Fair Work Ombudsman ("FWO"). Sam leaned over the counter and told me that this was 7-Eleven practice and that underpayment of workers was happening in every 7-Eleven store.

As much as I trusted Sam, I thought he must be mistaken; this kind of widespread underpayment could not be the standard practice of 7-Eleven. I began visiting other stores between Brisbane and the Gold Coast. Although it took a while to build trust with the workers, one by one they told me that they were being underpaid and that it was well known by the workers, the franchisees, and 7-Eleven that this was the normal 7-Eleven stores within Australia.

Alarming, Sam had recently been robbed at knifepoint twice in one day, yet the franchisee became angry with him and suggested he should have thrown the cash register at the thief instead of handing over the \$200. The franchisee showed no regard for Sam's safety or wellbeing and offered no assistance of any kind to recover from the events.

At this point, I would understand if the reader were to be quite angered by what they're reading and disgusted and shocked by the actions of the franchisee, especially given these stories have since been found out to be quite common in 7-Eleven stores across Australia. However, now knowing that underpayment and exploitation of foreign workers in 7-Eleven stores is a commonplace occurrence, who are the real bad guys? How do 400+ franchisees from China, India and Pakistan, owning 620+ stores in four states, all learn how to manipulate the books in the exact same fashion and (when a new scam is created to avoid detection) almost instantaneously learn and implement the new scam within 24 hours, regardless of what community they're from or the state they operate in?

It led me to think of what one's impression would be if they were to visit a large farm owned by a 'white' billionaire. There were 400 foreign workers who were sold a job as

managers and promised riches to oversee 6000 workers of foreign descent who were paid a pittance, if at all. Would you not cast your mind back to the days of slave ownership? And really, how different is that from what we have learned about 7-Eleven?

The question on everyone's lips is how did mass underpayment in 7-Eleven stores happen to tens of thousands of foreign workers over a period of decades without it becoming public knowledge and, according to the billionaire owner, without his knowledge?

Interestingly, Australia's legislation has failed to hold this man accountable. Why weren't his assets frozen, where was the police investigation, and has anyone been sacked from Head Office? Considering that the conditions 7-Eleven workers faced are frequently compared to slavery in media publications and public commentary, the person at the top should not be able to step down and effectively walk away. Section 180 of the *Corporations Act 2001* (Cth) makes the Board of Directors personally liable for breaching their duties. However, in this case, accountability appears to have solely fallen on franchisees. Throughout their investigation of 7-Eleven, Fair Work Australia said there was not enough evidence to hold the Board of Directors personally liable, citing section 550 of the *Fair Work Act 2009* (Cth).<sup>1</sup> They also said:

...7-Eleven's approach to workplace matters, while ostensibly promoting compliance, did not adequately detect or address deliberate non-compliance ... in particular, instances where franchisees created false and misleading records...<sup>2</sup>

However, this was not enough and franchisees that were forced to use an underpayment or non-payment wage model in order to survive were the only ones left to blame.

And while Fair Work Australia referred 7-Eleven to the Australian Tax Office to investigate these matters, they, along with other government departments, needed to make an example out of 7-Eleven to send a message to those who engage in similar practices. With instances of underpayment in other businesses and industries emerging regularly, it appears the opportunity to effect change in the way foreign workers are treated across Australia is slipping away.

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<sup>1</sup> Fair Work Ombudsman, Parliament of Australia, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven* (2016), 71.

<sup>2</sup> Ibid 4.



It is also worthwhile exploring why workers have not previously spoken up. To answer this, we must first ask ourselves, who are these people working in 7-Eleven stores and what did they sacrifice to come to Australia? After having spoken with many of these workers in great detail and forming personal friendships with many of them, I quickly learned the extreme lengths people go to and personal sacrifice they make to come to Australia. In many cases, their family sold their land and took out multiple loans just to create a circumstance where they could come to study in Australia in search of a better life for them and their families.

They come to Australia speaking little to no English, with no knowledge of our workplace laws, minimum wage, or legal avenues available to them to seek redress if they discover they have been underpaid. What is abundantly clear in the many discussions I have had is that they come here with a misplaced fear of being deported at the drop of a hat if they question their employer. This fear is propagated among the workers, adding to the hysteria surrounding the issue.

Foreign workers who do come to Australia and speak little English appear to have limited job options and find they are not considered for employment in major retailers. This leads to many applying for work under a Western name in the hopes that this won't happen. Ultimately, they find the only job options available to them are working in corner stores, petrol stations, and cleaning companies who appear to have very relaxed policies around complying with workplace legislation.

So, back to the question of why they would not speak up against underpayment and exploitation. They sell, borrow and sacrifice everything to come here to educate themselves in the hopes for a better future. They have a limited understanding of English and know nothing about our workplace laws or the rights and remedies available to them. They are often discriminated against by major retailers and are only left options to work for companies who routinely underpay and exploit workers. They are conditioned by their employer not to ask questions, to be grateful for their job and if they do want more money, they are told if they don't like it, go elsewhere. Both the employee and the employer know that 'go elsewhere' means go work for another person who will also underpay them, which defeats the purpose. Furthermore, the employer will use fear and the threat of deportation to discourage any retribution. Many workers

are on student visas and in knowing this, the employer asks them to work many more hours per fortnight than the 40 hours permitted by their visa. Not to mention that all employees need to work additional hours just to break even due to the low hourly rate they are being paid.

Often several months into their employment and through discussion with other friends that are employed under similar practices, foreign workers slowly become aware that they have employment rights. They will often subsequently raise their discovery with their employer and quite disturbingly, many are often sacked on the spot for having asked such questions.

At this point, many will conduct online research and discover there is such a thing as unfair dismissal and in consultation with their Australian university peers, they will be incorrectly advised to lodge a complaint with the FWO. There are a number of barriers that will arise and hurdles that will need to be overcome before they can seek a resolution. Firstly, in almost every case, 7-Eleven franchisees have fewer than 15 employees and as such are classified as a small business. This means that to be eligible for unfair dismissal, the worker would need to have been employed for a minimum of 12 months.

They will also be discouraged by fellow workers and other foreign students about taking any action and demonstrate an even greater fear of deportation that will often result in them not taking any action at all. If they do go to the FWO to raise a complaint about unfair dismissal, the Ombudsman will inform them that they are not the correct government body to address such complaints, and they are told they will need to raise the complaint with the Fair Work Commission ("FWC").

Unfortunately, potential complainants only have 21 days to make a complaint to the FWC. Many of the foreign workers can take several months to build up the courage and better inform themselves of their rights before they would take such action. Sadly, very few continue the process. If a foreign worker does find the courage to make an unfair dismissal complaint within 21 days (from my experience, this is very rare), they are subjected to a \$69.60 'application' fee, which as you can imagine is a struggle when they are already financially destitute.

If the workers ask the right questions, the FWC will tell them that they can apply to have the fee waived due to financial circumstances, however, this information is rarely volunteered. Having in-depth discussion with the FWC and professionals who have been involved in these disputes, it seems to be the case that an unfair dismissal complaint is unlikely to be successful, whilst in the meantime, the worker is out of a job. I should also note that as the franchisee will be informed of a complaint, it is quite common for the franchisee to intimidate, bully and harass the former employee in the hopes that they will be too fearful to continue with their complaint.

A worker who has found the courage to make an unfair dismissal complaint may also find the courage to make a complaint with the FWO about being underpaid. There are many challenges they will face going ahead with this process. Firstly, they will be discouraged from making a claim by their friends and any co-worker they share this information with, and they will propagate the hysteria around deportation. Then, the steps associated with making a complaint can be challenging, especially when English is not their first language. In the case of 7-Eleven workers, most of them have next to no documentation to substantiate the hours they worked and how much they have actually been paid. Furthermore, the records within the store are likely to be fraudulent and the records supplied to Head Office might be different, but also fraudulent. It is often much easier for the franchisee to substantiate the fake hours worked based on fraudulent records, as opposed to the employee substantiating the true hours worked. There are many scams and variations of the scams that are used widely within 7-Eleven stores to this day, ranging from the well-known and most used half pay scam, to the cash back scam, the free shift scam, and the free trial scam, along with variations of each (see appendix).

If the complaint is accepted by the FWO and the employee still wishes to go ahead, the franchisee will be informed, leading again to a bullying and harassment campaign in an attempt to intimidate them into retracting their complaint. It is quite common for the franchisee to refuse to comply with FWO requests and/or to provide false documentation to the FWO. If penalties are imposed against a franchisee, and/or the franchisee is ordered to pay back the wages, it has been common practice for the franchisee to transfer all assets into a relative's name and fold the business up, which up

until recently engineered a situation where they didn't have to pay any money.<sup>3</sup> It must feel disempowering for the FWO and highly disheartening for the worker.

Now to the franchisees: what would make them engage with these practices?

Behavioural Scientist Dan Ariely and his team conducted the Matrix Experiments, which tested how honest people would be when left to mark their exam and remunerate themselves based on how well they did.<sup>4</sup> There were 40,000 participants and the team found that 70% of people cheated, with about 20 big cheaters and 28,000 little cheaters.<sup>5</sup> What they observed through their studies was that good people often do dishonest things when there is a belief or an understanding that everybody is doing it.<sup>6</sup>

I do not condone, encourage or make excuses for franchisees' bad behaviour, but it helps to understand what would make 400+ franchisees, who are mostly otherwise good people, behave in such a way. In the many discussions I have had with franchisees in various states, I was amazed how many of them told me they purchased a 7-Eleven knowing that underpayment was common practice and that was just how 7-Eleven stores were run if the store was to make a profit. I was even more surprised to hear from various franchisees around the country that said prior to taking ownership of their store, they expressed concern to Head Office during their training about having to underpay staff to make a profit. On all accounts, they were asked to change the topic or all of their questions were dismissed.

Since the scandal broke, franchisees and ex-franchisees have come forward claiming they have evidence that the financials relied upon to purchase the store were fabricated and grossly misrepresented the true labour cost for that store. A lot of these franchisees come from the Indian subcontinent and other places around the world and have also sold everything and committed to huge loans in the hopes that they will make a good life for them and their family in Australia. They told me they thought they were buying a future with 7-Eleven but in reality, they purchased a job that requires huge time

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<sup>3</sup> Natalie James, 'Directors exposed as we lift the corporate veil' (Media Release, 23 June 2016) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2016-media-releases/june-2016/20160623-op-ed-lifting-the-corporate-veil>>.

<sup>4</sup> Dan Ariely and Yael Melamede, 'A fascinating experiment into measuring dishonesty' *Elsevier* (online), 22 September 2016 <<https://www.elsevier.com/editors-update/story/publishing-ethics/a-fascinating-experiment-into-measuring-dishonesty>>.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

commitments and has high-stress levels. They talk of the heavy hand applied by Head Office and bullying, intimidation and racial discrimination delivered at the hands of Head Office.

Many describe how there is an understanding among the franchisees that if you are not underpaying, then you are the only one not doing it, so they feel pressured and foolish if they're the only franchisee paying full wages. I recall an example of one franchisee coming to me after the scandal broke. He told me he had been underpaying for years in order to survive financially, and 7-Eleven never seemed to care until there was national media attention on the issue and he was subsequently breached. He explained to management the store was not profitable (and never would have been) and was unable to pay staff the legal wage. He was told that these were meant to be family-run businesses: that his wife could work a 12-hour shift every day, and then he could work a 12-hour shift every night, resulting in "no real need" for other staff. He told Head Office that they had young children and would never see them as a family but management expressed no concern. He was quite upset by their comments around this and, sadly, this was not the first time I had heard this.

There were so many franchisees that would tell me they were losing money every week on their stores paying the legal wage. Surprisingly, after the scandal broke and the new franchise agreement was subsequently formulated, quite a few franchisees still claim they can't break even paying the legal wage. Of course, there are a number of franchisees, predominantly multi-store owners, who were well known within the franchisee and worker community for underpayment and exploitation of workers that are quite wealthy and have made a lot of money out of 7-Eleven. If the regular complaints and phone calls that I receive are to be believed, they still routinely underpay and exploit workers in their stores, yet receive strong support from Head Office which goes right to the top. Workers who have complained to Head Office after the scandal about underpayment in those stores have called me out of frustration, complaining that they have informed Head Office, yet the franchisee receives no breaches or warnings about payroll, despite the evidence provided to them.

For the many franchisees out there that do want to do the right thing, they often feel that they have a choice to make. Lose everything they ever worked for and not be able to

provide for their family, or underpay workers to survive. Behind the tough exterior that many project, there is often a person who is under considerable stress and hates what they are doing, but doesn't know how to find a way out. How could all this happen? Who could have such a far-reaching agenda? Perhaps the answer lies with the billionaire owner, who nearly doubled his profit last year.<sup>7</sup>

What needs to be done? Thousands of people were underpaid at the hands of his company. He claims he did not know of widespread wage underpayment and has only taken some responsibility as a result of media pressure. As of 29 July 2016, 7-Eleven has paid back 599 workers almost \$23 million.<sup>8</sup> During the investigation, we estimated the true amount of underpayment to average \$80 million per year and both franchisees and workers claim this has been standard practice for over 20 years. Quite interestingly, if you add up the estimated underpayment over time and compare it with the owner's wealth, they almost cancel each other out.

Something needs to drastically change or mass exploitation of franchisees and workers will continue in Australia. In the lead up to the 2016 Federal Election, the two major parties made election promises to deal with accountability in franchise systems where there are instances of exploitation and underpayment. The policy put forward by the Coalition is an encouraging start: increasing penalties that apply to employers who underpay workers or fail to keep proper employment records, new offence provisions that capture Franchisors who fail to deal with exploitation, and delivering a funding increase to the Fair Work Ombudsman, among others.<sup>9</sup> The policy engineered by Labor appears to mirror that of the Coalition.<sup>10</sup>

If the key investigator of worker exploitation is the FWO, it is imperative that they are assigned with extra powers. As it currently stands, the FWO does not have the capacity to compel any person to answer questions on the record in relation to workplace law contravention, unlike other regulators.<sup>11</sup> With immunity provided to the witness, the

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<sup>7</sup> John Stensholt, 'BRW Rich 200 List 2016' *Australian Financial Review* (Australia), 26 May 2016.

<sup>8</sup> 7-Eleven Australia, *7-Eleven Wage Repayment Program* (2016) 7-Eleven Wage Repayment Program <[www.wagerepaymentprogram.com.au](http://www.wagerepaymentprogram.com.au)>.

<sup>9</sup> Liberal Party of Australia, *The Coalition's Policy to Protect Vulnerable Workers* (2016), Liberal Party of Australia <<https://www.liberal.org.au/coalitions-policy-protect-vulnerable-workers>>.

<sup>10</sup> Australian Labor Party, *Positive Policy – Protecting Rights at Work Fact Sheet* (2016), Australian Labor Party <[http://www.100positivepolicies.org.au/protecting\\_rights\\_at\\_work\\_fact\\_sheet](http://www.100positivepolicies.org.au/protecting_rights_at_work_fact_sheet)>.

<sup>11</sup> Fair Work Ombudsman, above n 1, 28.

FWO would be far better equipped to deal with all instances of exploitation, but particularly systemic abuses, as without this power, it is difficult for accountability to be proven beyond the franchisee level.

When it is evident that executives of a franchise system know about systemic wage fraud and proceed to do nothing about it, criminal charges should not be out of the question. The threat of harsh penalties could result in Head Office level employees reacting efficiently and effectively when informed of exploitative practices within their business. Of course, pioneering, encouraging or partaking in these exploitative practices at a Head Office level should involve harsher penalties including imprisonment — especially in the case of 7-Eleven, where the owner should have known. It comes back to modern day slavery and slave “owners”. If to force someone into modern day slavery is a criminal offence, then those involved in implementing such a business model should be held criminally accountable.

If the owner and directors of 7-Eleven oversaw the largest wage fraud in Australian history, where considerable circumstantial and anecdotal evidence shows they were acutely aware of (and in fact the driver of) the exploitation model, but never even received a knock on the door from the police, then we have a serious problem that needed to be addressed yesterday. After all, it appears key executives at 7-Eleven resigned from the company and walked away with little legal consequence while taking no responsibility for the modern day slavery of workers. Unfortunately, the problems do not walk away with them. Instead, the top down toxic culture continues to exist and absent any serious structural and operational changes, the culture at 7-Eleven will never change.

## II APPENDICES

### *Half Pay Scam*

The half pay scam is where, for example, an employee works 40 hours in a week, but is only paid for 20 hours. The franchisee would then record this employee as working 20 hours and record a “ghost employee” as working the remaining 20 hours. The ghost employee’s pay will then go into the franchisee’s or a family member’s account.

*Cash Back Scam*

Created within days of the scandal breaking, the cash back scam came into full swing. The worker would be paid the correct wage according to the award, however, was required to withdraw half of their pay and deliver to the franchisee in cash, off camera. When this scam was exposed nationally, creating risk for the franchisee to get caught, quite a number of franchisees changed it to avoid detection whereby they would employ a worker off the books and pay another worker in full who was then instructed to pay half of his pay via a bank transaction to the worker off the books and record it as being a loan repayment or gift. This practice was recently caught on a secret camera by an employee.<sup>12</sup>

*Free Shift Scam*

After the cash back scam and its variations became well known, a number of franchisees that owned other businesses such as IGA stores, created the free shift scam to use in place of the cash back scam. Under the free shift scam, you would work your normal shifts at 7-Eleven and be paid in full under the award. Your franchisee would then require you to do a number of shifts in their other business (such as an IGA) for free. This avoided any detection of underpayment practices at 7-Eleven.

*Free Trial Scam*

Franchisees place a new worker on an unpaid trial for several days or in some cases up to one month. At the end of the trial, the franchisee tells the worker that they were unsuccessful during the trial and won't be hired, and therefore are not paid. The franchisee will repeat this process many times with many workers.

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<sup>12</sup> Mark Willacy, *7-Eleven Worker Forced To Pay Back Wage, Covert Video Shows* (2016) ABC News <<http://www.abc.net.au/news/2016-11-21/covert-video-captures-711-workers-being-forced-to-pay-back-wage/8033808>>.



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# SOCIAL MOVEMENT PROSTITUTION: A CASE STUDY IN NONHUMAN ANIMAL RIGHTS ACTIVISM AND VEGAN PIMPING

DR COREY LEE WRENN\*

*This article explores the sexual objectification of female-identified volunteers in social movements as a form of tactical prostitution, arguing that tactical prostitution constitutes a violation of the dignity of women in social movement spaces, while posing a threat to the wellbeing of women and children in the larger public. This article investigates the Nonhuman Animal Rights movement, particularly suggesting that tactical prostitution is particularly counterintuitive in this context as it asks the public to stop objectifying Nonhuman Animals with the same oppressive logic that it wields by objectifying female activists. This critique is placed within a systemic analysis of neoliberalism as it impacts social movements through the formation of a non-profit industrial complex. This system encourages the commodification of marginalised groups for institutional gain.*

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## I INTRODUCTION

Naked protest has a long history in social justice activism.<sup>1</sup> While women's participation in this protest need not be sexualised,<sup>2</sup> in today's hyper-sexualised culture and "pornified" media realms, it frequently is.<sup>3</sup> Media attention is a social movement's best asset. It earns the organisation public recognition, attracts volunteers, and, most importantly, it stimulates fundraising.<sup>4</sup> To attract media attention in a digitised, high-speed media landscape that is laden with trillions of competing images, some social movement organisations attempt to stand out by using prostitution and free soft-core pornography. Free sampling is a technique heavily utilised by pornographers in the highly competitive online sex industry.<sup>5</sup> Web sites and performers provide the consumer a small taste of the product with the expectation that the consumer, thus excited, will seek to purchase more. This article will suggest that utilising the sales script of pornography to sell social justice by exploiting the bodies of female-presenting activists is ethically problematic and tactically counterintuitive. It will further argue that this process is a result of larger economic structures that encourage social movements to adopt a corporate model that necessitates exploitation to achieve growth.

## II PROSTITUTION IN NONHUMAN ANIMAL RIGHTS

Although sexualisation is manifest in a number of social movements with the intention of promoting a particular cause,<sup>6</sup> the Nonhuman Animal rights movement is an especially poignant case study in this regard, as it relies heavily on the tactic of naked protest. This is done so within the context of its stark gender disparity. This movement, in particular, engages in naked protest for at least two reasons. First, as Alaimo argues, disrobing allows protestors to 'momentarily cast off the boundaries of the human' and embody the natural

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<sup>1</sup> Stacy Alaimo, 'The naked word: the trans-corporeal ethics of the protesting body' (2010) 20(1) *Women & Performance: A Journal of Feminist Theory* 15.

<sup>2</sup> Barbara Sutton, 'Naked protest: memories of bodies and resistance at the World Social Forum' (2007) 8(3) *Journal of International Women's Studies* 139, 140.

<sup>3</sup> Women have also utilized naked protest to resist patriarchal sexual violence. See Deepti Misri, 'Are You a Man? Performing Naked Protest in India' (2011) 36(3) *Signs* 604.

<sup>4</sup> William Gamson and Gadi Wolfsfeld, 'Movements and media as interacting systems' (1993) 528 *Annals of the American Academy of Political and Social Science* 114.

<sup>5</sup> Gail Dines, *Pornland: How Porn Has Hijacked Our Sexuality* (Beacon Press, 2010).

<sup>6</sup> Corey Wrenn and Megan Lutz, 'White women wanted? An analysis of gender diversity in social justice magazines' (2016) 6(2) *Societies* 1.

world (a world where Nonhuman Animals are frequently positioned).<sup>7</sup> Naked protest, in this regard, could theoretically encourage the audience to empathise with other animals with nudity acting a reminder of human-nonhuman connectedness. Secondly, the Nonhuman Animal rights movement is predominantly female-identified (to the tune of 80%) but male-led,<sup>8</sup> suggesting that it's feminised participant base is particularly vulnerable to sexual exploitation. Naked protest, in other words, might be less a consequence of a desire to evoke empathy with trans-species sameness and more so a result of its feminised ranks, male leadership, and masculinised operational style.

Indeed, going naked "for the animals" appears to be the Nonhuman Animal rights movement's *modus operandi*. Although many supporters of Nonhuman Animal rights organisations that utilise sexualisation as a tactic may claim that men's naked bodies are used in this way as well, the overwhelming majority of sexualised bodies presented to the public are that of young, thin, white women. Volunteers and activists offer to organisations a wealth of physical assets. When these participants are predominantly female-identified, women's body parts are frequently sexualised and politicised to the exclusion of their potentially more beneficial intelligence, skills, creativity, dedication, or leadership ability. Organisations such as the movement's largest, People for the Ethical Treatment of Animals ("PETA"), recruit female volunteers and position them sexualised on street corners, posters and film as objects of solicitation. For all intents and purposes, these mostly unpaid girls and women are prostituted to extract funding, media attention, or other resources.<sup>9</sup> Female activists "sell" their bodies for the benefit of the movement, but little (if any) of the profit goes to the sex workers themselves. Instead, the money raised is redirected to the organisations they represent. In sum, women's bodies are used in protest and most of those utilised are thin, white women. Because their bodies are sexualised and this is done to mobilise resources, these female activists are engaging in what amounts to sex work. They are selling their sexualised bodies for profit.

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<sup>7</sup> Alaimo, above n 1, 32.

<sup>8</sup> Emily Gaarder, *Women and the Animal Rights Movement* (Rutgers University Press, 2011).

<sup>9</sup> PETA does appear to pay for the services of some models hired to stage protests.

The parallels between social movement prostitution and conventional prostitution are distinct. If a john buys a prostituted woman for sex acts in the sex industry, when he pays her, most of the money (or *all* of the money) will usually be forfeited to her pimp. In the non-profit industry, if a john purchases organisational membership or becomes a donor because of his interest in the sexualised bodies of women who are working or volunteering for the organisation, again, that which she earns is turned and forfeited. In this case, it is the social movement organisation that becomes the pimp, having industrialised social movement sex work and framing it as an act of charity for institutional gain.

This process, I argue, is likely a result of neoliberalism in cultural and political spaces. Neoliberalism has created social movement austerity, forcing organisations to rationalise and bureaucratised to amass wealth. To protect themselves, organisations gradually professionalise and increasingly treat protest as an opportunity for profit. As fewer and fewer coalitions in the movement remain grassroots, the non-profit model (one that transforms contentious activism into a growth-oriented business) is positioned to aggravate this industrialised sex exploitation. The sex industry, too, has industrialised following the impacts of neoliberalism (globalisation, privatisation, and reduced legal restrictions on industry).<sup>10</sup> As a result, it has become increasingly embedded across a number of social institutions, the social movement industry included. Indeed, the growth of naked protest in Nonhuman Animal rights correlates with the rise of non-profitism in the movement,<sup>11</sup> suggesting that the corporatization of anti-speciesism may have spawned this systemic objectifying sales tactic. While PETA may be the most infamous such organisation, it is certainly not the only one engaging this tactic.<sup>12</sup> PETA's relative success in the social movement arena allows it to shape the political imagination. Other organisations respond by replicating what they see as a resonating framework based on PETA's relative power. Exploiting women's bodies becomes common sense to Nonhuman Animal liberation.

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<sup>10</sup> Sheila Jeffreys, *The Industrial Vagina* (Routledge, 2008).

<sup>11</sup> Corey Wrenn, *Professionalization, Factionalism, and Social Movement Success: A Case Study on Nonhuman Animal Rights Mobilization* (Doctoral Dissertation, Colorado State University, 2016).

<sup>12</sup> Corey Wrenn, 'The role of professionalization regarding female exploitation in the Nonhuman Animal rights movement' (2013) 24(2) *Journal of Gender Studies* 131.

This repertoire is defended in ways similar to that of conventional prostitution: the women involved are said to “choose” their participation, or they’re presumed to be personally benefiting from it (sometimes this is framed as attention-seeking or empowerment).<sup>13</sup> These justifications, however, bank on the existence of free choice. The illusion of “free choice” is a construct foundational to sociological studies, one that easily individualises what is, instead, a *structural* phenomenon. “Free choice” invisibilises inequality by insinuating that each person is responsible for their own behaviour, although statistical analysis demonstrates patterns across race, gender, ability, and other identities to the discredit of individual choices. Free choice and agency thus become red herrings.<sup>14</sup> The ideology of agency is especially problematic, as women have historically not had available to them the same choices (or ability to choose) that men have. This line of thinking obscures the larger movement structure that funnels girls and women into the “choice” of stripping for the male gaze in public spaces (this “choice” is much less visible or plausible for men). The ability to choose is linked to one’s privilege. As a class, women’s choices are circumscribed in a patriarchal society. These choices are even further restricted by race, class, age, nationality and ability.

To that end, some participants will feel they have benefited from participation, but these benefits are unevenly experienced. It is particularly white, upper and middle-class women who have historically been best positioned to reap the positive repercussions of sexual agency and empowerment. As an example, aspiring models and actresses may work with organisations like PETA to gain exposure. Indeed, nudity itself is certainly not to be criticised, as women have for so long been discouraged from connecting with their bodies and their sexuality. This should not negate, however, the clear pattern of women’s bodies being sexually exploited in cultures where power is mostly reserved for men. It is not women’s sexuality in question here, but rather the powerful male-dominated institutions that exploit it to the detriment of women as a class. Women may predominate in the ranks, but leadership is disproportionately male. This situation does not see *all* women acting for the benefit of *all*

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<sup>13</sup> *Popaganda: Liberal Problems* (Created by Sarah Mirk, Bitch Media, 26 March 2015) <<https://bitchmedia.org/post/popaganda-episode-liberal-problems>>.

<sup>14</sup> Steven Loyal, ‘Agency as a Red Herring in Social Theory’ (2001) 31(4) *Philosophy of the Sciences* 507.

women. That is, for female activists privileged enough to make the “choice” to be sexually objectified for the movement, they frequently describe it as “empowerment” or “women’s liberation.” To the contrary, it is *some* very privileged women acting under the restrictions of sexism in the interest of the movement’s neoliberal agenda with little to no consideration to the potential harms promulgated for less privileged women who must also occupy sexist social spaces. That most sexualised bodies used by the movement are that of thin, white women, this indicates a structural influence, not simply a happenstance. It is not an individual choice, experience, or influence.

### III THE PERILS OF SEX WORK AS ADVOCACY

Agency and empowerment are prominent ideologies in support of a sexist movement structure. I have argued thus far that this rhetoric acts as a red herring that diverts attention from the sexist underpinnings of social movement sex work. When a movement literally frames women’s bodies as though they are meat for sale,<sup>15</sup> in the same way as are the bodies of Nonhuman Animals for whom the movement purports to represent, it is difficult to maintain that such a tactic maintains women’s dignity or “empowers” them or the women they supposedly represent.

For instance, one anti-fishing PETA campaign sees female activists holding signs which read ‘Don’t let your kids become hookers,’ thus banking on the stigmatisation of sex workers and prostituted girls and women.<sup>16</sup> Likewise, a vegan strip club in Portland, Oregon known as Casa Diablo hires women to strip and tease mostly male customers for “the cause”. More likely, the combination seeks to attract new clientele in a city famous both for its vegan community and its claim to the most strip clubs per capita in the country. Selling strippers and vegan food is a sales tactic in a highly competitive space and is not necessarily a tactic for undermining speciesism. The male club owner insists that “throwing boobs out there” is the only way to get people to visit his restaurant and try his vegan menu, but it is difficult to accept that this tactic is one with advocacy, and not profits, in mind. He claims he wants to

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<sup>15</sup> A popular form of naked protest in the Nonhuman Animal rights movement is to paint meat cuts (ie. “flank,” “loin,” “ribs”) onto women’s bodies.

<sup>16</sup> Jeff Mackey, *Don’t let your kids become hookers* (21 September 2011) PETA  
<<http://www.peta.org/blog/don-t-let-kids-become-hookers/>>.

“end the suffering of all creatures,” but it seems less important that the women in use are “creatures,” too. Certainly, “throwing penises out there” would draw some attention as well, but patriarchy ensures that it is the sexualised exposure of women’s bodies that will be expected.

Prostitution, stripping, and pornography are all forms of sex work, which often prey on vulnerable populations of girls and women. Of course, not all prostitutes are in the industry out of desperation or trafficking, but many are, and to prioritise the experiences of the privileged few invisibilises the reality of the majority who suffer in the system. Indeed, many feminists and survivors regard “sex work” as a euphemism,<sup>17</sup> and for the children and women who are trafficked, their condition can be acknowledged *only* as sex slavery. It is “work” insofar as the physical toll exacted on the bodies of prostituted persons is considerable and money is sometimes exchanged. The sex industry entails extremely high rates of sexual assault, rape, and other forms of violence. When it pays, it pays sporadically and poorly for most girls and women, especially for marginalised workers such as women of colour, trans women, and indigenous women. This marginalisation, however, positions sex work as a vital means of survival for somewhere other viable means of employment are unavailable. Those surviving in the system, of course, should not be stigmatised. Sex work can be an attempt to reclaim power in a world that has generally disempowered them.<sup>18</sup> Furthermore, the most marginalised of women who are dependent on the industry are certainly not the relatively privileged ones that non-profits are recruiting for protest. Yet, the system itself, a system of domination and colonisation, is worthy of criticism given its disproportionate impact on marginalised women and its implications for women as a class.

Increasingly, sex work is glamorised or romanticised in the liberal imagination as something freely chosen by independent women who have full control over their work and lives.<sup>19</sup> Some women with race, class, and nationality privilege are able to enjoy agency of this sort, but

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<sup>17</sup> Sheila Jeffreys, *The Industrial Vagina* (Routledge, 2008); Rachel Moran, *Paid For: My Journey Through Prostitution* (W.W. Norton & Company, 2015).

<sup>18</sup> Jennifer K. Wesley, ‘Growing up sexualized: Issues of power and violence in the lives of female exotic dancers.’ (2002) 8(10) *Violence against Women* 1182.

<sup>19</sup> Emily Bazelon, ‘Should prostitution be a crime?’ *The New York Times* (online), 5 May 2016 <<http://www.nytimes.com/2016/05/08/magazine/should-prostitution-be-a-crime.html>>.



most of those who enter the industry do not. It is this analytical framework that should inform the decision-making of non-profit organisations considering capitalising on sex work. An institutional adoption of sex industry attributes may benefit society's more privileged (such as white women of a higher class background who work as escorts, the male johns who purchase sex, and the pimps and corporations who profit financially), but it will inevitably come at the expense of marginalised women who lack any ability to choose or consent, those who disproportionately staff the sex industry. For that matter, by perpetuating the notion that women's bodies are available to be purchased, controlled, and used by men (and industries), non-profit pro-prostitution frameworks negatively impact *all* girls and women by normalising gender-based domination.<sup>20</sup> The sexual exploitation of women is a systematic means of devaluing and disempowering women.<sup>21</sup> It makes resources of women. They become objects, while their users remain subjects. The sexual exploitation of women is a logic of oppression.

#### IV COMMODIFYING BODIES UNDER NEOLIBERALISM

It is within this context — the wider realm of the sex industry as one that colonises the bodies of women, especially very vulnerable women — that social movement prostitution should be criticised. A system that exploits society's most marginalised to the benefit of society's most privileged is one that runs counter to social justice goals, as it represents a fundamental inequality. It thus becomes counterintuitive for the Nonhuman Animal rights movement to actively participate in the buying and selling of women's bodies given the serious ramifications that prostitution, as an institution, holds for the safety and well-being of girls and women. However, the vegan pimp model is more than an extension of the globalising sex industry and the rise of porn culture. It is instead a strategic response to the world's shift to a neoliberal economy.

Neoliberalism, in its effort to free markets, fans inequalities as access to and participation in markets is unevenly experienced.<sup>22</sup> Inequalities created by an exploitative capitalist system

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<sup>20</sup> Jeffreys, above n 12.

<sup>21</sup> Jennifer K. Wesley, *Being Female: The Continuum of Sexualization* (Lynne Rienner Publishers, Inc, 2012).

<sup>22</sup> Vicente Navarro, 'Neoliberalism, Globalization, Unemployment, Inequalities, and the Welfare State' (1998) 28(4) *International Journal of Health Services* 607.

are presumed solvable by “free” markets. The inevitable result in a system where corporations rule and states are relegated to serving business instead of the citizenry is the proliferation of suffering. More than this, by prioritising marketplace interactions, there is also an increase in commodification. That which was previously considered free, communal, or a guaranteed right thus becomes property that can be bought and sold. Even attempts to alleviate the inequality that arises from this system are packaged for consumption. Social justice, too, is for sale.

To be real and valuable under neoliberalism, a thing, action, or idea must have a market value. Non-profits thus place a value on social justice by prioritising fundraising and growth over grassroots mobilisation and radical structural change. For those in the game of social justice who adopt this strategy, this neoliberal marketplace ideology is the very same which normalises property ownership and systemic inequality. In such a system, it will always be the case that some will be able to participate fully (those who are privileged by gender, race, ability, age, nationality, and species, for instance), while others will participate less, if they are able to at all. Worse still, the longer that the marginalised are limited in their participation, the greater the market advantage of the privileged. Given this uneven access, it will also be the case that some will own property, and some will be *owned* as property. Women, Nonhuman Animals, indigenous persons, and some persons of colour have been so marginalised by the neoliberal system that they do indeed become property. Of course, these groups have been objectified, exploited and oppressed long before capitalism emerged, but recent economic shifts have exacerbated inequality considerably. It becomes questionable as to whether it is appropriate for non-profits to enter such an arena. They surely do so in hopes of amassing greater marketplace participation and ownership, but they do so at the expense of those less able to participate.

The rise of the non-profit system itself is a vital component to the neoliberal commodification process that manifests within social movement spaces. These institutions came to dominate the social movement arena in the latter half of the 20<sup>th</sup> century.<sup>23</sup> As grassroots organisations professionalised and incorporated into non-profits, they began to increase in size and wealth

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<sup>23</sup> INCITE!, *The Revolution Will Not Be Funded* (South End Press, 2007).

considerably. To achieve this, however, organisations must adopt a corporate approach, retooling social change efforts to be consistent with a cutthroat business design. A primary result of this organisation style is intense competition over vital funding and resources, as with growth comes greater financial responsibilities and available charity monies are limited (especially in a neoliberal “hands off” economy). Unfortunately, this extreme dependence on funding leaves once radical tactics vulnerable to compromise. Advocacy shifts away from liberatory visions to the goal of procuring wealth to sustain organisational inertia. Changing the world (the world that feeds the wealth of elite capitalist funders who sustain non-profits) becomes less of a priority.

Prostituting women consequently presents itself as a highly profitable tactic, especially when volunteers are not paid and come to the social movement arena “porn ready,” already groomed to believe that their tenuous participation in the public sphere must be sexualised. Ironically, even if the movement’s audience were to begin supporting Nonhuman Animal rights organisations as a result of being exposed to these sexualised tactics (and there is no evidence to support such a notion),<sup>24</sup> most of the money raised will not be used in support of anti-speciesism. Instead, most of it will be put toward keeping the lights on, paying staff members, and supporting ever more fundraising channels. Bureaucratisation comes with a number of opportunity costs.

Although naked protest is *not* shown to increase support for anti-speciesism, the protest continues in full force. When presented with this research, PETA insists that naked protest is crucial for garnering attention in mainstream media spaces.<sup>25</sup> This indicates that Nonhuman Animal rights organisations may be less interested in undermining speciesism than they are with overpowering competitors in the marketplace as they wrangle for greater control and ownership of resources. Prostituting women may not help Nonhuman Animals, but it can ensure that an organisation is visible and its brand image memorable and acute. From this perspective, any media attention is considered good attention, as it grows an organisation’s cultural capital. Unwittingly, female volunteers and employees who strip “for

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<sup>24</sup> Renata Bongiorno, Paul G. Bain, Nick Haslam., ‘When sex doesn’t sell,’ (2013) 8 (12) *PLoS One*,1.

<sup>25</sup> Mary Elizabeth Williams, ‘Surprise, PETA! Sex doesn’t sell’ *Salon* (online), 21 December 2013  
<[http://www.salon.com/2013/12/20/surprise\\_peta\\_sex\\_doesnt\\_sell/](http://www.salon.com/2013/12/20/surprise_peta_sex_doesnt_sell/)>.

the animals” may actually be stripping for capitalist elites. The absent referent Nonhuman Animals (and the women representing them) simply become symbols to be bought and sold to amass wealth for the privileged few, much in the same way as Nike swooshes and Playboy bunnies do.

#### V CONCLUSION

The Nonhuman Animal rights movement squanders an important resource by degrading women’s participation to stripping and other manifestations of prostitution. Much more could be accomplished for the movement and its constituency by nurturing women’s personhood rather than objectifying their bodies. However, this presumes that the movement does indeed seek to undermine speciesism with effective advocacy while the evidence suggests otherwise. Beyond the predatory behaviour of social movement organisations that utilise prostitution as a tactic and target girls and women groomed by society (and the movement itself) to see sexualisation as an expectation, it is also important to take into account the impact that this type of activism has on women *as a class*. The socially-accepted degradation of women and their sexual objectification is directly linked with discrimination and violence against women. All women are vulnerable to the status debasement of sexual exploitation, but only a privileged few are positioned to reap the limited status afforded by patriarchy by adopting the sexualised feminine role. Women, therefore, experience the ill-effects of a sexist society in varying degrees based on their social position. All women, however, are, as a group, disenfranchised by institutionalised sexism and while some may exact some compensation with patriarchal bargaining, sexual exploitation is an act of systematised oppression. This is a consequence that social justice movements should take very seriously. For that matter, it is hardly clear how the systematic objectification of women can be used to counter the systematic oppression of other animals. Social movements make a patriarchal bargain of their own by prostituting female activists, and this bargain also upholds inequality.

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## GENDER STEREOTYPING IN INTERNATIONAL LAW: THE BATTLE FOR THE REALISATION OF WOMEN'S REPRODUCTIVE HEALTH RIGHTS

DAISY-MAY CARTY COWLING\*

*In all forms of discrimination against women, the phenomena of gender stereotyping has played a significant role; gender stereotypes are often cited as one of the most crucial barriers states need to eliminate in order to achieve substantive equality between the sexes. Gender stereotyping and its impact on the realisation of women's human rights is arguably the most pervasive in the area of reproductive health. Whilst the existence of gender stereotyping can be damaging for both men and women, such stereotyping holds the sexual freedom and physical autonomy of women to unrivalled and relentless scrutiny. Despite the existence of human rights that regulate states' conduct when it comes to gender stereotyping and reproductive health, as has been consistently outlined in the breadth of international case law, gender stereotypes and patriarchal concepts that aim to determine a woman's role in society mean that rights such as access to abortion and contraception are endangered by religious and other ideological forces. It is concluded that states and international human rights bodies must focus their attention on the importance of combatting the harmful gender stereotypes that exist within their jurisdictions to achieve any form of substantive equality for women.*

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## I INTRODUCTION

International human rights law has developed in such a way that states now have concrete obligations to ensure that women have adequate access to reproductive health. Further, states are also bound to eliminate harmful gender stereotypes that hinder women's access to their human rights. Through a critical analysis of international human rights case law, this article will highlight the link between gender stereotyping and reproductive health rights and argue that in order for women to adequately access their reproductive rights, states and international human rights bodies must focus their attention on the importance of combatting the harmful gender stereotypes that exist within their jurisdictions.

## II GENDER STEREOTYPING

Gender stereotyping and its impact on the realisation of women's human rights is arguably the most pervasive in the area of reproductive health and will therefore be the focus of this article. The presence of gender stereotyping in reproductive health is



profound and can have extremely grave consequences for women,<sup>1</sup> as they are disproportionately affected by this phenomena.<sup>2</sup> Gender stereotypes include, but are not limited to, the view that women are weak and men are strong, that men are natural leaders whereas women are subordinate, and that a woman's "place" is in the home as a caregiver whereas men are the providers.<sup>3</sup> Whilst the existence of gender stereotyping can be damaging for both men and women, gender stereotyping holds women's sexual freedom and physical autonomy to unrivalled and relentless scrutiny. As Frances Raday articulates, '[t]he most globally pervasive of ... harmful cultural practices ... is the stereotyping of women exclusively as mothers and housewives.'<sup>4</sup> The motherhood stereotype is rooted in traditional religious and cultural ideas that are based on 'women's exclusion from the public power and of their subjection to patriarchal power within the family'.<sup>5</sup> Many if not all of the stereotypical ideas about women stem from the 'motherhood' notion,<sup>6</sup> and are intrinsically related to the plethora of challenges that women face in accessing reproductive health.<sup>7</sup>

### III DEVELOPMENT OF REPRODUCTIVE HEALTH RIGHTS

Women's reproductive health rights are relatively recent in international human rights law. Initial human rights documents such as the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* did not include any provisions that were specific to the type of human rights abuses women face, but merely acknowledged that 'sex' was a category that may owe itself to discrimination.<sup>8</sup>

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<sup>1</sup> Ben Quinn, 'Scandal in Ireland as Woman Dies in Galway after Being Denied an Abortion', *The Guardian* (online), 14 November 2012 <<http://www.theguardian.com/world/2012/nov/14/ireland-woman-dies-after-abortion-refusal>>.

<sup>2</sup> Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 15.

<sup>3</sup> Simone Cusack and Rebecca J Cook, 'Stereotyping Women in the Health Sector: Lessons from CEDAW' (2009) 16(1) *Journal of Civil Rights and Social Justice* 47, 50.

<sup>4</sup> Frances Raday, 'Culture, Religion, and Gender' (2003) 1(4) *International Journal of Constitutional Law* 663, 671.

<sup>5</sup> *Ibid* 669.

<sup>6</sup> Cusack and Cook, above n 3.

<sup>7</sup> Committee on the Elimination of All Forms of Discrimination against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1 (22 April 2015) para 42.

<sup>8</sup> *Universal Declaration of Human Rights*, GA Res 217A (III) UN GAOR, 3<sup>rd</sup> sess, 183<sup>rd</sup> plen mtg, UN Doc A/810 (10 December 1948) art 2; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3; *International*

The reason for this omission, which has been widely accepted by feminist scholars, is that international human rights law was shaped largely by men.<sup>9</sup> This meant that it was men's interests that were first represented in international law, and that women benefited only 'from human rights protection indirectly, via existing norms created with the lives of men rather than women in mind'.<sup>10</sup> It was not until the enactment of the *Convention of the Elimination of All Forms of Discrimination against Women* ('CEDAW') that the human rights issues women faced were properly considered at an international level.<sup>11</sup> As women's human rights were scarcely articulated in early human rights doctrines, it is unsurprising that women's reproductive rights did not feature heavily on the human rights agenda for some time. As Barbara Stark aptly highlights, reproductive rights focus on experiences — conception, pregnancy, childbirth — that affect women more directly than men, and so are not reflected in traditional rights discourse.<sup>12</sup> In fact, to date, only one international human rights document expressly grants a right to abortion.<sup>13</sup> Women's reproductive rights are nonetheless universally understood to be codified in international human rights law.

Women's reproductive rights were first established in CEDAW and can be identified in Article 12, which mentions specifically those 'services related to family planning' and articulates that State parties must 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period.' The strongest provision on women's reproductive health rights in international law is contained in the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* ('The Maputo Protocol').<sup>14</sup> Article 14 specifically mentions that women have the right to control their own fertility and to choose any method of contraception available.<sup>15</sup> Of

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<sup>10</sup> Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge University Press, 2011) 343.

<sup>11</sup> *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

<sup>12</sup> Barbara Stark, 'The Women's Convention, Reproductive Rights, and the Reproduction of Gender' (2011) 18(2) *Duke Journal of Gender, Law and Policy* 261, 271.

<sup>13</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, opened for signature 11 of July 2003 (entered into force 25 November 2005) art 14.

<sup>14</sup> *Ibid.*

<sup>15</sup> *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa*, art 14 ('Maputo Protocol').

significance is the latter part of Article 14 which is the only provision in international human rights law that specifically outlines a right to abortion.<sup>16</sup>

While this is considered a somewhat ground-breaking provision in international law, it is important to note that this provision does not expressly call abortions to be readily available for all women who should wish to have one. In fact, in the context of feminist arguments in favour of abortion, it is an extremely tame provision given that there is no option for a woman to enter a facility and access an abortion service on demand.<sup>17</sup> This type of provision is common in many states' domestic laws and is problematic as it still gives the state power to dictate and restrict access to abortion. Yet despite its weakness in language, the sentiments outlined in Article 14c are still vehemently resisted. For example, in relation to the *Maputo Protocol*, the influential head of the Catholic Church Pope Benedict XVI stated: 'how can we not be alarmed ... by the continuous attacks on life, from conception to natural death?'<sup>18</sup>

Opposition to the *Maputo Protocol* stems from the fact that women's access to abortion remains controversial.<sup>19</sup> Despite access to abortion being largely recognised as a women's rights issue today, 'much of the early focus on abortion was on what constitutes a human life, not on the impact on women'.<sup>20</sup> Religious institutions such as the Catholic Church often use the conception argument to oppose abortion while simultaneously espousing stereotypical ideas of women and their role in society.<sup>21</sup> All religions practice gender stereotyping to some degree, and it can be said that 'claims against gender equality have largely been made under one of the monotheistic religions — Judaism, Christianity, Islam — or under Hinduism'.<sup>22</sup>

In addition to their inclusion in human rights conventions, reproductive rights have also featured prominently in the women's human rights discourse, appearing in pivotal

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<sup>16</sup> Ibid.

<sup>17</sup> Sally Markowitz, 'Abortion and Feminism' (1990) 16(1) *Social Theory and Practice Journal* 1, 1–15.

<sup>18</sup> Pope Benedict XVI, 'To the Diplomatic Corps Accredited to the Holy See' (Speech delivered at the Traditional Exchange of New Year Greetings, Vatican Church, Monday 8 January 2007) <[http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf\\_ben-xvi\\_spe\\_20070108\\_diplomatic-corps.html](http://w2.vatican.va/content/benedict-xvi/en/speeches/2007/january/documents/hf_ben-xvi_spe_20070108_diplomatic-corps.html)>.

<sup>19</sup> Sally Markowitz, above n 17, 2.

<sup>20</sup> Ibid.

<sup>21</sup> A Denise Starkey, 'The Roman Catholic Church and Violence against Women' in Andy J Johnson (ed), *Religion and Men's Violence against Women* (Springer, 2015) 177, 183.

<sup>22</sup> Frances Raday, above n 4, 667.

documents such as the 1995 *Beijing Platform for Action*.<sup>23</sup> Further, as will be demonstrated by the ensuing discussion, women have successfully used a variety of provisions in international law that do not expressly promote reproductive health rights to hold states accountable, signifying that there is an international human rights law consensus on the existence of women's reproductive health rights. However, despite this, women's rights in this area are still being infringed at an alarming rate, due to prevailing stereotypical attitudes towards women.

#### IV ELIMINATING STEREOTYPES IN INTERNATIONAL LAW

International human rights law has provisions on eliminating stereotyping. The strongest prohibition on gender stereotyping is Article 5 of CEDAW which instructs State parties to:

Modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>24</sup>

This provision prohibits all types of gender stereotyping that may be harmful to women and expressly mentions the specific role of motherhood in stereotyping, which is very relevant in the context of reproductive rights.<sup>25</sup> It is also relevant that this provision is located within the first set of articulated human rights in CEDAW as this demonstrates how seriously the international community takes the issue of gender stereotyping and the impact it can have on women's human rights. Concern regarding stereotypes can also be found in regional human rights treaties that are specific to the rights of women. For example, State parties to the *Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women* agree 'to undertake progressively specific measures ... to modify social and cultural patterns of conduct of men and women ... customs and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on the stereotyped roles for men and

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<sup>23</sup> *Beijing Declaration and Platform of Action*, A/CONF.177/20 (17 October 1995) para 97.

<sup>24</sup> *Convention of the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) art 5(a).

<sup>25</sup> *Ibid* art 5.

women that legitimize or exacerbate violence against women'.<sup>26</sup> Similarly, State parties to the recently adopted *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence* ('*The Istanbul Convention*') are required to 'take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men'.<sup>27</sup> In addition to having some of the strongest provisions relating to reproductive health rights, the *Maputo Protocol* also takes a strong stance against stereotyping, urging State parties to modify practices and conduct based on perceived inferiorities or stereotyped perceptions of women.<sup>28</sup> Given that these human rights conventions focus on women specifically, it is clear that gender stereotyping is widely understood to negatively impact on women's human rights.

In addition to the sentiment expressed in Article 5 of CEDAW, the CEDAW Committee has continuously expressed how damaging gender stereotyping can be. The Committee has concluded that 'myths and stereotypes constitute discrimination on the basis of gender',<sup>29</sup> and that harmful stereotypes of women 'perpetuate widespread practices involving violence or coercion',<sup>30</sup> impact women's voting rights,<sup>31</sup> 'assign women to the private or domestic sphere,' and associate women 'with reproduction and the raising of children.'<sup>32</sup> However, despite the articulated international human rights treaties that recognise the need to eliminate stereotypical attitudes toward women and the accepted right to reproductive health, the ensuing discussion of international case law demonstrates that gender stereotyping in reproductive health is pervasive — as is its impact on women's access to human rights.

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<sup>26</sup> *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women*, opened for signature 9 June 1994, 1534 ILM 33 (entered into force 5 March 1995) art 8(b).

<sup>27</sup> *Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence*, opened for signature May 11 2011, CETS 210 (entered into force 1 August 2014) art 12(1).

<sup>28</sup> *Maputo Protocol*, art 2(2).

<sup>29</sup> Committee on the Elimination of Discrimination against Women, *Views: Communication No 34/2011*, 57<sup>th</sup> sess, CEDAW/C/57/D/34/2011 (10–28 February 2014) ('*R.P.B v The Philippines*').

<sup>30</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 19, Violence against Women*, 11<sup>th</sup> sess, UN Doc A/47/38 (1992) 11.

<sup>31</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 23, Article 7 (Political and Public Life)*, 16<sup>th</sup> sess, UN Doc A/52/38.

<sup>32</sup> *Ibid.*

*A The Committee on the Elimination of all Forms of Discrimination against Women*

The CEDAW Committee first addressed women's reproductive health in a case concerning the forced sterilisation of Roma women — *AS v Hungary*.<sup>33</sup> After giving birth, the applicant discovered she had been sterilised and could no longer get pregnant. The hospital claimed that she had signed a document authorising the sterilisation; however, the applicant stated that she would never have agreed to the sterilisation as, among other reasons, 'having children is said to be a central element of the value system of Roma families'.<sup>34</sup> The State party argued that, even if the sterilisation did take place without her full and informed consent, according to the *Public Health Act* of Hungary, a physician is allowed 'to deliver the sterilization without the information procedure generally specified when it seems to be appropriate in given circumstances'.<sup>35</sup> Particularly relevant to this case is the fact that there is a widely held stereotypical belief that Roma women have too many children.<sup>36</sup> The Committee found that Hungary had deprived the applicant of her chance to plan the spacing and number of her children and so was in breach of Article 16e of CEDAW.<sup>37</sup> Though the Committee did not make specific reference to harmful stereotypes in making their decision, their views demonstrated that the Committee takes violations of women's reproductive rights seriously and paved the way for subsequent cases.

The Committee actively considered the effects of harmful stereotyping in women's reproductive health in the case of *LC v Peru*.<sup>38</sup> In this case, the applicant was thirteen when she became pregnant as a result of sexual abuse.<sup>39</sup> Upon finding out about her pregnancy, the applicant attempted suicide. She did not succeed but was severely injured and needed spinal surgery. Doctors did not want to perform the spinal surgery while the applicant was pregnant, and she was denied access to an abortion.<sup>40</sup> The

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<sup>33</sup> Committee on the Elimination of Discrimination against Women, *Views: Communication No 4/2004*, 36<sup>th</sup> sess, CEDAW/C/36/D/4/2004 (7-25 August 2006) [2.4] ('*AS v Hungary*').

<sup>34</sup> *Ibid*.

<sup>35</sup> Amicus Brief by the Centre for Reproductive Rights Committee on the Elimination of Discrimination against Women, *Views: Communication No 4/2004*, 36<sup>th</sup> sess, CEDAW/C/36/D/4/2004 (7-25 August 2006) 2 ('*AS v Hungary*').

<sup>36</sup> *VC v Slovakia* (2011) App 18968/07 Eur Court HR 146.

<sup>37</sup> *AS v Hungary*, CEDAW/C/36/D/4/2004, 17 [11.4].

<sup>38</sup> Committee on the Elimination of Discrimination against Women, *Views: Communication No 22/2009*, 50<sup>th</sup> sess, CEDAW/C/50/D/22/2009 (3-21 October 2011) ('*LC v Peru*').

<sup>39</sup> *Ibid* [2.1].

<sup>40</sup> *LC v Peru*, CEDAW/C/50/D/22/2009.

applicant miscarried and is now permanently disabled as a result of the delay in the spinal operation.<sup>41</sup> The applicant submitted that in her case there had been a violation of Article 5 of the Convention 'because timely access to necessary medical treatment was made conditional on carrying to term an unwanted pregnancy, which fulfils the stereotype of placing ... [the applicant's] ... reproductive function above her right to health, life and a life of dignity'.<sup>42</sup> The Committee agreed with the applicant's submission and found a breach of Article 5 as 'the decision to postpone the surgery due to the pregnancy was influenced by the stereotype that protection of the foetus should prevail over the health of the mother'.<sup>43</sup> The Committee also found a violation of Article 12 on the right to health and urged Peru to liberalise their abortion laws.<sup>44</sup> However, as commentators have noted, not much has changed in Peru since the ruling.<sup>45</sup>

In addition to hearing cases under the communications procedure, the Optional Protocol to CEDAW establishes an enquiry procedure that allows the Committee to initiate an investigation where 'it has received reliable information of grave or systematic violations by a State Party of rights established in the Convention'.<sup>46</sup> The Committee has recently been investigating the Philippines in relation to a State-sanctioned contraception ban.<sup>47</sup> Despite acceptance in international human rights law that 'States should refrain from limiting access to contraceptives and other means of maintaining sexual and reproductive health',<sup>48</sup> since 2000, the Philippines has severely limited women's access to contraception.<sup>49</sup> The Committee uses the strongest language of any international human rights body when it comes to articulating the role that

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<sup>41</sup> Ibid [2.10].

<sup>42</sup> Ibid [7.2].

<sup>43</sup> Ibid [8.5].

<sup>44</sup> Ibid [8.17 12i].

<sup>45</sup> Charlotte Bates, 'Abortion and a Rights to Health in International Law: L.C v Peru' (2013) 2(3) *Cambridge Journal of International and Comparative Law* 640, 656.

<sup>46</sup> *The Optional Protocol to the Convention on Discrimination against Women*, opened for signature 6 October 1999, 1242 UNTS (entered into force 22 December 2000) art 8.

<sup>47</sup> Committee on the Elimination of All Forms of Discrimination Against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1 (22 April 2015).

<sup>48</sup> Committee on Economic, Social and Cultural Rights, *General Comment No 14: The Right to the Highest Attainable Standard of Health (Art. 12 of the International Covenant on Economic, Social and Cultural Rights)*, 22nd sess, UN Doc E/C.12/2000/4 (11 August 2000) 34.

<sup>49</sup> Committee on the Elimination of All Forms of Discrimination against Women, *Summary of the Inquiry Concerning the Philippines under Article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women*, Advance Unedited Version, CEDAW/C/OP.8/PHL/1, 22 April 2015.

stereotypes play in limiting women's access to reproductive health. In their summary of their investigation into the Philippines, the Committee stated:

[The contraception ban] ... reinforced gender stereotypes prejudicial to women, as they incorporated and conveyed stereotyped images of women's primary role as child bearers and child rearers, thereby perpetuating discriminatory stereotypes already prevalent in the Filipino society.<sup>50</sup>

The views expressed by the CEDAW Committee demonstrate the development of the idea that stereotypes impinge heavily on women's access to reproductive rights, and it can be said that the CEDAW Committee has taken the strongest stance on stereotyping in reproductive health. However, given the gendered nature of international law, states may be reluctant to take the views of the CEDAW Committee or even the CEDAW Convention itself seriously.<sup>51</sup> This may be one of the reasons why women have sought to imbed reproductive rights within other more well-known treaty bodies such as the Human Rights Committee and the European Court on Human Rights, where the possibility of states being labelled as perpetrators of torture or cruel, inhumane, or degrading treatment may hold more weight.<sup>52</sup>

### B *The Human Rights Committee*

The Human Rights Committee has considered cases regarding breaches of women's reproductive health rights under the *International Covenant on Civil and Political Rights* ('*Covenant*') beginning with the case of *KL v Peru*.<sup>53</sup> In this case, the applicant became pregnant at 17 and was told she was carrying an anencephalic foetus, meaning that the foetus would certainly die shortly after birth, and posed a risk to her life.<sup>54</sup> Based on this information, the applicant sought an abortion but was told she needed permission from the hospital director. The director denied her request. She subsequently carried the foetus until nearly full term and breastfed the baby for four days until its inevitable

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<sup>50</sup> Ibid 43.

<sup>51</sup> Marike De Pauw, 'Women's Rights: From Bad to Worse? Assessing the Evolution of Incompatible Reservations to the CEDAW Convention' (2013) 29 *Utrecht Journal of International and European Law* 51, 52.

<sup>52</sup> Catharine A MacKinnon, 'On Torture: A Feminist Perspective on Human Rights' in Kathleen E Mahoney and Paul Mahoney (eds), *Human Rights in the Twenty-first Century: A Global Challenge* (The Netherlands: Martinus Nijhoff Publishers, 1992) 21-31.

<sup>53</sup> Human Rights Committee, *Views: Communication No 1153/2003*, 85th sess, CCPR/C/85/D/1153/2003 (17 October – 3 November 2005) ('*KL v Peru*').

<sup>54</sup> Ibid [2.1].



death.<sup>55</sup> The applicant submitted that these events caused her to fall into a deep depression and claimed that existing harmful stereotypes prevented her from accessing her reproductive rights. She maintained that her 'special needs were ignored because of her sex'.<sup>56</sup> Significantly, the Committee found a violation of Article 7 of the *Covenant* which states that 'no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' and Article 17 on the interference with private life.<sup>57</sup>

In the subsequent case of *LMR v Argentina*,<sup>58</sup> the Human Rights Committee again considered restrictive abortion laws. The applicant in this case submitted a communication on behalf of her daughter who had a mental disability and was denied an abortion after becoming pregnant due to rape.<sup>59</sup> As was the case in *KL v Peru*, stereotypical attitudes toward women stemming from religious influence was a determining factor in the denial of abortion as both 'the Rector of the Catholic University and the spokesperson of the Corporation of Catholic Lawyers contributed to the pressure exerted on the family and the doctors'.<sup>60</sup> The Human Rights Committee found a violation of Article 7 and Article 2 stating, '[b]ecause it lacked the mechanisms that would have enabled L.M.R. to undergo a termination of pregnancy, the State party is responsible by omission for the violation of article 2 of the Covenant'.<sup>61</sup>

Despite the findings in both *LC v Peru* and *LMR v Argentina*, in neither case did the Human Rights Committee expressly address the harmful effects of gender stereotyping. The Committee failed to actively articulate that gender stereotypes, rooted in religious and cultural perceptions, played a significant role in the denial of abortion. Further, despite the horrific treatment inflicted upon both women by State organs, the Human Rights Committee did not find that this treatment amounted to torture in either case, demonstrating a lack of momentum for recognising the importance of women's reproductive health rights and the link with gender stereotyping.

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<sup>55</sup> Ibid [2.3].

<sup>56</sup> Ibid [3.2a].

<sup>57</sup> *International Covenant on Economic Social and Cultural Rights*, opened for signature 19 December 1966, (entered into force 3 January 1976) 993 UNTS 3 art 7, 17.

<sup>58</sup> Human Rights Committee, *Views: Communication No 1608/2007*, 101<sup>th</sup> sess, CCPR/C/101/D/1608/2007 (14 March – 1 April 2011) (*LMR v Argentina*).

<sup>59</sup> Ibid [2.9].

<sup>60</sup> Ibid.

<sup>61</sup> Ibid [3.4].

*C The European Court of Human Rights*

The European Court of Human Rights first dealt with women's reproductive health rights in the case of *Tysic v Poland*.<sup>62</sup> The applicant became pregnant and had a medical condition that she was told could worsen should she continue with her pregnancy. The applicant argued a violation of Article 8 in relation to interference with her private life and Article 3 on cruel inhumane and degrading treatment. In their judgement, the Court did not expressly identify that stereotypical attitudes toward women had played a role. However, the religious interest in this case is evidenced by third-party comments that were delivered by the Association of Catholic Families, Cracow, demonstrating the stronghold that religion has over reproductive rights.<sup>63</sup>

In the subsequent case of *A, B and C v Ireland*, three Irish applicants claimed they had been forced to obtain abortions outside of Ireland due to restrictive abortion laws. The trio brought a case to the European Court and jointly claimed 'that their situations [of wanting to terminate a pregnancy] must outweigh religious notions of morality'.<sup>64</sup> With the exception of one of the applicants who had cancer and feared it would return if she carried on her pregnancy, the Court did not find Ireland to be in breach of Article 8 or Article 3 of the *European Convention*. The Court did not interrogate the reasoning behind why Ireland felt abortion was against public morals. This is disappointing as it is well established that harmful gender stereotypes are inextricably linked to notions of morality and religion.<sup>65</sup> Further, the European Court in this instance did not examine the notion of morality in relation to restrictive reproductive rights, which is problematic. Added to this, the Court did not highlight how disproportionately women are affected by restricting access to reproductive health, nor did it draw upon international norms or standards in relation to women's access to reproductive health. The Court simply extended the margin of appreciation to Ireland, despite the fact that the Special Rapporteur on the Right to Health has condemned the use of public morality as an excuse for curtailing women's reproductive rights:

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<sup>62</sup> *Tysic v Poland* (2007) App 5410/03 Eur Court HR.

<sup>63</sup> *Ibid* 107.

<sup>64</sup> *A, B and C v Ireland* (2010) App 25579/05 Eur Court HR 185.

<sup>65</sup> Alexandra Timmer, 'Toward an Anti-Stereotyping Approach for the European Court of Human Rights' (2011) 11(4) *Human Rights Law Review* 707, 737.

Public morality cannot serve as a justification for enactment or enforcement of laws that may result in human rights violations, including those intended to regulate sexual and reproductive conduct and decision-making.<sup>66</sup>

This case aptly illustrates the limits of the European Court of Human Rights in cases relating to stereotyping and women's reproductive health as 'the Court, mindful of its supranational position, usually prefers to show constraint, rather than oblige Member States down a path they are not ready for'.<sup>67</sup>

Harmful gender stereotyping was glaringly evident in the subsequent case of *P & S v Poland*.<sup>68</sup> In this case, the applicant was a teenage girl who became pregnant after being raped. The applicant submitted that the first doctor she consulted advised her not to get an abortion and to get married.<sup>69</sup> The hospital also forced the teenage applicant to speak unattended with a priest who told her not to go through with the termination.<sup>70</sup> Disturbingly, in what appears to be a move to mobilise stereotypical religious beliefs around motherhood, the hospital issued a press release and consulted with the Polish media about their decision to refuse to grant an abortion. This meant that the personal decision of a teenage rape victim became national news and cause for public debate.<sup>71</sup> Further, in an attempt to shame the applicant, the Polish authorities instituted a 'criminal investigation into unlawful intercourse against her ... when she should have been considered to be a victim of sexual abuse'.<sup>72</sup> Gender stereotypes associating women with motherhood coupled with other harmful stereotypes such as the fact that women are not to be believed when they report cases of rape and sexual abuse were rife in this case.<sup>73</sup> Despite the fact that women 'should be able to rely on a justice system free from myths and stereotypes and on a judiciary whose impartiality is not

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<sup>66</sup> Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 18.

<sup>67</sup> Timmer, above n 65, 737.

<sup>68</sup> *P & S v Poland* (2012) App 57375/08 Eur Court HR.

<sup>69</sup> Ibid 13.

<sup>70</sup> Ibid 19.

<sup>71</sup> Ibid 27.

<sup>72</sup> Ibid 165.

<sup>73</sup> Barbara Masser, Kate Lee and Blake McKimmie, 'Bad Woman, Bad Victim? Disentangling the Effects of Victim Stereotypicality, Gender Stereotypicality and Benevolent Sexism on Acquaintance Rape Victim Blame' (2010) 62(7) *Sex Roles* 494, 494–504.

compromised by these biased assumptions,<sup>74</sup> this action from the State illustrates the way in which women cannot trust the domestic legal system to be free from harmful gender stereotypes. The court found a breach of Article 8, specifically due to the fact that the applicant's personal information was made public.<sup>75</sup> The court also found a breach of Article 3, although stating that the conduct of Poland did not meet the threshold for torture.<sup>76</sup>

#### D *The Inter-American Court on Human Rights*

The Inter-American Court on Human Rights has decided cases regarding women's reproductive rights that concern the same types of reproductive issues that have been heard in the case law of the CEDAW Committee, the Human Rights Committee, and European Court.<sup>77</sup> Of a different nature to the cases discussed is the recent finding in *Artavia Murillo et al v Costa Rica*. The applicants in this case sought to challenge Costa Rica's constitutional ban on access to In Vitro Fertilisation Treatment ('IVF').<sup>78</sup> The Court actively mentioned that the IVF ban disproportionately affects the human rights of women, due to the stereotyped perception of women as the 'basic creator of the family'.<sup>79</sup> Whilst articulating that they exist, the Court did not want to appear to condone these stereotypes and emphasised that 'these gender stereotypes are incompatible with international human rights law and measures must be taken to eliminate them'.<sup>80</sup> The Court found Costa Rica to be in breach of the *American Convention on Human Rights* Article 5 regarding the right to humane treatment, Article 7 regarding the right to personal liberty, and Article 11(2) regarding the right to non-interference with private life.<sup>81</sup> Whilst this was an effective outcome for women's access to reproductive health in Costa Rica, it is disappointing that the Court took a similar approach to that of the European Court of Human Rights and the Human Rights Committee in that it did not 'address the root causes of the violation in its reparations.

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<sup>74</sup> Simone Cusack, 'Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-Based Violence Cases' (2014) *Office of the High Commissioner for Human Rights* 20.

<sup>75</sup> *P & S v Poland* (2012) App 57375/08 Eur Court HR 134.

<sup>76</sup> *Ibid* 168.

<sup>77</sup> In relation to the forced sterilisation of Peruvian Indigenous women, see *Maria Chaves v Peru* (2003) Case 12.191 Inter-Am HR.

<sup>78</sup> *Artavia Murillo et al v Costa Rica* (2012) Case 257 Inter-Am HR 67.

<sup>79</sup> *Ibid* 195.

<sup>80</sup> *Ibid* 199.

<sup>81</sup> *Artavia Murillo et al v Costa Rica* (2012) Case 257 Inter-Am HR.

These causes are directly connected to the relationship that exists between the Catholic Church and the State and also societal norms of inequality, discrimination, and violence that are disproportionately harmful to women'.<sup>82</sup>

#### V REFORM: INTERROGATION OF STEREOTYPES

The international case law articulated in this research demonstrates that states have breached different aspects of women's reproductive health rights ranging from access to contraception and IVF treatments to forced sterilisation and denial of abortion. In all of these cases, women's physical and/or mental health has been adversely affected, and women's agency to make decisions regarding their own bodies has been denied. International human rights bodies have found breaches of reproductive rights in relation to the right to health, privacy rights, freedom from cruel and inhumane treatment, and the right to decide freely on the number of children. Hence, there are a number of ways women's reproductive rights can be infringed upon, and a number of ways women have been able to argue against the infringement in international law. However, despite this variety, what is very clear from the case law discussed is the impact that gender stereotyping has on women's ability to access their human rights. It is also worth noting that, while it is rarely articulated by human rights bodies, in all of the cases discussed in this research, religious influence has been a factor, demonstrating that the 'church exerts an incredible amount of power and control of women through an almost single-minded focus on reproduction and sexuality'.<sup>83</sup>

It is clear that gender stereotypes and patriarchal concepts not only uphold the status quo in relation to women's oppression, but they also serve to inform and influence government law and policy.<sup>84</sup> For example, in 2011, 'twenty five per cent of the world's population live[d] under legal regimes that prohibit all abortions except for those following rape or incest, as well as those necessary to save a woman's life'.<sup>85</sup> It has been established in international law that 'women are entitled to participate in all decisions

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<sup>82</sup> Ciara O'Connell, 'Litigating Reproductive Health Rights in the Inter-American System: What Does a Winning Case Look Like?' (2014) 16(2) *Health and Human Rights* 117, 122.

<sup>83</sup> Denise, above n 21, 183.

<sup>84</sup> Rebecca J Cook, Simone Cusack and Bernard M Dickens, 'Unethical Female Stereotyping in Reproductive Health' (2010) 109(3) *International Journal of Gynecology and Obstetrics* 255, 255.

<sup>85</sup> Anand Grover, *Report of the Special Rapporteur of the Human Rights Council on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health to the General Assembly (Main Focus: Criminalisation of Sexual and Reproductive Health)*, UN Doc A/66/254 (3 August 2011) 23.

affecting their sexual and reproductive health at all levels of decision-making'.<sup>86</sup> However, gender stereotyping prevents this from being a lived reality for many women. In order to fully eradicate harmful legislation and policy in the area of reproductive health, the focus needs to be on working toward substantive equality for women by the elimination of gender stereotypes. In order to achieve any meaningful change, 'governments must first honestly engage with the problem by identifying its root causes of patriarchy, economic inequality and lack of access, harmful traditional practices, and use human rights based solutions'.<sup>87</sup> The responsibility on states to eliminate harmful gender stereotypes should also extend to the international human rights bodies who should interrogate states in relation to the reasoning behind their restrictive reproductive rights policies. Simone Cusack and Rebecca J Cook emphasise the importance of this, stating that all forms of society should be 'exposing the operative gender stereotypes, examining their origins, contexts and means of perpetuation, and analysing how their application, enforcement or perpetuation harms women'.<sup>88</sup> Reform in this area is urgently needed. It is imperative that stereotypical notions of women in society are phased out and that it is universally understood that women are 'bearers of rights, as well as babies'.<sup>89</sup>

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<sup>86</sup> Ibid 54.

<sup>87</sup> Zarin Hamid, 'More Than Just a Theme: Violence against Women and Girls', *Thomson Reuters Foundation* (online), 8 March 2013 <<http://www.trust.org/item/?map=more-than-just-a-theme-violence-against-women-and-girls>>.

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<sup>89</sup> Markowitz, above n 17, 2.

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## KINSEY, EMPIRICISM, AND HOMO/TRANSPHOBIA\*

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*The struggle of the LGBTIQ community is well documented. In the not so distant past, spurred by prejudice and misinformation, LGBTIQ people were labelled mentally ill and faced criminal prosecution for their identities. Despite the gradual progression of understanding and empathy of the past century, members of the community still face daily hostility and discrimination rising from the remnants of that bygone era. In the spirit of great scientists such as Alfred Kinsey, who promoted understanding through evidence based conclusions, this article seeks to identify several basic reasons behind the hostility and apathy towards the LGBTIQ community in Australia and overseas.*

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\*Derived from a lecture at Curtin University, Centre for Human Rights Education, "From Alfred Kinsey to Orlando and beyond: The role of research in confronting homophobia", delivered on 26 August 2016 in Perth, Western Australia. The author acknowledges, and has taken into account, comments from anonymous reviewers. The author would also like to acknowledge the assistance of Myles Bayliss in preparing the manuscript for publication.

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## I KINSEY AND HIS LEGACY

Alfred Kinsey died exactly 60 years ago. He was an important scientist and one of the most influential biologists of the 20<sup>th</sup> century. The impact of his work is ongoing, helping us to understand and correct the basic causes of hostility to minority sexual orientation and gender diversity and experience, which it is the purpose of this article to identify and analyse.

Kinsey was born in New Jersey in June 1894. After studies, including at Harvard University, he became Professor of Zoology at Indiana University and the world's leading expert on gall wasps. In the 1930s, he turned his research to an investigation of human sexuality. In 1948, he and colleagues produced the first report on their research into the sexual behaviour in the human male.<sup>1</sup> In 1953 they produced their report on

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<sup>1</sup> Kinsey et al, *Sexual Behaviour in the Human Male* (Indiana University Press, 1948) 639: 'Males to do not represent two discrete populations, heterosexual and homosexual. The world is not to be divided into sheep and goats ... It is fundamental of taxonomy that nature rarely deals with discrete categories. Only

sexual behaviour in the human female.<sup>2</sup> These reports showed that human beings were not neatly divided into males and females or homosexual and heterosexual along binary lines. They exhibited a continuum of sexual desires, behaviours, and identities.

Kinsey's skill was taxonomy. His methodology was empirical. He and his team conducted thousands of interviews, which were anonymised, analysed, reported, and classified. The resulting reports created a sensation. They undermined cultural, religious, and sometimes intuitive assumptions that people within the sexual minorities were sick, psychologically disturbed, or wilfully antisocial, defying the "order of nature". On the contrary, Kinsey and his colleagues found that they were *part* of "order of nature".

Kinsey died in August 1956. Of course, his research and methodology were attacked in his lifetime and have been thereafter. However, later research lends support to Kinsey's overall findings and conclusions. One of the consequences of his reports was the removal of homosexuality from the World Health Organisation's classification of diseases.<sup>3</sup> Another was the initiation of moves for law reform, to abolish criminal offences that existed in many countries targeted at LGBTIQ ('Lesbian, Gay, Bisexual, Transgender, Intersex and otherwise Queer or Questioning persons') in respect of their sexual behaviour and identity. Such crimes applied even where the behaviour was conducted in private and confined to consenting adults. Sometimes the law reforms were the outcome of official reports.<sup>4</sup> Sometimes they were the result of parliamentary changes to the law.<sup>5</sup> Sometimes they came about as a consequence of judicial decisions, applying to previous laws broad constitutional guarantees of equality, privacy, or non-discrimination.<sup>6</sup> In Australia, the last of the relevant criminal laws (in Tasmania) was

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the human mind invents categories and tries to force facts into separate pigeon holes. The living world is a continuum in each and every one of its aspects. The sooner we learn this concerning human sexual behaviour, the sooner we will reach a sound understanding of the realities of sex.'

<sup>2</sup> Alfred C Kinsey et al, *Sexual Behaviour in the Human Female* (Indiana University Press, 1953); see also Evelyn Hooker, 'The Adjustment of the Overt Male Homosexual' (1957) 21 *Journal of Projective Techniques* 18; Cf William N Eskridge and Nan D Hunter, *Sexuality, Gender and the Law* (Westbury, Foundation Press, 1997) 145.

<sup>3</sup> Jack Drescher, 'Queer Diagnoses: Parallels and Contrasts in the History of Homosexuality, Gender Variance, and the Diagnostic and Statistical Manual' (2010) 39(2) *Archives of Sexual Behaviour* 427.

<sup>4</sup> Such as the Committee on Homosexual Offences and Prostitution, *United Kingdom Royal Commission on Homosexual Offences and Prostitution*, Cmd 247 (1957).

<sup>5</sup> Such as *Sexual Offences Act 1967* (UK).

<sup>6</sup> Such as *Lawrence v Texas* 539 U.S. 558 (2003). The US Supreme Court declared that the sodomy law in Texas was unconstitutional, reversing *Bowers v Hardwick* 478 U.S. 186 (1986).

repealed in 1997.<sup>7</sup> However, some remnants of the old hostility remain in respect to relationship recognition (same-sex marriage);<sup>8</sup> legal rights of adoption of children;<sup>9</sup> and the application of anti-discrimination laws, particularly in religious settings.<sup>10</sup>

In celebrating the life and work of Alfred Kinsey, I want to explore the reasons that may lie behind the animosity that the LGBTIQ people have suffered, in Australia and worldwide. That animosity did not disappear with the publication of the research of Kinsey, and those who have followed him. On the contrary, despite some progress,<sup>11</sup> shocking violence against LGBTIQ people continues. It is still a serious problem in Australia. However, even more serious instances involving violence have occurred elsewhere. These include the murder of two LGBTIQ activists in Bangladesh on 25 April 2016,<sup>12</sup> and the shooting of 49 young LGBTIQ people, killed at the Pulse gay nightclub in Orlando in the United States on 11 June 2016.

It is therefore appropriate to pause and reflect on the possible reasons for this enduring hostility, discrimination, and violence. Changing the law can sometimes help, as an educative tool, in the improvement of social attitudes. However, it does not resolve the

<sup>7</sup> Following *Croome v Tasmania* (1998) 191 CLR 119. And *Human Rights (Sexual Conduct) Act 1994* (Cth).

<sup>8</sup> *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441. See also *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, a case involving a transgender person.

<sup>9</sup> At the time of publication, joint adoption by same-sex couples was already possible in New South Wales, Tasmania, Victoria, the ACT and Western Australia with reform likely in Queensland, South Australia, and the Northern Territory. However if these jurisdictions do not reform their laws, federal marriage equality would not necessarily allow same-sex couples in those jurisdictions to adopt as their legislation is expressed in gender-specific terms. In the *Adoption Act 2009* (Qld) an applicant for adoption must have a spouse who 'is not the same gender as the [applicant]', see ss 76(1)(g)(ii); 89(7)(b)(v)(A); 92(1)(h)). The *Adoption Act 1988* (SA) s12(1) requires applicants to have cohabitated together in a 'marriage relationship' for at least five years. 'Marriage relationship' is defined as a 'relationship between two persons cohabiting as husband and wife or de facto husband and wife' and the *Adoption of Children Act 1994* (NT) s13(1)(a) restricts adoption to where 'the man and woman are married to each other and have been so married for no less than 2 years'.

<sup>10</sup> This refers to the exemption of religious groups from anti-discrimination laws present in most (if not all) Australian anti-discrimination legislation. For example, s37 of the *Sex Discrimination Act 1984* (Cth) exempts an act or practice of a body established for religious purposes that conforms to the doctrines of that religion or is necessary to avoid injury to the religious susceptibilities of adherents of that religion. For further reading see David Kinley *Human Rights in Australian Law* (Federation Press, 1998).

<sup>11</sup> For example, *Naz Foundation v Union of India* (2009) 160 Delhi Law Times 277, reversed by the Supreme Court of India in *Suresh Koushal v Naz Foundation* (2014) 1SCC 1 (SCI). See also *Caleb Orozco v Attorney General of Belize*, unreported, Supreme Court of Belize 15 August 2016.

<sup>12</sup> Two gay activists, Xulhaz Mannan and Rabbi Tonoy, were murdered in Dhaka on 25 April 2016. See 'Campaign of terror against Bangladesh's liberal voices', *The Economist* (online), 27 April 2016, <<http://www.economist.com/news/asia/21697811-recent-murders-have-cut-quick-countrys-civil-society-campaign-terror-against>> and Syed Zain al-Mahmod 'Extremist Group Claims Responsibility for Killing Bangladeshi Gay-Rights Activists' *The Wall Street Journal* (online) 26 April 2016 <<http://www.wsj.com/articles/extremist-group-claims-responsibility-for-killing-bangladeshi-gay-rights-activists-1461685288>>.

underlying causes for the animosity and the instances, large and small, where such causes manifest themselves in violence and discriminatory conduct. What, then, are some of the causes of homophobia and transphobia? These are questions that should engage Australia's universities and research institutions.

## II SOME CAUSES OF HOMO/TRANSPHOBIA

### *A Conservative Disposition and Power*

Imposing labels on people is often unhelpful to achieving harmony in relationships with them and the embrace of diverse opinions and attitudes that promote progress. LGBTIQ people generally know this for they have long suffered from verbal abuse, stereotyped labelling, and name-calling. In saying that some people of a conservative social disposition resist changes affecting LGBTIQ people, I do not mean to insult them or to disrespect those who defend laws and attitudes that have long appeared to be settled. As befits a lawyer, in some matters, I am myself quite conservative. Defending the rule of law and upholding long-standing features of our Constitution and law is quite a conservative posture. Yet it is one to which I adhere. However, like most people, I remain open to persuasion that things sometimes need to change.

However, on laws and policies concerning the unequal treatment of LGBTIQ fellow citizens, because of their sexual orientation and gender identity and expression, the minds of a significant number of citizens resist the very idea. They do not see why long-standing arrangements should be altered. Least of all for the benefit of a relatively small minority, whose conduct (and sometimes mere existence) they regard with distaste. If things have been ordered in a certain way for decades or even centuries, they ask, why they should now change? If gays have been frowned upon and discouraged, might that not be for good reason? In the past, most people knew of the existence of gays. But the laws and policies that required them to hide their sexuality, and pretend to be "normal", amounted to an arrangement that quite a large cohort of citizens thought should be preserved. The control was part of their power in society. They did not want that to change.

This attitude is especially true of many older people who grew up in the age of "Don't ask; don't tell". What was so wrong with that arrangement, its proponents ask? It was



basically “tolerant”; i.e. so long as LGBTIQ people pretended to be heterosexual they would basically be left alone. The problem with the continuation of this attitude is that it is fundamentally dishonest and essentially unscientific. It does not necessarily dispute what science now teaches, but it demands that everyone should continue to pretend that reality is different than it is. Increasing numbers of LGBTIQ people, and their families and allies, now regard preservation of the old order, unchanged, as fundamentally unacceptable to their sense of honesty and self-worth. Building attitudes and policies on a principle of personal and social truthfulness is just as important in the case of LGBTIQ people as it was earlier, following Charles Darwin’s scientific revelations about evolution of the species, in the place of acceptance of creationism in the education curriculum. But power does not typically surrender easily.<sup>13</sup>

### *B Experiential Limitations*

It is simpler to maintain laws and policies reflecting prejudice and discrimination if those who support that approach have little or no contact with those who suffer in consequences. In a sense, LGBTIQ people, who for centuries went along with the requirement to pretend that their desires and conduct was different from reality, conspired in their own invisibility. They did so to avoid hostility, violence, contempt, bringing shame to their families, career and social disadvantage, or to avoid unpleasant disclosures. Of course, many did not contribute to this invisibility and stood up for change, however this is a more recent occurrence, for decades after Kinsey, and still in present times, pretence and dishonesty is the safer path in many places both in Australia and internationally.<sup>14</sup>

Heterosexual people, who never met self-identifying LGBTIQ people, could then not be blamed for nurturing attitudes of hostility. After all, they were certainly the large majority of society, whose traditions, laws and arrangements were built around their experiences and needs. If LGBTIQ people maintained silence, they did not confront the majority with the pain and dishonesty that dissimulation occasioned, especially in relations with family and close friends.

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<sup>13</sup> Charles Darwin, *On the Origin of Species* (John Murray, 1859).

<sup>14</sup> Location is important to the kinds of pressures to disguise sexuality: there are fewer pressures in Australia, but when one moves to regional and rural areas, the pressures go up. Likewise, there is more pressure in Bangladesh. And intense pressure in Iran.

These hostile attitudes are similar to the ignorant, prejudiced, and sometimes shockingly uninformed attitudes towards racial minorities prevalent in the “White Australia” era, which prevailed under Australian laws before 1966 when reform began to occur. These attitudes were easy to hold simply because members of those minorities were not part of the ordinary experience of the majority. White Australia, like apartheid in South Africa, protected the majority of its population, living in a false belief that the world was comprised overwhelmingly (or totally) of people like themselves. When that reality changes and the diversity of society is experienced, opportunities are presented to adjust the thinking of those who might otherwise resist change. When a minority (whether LGBTIQ persons, Jews, Aboriginals, or Muslims) became neighbours, work friends and acquaintances, it is much more difficult to maintain hostility. This is how Australia, since 1966, has adjusted reasonably well to acceptance of a multi-racial and multi-cultural society. For those who were raised in the prejudice of “White Australia”, the evolution has been remarkable. It is continuing. It is now irreversible.

### *C Religious Beliefs*

There are not many passages in the scriptures shared by the Jewish, Christian, and Islamic ‘People of the Book’ that exhibit specific hostility against LGBTIQ people.

Modern translations of the Bible have sometimes substituted the word “homosexual”, in the list of disapproved groups, despite the fact that this word did not come into the English language (via German) until the late 19<sup>th</sup> century. The passages of scripture that have been construed to disapprove of consensual, adult homosexual (and like) conduct were written in much earlier times and in societies that had no knowledge of the scientific data later gathered by Kinsey and his successors. A number of theologians are now questioning the proper interpretation of the impugned passages.

Particularly is this so in the case of Christian theologians, conscious of the assertion by Jesus that He had brought to the world “a new Covenant”.<sup>15</sup> There are other passages of scripture that have been interpreted to disapprove of left-handedness. In apartheid South Africa and Southern States of the United States a prohibition on racial

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<sup>15</sup> See, eg, N Wright (ed) *Five Uneasy Pieces – Essays on Scripture and Sexuality* (ATF Press, 2011); Cf M D Kirby, *Sexual Orientation & Gender Identity — A New Province of Law of India* (Universal Law Publishing Co. Private Limited, 2015), 47ff.

miscegenation was taught as ordained by scripture. Some passages of scripture also appear to condone slavery. Certainly many passages appear to uphold a seriously unequal status for women. Misogyny sometimes spills over to, and explains, hostility to homosexuals and the challenge they present to patriarchal features of society. Not all religious people today are hostile to the reality of the lives of LGBTIQ persons. To the extent that they “tolerate” them, but demand of them a totally celibate sexual life that they could not demand of themselves, they adopt an unreasonable stance and evidence unnatural attitudes of maintaining hostility and violence that need to change.

#### *D Cultural Values*

Some cultures in our world are more accepting of sexual diversity than others. However, the two global cultures that are probably most hostile towards LGBTIQ people are the Anglo/Commonwealth and Islamic/Arabic cultures.

If any country that was at any time ruled by Britain, the criminal law imported the traditions of English common law hostile towards LGBTIQ behaviour. Criminal offences, often expressed as “sodomy”, a word of Biblical origin, can be found in the criminal codes imposed by rulers of the British Crown throughout the world. This was done whatever may have been the preceding state of the law on the topic, if any. In most cases, the Indigenous law had previously been silent on the subject. Criminal law is normally confined to anti-social conduct where there are victims who have been injured by, and complain against, the acts concerned. The sodomy and other similar offences exceptionally applied to adult conduct and consent was no defence. Such offences carried serious punishments, including originally, the death penalty. Such criminal offences still remain in force in 42 of the 54 member countries of the Commonwealth of Nations.

The United Kingdom and settler dominions of the British Crown repealed these offences decades ago. However, neither appeals to the legislature nor invocations of the jurisdiction of the courts under constitutional human rights provisions, have proved very fruitful in removing these laws.

Sixty years after Kinsey, a kind of log-jam has set in that is neither just to the people affected nor wise,<sup>16</sup> given the adverse consequences for successful strategies in dealing with the HIV epidemic.<sup>17</sup> In many of the former British colonies today, an excuse that is often given for inaction in the reform of the criminal provisions is that they are not vigorously enforced.<sup>18</sup> In most Islamic countries, the opposite is the case. The offence, if discovered, is strongly enforced. In some such jurisdictions, the death penalty is available, upon conviction, such is the hostility said to be required by religious adherence.<sup>19</sup> So long as the law remains hostile to the adult, consenting, private sexual conduct of LGBTIQ people (whether vigorously enforced or not) attitudes will often take their content from, and be reinforced by, such laws. Securing change by education, media, and scientific instruction will face severe hurdles. Hostile laws tend to occasion hostile attitudes.

### *E Natural Law Complementarity*

Because of the steadily declining numbers of people who align themselves with a hostile religious viewpoint in countries like Australia, attempts are now being made by some whose basic approach is shaped by their religious upbringing and beliefs to provide a secular explanation as to why they persist with a demand for legal and attitudinal inequality affecting the LGBTIQ citizens. After all, if discrimination (and even perhaps some violence) is to be justified there needs to be a reason. If scriptural texts do not now afford sufficient justification for many people, something more persuasive needs to be advanced. Reasons that appeal as logical and persuasive. This is where some advocates of differentiation reach for natural law explanations to justify the maintenance of attitudinal and legal distinctions.

A common argument along these lines is derived from the suggested “complementarity” of male and female sexual organs. Because, as it is said, the male reproductive organ was intended by nature to complement and integrate with the female reproductive

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<sup>16</sup> M D Kirby, ‘Breaking the Commonwealth Logjam Over Sexuality Issues’ (2011) 18(3) *CHRI Newsletter* 8.

<sup>17</sup> Commonwealth of Nations, Report of the Eminent Persons Group to CHOGM, *A Commonwealth of the People – Time for Urgent Reform* (Commonwealth, Perth, October 2011), 98-101; United Nations Development Programme, Global Commission on HIV and the Law, *Risks, Rights & Health* (UNDP, NY, July 2012), Ch 3.1 (“Men Who Have Sex With Men”), 44 ff.

<sup>18</sup> *Lim Meng Suang v Attorney General of Singapore* [2013] 3 SLR 118 (CA); in above n 10, 127-134.

<sup>19</sup> The death penalty is provided in a number of countries including Iran, Mauritania, and states of Nigeria. It was recently added to the Criminal Code of Brunei Darussalam.

organ, sexual activity that is contemplated and permitted by nature must be respectful of that complementarity. Arguments along these lines are sometimes advanced to explain, and justify, the maintenance of discriminatory provisions in the law.<sup>20</sup>

The difficulty with this line of argument arises when one goes beyond linguistic analysis into the kind of empirical research into sexual behaviour in humans that Alfred Kinsey undertook. When that is done (or even when much older sex manuals are remembered) it will be realised that sexual conduct, in search of pleasure and sexual fulfilment, does not confine itself to complementary body part interaction. The variety is enormous. This is so in heterosexual people as well as LGBTIQ. Engagement in sexual activity is undertaken, including by heterosexual people, not only for reproduction. It is done for pleasure, physical, and mental well-being, and affirmation of love and affection.

Moreover, enjoying a healthy sexual life is beneficial to the psyche and emotions of the participants. As long as what they do is carried out in private and with consenting participants who are of an age and competence to agree, it is now generally accepted by legal philosophers that enforcement of strictures demanded by religious or supposed natural law rules cannot be justified as proportional in a liberal democratic society. Thus, in a country like Australia, where the majority of marriages now take place outside traditional venues in churches or temples and in parks, hotels and vineyards, the demands that they must comply with rules accepted by particular religious or philosophical viewpoints no longer carry the persuasive force that once they did.

### *F Social Imagery*

A further explanation of hostility to LGBTIQ sexuality may arise from the aesthetic sense of some of a different sexuality. Even today, the overwhelmingly approved social indicators of human sexual relationships revolve around heterosexual experience: dating, hand-holding, engagement, weddings, christening ceremonies, divorce, remarriage, and so forth. Such imagery is found in every shape and form in popular media, whether print, movies, television, digital, and in women's or men's magazines.

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<sup>20</sup> See, eg, J Santamaria, 'The Primacy of the Family and the Subsidiary Role of the State' (2006) 27(3) *Australian Family* 12: 'Although the spouses' complementarity goes beyond mere biology, the biological substratum provides an essential bond between family members. By their marital acts, the couple expresses in a profound and special way their whole married life together: they are truly two-in-one-flesh. When their marital acts bear the fruit of children, these children (literally) issue from the marriage; they are the embodiment and thereby the extension into space and time of the parents' union'.

This imagery not only portrays a substantially exclusive pathway to human happiness. It also raises expectations amongst families, particularly parents and grandparents that deny different pathways. Whilst this may be understandable, on a personal level, it should not be a reason for the oppression of those for whom the usual pathways are not congenial or possible.

To demand that LGBTIQ people should get married in order to fulfil the expectations of their parents or others involves a ritual that still occurs, although less commonly in Australia today than in earlier generations. For many, including some LGBTIQ people themselves, the imagery of same-sex relationships is awkward and uncomfortable, simply because it is unusual and still relatively uncommon. Changing the imagery, and supplementing it with new aesthetics is beginning to occur, but slowly.

The *New York Times* has long carried articles on recent weddings and engagements. Now that these life events can legally extend to LGBTIQ couples, their stories are also beginning to appear. Exploring such stories in popular culture is not only appropriate to the variety of actual human experience. Carrying some such stories in print media, television and soap operas can contribute to community understanding and acceptance of the reality of diversity. The popular Australian television series of the 1970s, *Number 96*, portrayed the leading character as gay, attractive, and congenial. The sympathetic and factual elements of his life played an important role in promoting acceptance of sexual diversity in a large popular audience. In the same way, television soap operas have been used in Latin America to illustrate the challenges of the daily lives of LGBTIQ citizens and also of those living with HIV, in a way much more effective than didactic coverage would do. Portrayals of transgender lives as they are experienced are much less common. Yet, despite this, the number of young people identifying as transgender in identity or experience appears to be increasing. When people meet those involved, the unthreatening character of the minority is increasingly appreciated.

#### *G Superiority Instincts*

In seeking to explain why there was such hostility towards LGBTIQ people, particularly throughout Africa, Bishop Desmond Tutu once attributed homophobia to the need many

people feel to have someone to look down on.<sup>21</sup> If, as is now generally accepted, people do not choose and cannot change their sexual orientation or gender identity, it can be easy for the majority who identify as heterosexual to feel satisfied and superior in a posture that condemns others whose feelings and conduct are different. If one is heterosexual without actually choosing or working on it, it may be easy to believe that everyone should feel and behave in the same way. However, to demand of others what one would never demand of oneself is self-evidently unreasonable and even irrational.

Homosexual people should no more be made to feel obliged to experience sexual attraction to a person of the opposite sex than it would be reasonable to demand of a heterosexual person that they feel sexually aroused by the person of the same sex. It just will not happen. The moral principle at stake is an application of the Golden Rule. These are deep-wired feelings of the individual insusceptible to orders or demands. The earlier attempts of conversion therapy have now been abandoned as unscientific, unsuccessful, and oppressive. Yet such attempts were not uncommon in earlier decades. Even radical brain surgery (lobotomy) was earlier advocated to rid LGBTIQ people from their 'objective inclination to evil'.<sup>22</sup> In a number of jurisdictions, the former practice of conversion therapy has now been pronounced unlawful.<sup>23</sup>

One advantage of the empirical research of Alfred Kinsey was that it demonstrated the likely futility of attempting to stamp out the range of diverse sexual orientations and gender identities that exist in the world. If they exist, they constitute part of the natural order. Attempts to eliminate or render invisible that natural order are as impermissible in the case of sexual orientation and gender identity as they are in the cases of gender, race, indigenous ethnicity, and inherited physical and mental characteristics or disabilities.

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<sup>21</sup> Yasmine Hafiz, Desmond 'Archbishop Tutu would prefer Hell over a Homophobic Heaven', *Huffington Post* (online), 20 July 2013 <[http://www.huffingtonpost.com.au/entry/desmond-tutu-hell-homophobia\\_n\\_3661120](http://www.huffingtonpost.com.au/entry/desmond-tutu-hell-homophobia_n_3661120)>.

<sup>22</sup> The language of the catechism of the Roman Catholic Church. On lobotomy, see J W Friedlander and R S Banay, 'Psychosis following lobotomy in a case of sexual psychopathy: Report of a Case' (1948) 59(3) *Archives of Neurology and Psychiatry* 302.

<sup>23</sup> American Medical Association, *American Medical Association Policy on Sexual Orientation* (2007).

*H Revulsion Feelings*

Connected with some of the foregoing considerations, particularly built upon the common imagery of heterosexuality in society, is the emotional feeling of revulsion that some people have for what appear to them to be “perverse” sexualities. In some cases those who are displaying diversity may do so with exaggeration in order to be sure that they achieve an impact by their display. Cabaret artists, “drag queens”, “muscle Mary’s” and other exaggerated portrayals of LGBTIQ stereotypes sometimes allow LGBTIQ people themselves to laugh at the stereotypes or to cry over shared indignities. Holding up a mirror to nature and seeking to convey a message is a traditional role of theatre, literature, and media generally. On the other hand, what is displayed is often quite distant from the reality of the lives of most LGBTIQ people.

When I was a child, a neighbouring family living in our street had a daughter with Down syndrome. Her appearance produced mixed feelings of mortification and sympathy for the parents of the child and occasional hostility to the child, simply because she looked and behaved differently from other children of the same age. The feeling of sympathy for the parents of gay children was part of the horror story that frightened LGBTIQ children and their parents alike. Fear of such condescension can lead those affected into hiding or disguising their reality. Pity and sympathy are not attitudes one wishes to inflict on loved ones, at least for simply being oneself.

People of heterosexual orientation can be reassured that most LGBTIQ fellow citizens live lives as quiet, orderly and (for the most part) unexciting as their own. The vulgar, cacophonous appearances of “drag queens” in sequins are not typical of the daily lives of most transgender people, still less others in the LGBTIQ minority. To some extent, the exaggerated imagery survives for a purpose. The use of words like “gay” and “queer” have increasingly come into use in the English language to disempower their use as a means of insulting LGBTIQ people. By taking control of stereotypes and the language and imagery of hostility, the objective has been to defang the cruelty and to leave those who delight in it without the same weapons of verbal and visual insult and oppression.



*I Understanding Individual Experiences*

Of course, in particular cases, individuals can experience unwanted intrusions into their privacy and sexual integrity, including by LGBTIQ perpetrators. It is no more acceptable for an LGBTIQ person to seek to force their sexuality on someone whose sexuality is different or otherwise finds it unwelcome than for the reverse to occur. After polite rebuffs, it is expected in a civilised society that the intruder will retreat, in deference to the space and integrity of the other. Questions can arise as to the extent of a tolerable intrusion before it becomes offensive or even criminal.

In a case that came before the High Court of Australia during my service, the issue was presented as to whether a non-violent sexual advance by a gay friend of the accused could, in law, amount to conduct that justified the killing of the individual as a legal provocation.<sup>24</sup> A majority of the Court concluded that the question was one apt to be determined by a jury. However, on the suggestion that a non-threatening sexual advance or sexual overture amounted, in law, to provocation causing the accused to lose self-control, and to inflict ten fatal stab wounds in the deceased's chest in the shape of a butterfly, I said:

If every woman who was a subject of a 'gentle', 'non-aggressive' although persistent sexual advance, in a comparable situation to that described in the evidence in this case could respond with brutal violence arising to an intention to kill or inflict grievous bodily harm on the male importuning her, and then claim provocation after a homicide, the law of provocation would be sorely tested and undesirably extended ... Any unwanted sexual advance, heterosexual or homosexual, can be offensive. It may intrude on sexual integrity in an objectionable way. But this court should not send the message that, in Australia today, such conduct is objectively capable of being found by a jury to be sufficient to provoke the intent to kill or inflict grievous bodily harm. Such a message unacceptably condones serious violence by people who take the law into their own hands.<sup>25</sup>

After the majority decision in this case was announced, law reform reports recommended abolition or alteration of the law of provocation in Australia. Reforms have been adopted in most States and Territories (and in many jurisdictions overseas)

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<sup>24</sup> *Green v The Queen* (1997) 191 CLR 334.

<sup>25</sup> *Green v The Queen* (1997) 191 CLR 334 at 415-416. Cf at 387 per Gummow J (dissenting). Contrast Brennan CJ at 345-6, Toohey J at 357 and McHugh J at 371.

to amend the law of provocation so as to reduce the ambit of the so-called 'gay panic' defence.<sup>26</sup> Obviously, society needs to draw a line that marks its disapproval of non-consensual sexual intrusions. However, the line needs to be drawn well clear of the response of homicide if it is to operate in a way consonant with proper enforcement of the criminal law, not crude self-help.

### *J Unresolved Personal Conflicts*

Finally, there is a feature that accords with the experience of many members of the LGBTIQ minorities and doubtless others. This is that most heterosexual people are not especially homophobic or transphobic. They may not fully understand variation of people's feelings and behaviour. However, they know enough of the importance of sexuality to their own lives to realise that demands for life-long celibacy or denial of sexual orientation and gender identity are doomed to fail. Accordingly, a more realistic policy must be adopted. It needs to be reflected both within the law and in social practice. It is this turn around in social awareness that has brought about major changes in attitudes towards sexual minorities in countries like Australia.

The biggest change that has occurred has been in relation to gay and lesbian people, possibly because they have been more visible and assertive in explaining their experiences and demonstrating how, overwhelmingly, their lives are similar to the heterosexual majority. There is less understanding about bisexuals, transgender, and intersex persons because there is less knowledge about them. Hostility towards such persons is still significant because these minorities are more invisible and less understood. Only these considerations could probably explain the harsh provisions of current obligations that require transgender people who wish to change their identity papers to prove they have undergone or are undergoing surgical reconstruction of their sexual organs.<sup>27</sup> This is extremely radical, expensive, and sometimes risky surgery. For some, it is strongly desired. For others, it imposes a seriously disproportionate legal

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<sup>26</sup> Kent Blore, 'The Homosexual Advance Defence and the Campaign to Abolish it in Queensland – The Activist's Dilemma and the Politician's Paradox' (2012) 12(2) *Queensland University of Technology Law Review* 489.

<sup>27</sup> *AB v Western Australia* (2011) 244 CLR 390 (human rights construction of legislation on transgender persons) and *New South Wales Registrar of Births, Deaths and Marriages v Norrie* (2014) 250 CLR 490, with reference to *Births, Deaths and Marriages Registration Act 1995* (NSW) s32 DA (permitting registration as "non-specific" sex).

requirement.<sup>28</sup> I applaud the special attention that is given to transgender issues in several Australian universities and research institutes. This is a field in which more empirical research is essential to turn around the fears and hostility towards a most vulnerable and tiny minority.<sup>29</sup>

Deep in the minds of some people who feel hostility and a right to discriminate against those who are LGBTIQ is sometimes an unresolved conflict about their own desires.<sup>30</sup> Perhaps the conflict is one that they have not been able to express to their family or those close to them. Or even possibly to acknowledge to themselves because of the stress and denial occasioned by the step of owning up to their own feelings and desires.

The official inquiry into the shooting of 49 young LGBTIQ people at the Pulse gay nightclub in Orlando on 11 June 2016 has not yet been concluded. Why Omar Mir Seddique Mateen, a 29 year old United States citizen, born in New York of Afghan parents, would act in such cruel and brutal way towards strangers is not yet fully known. Indeed, it may never be known.<sup>31</sup>

However, several indications exist that suggest that Omar Mateen had visited the club previously, used gay websites, and engaged in gay sex. Something existential caused him to occasion the deadliest event involving a single shooter in the history of the United States and the worst terrorist event in that history (if that is what it was) apart from the attack on 11 September 2001.

Either way, the killings showed where phobias targeted on sexual minorities can sometimes lead. They cannot, of their nature, be brushed aside. They cannot be excused

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<sup>28</sup> Following the adoption of the *Australian Government Guidelines on the Recognition of Sex and Gender*, several policies have become more empathetic towards trans people, eg the introduction sex-X on Australian passports. However, many regimes such as the State-based BDM Registers still impose harsh requirements on those wishing to change their legal sex, such as requiring an applicant to supply a statement from a medical or psychological practitioner specifying their gender.

<sup>29</sup> S. Winter, *Lost in Transition, Transgender People, Rights and HIV Vulnerability in Asia-Pacific Region* (UNDP-APTN, 2012).

<sup>30</sup> Terry Stein and Carol Cohen (eds), *Contemporary Perspectives on Psychotherapy with Gay Men and Lesbians* (Springer, 2013), 133; Netta Weinstein et al, 'Parental Autonomy Support and Discrepancies Between Implicit and Explicit Sexual Identities: Dynamics of Self-Acceptance and Defense' (2012) 102(4) *Journal of Personality and Social Psychology* 815.

<sup>31</sup> Hayley Tsukuyama, Mark Berman and Jerry Markon, 'Gunman who killed 49 in Orlando nightclub had pledged allegiance to ISIS', *The Washington Post* (online) 13 June 2016 <[https://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/?utm\\_term=.ffa417f7c5a9](https://www.washingtonpost.com/news/post-nation/wp/2016/06/12/orlando-nightclub-shooting-about-20-dead-in-domestic-terror-incident-at-gay-club/?utm_term=.ffa417f7c5a9)>.

as just another permissible if unfortunate outcome of the practice of a religious faith. They cannot be minimised as an incident of general violence or the oversupply of firearms. The violence in Orlando was specific to the LGBTIQ community. It is necessary to build defences and effective responses against such violence. That means doing so in the entire community, including in schools, colleges and universities, by print, film, digital, and other media.

### III DEFENCES IN THE MINDS OF HUMAN BEINGS

So this is where work of Australia's universities and research institutions is directly relevant. Identifying the causes of the hostility that sometimes lead to violence, and often to discrimination and disadvantage, should be a purpose and a priority of research and empirical investigation.

I have offered ten possible explanations for the hatred, violence, and discrimination that continue to exist towards the LGBTIQ minority. My list is not comprehensive; neither is it exhaustive. It is based on my own experience and my exposure (mostly verbal and behavioural) to violence and discrimination over a long life.

The lesson that Alfred Kinsey left for us is that analysis of this kind is useful; but it is not sufficient. Theories and postulates are helpful. But they must be grounded in experience and measured against scientific research. That research must involve social and behavioural scientists as well as biological scientists. Kinsey helped to bring the physical and social sciences together.

It would be useful if Kinsey's successors, including in Australia, were to undertake interviews using the most up to date contemporary techniques of sampling to ascertain the reasons for the violence and discrimination that continue to exist in society, targeted against LGBTIQ persons. Conducting such research would have its own intellectual merits and justification. However, it would also have a practical dimension. Only if we can understand better the reasons for the deep seated, long lasting and still enduring attitudes of violence and discrimination, will it be possible to design effectively the responses that are necessary to overcome and eliminate such endemic features of human society. And to build the defences of human rights in the minds of human beings everywhere.

The hopes that the outcomes of Dr Kinsey's research would quickly expel homophobia and transphobia from human society have not been realised over the past 70 years. Nor have the reforms of the law, the repeal of discriminatory legal provisions, and the introduction of media and educative repair of the ignorant beliefs of the past been accomplished. Progress has been made. Further progress is likely to come from further research. That research will take place in institutions divided by great distances but united by common goals: the Kinsey Institute in Bloomington, Indiana in the United States, and universities and other bodies in Australia.

The further research should, as Kinsey taught, be based on the scientific method. On a neutral examination of empirical data, pursuing it wherever it may lead. On transparency and full publication of its outcomes. On vigorous analysis of the findings. And on publicity and engagement with society, including by those who still harbour feelings of distaste, animosity, and discrimination.

The work of Alfred Kinsey shows that taxonomy and empiricism can contribute to change and improvements in beliefs and attitudes. The challenge of Kinsey remains before us. Future generations will embrace the challenge. They will advance the enlightenment.

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