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CONTENTS

A MODEL VOLUNTARY ASSISTED DYING BILL

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This paper proposes a new model Voluntary Assisted Dying Bill, along with an Introduction, and Explanatory Notes to provide a brief context and explanation of several key components.

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I INTRODUCTION

Voluntary assisted dying is the subject of much public, policy, parliamentary and legal discussion in Australia. Victoria's *Voluntary Assisted Dying Act 2017* (Vic) commenced on 19 June 2019 after an 18-month implementation period. This is the first time in more than twenty years that voluntary assisted dying has been lawful in Australia following the repeal of the Northern Territory legislation, *Rights of the Terminally Ill Act 1995,* by the Commonwealth in 1997.[1] There is not yet empirical research available on how the Act is functioning, although the Voluntary Assisted Dying Review Board has released its first report covering the first eleven days of the Act's operation.[2]

Victoria may soon be joined by other Australian States. At the time of writing, the Western Australian Parliament is considering its Voluntary Assisted Dying Bill 2019 (WA). This Bill resulted from a recommendation of the Joint Select Committee on End of Life Choices that voluntary assisted dying be permitted in that State.[3] The Government adopted that recommendation,[4] and, reflecting the Victorian law reform path, the Government established a Ministerial Expert Panel to advise on specific elements of a proposed voluntary assisted dying legislative framework.[5]

Further, in November 2018, Queensland referred the issue of voluntary assisted dying laws to a Parliamentary Committee[6] and South Australia took a similar course in April 2019.[7] Also in 2019, an Australian Capital Territory Parliamentary Select Committee, established to inquire into end of life choices including voluntary assisted dying, published its Report.[8] The Australian Capital Territory, like the Northern Territory,

[1] The Commonwealth Government exercised its constitutional powers to repeal the *Rights of the Terminally Ill Act 1995* (NT) just nine months after the legislation commenced operation: *Euthanasia Laws Act 1997* (Cth).
[2] Voluntary Assisted Dying Review Board, *Report on Operations 2018-2019* (Report, August 2019).
[3] Joint Select Committee on End of Life Choices, 40th Parliament of Western Australia, *My Life, My Choice* (Report No 1, August 2018), xl-xli.
[4] Government of Western Australia, 'Western Australian Government response: Joint Select Committee on End-of-Life Choices Report, *My Life, My Choice*' (Report, WCP-013515, December 2018).
[5] Department of Health, Government of Western Australia, *Ministerial Expert Panel on Voluntary Assisted Dying: Final Report* (Discussion paper, HEN-013590, June 2019).
[6] An issues paper was released in February 2019: Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, 56th Parliament of Queensland, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Paper No 3, 14 February 2019).
[7] Joint Committee on End of Life Choices, Parliament of South Australia, 'Terms of Reference' (April 2019).
[8] ACT Legislative Assembly, *Select Committee on End of Life Choices in the ACT* (Report, March 2019), 74-96.

currently lacks constitutional power to enact voluntary assisted dying legislation.[9] However, a majority of the Select Committee suggested that the Australian Capital Territory 'gives serious consideration … to establishing an appropriate scheme' should their power to enact legislation be restored.[10] The Report also identified some proposed eligibility and safeguards for such a legislative regime.[11]

This recent flurry of activity occurs against the backdrop of longstanding efforts to reform the law in this area. At the time of writing, there have been a total of 59 Bills introduced in Australian Parliaments over a 30-year period dealing with voluntary assisted dying. Forty-five of these Bills proposed models to permit and regulate voluntary assisted dying.[12] The authors have elsewhere observed that, over recent times, these Bills have been closer to passing through the relevant Chamber in which they were introduced.[13] Reform is becoming increasingly likely.

Much of the discussion that has accompanied these reform efforts, and critique of them, has been in relation to the threshold issue of whether the law should change to permit voluntary assisted dying or not. While this will continue to be a critical issue, given the likelihood of reform, the authors submit that there should be an increased focus on the range of policy options for the way in which voluntary assisted dying is regulated, including the scope of what is permitted.[14]

When thinking about the future of voluntary assisted dying reform in Australia, there may be a temptation to simply adopt the Victorian model; it has passed through an Australian Parliament so may be regarded as 'politically feasible'.[15] Alternatively, it may be seen as

[9] These powers were removed by the Commonwealth Government by the enactment of the *Euthanasia Laws Act 1997* (Cth).
[10] ACT Legislative Assembly (n 8) 95.
[11] Ibid.
[12] See Lindy Willmott et al, '(Failed) voluntary euthanasia law reform in Australia: Two decades of trends, models and politics' (2016) 39(1) *University of New South Wales Law Journal* 1; Ben White and Lindy Willmott, 'Future of assisted dying reform in Australia' (2018) 42(6) *Australian Health Review* 616. The latest (and only) Bill not included in the two articles above is the Voluntary Assisted Dying Bill 2019 (WA). The Bills that did not propose a model for assisted dying generally sought to either overturn the prohibition on territories legislating on this topic, or to hold a referendum on law reform. For analysis of the arguments that politicians have raised for and against voluntary assisted dying when debating these Bills in parliament, see Andrew McGee et al, 'Informing the euthanasia debate: Perceptions of Australian politicians' (2018) 41(4) *University of New South Wales Law Journal* 1368.
[13] White and Willmott, 'Future of assisted dying reform in Australia' (n 12).
[14] See for example Ben White and Lindy Willmott, 'How should Australia regulate voluntary euthanasia and assisted suicide' (2012) 20 *Journal of Law and Medicine* 410.
[15] White and Willmott, 'Future of assisted dying reform in Australia' (n 12) 618.

the starting point for reform discussions with a 'plus/minus' approach taken of removing or adding components to the Victorian model.[16] This latter approach has been the case in Western Australia as the Voluntary Assisted Dying Bill 2019 (WA) draws heavily on the Victorian model but with some variations.[17]

The authors raise for consideration a different approach — a legislative model based on values that the authors consider are appropriate to underpin laws of this kind. It is suggested this is needed for two reasons. The first is that there are challenges with the Victorian model. Some of these are discussed below (briefly, because of space constraints), but a key challenge is the complexity of the legislative framework.[18] As part of designing a Bill that was sufficiently conservative to navigate through both Houses of the Victorian Parliament, the process for accessing voluntary assisted dying is complex and with many safeguards. When supporting the passage of the Victorian Bill, the Premier observed that it provided the 'safest scheme in the word, with the most rigorous checks and balances'.[19] As noted, this may be a function of the political nature of reform, but it must be questioned whether the Victorian legislation provides the optimal model for permitting and regulating voluntary assisted dying.

The second (and linked) reason is that core features of a voluntary assisted dying Bill, particularly in relation to the scope of what is permitted, the eligibility criteria and safeguards, need to be justifiable by reference to values that should underpin this kind of legislation. Providing a person access to assistance to die is a serious issue, and so the rigour of testing a Bill against a defined set of values is important. The alternative is that political compromise, while often necessary for law reform, can lead to legislation failing to reflect its overall policy objectives in important respects.

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[16] Ibid 619.

[17] Ben White et al, 'WA's take on assisted dying has many similarities with the Victorian law – and some important differences', *The Conversation* (online, 9 August 2019)<https://theconversation.com/was-take-on-assisted-dying-has-many-similarities-with-the-victorian-law-and-some-important-differences-121554>. The model Bill presented in this article was written prior to the Voluntary Assisted Dying Bill 2019 (WA) being released. However, the authors note that there are some similarities between the Western Australian Bill and the model Bill in terms of key departures from the Victorian approach.

[18] See Ben White, Lindy Willmott and Eliana Close, 'Victoria's voluntary assisted dying law: clinical implementation as the next challenge' (2019) 210(5*) Medical Journal of* Australia 207. For example, it has been questioned whether a safeguard intended to prevent coercion may also act as a barrier for eligible patients to access voluntary assisted dying: Carolyn Johnston and James Cameron, 'Discussing Voluntary Assisted Dying' (2018) 26(2) *Journal of Law and Medicine* 454.

[19] Daniel Andrews, 'Victoria State Government 'Voluntary assisted dying model established ahead of vote in Parliament' (Media release, 25 July 2017).

The authors have previously identified a set of values to guide law reform in this area, and have outlined in broad terms the model this would produce.[20] The authors continue to endorse the importance of these values and have used them as a departure point to draft a Voluntary Assisted Dying Bill. However, this Bill has also moved beyond these values as more abstract considerations. The process of drafting a Bill prompts deeper and more concrete thought, not only about the policy decisions that need to be made, but how to present them.[21]

This article is comprised of two parts: Explanatory Notes and the Bill. The Explanatory Notes explain the approach taken to drafting the Voluntary Assisted Dying Bill. They differ from traditional Explanatory Notes which tend to address each provision sequentially and explain its purpose. By contrast, the primary goal of the Explanatory Notes that follow is to explain the Bill at a global level, while still explaining some of the more important provisions in more detail. Key issues covered are the values and principles that underpin the Bill, the major policy positions taken, and the approach adopted in relation to drafting style. This is then followed by the full text of the Bill.

Voluntary assisted dying is a vexed and contested issue. Despite this complexity, over recent years there has been a shift in the national debate as successive governments put the issue of voluntary assisted dying on the political agenda. Reform is likely to be a matter of 'when' rather than 'if'.[22] As such, it is imperative now to consider carefully what shape reform should take rather than uncritically adopt the legislative model recently passed by the Victorian Government. In an attempt to widen the Australian debate, the authors offer this Bill and its Explanatory Notes for consideration. Since finalising the manuscript, the authors also note that the *Voluntary Assisted Dying Act 2019* was passed by the Western Australian Parliament.

[20] Lindy Willmott and Ben White 'Assisted dying in Australia: A values-based model for reform' in Ian Freckelton and Kerry Petersen (eds) *Tensions and Traumas in Health Law* (Federation Press, 2017), 488-99.
[21] As stated by the Commonwealth Secretariat guide on law reform: 'the interrogation that proposals are subjected to as a result of the process of instructing legislative drafters assists with the refining of the policy behind the recommendations' Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (Report 2017), 146 <http://www.calras.org/pub/Main/LawReform/Changing%20The%20Law.pdf>.
[22] White and Willmott, 'Future of assisted dying reform in Australia' (n 12).

II EXPLANATORY NOTES FOR THE VOLUNTARY ASSISTED DYING BILL 2019

These Explanatory Notes explain the approach taken to drafting the Voluntary Assisted Dying Bill 2019. This includes identifying the values and principles that underpin the Bill, the major policy positions taken, and the approach adopted in relation to drafting style. These Notes are different from the traditional Explanatory Notes which usually explain each provision sequentially. While some specific provisions are explained further below, this document is primarily aimed at explaining the Bill at a more global level. A diagram providing an overview of the process proposed by the Bill for accessing voluntary assisted dying is included in the Appendix.

A *Values Underpinning the Bill*

The values underpinning the design of this Bill are those outlined and explained in the book chapter 'Assisted Dying in Australia: A Values-based Model for Reform' in the book *Tensions and Traumas in Health Law*.[23] Those values are:

- Life;
- Autonomy;
- Freedom of conscience;
- Equality;
- Rule of law;
- Protecting the vulnerable; and
- Reducing human suffering.

Added to this list which underpinned the design of the Bill is the concept of safe and high-quality care.[24] The proposed model situates voluntary assisted dying as part of health care and as being provided within the health system. Accordingly, voluntary assisted dying must be provided in a way that is safe and of high-quality like all other health care.

[23] White and Willmott (n 20).

[24] For a discussion of the elements of safe and high-quality end of life care, see Australian Commission on Safety and Quality in Health Care, *National Consensus Statement: Essential elements for safe and high-quality end-of-life care* (Report, 2015) <https://www.safetyandquality.gov.au/wp-content/uploads/2015/05/National-Consensus-Statement-Essential-Elements-forsafe-high-quality-end-of-life-care.pdf>.

B *Position on Key Overarching Policy Issues*

Many of the key policy decisions are explained in the book chapter 'A Values-based Model for Reform',[25] and so will not be repeated at length below. However, drafting a Bill necessarily requires more detailed decisions to be made about how a voluntary assisted dying system should operate and some of these other overarching positions will be briefly explained (including how they differ from the Victorian model).

- Clause 6 outlines that voluntary assisted dying includes both of what has historically been called voluntary euthanasia (called practitioner administration in the Bill) and physician assisted suicide (called self-administration in the Bill). We do not endorse the Victorian approach of having self-administration as the default and primary method of voluntary assisted dying. Providing a choice of practitioner administration and self-administration for a person requesting access to voluntary assisted dying promotes the value of autonomy. Where both options are available internationally, people overwhelmingly choose practitioner administration.[26] Also, while the evidence base is limited, that which exists suggests that practitioner administration is safer than self-administration with fewer complications.[27]
- Clause 6 also explains that voluntary assisted dying must occur under medical supervision. This will clearly occur with practitioner administration when the registered medical practitioner administers the voluntary assisted dying medication. In relation to self-administration, being under the supervision of a registered medical practitioner means that the registered medical practitioner will be present while the person self-administers the voluntary assisted dying medication. We anticipate this could be done unobtrusively by the medical practitioner so as to respect the person's wishes about how their death occurs.

[25] White and Willmott (n 20).
[26] For example, in the Netherlands in 2017, of 6585 cases reported to Euthanasia Review Committees, 6306 were of euthanasia, 250 were of assisted suicide, and 29 cases involved a combination of both: Regional Euthanasia Review Committees, *Annual Report 2017* (March 2018) 10. In Canada, drawing on the last two federal government reports covering the period from 1 January 2017 to 31 October 2018, of the 4575 medically assisted deaths reported, only 2 were self-administered: Health Canada, *Fourth Interim Report on Medical Assistance in Dying Canada* (Report, April 2019) 5 (note: this does not include data from some provinces as outlined in the report).
[27] Ezekiel Emanuel et al, 'Attitudes and practices of euthanasia and physician assisted suicide in the United States, Canada and Europe' (2016) 316(1) *Journal of American Medical Association* 79, 86.

We acknowledge that such an approach has disadvantages, including: access implications for persons living in rural and remote areas;[28] burdens on medical practitioners to supervise voluntary assisted dying; and some limits on a person's autonomy in terms of timing of their death and who is present. In addition to there being ways to address these concerns, our view is that the policy benefits of the proposed approach outweigh these disadvantages for three main reasons:

1. These disadvantages only arise in relation to self-administration as by definition practitioner administration is always medically supervised. Given that where choice is available, practitioner administration is overwhelmingly chosen, these disadvantages are only likely to arise in the small number of voluntary assisted dying cases where a person specifically wants to self-administer.
2. The safety and quality of voluntary assisted dying for the person should be prioritised. This is enhanced by medical supervision.
3. The voluntary assisted dying medication will be safely managed as it will always be in the possession or under the direct supervision of a registered medical practitioner. This also means that complex provisions relating to the medication's collection, storage and disposal, such as those in the *Voluntary Assisted Dying Act 2017* (Vic), are not required. Registered medical practitioners are subject to existing regulations in relation to the dangerous medications and the Bill provides scope for regulations to address this further if needed.

- The starting point for drafting the eligibility criteria in clause 9 was broadly the approach in the *Voluntary Assisted Dying Act 2017* (Vic). While there may be cases that many regard as appropriate to allow access to voluntary assisted dying which may fall outside that legislation, eligibility criteria necessarily involve a basis for determining access and the Victorian model is a defensible approach. We have, however, departed from this model in three important respects.

  The first is that although the Bill requires a person to have a medical condition that will cause their death, it does not impose a time limit within which a person is expected to die. We adopt this approach because a time limit is arbitrary. While a

[28] While we have not included this in the Bill, permitting nurse practitioners to provide voluntary assisted dying has been one response to address access issues in Canada. Although released subsequent to drafting the Bill, we also note that the Voluntary Assisted Dying Bill 2019 (WA) grants nurse practitioners a role in voluntary assisted dying: see for example clause 53.

secondary consideration, not imposing a time limit avoids a registered medical practitioner from having to engage in the difficult task of determining prognosis and timing of death.

The second difference is that we have not required that a person be *both* (a) ordinarily resident in a State *and* (b) ordinarily resident in a State for a period of at least 12 months prior to a first request. The Bill only requires (a) as this is sufficient to achieve the policy goal of preventing non-residents having access to voluntary assisted dying in another State. The additional time-based requirement of (b) creates a further hurdle to access voluntary assisted dying for otherwise eligible persons and is unnecessary to prevent cross-border requests.

The third difference is in relation to the suffering requirement. To be eligible under the Bill, the medical condition must be causing the person 'intolerable and enduring' suffering. This is a higher threshold than under the Victorian Act but is consistent with some international approaches.

- Clauses 38 and 39 protect conscientious objection by registered health practitioners in relation to voluntary assisted dying and the ability of entities providing care and residential services to refuse access to voluntary assisted dying within their facilities. However, both provisions also create mechanisms that reflect the balance normally struck in medicine that respects conscience but values autonomy and equality in ensuring a person still has effective access to a lawful health service. As outlined in the Note at the end of Clause 38, subclause (3) is drafted sufficiently broadly to allow the person requesting access to voluntary assisted dying to be provided with contact details of an entity which can provide information that will facilitate that access to voluntary assisted dying. This provides an option that some registered medical practitioners might regard as morally preferable. This would, however, be dependent on the existence of an entity to provide such information enabling access to voluntary assisted dying. The approach of the model Bill differs from the Victorian Act which only addresses the right for a registered health practitioner to refuse to participate in various aspects of voluntary assisted dying.

C *Approach to Drafting*

1 Other legislation and Bills consulted

We adopted or adapted the drafting of the *Voluntary Assisted Dying Act 2017* (Vic) where our policy position was the same or similar, recognising that this Act had been passed already by an Australian Parliament. This includes retaining some wording that may otherwise be regarded as complex.

We also consulted a range of other sources in drafting this Bill. They include other recent Australian Bills[29] that were close to passing through the relevant Chamber in which they were introduced such as the Voluntary Assisted Dying Bill 2013 (Tas), the Death with Dignity Bill 2016 (SA) and the Voluntary Assisted Dying Bill 2017 (NSW) as well as the *Rights of the Terminally Ill Act 1995* (NT) which was in force for a 9 month period in the mid-1990s. (The Voluntary Assisted Dying Bill 2019 (WA) was not released at the time of drafting the model Bill so was not able to be considered.) Legislation regulating voluntary assisted dying overseas was also consulted but we note that drafting styles are quite different in some of these countries, especially in European civil law jurisdictions.

2 Acknowledging jurisdictional drafting styles and different laws

We recognise that legislative drafting is a specific skill and that different jurisdictions have different drafting conventions. Accordingly, our approach in drafting this Bill was to make the policy position clear, being aware that it would be revised in line with local drafting guidelines. We also acknowledge that there are alternative drafting techniques to present the policy framework proposed in this Bill.

3 Preference for brevity

Our view is that the Bill should be as short and simple as practicable. A decision was made therefore that the Bill should focus on establishing the wider legal framework for voluntary assisted dying, but not be the source of detailed procedural steps about how it is provided. In part, this is because unnecessary length and complexity can impede a clear explanation on the proposed policy position.

[29] See also the account of Australian Bills in Willmott et al (n 12); updated in White and Willmott, 'Future of assisted dying reform in Australia' (n 12)

However, we favour this approach predominantly because of our view about the appropriate role of legislation within a regulatory framework. Voluntary assisted dying should be governed by a suite of regulatory tools including legislation, regulations, policies and guidelines. We consider the appropriate function for legislation is to establish the legal framework for these decisions, but that the detailed procedural guidance is better addressed in regulations, policies and guidelines.

This is one way in which we have departed from the *Voluntary Assisted Dying Act 2017* (Vic), which is very prescriptive in its approach. We also note this means that omitting a provision in the Victorian Act from our Bill does not mean we consider that the relevant issue should not be regulated. It may simply reflect that such a matter is more appropriately dealt with in regulations or policies and guidelines. It may also be that some matters are already adequately dealt with either by existing legislation or established protocols in the health system within which voluntary assisted dying will occur.

D Specific Policy Issues Explained

Earlier in these Explanatory Notes, some key overarching policy issues were explained. Here we address a series of smaller and specific policy decisions that have been made in the course of drafting the Bill.

Some of the discussion below explains why certain safeguards in the *Voluntary Assisted Dying Act 2017* (Vic) have not been adopted. A global point to make here is that the Victorian Act is very unusual in its detail and complexity when compared with international models, the *Rights of the Terminally Ill Act 1997* (NT) and the other Australian Bills consulted. As mentioned above, some of this detailed procedural guidance in the Victorian Act is better placed in regulations, policies or guidelines.

Further, some of the Victorian Act's safeguards do not add substantive value to safeguarding vulnerable persons, may impose undue burden on persons requesting access to voluntary assisted dying and the registered health practitioners assisting them, and are inconsistent with the overarching values that we consider should guide the law in this area. For these reasons, we concluded that their inclusion in the Bill was not justified. Instead, we have focused on safeguards that we consider are needed to ensure

the voluntary assisted dying system operates as intended, and have drawn on approaches in other Australian Bills and international models.

- The Bill does not contain a prohibition on registered health practitioners initiating discussions about voluntary assisted dying with their patients as imposed by section 8 of the *Voluntary Assisted Dying Act 2017* (Vic). For reasons expanded on elsewhere,[30] this impedes the frank discussions needed for safe and high-quality end-of-life care.
- The Bill does not contain a requirement to obtain a permit from the relevant government department prior to providing access to voluntary assisted dying as required by Part 4 of the *Voluntary Assisted Dying Act 2017* (Vic). This requirement is unnecessarily bureaucratic, delays access to voluntary assisted dying, and is of limited utility as a safeguard as it is only likely to be a review of the relevant documentation.
- The wording of clause 13(3) of the Bill prescribing the required qualifications and experience of one of the registered medical practitioners is intentionally different from section 10(3) of the *Voluntary Assisted Dying Act 2017* (Vic). Under the Victorian Act, one of the registered medical practitioners must be a *medical specialist in the person's disease, illness or medical condition* (emphasis added). The interpretation of this provision is that General Practitioners and Palliative Care Physicians would not qualify as having this 'expertise and experience'. The proposed wording in this Bill is instead that either of the registered medical practitioners 'must have relevant experience in treating or managing the medical condition expected to cause the death of the person being assessed'. While retaining the same policy goal that at least one of the registered medical practitioners has particular experience with the person's medical condition, this wider wording is intended to reflect that General Practitioners and Palliative Care Physicians may have such experience.
- This Bill does not contain additional provisions in relation to notifications to the Australian Health Practitioner Regulation Agency as the existing law requiring mandatory notifications and permitting voluntary notifications is considered to be adequate.[31]

[30] See for example, Lindy Willmott et al, 'Restricting conversations about voluntary assisted dying: Implications for clinical practice' (2019) *BMJ Supportive and Palliative Care* (in press); Johnston and Cameron (n 18).

[31] See for example part 8, divisions 2 and 3 of the *Health Practitioner Regulation National Law* (Qld). Note that the provisions in part 7, division 1 of the *Voluntary Assisted Dying Act 2017* (Vic) closely resemble those in part 8, divisions 2 and 3 in the *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic).

- This Bill does not include specific provisions about intervention in voluntary assisted dying decisions by the courts or tribunals. This is because these are primarily clinical matters for the first and second medical practitioner to assess. An exception is in relation to decision-making capacity. Depending on local legislation, guardianship or civil and administrative tribunals may have jurisdiction to adjudicate a person's decision-making capacity, and if not, it may be appropriate to specifically grant such jurisdiction to a tribunal in relation to capacity. Finally, should exceptional circumstances warrant wider judicial scrutiny, Supreme Courts have been willing to consider end-of-life issues in appropriate circumstances when approached for guidance.[32]
- Clause 2 of the Bill requires an 18-month delay before the Act comes into force to permit time for implementation as has occurred in Victoria.
- Clause 5 sets out the Bill's principles, which are based on the values outlined above. We note for completeness, however, that the value of respecting the rule of law does not appear in this list of principles. While it remains an appropriate value to inform the design and implementation of voluntary assisted dying laws, it is not as relevant in guiding a person or other entity who is exercising a power or performing a function or duty under the Act.
- Definitions of capacity or decision-making capacity (defined in clause 7 of the Bill) vary by jurisdiction and so the Bill's approach may need to be adjusted to reflect this. For example, Queensland includes the requirement for the person to have 'freely and voluntarily' made the decision as part of the capacity test in its guardianship legislation.[33] In the proposed model, this requirement is addressed as part of the eligibility criteria.
- Clause 33(3) contains the safeguard that a person's final request for voluntary assisted dying must occur immediately prior to access. This ensures it is a contemporaneous request by a person with capacity who is acting freely and voluntarily in requesting access to voluntary assisted dying.
- As noted in the Bill, the criminal law of each jurisdiction varies and accordingly, Parts 7 and 8 will need to be considered in light of local laws. This would include

[32] See for example, *Brightwater Care Group (Inc) v Rossiter* (2009) 40 WAR 84; *H Ltd v J* (2010) 107 SASR 352.
[33] See *Guardianship and Administration Act 2000* (Qld) sch 4 (definition of 'capacity') and *Powers of Attorney Act 1998* (Qld) sch 3 (definition of 'capacity').

determining the appropriate reach of existing criminal law offences, such as those relating to assisting suicide, and how they would interact with the Bill including its proposed protections from criminal liability.

III VOLUNTARY ASSISTED DYING BILL 2019

A *Contents*

B *Bill*

2019

A Bill

for

An Act to provide for voluntary assisted dying, in specific and restricted circumstances and subject to safeguards, for persons with an incurable, advanced and progressive medical condition that will cause death, to protect registered medical practitioners who wish to provide voluntary assisted dying and registered health practitioners who do not wish to participate in voluntary assisted dying, and for related purposes.

The Parliament of [State] enacts—

Part 1 Preliminary

1 Short title

This Act may be cited as the *Voluntary Assisted Dying Act 2019.*

2 Commencement

(1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.

(2) If a provision of this Act does not come into operation before [insert day 18 months after Parliament passing this Act], it comes into operation on that day.

3 Act binds all persons

This Act binds all persons, including the State.

4 Main objects of the Act

The main objects of this Act are to—

(a) provide access to voluntary assisted dying for persons with an incurable, advanced and progressive medical condition that will cause death;

(b) establish safeguards to ensure that voluntary assisted dying is accessed only by persons who meet this Act's eligibility criteria;

(c) establish the Voluntary Assisted Dying Review Board to provide oversight of voluntary assisted dying under this Act;

(d) provide protections from liability for registered health practitioners and other persons who facilitate voluntary assisted dying in accordance with this Act; and

(e) enable registered health practitioners and entities who provide a health service, residential service or professional care service to refuse to participate in voluntary assisted dying without incurring liability.

5 Principles

A person exercising a power or performing a function or duty under this Act must have regard to the following principles—

(a) human life is of fundamental importance and should be valued;

(b) a person's autonomy should be respected;

(c) freedom of conscience should be respected, including choosing to—

(i) participate in voluntary assisted dying; and

(ii) not participate in voluntary assisted dying;

(d) a person's equality should be respected and they should be free from discriminatory treatment;

(e) persons who are vulnerable should be protected from coercion and abuse;

(f) human suffering should be reduced; and

(g) the provision of voluntary assisted dying should reflect the established standards of safe and high-quality care.

6 Meaning of voluntary assisted dying

(1) ***Voluntary assisted dying*** means the administration of voluntary assisted dying medication to a person and includes steps reasonably related to such administration.

(2) To remove any doubt, ***voluntary assisted dying*** may occur through—

(a) a registered medical practitioner administering voluntary assisted dying medication to a person to bring about their death (***practitioner administration***); or

(b) a person taking voluntary assisted dying medication themselves to bring about their death under the supervision of a registered medical practitioner (***self-administration***).

(3) For the purposes of subsection (2)(b), being under the supervision of a registered medical practitioner means that the registered medical practitioner is present while the person self-administers the voluntary assisted dying medication.

7 Meaning of decision-making capacity

(1) A person has ***decision-making capacity*** in relation to voluntary assisted dying if the person is able to—

(a) understand the information relevant to the decision relating to access to voluntary assisted dying and the effect of the decision; and

(b) retain that information to the extent necessary to make the decision; and

(c) use or weigh that information as part of the process of making the decision; and

(d) communicate the decision and the person's views and needs as to the decision in some way, including by speech, gestures or other means.

(2) For the purposes of subsection (1), a person is presumed to have decision-making capacity unless there is evidence to the contrary.

8 Definitions

The dictionary in Schedule 1 defines particular words used in this Act.

Part 2 Eligibility and requests for access to voluntary assisted dying

Division 1 Eligibility for access to voluntary assisted dying

9 Eligibility criteria

For a person to be eligible for access to voluntary assisted dying—

(a) the person must be aged 18 years or more; and

(b) the person must—

(i) be an Australian citizen or permanent resident; and

(ii) be ordinarily resident in [State]; and

(c) the person must have decision-making capacity in relation to voluntary assisted dying; and

(d) the person's decision to access voluntary assisted dying must be—

(i) enduring;

(ii) made voluntarily and without coercion; and

(e) the person must be diagnosed with a medical condition that—

(i) is incurable; and

(ii) is advanced, progressive and will cause death; and

(iii) is causing intolerable and enduring suffering.

10 Clarification of eligibility criteria

(1) Whether a person's medical condition will cause the person's death is to be determined by reference to available medical treatment that is acceptable to the person.

(2) For the purposes of subsection 9(e)(iii)—

(a) whether suffering is intolerable is to be determined by the person requesting access to voluntary assisted dying;

(b) suffering caused by a person's medical condition includes suffering caused by treatment provided for that medical condition; and

(c) suffering includes physical, psychological and existential suffering.

Division 2 Requests for access to voluntary assisted dying

11 A person may make a first request

(1) A person may make a request to a registered medical practitioner for access to voluntary assisted dying (a ***first request***).

(2) A person's first request for access to voluntary assisted dying must be—

(a) clear and unambiguous; and

(b) made by the person personally.

(3) The person may make the first request verbally or by gestures or other means of communication available to the person.

Part 3 Assessment of eligibility for access to voluntary assisted dying

Division 1 Two registered medical practitioners to assess eligibility

12 Two registered medical practitioners to assess eligibility

(1) A person may access voluntary assisted dying only if two registered medical practitioners (a ***first medical practitioner*** and a ***second medical practitioner***) assess the person as eligible for access to voluntary assisted dying.

(2) The first medical practitioner and a second medical practitioner must be independent of each other.

(3) For the purposes of subsection (2), the first medical practitioner and a second medical practitioner will not be independent of each other if—

(a) they are family members; or

(b) one medical practitioner is employed by or working under the supervision of the other medical practitioner.

13 Qualifications and experience of first and second medical practitioners

(1) Each of the first medical practitioner and second medical practitioner must—

(a) hold a fellowship with a specialist medical college; or

(b) be a vocationally registered general practitioner.

(2) Either the first medical practitioner or each second medical practitioner must have practised as a registered medical practitioner for at least 5 years after completing a fellowship with a specialist medical college or vocational registration (as the case requires).

(3) Either the first medical practitioner or each second medical practitioner must have relevant experience in treating or managing the medical condition expected to cause the death of the person being assessed.

14 Approved training

The first medical practitioner and a second medical practitioner must not commence their assessment for eligibility for access to voluntary assisted dying unless that practitioner has completed approved assessment training.

Division 2 Assessment by first medical practitioner

15 First medical practitioner may undertake first assessment

(1) A registered medical practitioner (the ***first medical practitioner***) who receives a first request from a person may undertake a ***first assessment***.

(2) The first assessment requires an examination of the person and a review of their relevant medical records.

16 First assessment

When undertaking a first assessment, the first medical practitioner must assess whether the person requesting access to voluntary assisted dying meets the eligibility criteria.

17 Further expertise required for assessment

(1) If the first medical practitioner is unable to determine whether a person requesting access to voluntary assisted dying meets one or more of the eligibility criteria, they must refer the person to a registered health practitioner or health practitioners with appropriate skills and training.

Example—

A first medical practitioner who is unable to determine whether a person has capacity in relation to voluntary assisted dying must refer the person to a registered health practitioner with expertise to undertake that assessment. This could be, for example, a psychiatrist or geriatrician.

(2) If the first medical practitioner refers the person to a registered health practitioner under subsection (1), the first medical practitioner may adopt the determination of the registered health practitioner in relation to the matter in respect of which the person was referred.

18 Information to be provided if first medical practitioner assesses person as meeting eligibility criteria

(1) If the first medical practitioner is satisfied that the person requesting access to voluntary assisted dying meets all the eligibility criteria, the first medical practitioner must inform the person about the following matters—

(a) the person's diagnosis and prognosis;

(b) the treatment options available to the person and the likely outcomes of that treatment;

(c) palliative care options available to the person and the likely outcomes of that care;

(d) the potential risks of taking voluntary assisted dying medication or having it administered;

(e) that the expected outcome of taking voluntary assisted dying medication or having it administered referred to in paragraph (d) is death; and

(f) that the person may decide at any time not to continue with their request for access to voluntary assisted dying.

(2) The first medical practitioner must also encourage the person to inform their family and other treating registered medical practitioners of the person's request for access to voluntary assisted dying.

(3) Nothing in this section affects any duty a registered medical practitioner has at common law or under any other enactment.

19 Referral to second medical practitioner

If the first medical practitioner is satisfied that the person—

(a) meets the eligibility criteria; and

(b) understands the information required to be provided under section 18,

the first medical practitioner must refer the person to a second medical practitioner for a second assessment.

Division 3 Assessment by second medical practitioner

20 Second medical practitioner may undertake second assessment

(1) A registered medical practitioner (a ***second medical practitioner***) who receives a referral from the first medical practitioner may undertake a ***second assessment***.

(2) A second assessment requires an examination of the person and a review of their relevant medical records.

21 Second assessment

When undertaking a second assessment, a second medical practitioner must assess whether the person requesting access to voluntary assisted dying meets the eligibility criteria.

22 Further expertise required for assessment

(1) If a second medical practitioner is unable to determine whether a person requesting access to voluntary assisted dying meets one or more of the

eligibility criteria, they must refer the person to a registered health practitioner or health practitioners with appropriate skills and training.

Example—

A second medical practitioner who is unable to determine whether a person has capacity in relation to voluntary assisted dying must refer the person to a registered health practitioner with expertise to undertake that assessment. This could be, for example, a psychiatrist or geriatrician.

(2) If a second medical practitioner refers the person to a registered health practitioner under subsection (1), the second medical practitioner may adopt the determination of the registered health practitioner in relation to the matter in respect of which the person was referred.

23 Information to be provided if second medical practitioner assesses person as meeting eligibility criteria

(1) If a second medical practitioner is satisfied that the person requesting access to voluntary assisted dying meets all the eligibility criteria, the second medical practitioner must inform the person about the following matters—

(a) the person's diagnosis and prognosis;

(b) the treatment options available to the person and the likely outcomes of that treatment;

(c) palliative care options available to the person and the likely outcomes of that care;

(d) the potential risks of taking voluntary assisted dying medication or having it administered;

(e) that the expected outcome of taking voluntary assisted dying medication or having it administered referred to in paragraph (d) is death; and

(f) that the person may decide at any time not to continue with their request for access to voluntary assisted dying.

(2) Nothing in this section affects any duty a registered medical practitioner has at common law or under any other enactment.

24 Outcome of first and second assessments

(1) If the first medical practitioner and a second medical practitioner are satisfied that the person—

(a) meets the eligibility criteria; and

(b) understands the information required to be provided under sections 18 and 23,

the person is eligible for access to voluntary assisted dying.

(2) If the first medical practitioner assesses a person as eligible for access to voluntary assisted dying but a second medical practitioner assesses that person as not eligible for access to voluntary assisted dying, the first medical practitioner may refer the person to another registered medical practitioner for a further second assessment.

25 First medical practitioner report to Board about eligibility determination

(1) The first medical practitioner must, within 14 days of an ***eligibility determination*** being made in relation to a person, give the Board a report about a person's eligibility determination in the approved form.

(2) The report must include a copy of the following—

(a) a record of the first request;

(b) the first assessment report;

(c) any second assessment report; and

(d) any other information required by regulation.

(3) For the purposes of this section, an eligibility determination means a determination by the first medical practitioner that—

(a) a person is eligible for access to voluntary assisted dying in accordance with subsection 24(1); or

(b) a person is not eligible for access to voluntary assisted dying in accordance with subsection 24(1).

Division 4 Transfer of first medical practitioner's role

26 Transfer of first medical practitioner's role

(1) The first medical practitioner for a person may transfer the role of first medical practitioner to another registered medical practitioner at—

(a) the request of the person; or

(b) the first medical practitioner's own initiative.

(2) The first medical practitioner for a person may transfer the role of the first medical practitioner to a second medical practitioner for the person if the second medical practitioner has assessed the person as eligible for access to voluntary assisted dying

Note—

The first and second medical practitioners' assessments that the person is eligible for access to voluntary assisted dying remain valid despite this referral and so the person will have the two assessments as required under this Act. A second medical practitioner, who has already conducted their assessment, will become the first medical practitioner who will supervise the person's voluntary assisted dying.

(3) The first medical practitioner for a person may also transfer the role of the first medical practitioner to a registered medical practitioner other than a second medical practitioner.

(4) A transfer of the role of the first medical practitioner under subsection (3) can take effect only if the new first medical practitioner has assessed the person as eligible for access to voluntary assisted dying, having conducted their own assessment in accordance with sections 15 to 18.

Note—

The purpose of this subsection is to ensure that the first medical practitioner has always undertaken their own eligibility assessment given that practitioner is supervising the person's voluntary assisted dying.

(5) The person requesting access to voluntary assisted dying must agree to the role of the first medical practitioner being transferred to the other registered medical practitioner before that transfer can take effect.

Part 4 Access to voluntary assisted dying

Division 1 Second request for access to voluntary assisted dying

27 Person assessed as eligible for access to voluntary assisted dying may make second request

(1) A person assessed as eligible for access to voluntary assisted dying in accordance with subsection 24(1) may make a written request (a ***second request***) requesting access to voluntary assisted dying.

(2) The second request must—

(a) specify that the person—

(i) makes the declaration voluntarily and without coercion; and

(ii) understands the nature and the effect of the request the person is making; and

(b) be in writing and in the approved form;

(c) be signed by the person making the request in the presence of two witnesses and the first medical practitioner.

(3) Despite subsection (2)(c), a person may sign a second request at the direction of the person making the request if—

(a) the person making the request is unable to sign the declaration; and

(b) the person signing—

(i) is aged 18 years or more; and

(ii) is not a witness to the signing of the request.

(4) A person who signs a written request on behalf of the person making the request must do so in that person's presence.

(5) If a person makes a second request with the assistance of an interpreter, the interpreter must certify on the request that the interpreter provided a true and correct translation of any material translated.

28 Witness to making of second request

(1) A person is eligible to witness the making of a second request if the person is—

(a) aged 18 years or more; and

(b) not an ineligible witness.

(2) A person is an ineligible witness for the purposes of a second request if the person—

(a) knows or believes that the person—

(i) is a beneficiary under a will of the person making the second request; or

(ii) may otherwise benefit financially or in any other material way from the death of the person making the second request; or

(b) is an owner of, or is responsible for the day-to-day operation of, any facility at which the person making the second request is receiving a health service, residential service or professional care service; or

(c) is directly involved in providing a health service, residential service or professional care service to the person making the second request.

(3) Not more than one witness may be a family member of the person making the second request.

29 Certification of witness to signing of second request

(1) A witness who witnesses a person signing a second request must—

(a) certify in writing in the second request that—

(i) in the presence of the witness, the person making the second request appeared to voluntarily and without coercion sign the second request; and

(ii) at the time the person signed the second request, the person appeared to have decision-making capacity in relation to voluntary assisted dying; and

(iii) at the time the person signed the second request, the person appeared to understand the nature and effect of making the second request; and

(b) state that the witness is not knowingly an ineligible witness.

(2) A witness who witnesses another person signing a second request on behalf of the person making it must—

(a) certify in writing in the second request that—

(i) in the presence of the witness, the person making the second request appeared to voluntarily and without coercion direct the other person to sign the second request; and

(ii) the other person signed the second request in the presence of the person making the second request and the witness; and

(iii) at the time the other person signed the second request, the person making it appeared to have decision-making capacity in relation to voluntary assisted dying; and

(iv) at the time the other person signed the second request, the person making it appeared to understand the nature and effect of making the second request; and

(b) state that the witness is not knowingly an ineligible witness.

(3) A certification and statement under subsection (1) or (2) must be signed by the witness making it in the presence of the first medical practitioner.

Division 2 Final request for access to voluntary assisted dying

30 Person may make final request for access to voluntary assisted dying

(1) A person may make a ***final request*** to the first medical practitioner for the person that the first medical practitioner provide access to voluntary assisted dying to the person if—

(a) the person has made a second request in accordance with section 27;

(b) the person has decision-making capacity in relation to voluntary assisted dying;

(c) the person's request for access to voluntary assisted dying is made voluntarily and without coercion;

(d) the person's request for access to voluntary assisted dying is enduring; and

(e) the person understands that access to voluntary assisted dying will be provided immediately after the making of the final request.

(2) The person's final request for access to voluntary assisted dying must be—

(a) clear and unambiguous; and

(b) made by the person personally.

(3) The person may make the request verbally or by gestures or other means of communication available to the person.

(4) A final request must be made in the presence of a witness.

(5) The first medical practitioner must refuse to accept the person's final request if the first medical practitioner is not satisfied of any matter under subsection (1).

31 Nature of voluntary assisted dying in final request

The person's final request must specify the nature of the voluntary assisted dying requested from the first medical practitioner, namely—

(a) practitioner administration of voluntary assisted dying medication to the person; or

(b) supervised self-administration by the person of voluntary assisted dying medication.

32 Witness to making of final request

(1) A person is eligible to witness the making of a final request if the person is—

(a) aged 18 years or more;

(b) not employed by or working under the supervision of the first medical practitioner; and

(c) not a family member of the first medical practitioner.

(2) The witness who witnesses a person making a final request must certify in writing in the approved form that—

(a) the person at the time of making the final request appeared to have decision-making capacity in relation to voluntary assisted dying;

(b) the person in requesting access to voluntary assisted dying appeared to be acting voluntarily and without coercion; and

(c) the person's request to access voluntary assisted dying appeared to be enduring.

33 Timing of final request

(1) A person's final request must be made—

(a) subject to subsection (2), at least nine days after the day on which the person made the first request; and

(b) in any case, at least one day after the day on which the second assessment that assessed the person as eligible for access to voluntary assisted dying was completed.

(2) Subsection (1)(a) does not apply if the first medical practitioner for the person considers that the person's death is likely to occur before the expiry of the time period specified in that subsection, and this is consistent with the prognosis of a second medical practitioner who conducted a second assessment for the person.

(3) A person's final request must also be made immediately before the first medical practitioner provides access to voluntary assisted dying.

Division 3 First medical practitioner may provide access to voluntary assisted dying

34 First medical practitioner may provide access to voluntary assisted dying

Upon receiving the final request from a person, the first medical practitioner for that person may provide access to voluntary assisted dying to that person in accordance with the final request.

Division 4 Management of voluntary assisted dying medication

35 Collection, storage and disposal of voluntary assisted dying medication

The collection, storage and disposal of the voluntary assisted dying medication by the first medical practitioner must occur in accordance with the requirements set out in the regulations.

Division 5 Person may decide at any time not to take any further step in relation to access to voluntary assisted dying

36 Person may decide at any time not to take any further step in relation to access to voluntary assisted dying

(1) A person requesting access to voluntary assisted dying may decide at any time not to take any further step in relation to access to voluntary assisted dying.

(2) The person may express their decision verbally or by gestures or other means of communication available to the person.

Division 6 Reporting of voluntary assisted dying

37 First medical practitioner report to Board about voluntary assisted dying

(1) The first medical practitioner must, within 14 days of providing access to voluntary assisted dying to a person, give the Board a report about the voluntary assisted dying in the approved form.

(2) The report must include a copy of the following—

(a) a record of the first request;

(b) the first assessment report;

(c) any second assessment report;

(d) the second request;

(e) a record of the final request;

(f) the witness's certification of the final request; and

(g) any other information required by regulation.

Part 5 Participation in voluntary assisted dying is voluntary

38 Registered health practitioners with conscientious objection

(1) A registered health practitioner who has a conscientious objection to voluntary assisted dying has the right to refuse to do any of the following—

(a) provide information about voluntary assisted dying;

(b) participate in any part of the request and assessment process for voluntary assisted dying;

(c) supply, prescribe or administer voluntary assisted dying medication;

(d) be present during voluntary assisted dying.

(2) A registered medical practitioner exercising a conscientious objection in accordance with subsection (1) must disclose the practitioner's conscientious objection to the person and offer to refer the person to another practitioner or entity in accordance with subsection (3).

(3) If requested, the registered medical practitioner must refer the person, or transfer their care, to—

(a) another registered medical practitioner who, in the referring registered medical practitioner's belief, does not have a conscientious objection to voluntary assisted dying; or

(b) an entity at or through which, in the referring registered medical practitioner's belief, the person will have access to another registered medical practitioner who does not have a conscientious objection to voluntary assisted dying.

Note—

Subsection (3)(b) provides for referral of a person requesting access to voluntary assisted dying to be to an entity through which the person will have access to another registered

medical practitioner who does not have a conscientious objection to voluntary assisted dying. This would permit a registered medical practitioner to provide the person requesting access to voluntary assisted dying with contact details of an entity which can provide information that will facilitate access to voluntary assisted dying.

39 Entity may refuse access to voluntary assisted dying within its facility

(1) This section applies to an entity, other than a natural person, who provides a health service, residential service or professional care service.

(2) An entity may refuse access to voluntary assisted dying, including assessments in relation to voluntary assisted dying, within its facility.

(3) Where a person who requests access to voluntary assisted dying is being cared for or resides in a facility of an entity that refuses access to voluntary assisted dying within the facility, the entity must—

(a) inform the person of the entity's decision to refuse access to voluntary assisted dying within its facility;

(b) offer to arrange a transfer of the care or residence of the person to an entity at which, in the entity's belief, access to voluntary assisted dying can be provided by a registered medical practitioner who does not have a conscientious objection to voluntary assisted dying; and

(c) take reasonable steps to facilitate that transfer.

Part 6 Voluntary Assisted Dying Review Board

This Part of the Bill is not outlined in detail because legislative provisions for statutory boards vary by jurisdiction. However, the model outlined in the Voluntary Assisted Dying Act 2017 *(Vic) is generally supported. Specific matters that the Bill should address include:*

- *establishing the Voluntary Assisted Dying Review Board and its functions, along with the powers needed to undertake those functions;*
- *determining the composition of the Board and its procedures and staffing; and*
- *the Board's monitoring role.*

In relation to the Board's monitoring role, this would need to be both for individual cases and the system as a whole. In terms of individual cases, the Board should conduct a post-hoc review of each case of voluntary assisted dying to ensure that it complied with the requirements of the Act and this duty should be specified in the Act. The Board's powers should include the ability to request further information beyond that provided by the first medical practitioner if it considers this necessary. If there are concerns about compliance, the Board should be empowered to refer that case to entities such as the police, the Coroner and the Australian Health Practitioner Regulation Agency.

The Board's monitoring role also requires oversight of the system as a whole to ensure that it is functioning as intended and to make recommendations for improvement where needed. To support this, the Board would collect and analyse data provided to it by registered medical practitioners in their reporting. It may also need to collect further information to undertake this overall monitoring role. This data (in de-identified form) should also be made publicly available for community scrutiny in the form of annual reports tabled in Parliament. The Board should also have power to undertake educational initiatives for registered health practitioners and the wider community to promote understanding of, and compliance with, the requirements of the Act.

Part 7 Protections from liability for acting in accordance with Act

40 Protection from criminal liability of person who assists or facilitates request for or access to voluntary assisted dying

A person who in good faith does something or fails to do something—

(a) that assists or facilitates any other person who the person believes on reasonable grounds is requesting access to or is accessing voluntary assisted dying in accordance with this Act; and

(b) that apart from this section, would constitute an offence at common law or under any other enactment—

does not commit the offence.

41 No liability for registered health practitioner who acts in accordance with Act

(1) A registered health practitioner who, in good faith and without negligence, acts under this Act believing on reasonable grounds that the act is in accordance with this Act is not in respect of that act—

(a) guilty of an offence; or

(b) liable for unprofessional conduct or professional misconduct; or

(c) liable in any civil proceeding; or

(d) liable for contravention of any code of conduct.

(2) To remove any doubt, subsection (1) includes when a registered health practitioner exercises a conscientious objection to voluntary assisted dying provided that occurs in accordance with this Act.

42 No liability for registered health practitioner present after voluntary assisted dying medication administered

(1) A registered health practitioner who, in good faith, does not administer life saving or life sustaining medical treatment to a person who has not requested it, and believes on reasonable grounds that the person is dying after being administered or self-administering voluntary assisted dying medication in accordance with this Act, is not, in respect of that omission to act—

(a) guilty of an offence; or

(b) liable for unprofessional conduct or professional misconduct; or

(c) liable in any civil proceeding; or

(d) liable for contravention of any code of conduct.

(2) This section does not prevent a registered health practitioner from providing medical treatment for the purpose of ensuring the person's comfort.

43 Section [insert number] of the [insert relevant criminal law Act or Code] does not apply

Section [insert number] of the [insert relevant criminal law Act or Code] does not apply to a person who knows or believes on reasonable grounds that a person is accessing voluntary assisted dying in accordance with this Act.

This provision is based on section 82 of the Voluntary Assisted Dying Act 2017 *(Vic) which states that section 463B of the* Crimes Act 1958 *(Vic) does not apply. Section 463B justifies the use of force to prevent a suicide. This means that the proposed provision in this Bill will only be needed in jurisdictions where a provision like section 463B exists authorising the prevention of a suicide.*

Part 8 Offences

The approach to and wording of offence provisions varies by jurisdiction so the below are illustrative of the standard type of offences included in Voluntary Assisted Dying Bills. Other offences may be added or the below proposed offences modified depending on how the criminal law is regulated by jurisdiction.

44 Inducing another person to request access to voluntary assisted dying

A person who, by dishonesty or undue influence, induces another to make a request for access to voluntary assisted dying is guilty of a crime.

Maximum penalty— [insert]

45 Inducing another person to access voluntary assisted dying

A person who, by dishonesty or undue influence, induces another to self-administer voluntary assisted dying medication or induces another to request that a registered medical practitioner administer that medication is guilty of a crime.

Maximum penalty— [insert]

46 False or misleading statements

A person who knowingly makes a false or misleading statement in, or in relation to, a request for access to voluntary assisted dying is guilty of a crime.

Maximum penalty— [insert]

47 Failing to report to Board

A registered medical practitioner who fails to report to the Board as required by this Act is guilty of a crime.

Maximum penalty— [insert]

Part 9 Miscellaneous

The approach to the Miscellaneous Part of the Bill will also vary by jurisdiction. Specific matters that the Bill could or should address include:

- *a requirement to review the Act's operation after 5 years;*
- *provisions regulating the use of interpreters;*
- *approval of training for registered medical practitioners by the relevant government department;*
- *confidentiality duties for those with access to personal information in the course of administering the Act;*
- *the recording of the death on the Register of Births, Deaths and Marriages;*
- *that the death is not a 'reportable death' for coronial investigation;*
- *the effect that the Act has on wills, insurance policies, contracts and other statutes;*
- *forfeiture provisions in relation to a person's estate where another person is found guilty of an offence under this Act; and*

- *the making of regulations under the Act.*

Consequential or transitional provisions will also vary by jurisdiction and so have not been included in the Bill

Schedule 1 Dictionary

Only a limited number of important terms used in this Bill are defined below as jurisdictions vary in their approaches to definitions sections. Variability also arises because jurisdictions have:

- *different acts interpretation legislation which can define commonly used legislative terms in different ways; and*
- *different local health legislation from which definitions for Voluntary Assisted Dying Bills are sometimes taken.*

approved assessment training means training approved by the [insert relevant government department official] under section 14.

Board means the Voluntary Assisted Dying Review Board.

decision-making capacity has the meaning set out in section 7.

eligibility criteria means the criteria set out in section 9 and clarified in section 10.

eligibility determination has the meaning set out in section 25(3).

family member of a person means the person's spouse or domestic partner, parent, grandparent, sibling, child or grandchild.

final request means a request from a person for access to voluntary assisted dying to a registered medical practitioner in accordance with section 30.

first assessment means an assessment undertaken in accordance with Part 3 Division 2.

first medical practitioner means the registered medical practitioner—

(a) who receives a first request from a person and undertakes a first assessment; or

(b) to whom the role is transferred in accordance with section 26.

first request means a request from a person for access to voluntary assisted dying to a registered medical practitioner in accordance with section 11.

ineligible witness has the meaning set out in section 28(2).

medical condition means a medical condition whether caused by disease, illness or injury.

practitioner administration has the meaning set out in section 6.

professional care services means any of the following provided to another person under a contract of employment or a contract for services—

(a) support or assistance;

(b) special or personal care;

(c) a disability service within the meaning of [the Disability Act].

registered health practitioner means a person registered under the *Health Practitioner Regulation National Law* to practise a health profession other than as a student.

registered medical practitioner means a person registered under the *Health Practitioner Regulation National Law* to practise in the medical profession other than as a student.

request and assessment process means, in respect of a person, the making or the conducting of the following—

(a) a first request;

(b) a first assessment;

(c) a second assessment;

(d) a second request;

(e) a final request.

second assessment means an assessment undertaken in accordance with Part 3 Division 3.

second medical practitioner means a registered medical practitioner who receives a referral from the first medical practitioner under section 19 and undertakes a second assessment.

second request means a request from a person for access to voluntary assisted dying to a registered medical practitioner in accordance with section 27.

self-administration has the meaning set out in section 6.

special or personal care means—

(a) assistance with one or more of the following—

(i) bathing, showering or personal hygiene;

(ii) toileting;

(iii) dressing or undressing;

(iv) meals; or

(b) assistance for persons with mobility problems; or

(c) assistance for persons who are mobile but require some form supervision or assistance; or

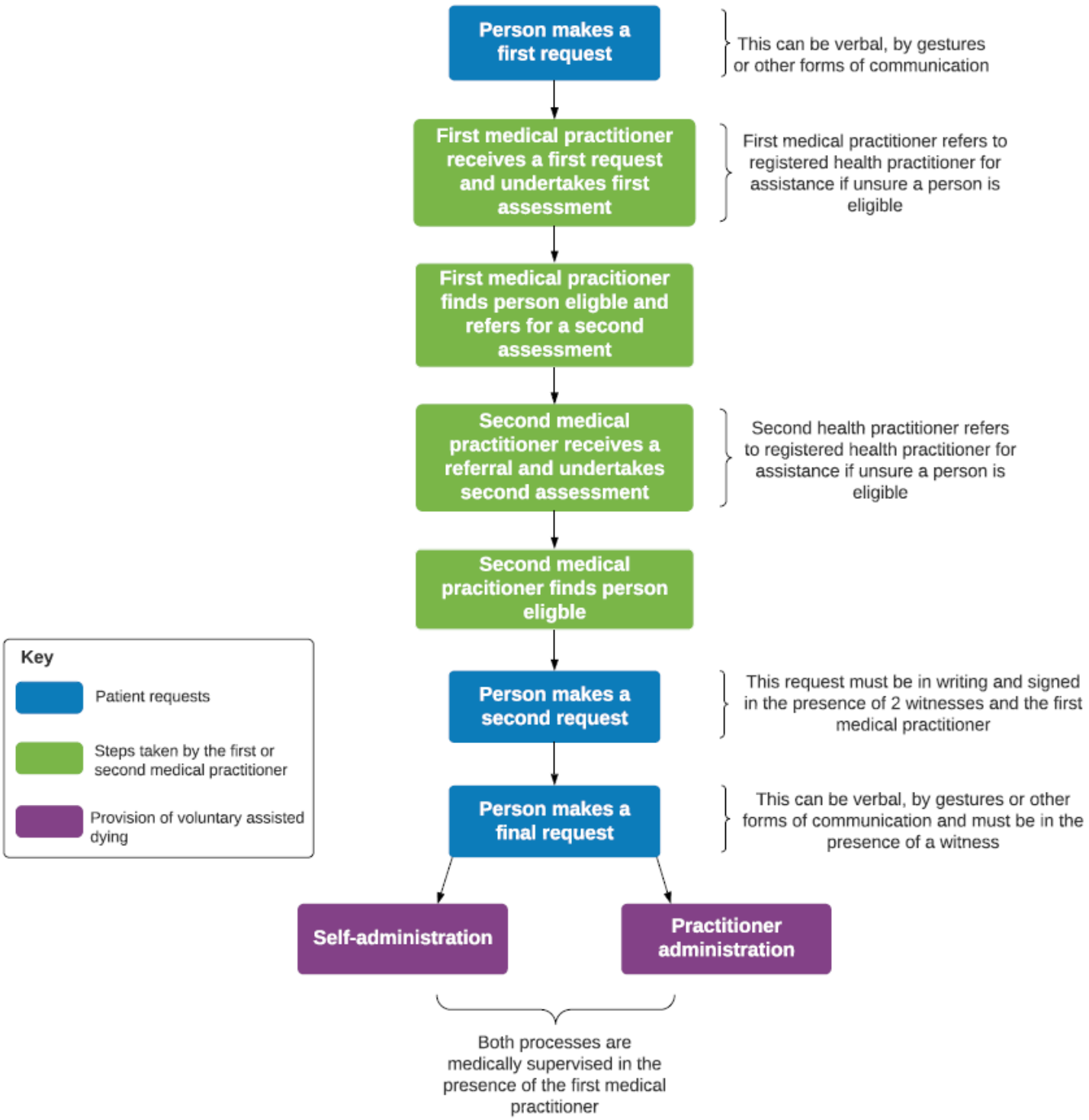
(d) assistance or supervision in administering medicine; or

(e) the provision of substantial emotional support.

voluntary assisted dying has the meaning set out in section 6.

voluntary assisted dying medication means a poison or controlled substance or a drug of dependence prescribed by the first medical practitioner for the purpose of causing a person's death

IV APPENDIX: SHORT OVERVIEW OF THE PROCESS TO ACCESS VOLUNTARY ASSISTED DYING IN THE VOLUNTARY ASSISTED DYING BILL 2019



REFERENCE LIST

A *Articles/Books/Reports*

ACT Legislative Assembly, *Select Committee on End of Life Choices in the ACT* (Report, March 2019)

Commonwealth Secretariat, *Changing the Law: A Practical Guide to Law Reform* (Report, 2017) <http://www.calras.org/pub/Main/LawReform/Changing%20The%20Law.pdf>

Department of Health, Government of Western Australia, *Ministerial Expert Panel on Voluntary Assisted Dying: Final Report* (Discussion paper, HEN-013590, June 2019)

Emanuel, Ezekiel et al, 'Attitudes and practices of euthanasia and physician assisted suicide in the United States, Canada and Europe' (2016) 316(1) *Journal of American Medical Association* 79

Government of Western Australia, 'Western Australian Government response: Joint Select Committee on End-of-Life Choices Report, *My Life, My Choice*' (Report, WCP-013515, December 2018)

Health Canada, *Fourth Interim Report on Medical Assistance in Dying Canada* (Report, April 2019)

Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, 56th Parliament of Queensland, *Inquiry into aged care, end-of-life and palliative care and voluntary assisted dying* (Paper No 3, 14 February 2019)

Johnston, Carolyn and James Cameron, 'Discussing Voluntary Assisted Dying' (2018) 26(2) *Journal of Law and Medicine* 454

Joint Committee on End of Life Choices, Parliament of South Australia, 'Terms of Reference' (April 2019)

Joint Select Committee on End of Life Choices, 40th Parliament of Western Australia, *My Life, My Choice* (Report No 1, August 2018)

McGee, Andrew et al 'Informing the euthanasia debate: Perceptions of Australian politicians' (2018) 41(4) *University of New South Wales Law Journal* 1368

Regional Euthanasia Review Committees, *Annual Report 2017* (March 2018) 10

Voluntary Assisted Dying Review Board, *Report on Operations 2018-2019* (Report, August 2019)

Willmott, Lindy and Ben White 'Assisted dying in Australia: A values-based model for reform' in Ian Freckelton and Kerry Petersen (eds) *Tensions and Traumas in Health Law* (Federation Press, 2017)

White, Ben and Lindy Willmott, 'Future of assisted dying reform in Australia' (2018) 42(6) *Australian Health Review* 616

White, Ben and Lindy Willmott, 'How should Australia regulate voluntary euthanasia and assisted suicide' (2012) 20 *Journal of Law and Medicine* 410

White, Ben, Lindy Willmott and Eliana Close, 'Victoria's voluntary assisted dying law: clinical implementation as the next challenge' (2019) 210(5*) Medical Journal of* Australia 207

Willmott, Lindy et al, '(Failed) voluntary euthanasia law reform in Australia: Two decades of trends, models and politics' (2016) 39(1) *University of New South Wales Law Journal* 1

Willmott, Lindy et al, 'Restricting conversations about voluntary assisted dying: Implications for clinical practice' (2019) *BMJ Supportive and Palliative Care* (in press)

B *Cases*

Brightwater Care Group (Inc) v Rossiter (2009) 40 WAR 84

H Ltd v J (2010) 107 SASR 352

C *Legislation*

Euthanasia Laws Act 1997 (Cth)

Guardianship and Administration Act 2000 (Qld)

Health Practitioner Regulation National Law (Qld)

Practitioner Regulation National Law (Victoria) Act 2009 (Vic)

Powers of Attorney Act 1998 (Qld)

Rights of the Terminally Ill Act 1995 (NT)

Voluntary Assisted Dying Act 2017 (Vic)

Voluntary Assisted Dying Bill 2019 (WA)

D *Other*

Australian Commission on Safety and Quality in Health Care, *National Consensus Statement: Essential elements for safe and high-quality end-of-life care* (Report, 2015) <https://www.safetyandquality.gov.au/wp-content/uploads/2015/05/National-Consensus-Statement-Essential-Elements-forsafe-high-quality-end-of-life-care.pdf>

Daniel Andrews, 'Victoria State Government 'Voluntary assisted dying model established ahead of vote in Parliament' (Media release, 25 July 2017)

White, Ben et al, 'WA's take on assisted dying has many similarities with the Victorian law – and some important differences', *The Conversation* (online, 9 August 2019) <https://theconversation.com/was-take-on-assisted-dying-has-many-similarities-with-the-victorian-law-and-some-important-differences-121554>

DIVERSITY, EQUITY AND INCLUSION (OR EXCLUSION) IN SPORT: A REVIEW OF THE CASTER SEMENYA CASE

ANNETTE GREENHOW* AND KIM WEINERT**

The right to participate in sport, regardless of race, gender, or other defining characteristics is enshrined in various international arrangements. Ratification of these instruments by nation states is located in the development of policies and initiatives which embrace and promote a 'sport for all' ethos — where principles of diversity, equity and inclusion are advanced and promoted. International sport federations and world governing sporting authorities are expected to develop policies and regulations as guardians and custodians of the sport to advance this ethos. The parameters of the participatory right to sport have recently been questioned following the arbitral award by the Court of Arbitration ('CAS') involving Caster Semenya and the International Association of Athletics Federations ('IAAF'). This article briefly critiques the Semenya decision using Dworkin's rights theory and contributes to the literature by framing the analysis of decision-making vis a vis an intersex person's right to sport as one that involves measuring individual rights against utilitarian preferences. It posits the question as to whether it is time to review the wider social context and human rights considerations in sport-related disputes and whether the private arbitral framework of the CAS is the appropriate forum in such cases.

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> *The United Nations General Assembly Human Rights Council…Calls upon States to ensure that sporting associations and bodies implement policies and practices in accordance with international human rights norms and standards, and to refrain from developing and enforcing policies and*

> *practices that force, coerce or otherwise pressure women and girl athletes into undergoing unnecessary, humiliating and harmful medical procedures in order to participate in women's events in competitive sports, and to repeal rules, policies and practices that negate their rights to bodily integrity and autonomy.*
>
> – United Nations General Assembly.[1]

I INTRODUCTION

On 1 May 2019, the Court of Arbitration for Sport ('CAS') issued an executive summary of its highly-anticipated decision in the sports arbitration case between elite athlete Caster Semenya and Athletics South Africa (as claimants) and the International Association of Athletics Federations ('IAAF') (herein referred to as 'the Semenya decision'). Later, the CAS released full details of the Semenya decision in a 163-page arbitral award representing a pivotal decision in the CAS's 35-year history as the global sports dispute resolution body. As this article will illustrate, the Semenya decision was indeed a pivotal one, and as evidenced from the above extract from the United Nations Human Rights Council Draft Resolution, the impact of the Semenya decision transcends beyond the private dispute-resolution framework under the CAS arbitral regime.

The Semenya decision upholds regulations promulgated by the IAAF, the Eligibility Regulations for the Female Classification — Athletes with Differences of Sex Development ('DSD Regulations') — which subsequently discriminates against and establishes an eligibility criteria for competitive female athletes who are considered non-binary based on defining biological characteristics such as high levels of naturally occurring testosterone. The operative sections of the DSD Regulations are discussed further in Part II of this article. The most polarising aspect of the DSD Regulations, drawing condemnation from the Human Rights Commission, involves the displacement of a female athlete's right to bodily integrity and autonomy, by having them medicate to reduce blood testosterone level to fit within the IAAF's limits and maintain this continuously 'for so long as she wishes to maintain eligibility to compete in the female

[1] United National General Assembly, Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/L.10/Rev. 1 (25 February-22 March 2019).

classification in Restricted Events at International Competitions…'.[2] In non-sporting contexts, it is hard to imagine a case where the general welfare of society would justify the displacement of such a right to bodily integrity and autonomy.[3]

The Semenya decision, made within the scope of a private arbitral framework, was justified by the CAS on the basis that the DSD Regulations were a necessary, reasonable and proportionate measure that would ensure a fair competition in certain events for elite level female athletes.[4] In balancing conflicting rights between female athletes who do and do not have DSD,[5] the CAS Panel considered the IAAF's approach to be 'a rational resolution of conflicting human rights'.[6]

As an individual, 28-year-old Caster Semenya identifies as female.[7] As such, the 'rights' boundaries' within this article are framed by Semenya exercising her legitimate, individual right of autonomy over her body and asserting her gender identity. This article will demonstrate that the Semenya case is one about an individual's rights and not about collective or majoritarian rights.[8] By applying Dworkin's rights theory,[9] this article critiques the Semenya decision and argues that CAS is not the appropriate forum to determine matters which result in displacement of an individual's right over body and gender. Specifically, this article will examine the public condemnation of the DSD Regulations by prominent global actors, such as the General Assembly of the United

[2] *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development) Version 1.0*, International Association of Athletics Federations (entered into force 1 November 2018) reg 2.3(c) ('*IAAF DSD Version 1.0 Regulations*'). The IAAF issued Version 2.0 of the DSD Regulations which was published on 1 May 2019 after the Semenya decision. This article refers to Version 1.0 of the *IAAF DSD Regulations* as this was the version considered by the CAS Panel in the Semenya Decision. See also *Mokgadi Caster Semenya v International Association of Athletics Federations (Award)* (Court of Arbitration for Sport, Case No 2018/O/5794, 30 April 2019) [425]–[53] ('*Arbitral Award*').

[3] It is beyond the scope of this paper to examine such cases, but only the most egregious of cases would likely fall within contemplation of forced or coerced medical intervention against the will of an individual.

[4] The CAS Panel consisted of three Arbitrators, and the Semenya decision was awarded by a two-third majority: Ibid. As to the requirement of the regulation being necessary, reasonable and proportional see *Arbitral Award* (n 2) [556]–[581], [582]–[619]. See especially the conclusion on reasonableness and proportionality, see *Arbitral Award* (n 2) [620]–[624].

[5] See ibid [554].

[6] Ibid [589].

[7] For further discussion on evidence of Semenya as female, see John M. Sloop, '"This is not natural:" Caster Semenya's Gender Threats' (2012) 29(2) *Critical Studies in Media Communication* 81, 86-8.

[8] The authors have applied an individual rights approach to undertake this critique of the Semenya decision. The authors acknowledge, however, that a group rights approach could also be applied to the case and form the basis of future research in this area. Indeed, the CAS Panel acknowledged constraints on the Panel's competence and role, and that the majority of the Panel did not consider it necessary or appropriate to seek to make any assessment of the possible wider impact of the DSD Regulations. See *Arbitral Award* (n 2) [589].

[9] Ronald Dworkin, *Taking Rights Seriously* (Bloomsbury, 1997), 106-7.

Nations Human Rights Council ('UNHRC') [10] and the World Medical Association ('WMA'),[11] in seeking to advance, amongst other things, an individual's right to bodily integrity and autonomy. The fact that these global actors have publicly condemned the DSD Regulations lends support to examine whether utilitarian preferences should indeed have trumped individual rights as upheld by the CAS in the Semenya decision. A primary consideration, therefore, is to question whether the CAS is the appropriate forum for deciding matters involving new and emerging contemporary socio-legal issues, such as intersex participation in competitive sport.

In addressing the above questions, Part II will outline the background of the Semenya decision to illustrate the conflicts and competing interests that led to the arbitral dispute before the CAS. Next, Part III will examine the role of the CAS as a private arbitral body in sport and its function as an alternative regime to litigation in national courts. While the CAS's primary aim is to uphold a sport's integrity and utility, this part seeks to reconcile the CAS decision with Article 20 of The Universal Declaration of Human Rights and the failure by the CAS to take into account the broader social impact or human rights implications arising from its decision.[12] From here, Part IV applies Dworkin's rights theory to critically analyse how the CAS, while attempting to be the structural mechanism to achieve fairness for the majority, has consequently removed Caster Semenya's right to her bodily integrity and autonomy, and marginalised intersex bodies. By failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it as an 'ultimate [sic] matter for the courts of the various jurisdictions in question to determine',[13] the Semenya decision reverts to the pre-CAS period where litigation before state courts was thought to be 'ineffective in resolving disputes in international sport'.[14] This article concludes in Part V that the outcry following the Semenya case provides a compelling basis upon which to review whether

[10] Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/L.10/Rev. 1 (25 February-22 March 2019).
[11] World Medical Association, 'WMA Urges Physicians not to Implement IAAF Rules on Classifying Women Athletes' (Press Release, 25 April 2019) <https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/>.
[12] For further discussion about the compatibility with international human rights law, see *Arbitral Award* (n 2) [553]–[555]. For discussion about the wider social context, see *Arbitral Award* (n 2) [587]–[589].
[13] See ibid [555].
[14] Lloyd Freeburn, *Regulating International Sport: Power, Authority and Legitimacy* (Brill Nijhoff, 2018) 13.

or not the narrowly construed private arbitral system remains the most appropriate authoritative process to determine such matters.

II GENDER AND SUSPICION-BASED TESTING REGIMES

The hearing held at CAS headquarters in Lausanne between 18 to 22 February 2019, was not the first time Caster Semenya and the IAAF officials had interacted. Indeed, the background to the Semenya case illuminates the history and struggles in the IAAF's quest to regulate intersex athletes. Before considering the background to this relationship, it is worth briefly considering the evolution and development of intersex testing in competitive sport.

A *From Dignity Depleting 'Peak and Poke' to Modern-Day Suspicion-Based Mechanisms*

Patel provides a comprehensive review of gender as a defining characteristic that has influenced policies in seeking to balance the inclusion and exclusion of the right to participate in competitive sport.[15] Patel traces the evolution and development from the 'peak and poke' testing regime arising from gender fraud in the Eastern Bloc, to modern day 'suspicion-based gender verification' cases involving intersex athletes.[16] Through this analysis, Patel identifies the challenges faced by sports administrators in developing appropriate 'sport regulatory mechanisms' to address intersex concerns.[17]

Xavier and McGill chronicle the history of gender policies in national and international athletics, and explain the rationale around the earlier iterations of IAAF policies to address intersex concerns.[18] The authors note that the 2011 IAAF Hypoandrogenism policy stipulated a 10 nmol/L upper limit for women's sports, creating for

[15] Seema Patel, *Inclusion and Exclusion in Competitive Sport: Socio-legal and Regulatory Perspectives* (Routledge, 2015) 85–108.
[16] Ibid 85-6. Patel refers to the Cold War as bringing about increased competition in sport and notes that sex testing began as a way of deterring deliberate cheats in the Eastern Bloc.
[17] Ibid 88-93. Patel analyses the concept of fair and unfair advantages in sport and traces the regulatory mechanisms introduced by sport administrators by reference to several case studies involving intersex athletes. Citing Karkazis *et al*, Patel at [93] concludes that 'the policing of 'biologically natural bodies' is not entirely fair.
[18] Neena A Xavier and Janet B McGill, 'Hyperandrogenism and Intersex Controversies in Women's Olympics' (2012) 97(11) *The Journal of Clinical Endocrinology & Metabolism* 3902.

endocrinologists a 'new and prominent role in the evaluation and treatment of women with the potential to become elite athletes'.[19]

Early iterations of policies such as the International Olympics Committee's ('IOC') Barr body test was introduced in 1968 and developed as enhanced scientific understanding emerged around genetic and hormone testing. According to Patel, spectators and competitors in sport were fearful that women with intersex characteristics would begin to dominate the sports.[20] These key actors were early influencers of the IOC's decision to introduce and maintain various methods of testing with the objective to 'prevent gender fraud, eliminate scandal, ensure fairness and fair performance advantage, and maintain the natural order of masculinity and femininity'.[21] Based on Patel's assessment, the confidential nature of testing makes it difficult to measure with any accuracy how many intersex females have been forced 'quietly' out of competition.[22] She also concludes, however, that the 'consequences of testing only some of the factors which determine sex can lead to unreasonable exclusion of innocent women who may naturally vary'.[23]

B *Caster Semenya and the IAAF*

1 The 2009 Event

In 2009, 18-year-old South African middle-distance runner, Caster Semenya, found herself thrust into the public spotlight after she won the gold medal in the World Championships held in Berlin. This increased public attention was not due to her success on the track, but instead, it was due to questions raised as to her gender 'ambiguity' and eligibility to 'race as a woman' in the female classification in the 800-metre event.[24] Consequently, Semenya was subjected to a testing regime under an earlier iteration of the IAAF's hyperandrogenism policy.[25]

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[19] Ibid 3906.
[20] Patel also explains that this fear reinforced the belief that the possession of a male Y chromosome produces superior athletic ability. See Patel (n 15) 86.
[21] For further discussion, see generally Patel (n 15) 87.
[22] Ibid 86.
[23] Ibid 88.
[24] Cheryl Cooky, Ranissa Dycus and Shari L Dworkin, '"What Makes a Woman a Woman?" Versus "Our First Lady of Sport: A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya' (2013) 37(1) *Journal of Sport and Social Issues* 31, 39.
[25] The IAAF policy was the *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition*. See *Arbitral Award* (n 2) [7]. Patel also considered the 1985 case of Spanish

According to Patel, the IAAF had earlier requested the IAAF Member Federation in South Africa, Athletics South Africa ('ASA') to withdraw her from the team competing in Berlin.[26] The ASA refused, and when Semenya won gold in the 800-metre event, she was subjected to a 'suspicion-based' testing regime. Patel notes that the IAAF 'ordered' the 18-year-old to undergo a 'gender-verification' test,[27] that involved an extensive medical evaluation conducted by a range of medical experts in the field. The IAAF was accused of the 'clumsy handling' of the 2009 Semenya case, primarily based on the absence of a clear policy and for the public humiliation caused to the 18-year-old runner.

2 The Right to Participate

In addition to the enjoyment of fundamental human rights, athletes are also entitled to the promotion and protection of the right to participate in sport, free from all forms of discrimination. Indeed, many significant constituent documents embed such a right. To illustrate, the fundamental principles of Olympism in the Olympic Charter recognise that

> [T]he practice of sport is a human right. Every individual must have the possibility of practising sport, without discrimination of any kind and in the Olympic spirit, which requires mutual understanding with a spirit of friendship, solidarity and fair play.[28]

With a specific reference to the rights enjoyed by athletes, the Olympic Charter provides that

> … [t]he enjoyment of the rights and freedoms set forth in this Olympic Charter shall be secured without discrimination of any kind, such as race, colour, sex, sexual orientation, language, religion, political or other opinion, national or social origin, property, birth or other status.[29]

In recognition of the right to participate in the sport of athletics free from discrimination, the 2017 IAAF Constitution provides an object as:

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hurdler, Maria Martinez Patino, Indian 800m runner, Santhi Soundarajin, Caster Semenya and South Korean footballer, Park Eun-Seon. For further discussion, see Patel (n 15) 91–3. See also Xavier and McGill (n 18).

[26] Patel (n 15) 90.

[27] Ibid.

[28] International Olympic Committee, *Olympic Charter* (in force 26 June 2019) art 4.

[29] Ibid.

> … striving to ensure that no gender, race, religious, political or other kind of unfair discrimination exist, continues to exist or is allowed to develop in Athletics in any form, and that all may participate in Athletics regardless of their gender, race, religious or political views or any other irrelevant factor.[30]

The 2009 event signalled the first displacement of Semenya's right to participate in sport free from discrimination. It also displaced Semenya's right to bodily integrity and autonomy due to her differences of sex development and naturally occurring genetic condition.

3 The IAAF's Regulatory Control

The IAAF asserted regulatory power and control to order Semenya to undergo this testing regime, primarily on the basis of its position as the international sports federation ('ISF') over the sport of athletics. Foster describes ISF's as 'autonomous organisations and independent of national governments', establishing their regulatory power and legitimacy.[31]

Although no direct contractual relationship exists between Semenya and the IAAF, she is bound to comply, through a series of interlocking arrangements, with the regulation and rules of the IAAF. The exact nature and extent of an ISF's legitimacy in asserting regulatory control over participants such as Semenya remains subject to legal debate. Several commentators suggest that the source of this power is based on the consensus amongst those involved in the sport, creating a binding series of interlocking arrangements cascading throughout the various tiers within the sport's pyramid in governing international athletics.[32] Freeburn questions whether this relationship is truly

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[30] *International Association of Athletics Federation (IAAF) Constitution* (1 January 2017) art 4.4 ('*IAAF Constitution*'). The *IAAF Constitution* was revised in 2019, effective 1 January 2019 (*IAAF 2019 Constitution)* and removed reference to the former art 4.4. Instead, the 2019 IAAF Constitution now provides a new Purpose in art 4.1(j) to 'preserve the right of every individual to participate in Athletics as a sport, without unlawful discrimination of any kind undertaken in the spirit of friendship, solidarity and fair play'. The DSD Regulations came into force on 1 November 2018 so the provisions of the IAAF 2017 Constitution are relevant to consider as the 2017 IAAF Constitution reflected the express object as provided in art 4.4.

[31] Ken Foster, 'Is There a Global Sports Law?' in Robert C.R Siekmann and Janwillem Soek (eds), *Les Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012) 35, 36.

[32] Lewis and Taylor explain that international sport is arranged via a 'chain of interlocking associations/organisations responsible for the sport's governance at each level': see Adam Lewis and

based on contract or whether de facto power is a more 'plausible basis' to explain the power and control of ISFs under the existing regulatory regime.[33] Others go further to question the source of this power by arguing the absence of a direct contractual relationship undermines the legitimacy on the part of an ISF to assert regulatory power.[34]

Under its constitution, the IAAF describes itself as the 'sole competent international authority for the sport of Athletics worldwide…'.[35] The IAAF sits at the apex of the sporting pyramid, a hierarchical model establishing a 'chain of interlocking associations responsible for the sport's governance at each level'.[36] In this position, the IAAF exercises control over many key functions in the promotion, organisation and regulation of athletics.[37] Moreover, the IAAF retains vertical oversight and control through this network of interlocking arrangements with member federations spread across diverse geographical locations.[38] To illustrate, the ASA is a member federation and acts as the national sports organisation in South Africa, contractually bound to comply with the 'Constitution, Rules and Regulations' of the IAAF.[39]

4 Vulnerability and Consent

While some have questioned whether Semenya was entitled to disobey the 2009 IAAF order due to questions around vulnerability and absence of consent,[40] Semenya submitted to the process. Indeed, she had been training to compete in the Olympics, and by competing in international events, she would further her performance-driven aspirations and goals. A reasonable conclusion, therefore, is that Semenya considered compliance with the IAAF's directions as the only viable option, to enable her to excel in her sport and earn her living by practising her sport at the competitive level.

Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014) [3.11]. See also Freeburn (n 14) 7–9, 42.

[33] For further discussion, see Freeburn (n 14).

[34] Ibid.

[35] *IAAF 2019 Constitution* (n 30) art 1.3. See also *IAAF 2017 Constitution* (n 30) art 2.1, referring to the IAAF as the 'world governing body for the sport of Athletics'.

[36] Lewis and Taylor (n 32) [3.11].

[37] *IAAF 2017 Constitution* (n 30) established the Objects of the IAAF in Article 4.1–4.16; see cl 4 Purposes, cl 4.1(a)–(n).

[38] *IAAF 2017 Constitution* (n 30) art 5.2, art 5.8 (b). See also, *IAAF 2019 Constitution* (n 30) art 6.2.

[39] *IAAF 2019 Constitution* (n 30) art 9(1)(b).

[40] In questioning the ethical and legal questions about the legality of sex testing in sport, Patel, citing Cooper, raises this as a point, albeit a moot point, as the case was not legally challenged at the time. See Patel (n 15) 90.

5 Enduring Suspicion

After being cleared to run again, Semenya's participation in her chosen events continued to raise suspicions and fears that she would dominate, leading to perceived unfairness by being included in female classified events. Others described her physical advantage, akin to an adult competing against a child in the same competition.[41]

In 2018, the IAAF released the new DSD Regulations, which came into force on 1 November 2018.[42] The operative parts of the amended version of these are reproduced in the Semenya decision.[43] According to the IAAF, the new regulations

> … require any athlete who has a Difference of Sexual Development (DSD) that means her levels of circulating testosterone (in serum) are five (5) nmol/L or above and who is androgen-sensitive to meet the following criteria to be eligible to compete in Restricted Events in an International Competition (or set a world record in a Restricted Event at competition that is not an International Competition):
>
> (a) she must be recognised at law either as female or as intersex (or equivalent);
>
> (b) she must reduce her blood testosterone level to below five (5) nmol/L for a continuous period of at least six months (e.g., by use of hormonal contraceptives); and
>
> (c) thereafter she must maintain her blood testosterone level below five (5) nmol/L continuously (i.e. whether she is in competition or out of competition) for so long as she wishes to remain eligible.[44]

The DSD Regulations Version 1.0 provide an alternative solution for female athletes who do not wish to comply. In this regard, the IAAF provides that:

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[41] 'Caster Semenya to Challenge IAAF Rules Forcing Her to Take Medication to Lower Her Testosterone Levels', *ABC News* (online, 19 June 2018) <https://www.abc.net.au/news/2018-06-19/caster-semenya-to-challenge-iaaf-female-classification-rule/9884762> ('*Caster Semenya to Challenge IAAF Rules*').
[42] World Athletics, 'IAAF Introduces New Eligibility Regulations for Female Classification' (Press Release, 26 April 2018) <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>.
[43] See *Arbitral Award* (n 2).
[44] See *IAAF DSD Regulations Version 1.0* (n 2) reg 2.3 (c).

> If a female athlete does not wish to lower her testosterone levels, the IAAF regulations provide will still be eligible to compete in:
>
> (a) the female classification:
>
> (i) at competitions that are not International Competitions: in all Track Events, Field Events, and Combined Events, including the Restricted Events; and
>
> (ii) at International Competitions: in all Track events, Field Events, and Combined Events, other than the Restricted Events; or
>
> (b) in the *male classification* (emphasis added), at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events; or
>
> (c) in any applicable intersex or similar classification that may be offered, at all competitions (whether International Competitions or otherwise), in all Track Events, Field Events, and Combined Events, including the Restricted Events.[45]

Within a few months of the release of the DSD Regulations, Semenya challenged the validity of the rules based on her view that she should be 'entitled to compete the way she was born without being obliged to alter her body by any medical means'.[46] No longer was Semenya willing to comply with the IAAF eligibility requirement. From a human rights perspective, the intention to dispute the validity of the DSD Regulations signalled her intention to assert her rights to bodily integrity and autonomy.

So, what were Semenya's options in selecting an appropriate forum to hear her concerns? Based on the above discussion about the regulatory control of the IAAF, Semenya had submitted to the exclusive jurisdiction of the CAS as the private arbitral body to hear her dispute. In June 2018, Semenya filed her request for arbitration with the CAS against the IAAF, primarily seeking an award that the DSD Regulations be declared unlawful.[47]

[45] Ibid.
[46] *Caster Semenya to Challenge IAAF Rules* (n 41).
[47] See *Arbitral Award* (n 2) [14].

III THE ROLE OF THE CAS

Established in 1984 as an alternative forum to state courts in resolving sport-related disputes, the CAS has evolved to become recognised as a legitimate and exclusive decision-making body. The CAS, despite the misnomer, is not an international court of law but instead an arbitral tribunal based in Switzerland.[48]

The jurisdiction of the CAS is entirely based on the arbitral agreement whereby athletes agree, though a series of interlocking arrangements, to submit to the exclusive jurisdiction of the CAS.[49] The Code of Sports-Related Arbitration ('CAS Code') governs the administration and procedures of the CAS.[50] The IAAF Constitution contains a parallel provision which stipulates that final decisions made by the IAAF may be appealed exclusively to the CAS.[51]

The CAS Code provides the CAS with jurisdiction to hear all disputes which 'involve matters of principle relating sport or matters of pecuniary or other interests relating to the practice or development of sport and may include, more generally, any activity or matter related or connected to sport'.[52] The nature of proceedings before the CAS fall within one of three divisions: the Ordinary Arbitration Division, the Anti-Doping Division, or the Appeals Arbitration Division.[53] The types of dispute include doping, contractual, disciplinary, governance, and nationality disputes. Other matters involve the interpretation and application of rules that impact an athlete's eligibility to participate in Olympics and other international competitions.[54] There is no reference to human rights determinations within the CAS framework. Patel notes that the CAS has

[48] *Code of Sports-related Arbitration* (in force from 1 January 2019) s 1 ('*CAS Code*').
[49] Lewis and Taylor (n 32); Freeburn (n 14).
[50] *CAS Code* (n 48).
[51] *IAAF Constitution* (n 30) art 84.3. The IAAF 2017 Constitution (n 30) provides in Art 20.1 that all disputes under this Constitution shall, in accordance with its provisions, be subject to an appeal to the Court of Arbitration for Sport in Lausanne. The IAAF Constitution 2019 (n 30) provides in art 84.3 that final decisions made by the IAAF under the Constitution may be appealed exclusively to the CAS which will resolve the dispute definitively in accordance with the CAS Code of Sports–related Arbitration.
[52] *CAS Code* (n 48) r 47.
[53] Ibid r 3.
[54] Rustam Sethna, 'A Data Analysis of the Arbitrators, Cases and Sports at the Court of Arbitration for Sport', *Law in Sport* (Web Page, 4 July 2019) <https://www.lawinsport.com/topics/articles/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport>; Matthew J Mitten and Timothy Davis, 'Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities' (2008) 8(1) *Virginia Sports and Entertainment Law Journal* 71, 74. See also Patel (n 15) 51.

> … emphasised the responsibility of governing bodies to act in accordance with the general principles of law…including that rules must be construed in accordance with the fundamental rights protected under the ECHR.[55]

The CAS adopts the Swiss Federal Code on Private International Law so the parties have rights, albeit limited rights, to lodge appeals from the CAS to the Swiss Federal Tribunal. Successful appeals from the CAS have been described as 'few and far between', with a recent study suggesting 82% of appeals being dismissed by higher courts and appeals successfully upheld in 2.5% of cases.[56]

Prior to its establishment, state courts were ineffective forums in deciding sport-related disputes. Freeburn, however, cites other reasons which might have influenced the decision, including a desire by the IOC and ISFs to control, within a narrow framework, the ambit of decision-making in sport.[57] Furthermore, rather than freely negotiated contractual arrangements, the agreement to submit to the jurisdiction of the CAS is akin to forced mediation — whereby athletes have no rights to opt out or negotiate alternative arrangements for the resolution of sport-related disputes. In that regard, compliance motivations in submitting to the exclusivity of the CAS jurisdiction are likely to be influenced by normative, economic and social considerations rather than the exercise of free will.[58]

CAS was established as an independent and impartial arbitral tribunal conducting hearings on a de novo basis and interpreting the rules, regulation and decisions of sport applicable to the IOC and other ISF's regarding a range of matters. Of relevance to the Semenya case is the role of the CAS through the Panel of arbitrators in reviewing the DSD

[55] Patel (n 15) 51, citing Lewis and Taylor (n 32) 344.
[56] Freeburn explains the right is limited to the grounds of lack of jurisdiction, violation of elementary procedural rules or incompatibility with public policy. See Freeburn (n 14) 14-5.
[57] Other motivations such as the desire of sports governing bodies for autonomy the financial risks association with litigation in national courts, and the reluctance of the state to become involved in resolution of sports disputes. Freeburn, (n 14) 13, nn 54.
[58] Simon Gardiner, et al. *Sports Law* (Routledge, 4th ed, 2012) 97; see also Freeburn (n 14) 105-6. While falling outside the scope of this paper, 'take it or leave it' terms in standard form agreements and contracts of adhesion could amount to unfair contract terms and potentially undermine the legitimacy of the international sports framework.

Regulations to determine whether they are necessary, reasonable and proportionate within the narrow arbitral framework.[59]

CAS Panelists are appointed from a 'closed' list of arbitrators, based on their expertise in sports law. A recent review of the history of CAS awards, however, illustrates that most cases are determined by a relatively small number of arbitrators.[60]

The legitimacy of CAS as an independent and impartial arbitral tribunal was reinforced in 2018 with the finding by the European Court of Human Rights ('ECHR') in *Adrian Mutu & Claudia Pechstein v Switzerland* confirming the CAS as a 'genuine arbitration tribunal'.[61] The ECHR was asked to consider whether the CAS process was a violation of the right to a fair trial under the European Convention on Human Rights.[62] While re-emphasising the CAS as an independent and impartial tribunal, the ECHR considered that acceptance of the CAS jurisdiction 'had not been freely given'.

IV A DWORKIN'S RIGHTS THEORY AND THE SEMENYA CASE

Dworkin's rights theory is primarily concerned with assessing whether decisions that purport to embody utilitarian preferences — decisions justified as reflecting the greatest good for the greatest number — are balanced against the 'trade off' of an individual's rights in pursuit of the common good.[63] Dworkin argues that decisions which trade off an individual's right for the benefit of the whole community must be grounded on a compelling argument.[64] To that end, Dworkin reintroduced the 'old idea of individual human rights', challenging the founder of the utilitarianism, Jeremy Bentham, who had earlier dismissed these rights as 'nonsense on stilts'.[65]

[59] Patel (n 15) 50; Mark James, *Sports Law* (Palgrave Macmillan, 2nd ed, 2013) 56.
[60] Sethna (n 54).
[61] European Court of Human Rights, 'The Procedures Followed by the Court of Arbitration for Sport Complied with the Right to a Fair Hearing, Apart from the Refusal to Hold a Public Hearing' (Press Release No 324, ECHR, 2 October 2018).
[62] See *Convention for the Protection of Human Rights and Fundamental* Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 6 §1.
[63] Dworkin refers to the theory of utilitarianism, which holds that law and its institutions should serve the general welfare, deriving from the philosophy of Jeremy Bentham. See Dworkin (n 9) 1.
[64] Ibid 116.
[65] Ibid 2.

A *The CAS and the Utilitarian Preference*

The most polarising element to the Semenya decision has centered on the 'necessary, reasonable and proportionate' discriminatory measures to ensure the IAAF 'preserve the integrity of female athletics in the Restricted Events'.[66] By upholding the DSD Regulations as the structural mechanism to achieve fairness for the majority, the CAS has consequently removed Caster Semenya's right to her bodily integrity and autonomy, and further marginalised intersex bodies.

Proportionate discrimination is not a new issue in sport. Australian anti-discrimination laws allow for numerous exemptions that restrict and prevent people from engaging in all sports based on various grounds such as, gender, physical ability and age.[67] Indeed, proportionate discrimination is recognised in Australian sport moderated by legislative instruments such as the *Equal Opportunity Act 2010* (Vic) with specific exceptions in relation to competitive sport.[68] Obliquely phrased as 'discrimination in good faith', statutory exemptions are supported by Article 29 of The Universal Declaration of Human Rights whereby an individual's rights and freedoms are restricted for just requirements of public order and the general welfare of a democratic society. However, there remains a challenge to understand how Article 29 can be relied upon by both the CAS and the IAAF to discriminate against Semenya.

This challenge lies in determining with accuracy the status and function of the CAS. As discussed in Part III, the CAS can neatly be described as an appellate legal framework that resolves and determine sport-related disputes.[69] Unlike a State decision maker or tribunal, the CAS arguably makes determinations in the role as an international 'guardian' of all sports. Within this abstract role as a 'guardian', CAS is provided with political

[66] Court of Arbitration for Sport, 'CAS Arbitration: Caster Semenya, Athletics South Africa (ASA) and International Association of Athletics Federation (IAAF): Decision' (Media Release, 1 May 2019) 2 <https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf>.
[67] See *Anti-Discrimination Act 1991* (Qld) s 111; *Anti-Discrimination Act 1977* (NSW) s 38; *Equal Opportunity Act 2010* (Vic) s 72; *Equal Opportunity Act 1984* (WA) s 35; *Anti-Discrimination Act 1992* (NT) s 5; *Equal Opportunity Act 1984* (SA) s 48; *Anti-Discrimination Act 1988* (Tas) ss 29 and 43.
[68] For further discussion on the sporting exemption, see Victorian Equal Opportunity and Human Rights Commission <https://www.humanrightscommission.vic.gov.au/discrimination/places-of-discrimination/sport#activities-for-people-of-one-sex-or-gender-identity-to-allow-for-strength-stamina-or-physique>.
[69] See *CAS Code* (n 48) s 12.

authority to make decisions and directions over sport. The Semenya decision exemplified the reach of these decisions over all sport activity and individuals as participants.

B *A Hard Case*

The CAS Panel acknowledged that they found the Semenya case not an easy one to decide.[70] By framing Semenya's case as a hard or novel case, it suggests that the CAS considered itself in a position whereby it was constrained as being unable to participate in 'stretching or reinterpreting existing rules'.[71] Indeed, by failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it as an 'ultimate [sic] matter for the courts of the various jurisdictions in question to determine',[72] the Semenya decision implicitly suggests these socio-legal and human rights matters ought to be diverted to state courts. Paradoxically, one of the reasons for the establishment of the CAS in the first place was the view that state courts were 'ineffective in resolving disputes in international sport'.[73]

CAS's reluctance to find for Semenya and to declare the regulations invalid or void pursuant to human rights legislation is reflexive of Sunstein's judicial minimalism.[74] The limited breadth of not upholding human rights law within the landscape of international sports law in the Semenya decision illustrates an unwillingness by CAS to craft new or good rules in this novel case and appears consistent with the view that CAS is not the appropriate forum to determine human rights matters in sport.

Commentators suggest that the commitment to policy over the application of legal rules and principles is done to avoid a broad ruling.[75] The notion of uncertainty might be one factor to consider in exploring CAS's motivations to undertake this approach. Should CAS have held that the regulations were unlawful, it would bring an implication of uncertainty

[70] Indeed, on many occasions throughout the Executive Summary and the Arbitral Award, the CAS went to great lengths to explain their decision-making framework and the constraints based solely on the evidence and arguments advanced by the parties. See 'Executive Summary', *Court of Arbitration for Sport* <https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf> ('*Executive Summary*'). See also *Arbitral Award* (n 2) [469], [471].
[71] Dworkin (n 9) 106.
[72] See *Arbitral Award* (n 2) [555].
[73] Freeburn (n 14) 13.
[74] Cass R Sunstein, 'Beyond Judicial Minimalism' (Working Paper No 432, John M Olin Program in Law and Economics, 2008).
[75] Justin Fox, 'Narrow Versus Broad Judicial Decisions' (2014) 26(3) *Journal of Theoretical Politics* 355, 357–8.

for all sports. Consequently, such uncertainty could undermine the nature of the strict binary divisions already entrenched within many competitive sports, and, moreover, impact decision-making vis a vis participation in competitive events.

On the issue of balancing individual rights, the CAS Panel states that

> It is not possible to give effect to one set of rights without restricting the other set of rights. Put simply, on one hand is the right of every athlete to compete in sport, to have their legal sex and gender identity respected, and to be free from any form of discrimination. On the other hand, is the right of female athletes, who are relevantly biologically disadvantaged vis-à-vis male athletes, to be able to compete against other female athletes and to achieve the benefits of athletic success.[76]

This mixed statement of egalitarianism attempts to preserve the notion that all competitors are equal subjects of sport within a strict dichotomisation of gender. CAS's functional account of how sport is and must be organised imposes a strictness on gender performativity. One view of this approach could be that by upholding this traditional division of the sexes, CAS has unwittingly linked women in competitive sport to inequality.[77] By reinforcing gendered ontologies and inequalities, the Semenya decision denotes a false ideal that while all competitors are equal subjects, they have unequal rights.

This departure from the general ideological understanding of general equality and human rights offers an insight into CAS's conservative thinking and reading around Caster Semenya's hyperandrogenism. By displacing her legal status as a woman, CAS took the preferred view that competitive athletics is 'founded in biology rather than legal status'.[78] A risk arising for such an interpretation could be to undermine efforts in areas such as law reform for the LGBTQI+ community in obtaining substantive equality.[79] Disregarding legal status, CAS reasoned on the evidence that 'endogenous testosterone

[76] See *Executive Summary* (n 70) [12]. See also *Arbitral Award* (n 2) [554].
[77] Aoife Cartwright, et al, 'An Investigation into the Relationship between Gender Binary and Occupational Discrimination Using the Implicit Relational Assessment Procedure' (2017) 67(1) *The Psychological Record* 121, 122.
[78] See *Executive Summary* (n 70) [18].
[79] See *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

as the primary driver of the sex difference in sports performance between males and females.'[80] In essence, female intersex athletes disrupt fairness in the Restricted Events.[81]

The Semenya decision appears to be predicated on a desire to protect and uphold the integrity of fairness in sport. By recognising the IAAF DSD Regulations as necessary, reasonable and proportionate, the CAS has prioritised the collective interests of the IAAF and non-DSD athletes, over the interests of those falling within the ambit of the DSD Regulations.[82] As such, the CAS's decision is firmly grounded in policy, rather than human rights principles, a point recognised by the CAS when the majority accepted that the DSD Regulations 'reflect a rational resolution of conflicting human rights'. [83] Dworkin would likely evaluate values such as fairness and equality as collective goals. These collective goals are either achieved or promoted by political efforts and intended to yield more utility. The IAAF's efforts to achieve fairness are measured by the extent to which they engaged in stakeholder consultation around the design and development of the DSD Regulations, and how the CAS subsequently interpreted the DSD Regulations as lawful. The fundamental aim of the DSD Regulations was to succeed in offering a fair playing field, specifically for those athletes who were competing against an athlete who was found to have a 'certain insuperable performance advantages derived from biology rather than legal status'.[84]

C *Levelling the Playing Field?*

In attempting to level out the playing field, the DSD Regulations represent a mechanism designed to advance the principle of utility which is directed to satisfy the external welfare and happiness of the playing field, and others. The 'chorus of voices' from other female athletes had loudly condemned Semenya's performance as unfair in her playing field and, consequently, the IAAF took action.[85] The question remains unanswered, however, as to what might justify acceptable forms of naturally occurring characteristics

[80] See *Executive Summary* (n 70) [21].
[81] Ibid [26].
[82] As to finding the DSD Regulations as necessary, see *Arbitral Award* (n 2) [556]–[581]. As to finding the DSD Regulations reasonable and proportionate, see *Arbitral Award* (n 2) [582]–[586], [620].
[83] See ibid [589].
[84] Ibid [20].
[85] Madeleine Pape, 'I Was Sore About Losing to Caster Semenya but the Decision Against Her is Wrong', *The Guardian* (online, 1 May 2019) <https://www.theguardian.com/commentisfree/2019/may/01/losing-caster-semenya-decision-wrong-women-testosterone-iaaf>.

known to enhance athletics performance. Indeed, an argument raised in support of Semenya noted that her naturally occurring genetic advantage be treated the same as someone with, for example, the genetic advantage of a basketballer's wide reach, or a swimmer's large feet.[86]

Reaction from others in the field have welcomed CAS's ruling and have expressed their happiness about the necessity of the regulations to ensure fair competition, and that female athletes now have a path to success in sport.[87] The utility narrative of fairness and happiness in Semenya's decision is qualified by the use of the words: 'necessary, 'reasonable', 'proportionate' and 'burden'.[88]

D *Public Condemnation of the DSD Regulations*

In March 2019, the IAAF was criticised by the General Assembly of the UNHRC over concerns that their

> discriminatory regulations … to medically reduce blood testosterone levels contravene international human rights … including the right to equality and non-discrimination…and full respect for the dignity, bodily integrity and bodily autonomy of the person.[89]

With specific reference to the IAAF's DSD Regulations, the UNHRC called upon states to 'ensure that sporting associations … refrain from developing and enforcing policies … that force, coerce or otherwise pressure … athletes into undergoing unnecessary, humiliating and harmful medical procedures'. The UNHRC also requested the UN High Commissioner to prepare a report on the intersection of gender discrimination in sports and human rights to present to the Human Rights Council at its forty-fourth session, likely to be held in June 2020.

In April 2019, prior to the decision of the CAS being released, the WMA, as the peak international organisation representing physician in upholding high standards of medical

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[86] Andy Bull, 'Caster Semenya and the IAAF: If the science is wrong, the ruling is wrong', *The Guardian* (online, 1 May 2018) <https://www.theguardian.com/sport/blog/2018/may/01/caster-semenya-iaaf-science-athletics-testosterone>.
[87] David Wharton, 'Caster Semenya Loses Her Gender Case in Bid to Continue to Compete as a Woman', *Los Angeles Times* (online, 1 May 2019) <https://www.latimes.com/sports/la-sp-caster-semenya-loses-appeal-20190501-story.html>.
[88] *Executive Summary* (n 70).
[89] Human Rights Council (n 10).

ethics, issued a Press Release urging its members not to implement the IAAF DSD Regulations. The WMA, through the authority of its Council, 'demanded the immediate withdrawal of the regulations',[90] labelling the DSD Regulations as discriminatory, and contrary to international medical ethics and human rights standards. In doing so, the WMA has signalled its condemnation towards the implementation of the DSD Regulations.

A significant point to consider is whether, considering the nature of the WMA warning, physicians who disregard the warning would breach their ethical duty of 'do no harm' to patients. Indeed, according to the WMA, the DSD Regulations would 'constrain athletes to take unjustified medication not based on medical need'. With that knowledge, could a doctor then be held to have failed in compliance with best practice standards and medical ethics, falling short of the standards expected?

Another point of concern is the difference of opinions within the scientific community regarding the link between testosterone and performance advantage. In the Semenya case, the IAAF contend that the DSD Regulations are based on 'strong scientific, legal and ethical foundations.[91] On the contrary, the WMA contends that there are 'strong reservations about the ethical validity of these regulations', based on 'weak evidence' and currently being debated widely by the scientific community.[92]

Rebutting general policy and political assumptions, the DSD Regulations and the Semenya decision aligns with the medical account of intersex, which attempts to normalise bodies.[93] Disregarding legal and socio-culture understandings of intersex, the Semenya decision strives to normalise her intersex body by imposing medical treatment as a non-negotiable condition for her to professionally compete which in turn ultimately imposes a condition on her employment. Consequently, the institution of sport has further

[90] World Medical Association (n 11).
[91] *Arbitral Award* (n 2) [286].
[92] The WMA did not give evidence in the Semenya case. However, WMA President Dr. Leonid Eidelman said 'We have strong reservations about the ethical validity of these regulations. They are based on weak evidence from a single study, which is currently being widely debated by the scientific community. They are also contrary to a number of key WMA ethical statements and declarations, and as such we are calling for their immediate withdrawal'. See World Medical Association (n 11).
[93] Fae Garland and Mitchell Travis, 'Legislating Intersex Equality: Building Resilience of Intersex People Through Law' (2018) 38 *Legal Studies* 587, 589.

embedded social, cultural and legal subjugation and marginalisation of Semenya and other intersex participants.

E *The Cost of Semenya's Rights Trade-Off*

The critical implication of the DSD Regulations and CAS's decision burdens Semenya's personal liberties, freedoms and rights. Although the CAS went to some length to explain the rationale for the majority finding in regard to Semenya being required to take oral contraceptives as not burdensome and proportionate to achieve the IAAF's policy goal of fairness, the decision makes it near impossible for Semenya to have autonomy and a right to make decisions about her body.[94] According to Dworkin, where decisions are being made for the community as a whole at the comprise of an individual's rights, then it is wrong to sacrifice the rights of one.[95] Here, CAS's decision has removed Semenya's individual right to her autonomy and her integrity over her body, personality and identity, and as a matter of principle based on Dworkin's rights theory, her rights should not have been traded off for a policy decision of utility.

Furthermore, Dworkin contends that another compelling argument or reason is required if an individual's rights are to be traded off for the benefit of the whole community.[96] Limitations of freedoms and rights, as captured by Article 29, provides for compelling arguments of public order and general welfare as justifiable reasons to these limits. However, questions arise as to whether CAS's policy decision is compelling enough to displace or limit the individual right of bodily autonomy of intersex bodies. Consequently, in CAS striving to formally protect women in competitive sport, it has excluded the purpose and principles of human rights through its decision, and in turn, has sent a message that permeates across the entire intersex community in the public sphere. If this outcome was, as appears from reading the Semenya decision, a product of the narrow private arbitral framework, then a broader discussion needs to be had about mechanisms to give a voice to these socio-legal and human rights considerations in sport.

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[94] Based on the evidence presented, the majority of the CAS Panel concluded that the side effects of taking an oral contraceptive did not outweigh the need to 'give effect to the DSD Regulations in order to attain the legitimate objective of protecting and facilitating fair competition in the female category', see *Arbitral Award* (n 2) [599].
[95] Dworkin (n 9) 109.
[96] Ibid 116.

V REVIEW AND REFORM

The Semenya decision has now been appealed to the Swiss Federal Tribunal. While we wait for the outcome, a significant amount of academic and public discussion has focused on notions of fairness and finding the balance between individual rights and utilitarian preferences. These are important socio-legal questions that permeate beyond the seat of CAS in Lausanne. The public condemnation by UNHRC and the WMA suggests that challenges are likely to arise in areas such as the implementation, enforcement and efficacy of the DSD Regulations, leading ultimately to a fragmented sports system.

As noted earlier, by framing Semenya's case as a hard or novel case it suggests that the CAS considered itself constrained as not being in a position of 'stretching or reinterpreting existing rules'.[97] Indeed, by failing to determine and/or give consideration to the wider social context and human rights perspectives, and preferring to leave it the courts of the various jurisdictions in question to determine,[98] the Semenya decision opens up the possibility to explore options to review the current regime in support of the view that CAS is not the appropriate forum to determine human rights matters in sport. At the very least, the Semenya decision suggests that reform is needed to balance information asymmetries that might exist around the contractual arrangements for vulnerable athletes when embarking upon their competitive sporting careers.

[97] Ibid 106.
[98] See *Arbitral Award* (n 2) [555].

REFERENCE LIST

A *Articles/Books/Reports*

Cartwright, Aoife, et al, 'An Investigation into the Relationship between Gender Binary and Occupational Discrimination Using the Implicit Relational Assessment Procedure' (2017) 67(1) *The Psychological Record* 121

Cooky, Cheryl, Ranissa Dycus and Shari L Dworkin, '"What Makes a Woman a Woman?" Versus "Our First Lady of Sport: A Comparative Analysis of the United States and the South African Media Coverage of Caster Semenya' (2013) 37(1) *Journal of Sport and Social Issues* 31

Dworkin, Ronald, *Taking Rights Seriously* (Bloomsbury, 1997)

Foster, Ken, 'Is There a Global Sports Law?' in Robert C.R Siekmann and Janwillem Soek (eds), *Les Sportiva: What is Sports Law?* (T.M.C. Asser Press, 2012)

Fox, Justin, 'Narrow versus Broad Judicial Decisions' (2014) 26(3) *Journal of Theoretical Politics* 355

Freeburn, Lloyd, *Regulating International Sport: Power, Authority and Legitimacy* (Brill Nijhoff, 2018)

Gardiner, Simon et al. *Sports Law* (Routledge, 4th ed, 2012)

Garland, Fae and Mitchell Travis, 'Legislating Intersex Equality: Building Resilience of Intersex People Through Law' (2018) 38 *Legal Studies* 587

James, Mark, *Sports Law* (Palgrave Macmillan, 2nd ed, 2013)

Lewis, Adam and Jonathan Taylor, *Sport: Law and Practice* (Bloomsbury Profession, 3rd ed, 2014)

Mitten, Matthew J and Timothy Davis, 'Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities' (2008) 8 *Virginia Sports and Entertainment Law Journal* 71

Patel, Seema, *Inclusion and Exclusion in Competitive Sport: Socio-legal and Regulatory Perspectives* (Routledge, 2015)

Sloop, John M. '"This is not natural:" Caster Semenya's Gender Threats' (2012) 29(2) *Critical Studies in Media Communication* 81

Sunstein, Cass R, 'Beyond Judicial Minimalism' (John M. Olin Program in Law and Economics Working Paper No. 432, 2008)

Xavier, Neena A and Janet B McGill, 'Hyperandrogenism and Intersex Controversies in Women's Olympics' (2012) 97(11) *The Journal of Clinical Endocrinology & Metabolism* 3902

B *Cases*

Mokgadi Caster Semenya v International Association of Athletics Federations (Award) (Court of Arbitration for Sport, Case No 2018/O/5794, 30 April 2019)

C *Legislation*

Anti-Discrimination Act 1988 (Tas)

Anti-Discrimination Act 1991 (Qld)

Anti-Discrimination Act 1992 (NT)

Anti-Discrimination Act 1977 (NSW)

Equal Opportunity Act 1984 (SA)

Equal Opportunity Act 1984 (WA)

Equal Opportunity Act 2010 (Vic)

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)

D *Treaties*

Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)

Human Rights Council, *Elimination of Discrimination Against Women and Girls in Sport*, 40th sess, Agenda Item 3, UN Doc A/HRC/40/L.10/Rev. 1 (25 February-22 March 2019)

E *Other*

Bull, Andy, 'Caster Semenya and the IAAF: If the science is wrong, the ruling is wrong' *The Guardian* (online, 1 May 2018) <https://www.theguardian.com/sport/blog/2018/may/01/caster-semenya-iaaf-science-athletics-testosterone>

'Caster Semenya to Challenge IAAF Rules Forcing Her to Take Medication to Lower Her Testosterone Levels', *ABC News* (online, 19 June 2018) <https://www.abc.net.au/news/2018-06-19/caster-semenya-to-challenge-iaaf-female-classification-rule/9884762>

Code of Sports-related Arbitration (in force from 1 January 2019)

Court of Arbitration for Sport, *Executive Summary, Mokgadi Caster Semenya v International Association of Athletics Federations* Court of Arbitration for Sport, Case No 2018/O/5794 <https://www.tas-cas.org/fileadmin/user_upload/CAS_Executive_Summary__5794_.pdf>

Court of Arbitration for Sport, 'CAS Arbitration: Caster Semenya, Athletics South Africa and International Association of Athletics Federation: Decision' (Media Release 1 May 2019) <https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf>

European Court of Human Rights, 'The Procedures Followed by the Court of Arbitration for Sport Complied with the Right to a Fair Hearing, Apart from the Refusal to Hold a Public Hearing' (Press Release No 324, ECHR, 2 October 2018)

International Association of Athletics Federation (IAAF) Constitution (1 January 2017)

International Association of Athletics Federation (IAAF) Constitution (1 January 2019)

International Association of Athletics Federations, *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development): Version 1.0*

International Association of Athletics Federations, *Eligibility Regulations for the Female Classification (Athletes with Differences of Sex Development): Version 2.0*

International Association of Athletics Federations *Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition*

Pape, Madeleine, 'I was Sore about Losing to Caster Semenya. But the Decision Against Her is Wrong', The *Guardian* (online, 1 May 2019) <https://www.theguardian.com/commentisfree/2019/may/01/losing-caster-semenya-decision-wrong-women-testosterone-iaaf>

Sethna, Rustam, 'A Data Analysis of the Arbitrators, Cases and Sports at the Court of Arbitration for Sport', *Law in Sport* (Web Page, 4 July 2019) <https://www.lawinsport.com/topics/articles/item/a-data-analysis-of-the-arbitrators-sports-and-cases-at-the-court-of-arbitration-for-sport>

Victorian Equal Opportunity and Human Rights Commission <https://www.humanrightscommission.vic.gov.au/discrimination/places-of-discrimination/sport#activities-for-people-of-one-sex-or-gender-identity-to-allow-for-strength-stamina-or-physique>

Wharton, David, 'Caster Semenya Loses her Gender Case in Bid to Continue to Compete as a Women', *Los Angeles Times* (online, 1 May 2019) <https://www.latimes.com/sports/la-sp-caster-semenya-loses-appeal-20190501-story.html>

World Athletics, 'IAAF Introduces New Eligibility Regulations for Female Classification' (Press Release, 26 April 2018) <https://www.iaaf.org/news/press-release/eligibility-regulations-for-female-classifica>

World Medical Association 'WMA Urges Physicians not to Implement IAAF Rules on Classifying Women Athletes' (Press Release, 25 April 2019) <https://www.wma.net/news-post/wma-urges-physicians-not-to-implement-iaaf-rules-on-classifying-women-athletes/>

THE RIGHT TO A HEALTHY ENVIRONMENT IN AUSTRALIA

REVEL POINTON* AND DR JUSTINE BELL-JAMES**

While Australia does not have human rights enshrined in our Constitution, and only limited reflection through other federal laws, various states have introduced legislation that seeks to recognise and protect human rights. As the dialogue around legal protection of human rights in Australia grows, where does the right to a healthy environment sit in this discussion? The right to a healthy environment has been integrated into over 150 legal frameworks around the world; Australia remains one of only 15 countries without the right to a healthy environment enshrined in our federal laws or constitution. This article reviews how the right has been both characterized and put into practice overseas, with a view to determining how Australian jurisdictions could benefit from this right being legislated.

CONTENTS

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I INTRODUCTION – WHAT IS THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT?

That all humans deserve to enjoy basic human rights is well accepted,[1] even though these rights may not be enshrined in all legal systems, including Australia's national legal system. The fact that enjoyment of many of these rights is dependent on the existence of a healthy environment is not yet as widely recognised, but is definitely gaining traction.[2] To date, the right to a healthy environment has not been incorporated into an international convention, but it has been reflected in various forms in many constitutions and sub-national legal frameworks globally. In fact, Australia is one of only 15 countries that have not yet included the right to a healthy environment in our constitution.[3] There is broad consensus that the protection of the environment 'is a vital part of contemporary human rights doctrine and a *sine qua non* [essential element] for numerous rights, such as the right to health and the right to life'.[4]

There were early indications that recognition of this right would develop internationally — for example, the Stockholm Convention in 1972 recognised that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future

[1] See, eg, *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[2] See, eg, John H Knox and Ramin Pejan (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018); Bridget Lewis, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018).
[3] David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011).
[4] Gabcikovo Nagymaros Project (Hungary v Slovakia) (Separate Opinion of Vice President Weeramantry) [1997] ICJ 97, 110 [Separate Opinion]; Asia Pacific Forum Secretariat, Human Rights and The Environment Background Paper (September 2007) Asia Pacific Forum <http://www.mcmillan.ca/Files/SOCarroll_HumanRightsandtheEnvironment.pdf>; Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change* (Background Paper, April 2008), 3.

generations'.[5] However, Knox argues that the UN has not come close to this level of recognition to a right to a healthy environment since,[6] noting even the 1992 Rio Declaration provided only that 'human beings are at the center of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature'.[7]

The tendency to separate concepts of human rights and environmental protection in our laws is arguably a symptom of the same ideological constructs that have led to the significant environmental degradation and poor health that plague our world today. Fundamentally, our laws rarely reflect the physiological reality that we are integrally connected to our environment; the health of our environment is a major, if not greatest, determiner of our human health and wellbeing. It is trite but true to say that, without clean air to breathe, clean water to drink and safe, healthy and clean food to eat, our lives can become substantially shorter and our ability to enjoy other basic human rights can be substantially diminished. Recognition of the human right to a healthy environment in legislation is a step towards seeking to clearly recognise our own health's dependency on the health of our environment. Recognition of a right to a healthy environment has also had many other benefits for the countries that have introduced this right in their laws, which will be examined in more detail below.

The right to a healthy environment can be distinguished from another concept gaining momentum globally — the rights of nature. Whereas the human right to a healthy environment seeks to provide a human-centric recognition that humans are dependent on the environment and therefore deserve a right to a healthy environment, the rights of nature concept acknowledges that environmental values have intrinsic rights existing separately from any reliance we may have on them for our survival.[8] Arguably, this is how the law currently frames environmental protection measures; without reference to the right (and requirement) of a healthy environment for humans, our environmental laws provide some regulation of our impacts with a purpose of ensuring the protection

[5] Declaration of the United Nations Conference on the Human Environment in 'Report of the United Nations Conference on the Human Environment' UN Doc A/CONF.48/14/Rev.1 (1973) Principle 1.
[6] John Knox, 'The Global Pact for the Environment: at the Crossroads of Human Rights and the Environment' (2019) 28(1) *Review of European, Comparative & International Environmental Law* 40.
[7] *Report of the United Nations Conference on Environment and Development,* UN Doc A/CONF/151/26 (12 August 1992) annex I ('*Rio Declaration on Environment and Development*'), Principle 1.
[8] Hillebrecht, Anna, 'Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse' (2017) 6 *Rachel Carson Center Perspectives* 15.

of the environment. However, there is no explicit recognition in Australian laws that other species or ecosystems deserve, and hold the legal right, to exist and thrive.

While the rights of nature concept is gaining momentum globally in a way that is leading to real changes to environmental impact regulation,[9] integration of the right to a healthy environment may be more feasible in Australian jurisdictions at this point in time; particularly, there is growing movement at the state and territory level to introduce human rights laws. Furthermore, it is important to acknowledge that the rights of nature concept separates humans from nature. This is arguably incongruous with the relationship of Aboriginal and Torres Strait Islander Peoples to country, in which they are a part of, and custodians over, their country. That said, the relationship that First Nations peoples have with land is also distinct from the right to a healthy environment, as it is based more on an obligation to *maintain* a healthy environment, rather than a right *to* a healthy environment.[10] Neither of these concepts therefore entirely reflects the relationship of Aboriginal and Torres Strait Islander Peoples to country, but the right to a healthy environment does reflect the human/environment interface to a degree.

This article will commence with a brief overview of environmental protection in the Australian context, highlighting the myriad problems which could be addressed by an enshrined right to a healthy environment. It will then consider how the right to a healthy environment has been used in other jurisdictions. It will acknowledge that existing human rights protections in some jurisdictions could be used for environmental arguments — for example, the right to life — but ultimately concludes that the enshrined human right to a healthy environment would provide a host of additional, wide-ranging benefits for society.

[9] See Michelle Maloney, 'Rights of Nature, Earth democracy and the Future of Environmental Governance' in The Green Institute *Rebalancing rights: Communities corporations and nature* (Report, March 2019) 11.
[10] Deborah Bird Rose, *Nourishing Terrains: Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996).

II THE AUSTRALIAN CONTEXT

Australia is signatory to numerous international agreements which carry obligations protect our environment.[11] These agreements are sought to be reflected in our environmental laws, particularly in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). There is, however, widespread concern that both national and sub-national laws are not adequately protecting the environment, with Australia currently ranked fourth in the world for extinct and critically endangered species,[12] first for mammalian extinctions,[13] and increasing acceptance that we are in the midst of an extinction crisis.[14] The reasons for the failures in our environmental laws are varied, but it is known that these failings have led to the high rate of biodiversity loss through excessive habitat clearing and fragmentation, increased incidence of invasive species, and climate change impacts.[15] Environmental laws are viewed by some as endorsing a licence to pollute, and a mechanism to manage the competing priorities of our demands for and upon natural resources, rather than actually protecting our environmental values.[16]

Not only have our environmental laws failed to prevent significant biodiversity loss and environmental degradation, their operation has created scenarios of deep environmental injustice, particularly in regional areas of Australia. This injustice is perhaps most obvious in the regulation of air emissions under the remit of state and territory legislation. While many urban areas enjoy some level of regular monitoring and reporting of air quality, regional areas frequently do not enjoy this right, even if

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[11] See, eg, Commonwealth Government website: <https://www.environment.gov.au/about-us/international> which lists the international agreements which Australia is party to.
[12] IUCN, *Red List: Table 6a: Red List Category Summary Country Totals (Animals)* (Webpage Statistics, 2018) <http://cmsdocs.s3.amazonaws.com/summarystats/2018-1_Summary_Stats_Page_Documents/2018_1_RL_Stats_Table_6a.pdf>.
[13] J. C. Z. Woinarski, et al. 'The Disappearing Mammal Fauna of Northern Australia: Context, Cause, and Response' (2011) 4(3) *Conservation Letters* 192.
[14] Parliament of Australia, *Environment and Communications References Committee: Australia's Faunal Extinction Crisis* (Interim Report, 2019), ch 2; Afshin Akhtar-Khavari et al, 'Why do Australia's Environmental Law Fail to Save Our Species from Extinction' *IUCN News* (online, 13 July 2019) <https://www.iucn.org/news/world-commission-environmental-law/201907/why-do-australias-environmental-laws-fail-save-our-species-extinction>.
[15] Department of Environment and Energy, *State of the Environment* (Report, 2016) Overview, vii.
[16] Australian Conservation Foundation, World Wildlife Fund, The Wilderness Society and The University of Queensland, *Fast-tracking Extinction: Australia's National Environmental Law* (Report, 2018 Gunther, Handl, "Human Rights and Protection of the Environment: A Mildly Revisionist View" in A. Cançado Trindade (ed), *Human Rights and Environmental Protection* (1995) 117, 121; Rebecca Bratspies, 'Claimed Not Granted: Finding a Human Right to a Healthy Environment' (2017) 26 *Transnational Law and Contemporary Problems* 263.

they are situated next to emissions intensive industries such as power stations or mines. A study published in 2014 found 'significant and systemic inequities in the social distribution of industrial air pollution in Australia. Regardless of how air pollution was measured; facility presence, emission volume, or toxicity, our analysis indicated a consistent and disproportionate impact on indigenous and socially disadvantaged communities'.[17] Monitoring requirements are often provided with reference to the size of the population; currently a national law suggests that only populations of 25,000 or more people will trigger the need to provide the suggested number of monitoring stations.[18]

How air emissions are regulated differs considerably depending on the town and the type of activity emitting the pollution, as project-level environmental authorities stipulate what level of emissions are allowed for each pollutant and how, if at all, emissions must be monitored and reported.[19] In Queensland, many environmental authorities for fossil fuel projects only require that emissions be monitored and reported after a complaint is registered from the community raising the concern that emissions are too high. For example, in the Land Court objection decision for the New Acland Coal (NAC) mine Stage 3 expansion, the presiding Member found that over 100 complaints had been recorded since the mine commenced 15 years earlier, yet the mine had only monitored air quality and dust for 27 days over an 11 year period.[20] This community has had no benefit of independent, regular government monitoring of the range of air pollutants likely to be emitted from this site. This information would provide necessary information for the community to know what they are breathing and whether the environmental authority conditions are being breached. Further, this information is only provided by the very company that is producing the problem, and there is no requirement for regular monitoring. By conditioning the mine in such a way that air quality monitoring only occurs once the community puts in a complaint, this makes it incumbent on the community to be aware that there is a problem and then for the company and regulator to take action in time based on a complaint. Given the

[17] Jayajit Chakaraborty and Donna Green, 'Australia's First National Level Quantitative Environmental Justice Assessment of Industrial Air Pollution' (2014) 9(4) *Environmental Research Letters* 1.
[18] *National Environment Protection (Ambient Air Quality) Measure 2015* (Cth) s 14.
[19] Brendan Dobbie and Donna Green, 'Australians Are Not Equally Protected from Industrial Air Pollution' (2015) 10(5) *Environmental Research Letters* 1.
[20] New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) [2017] QLC 24, [580]-[581].

variables of weather and timing of mine activities which cause emissions, this regulatory method makes it extremely difficult to determine when the mine has breached their conditions unless the community themselves are constantly monitoring the site with high quality monitoring equipment.

The connection between the need to recognise the right to a healthy environment and other basic human rights can also clearly be seen through the experiences of a community in central Australia, Mulga Bore. This community was allegedly known by the Australian Government to have water with nitrate levels that were 150 per cent higher than the World Health Organisation's standards, putting pregnant mothers, babies and young children all at serious risk of health issues.[21] In February 2008, water stopped running completely in the town, at which point the Mulga Bore School closed, depriving the students of their right to an education.[22] More recently, environmental injustice was documented in the remote mining city of Mount Isa, where studies found higher geometric mean blood lead levels among Indigenous children compared to non-Indigenous children.[23]

A recent Human Health and Wellbeing Climate Change Adaptation Plan for Queensland found that vulnerable populations, such as First Nations persons, older people, young people, disabled and socio-economically disadvantaged people, are already suffering disproportionate adverse health impacts associated with climate change such as heatwaves, extreme weather events, access to food and water and sea level rise in the Torres Strait Islands, with this disadvantage is likely to grow.[24] With heatwaves and energy prices both increasing, many socio-economically disadvantaged Australians must make the difficult choice as to whether to turn on their air conditioner and face financial detriment, or to risk potentially deadly health impacts from serious heatwaves.[25]

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[21] Russell Skelton, 'Not a Single Drop to Drink: This is Australia', *The Sydney Morning Herald* (online, 28 February 2008) <https://www.smh.com.au/national/not-a-single-drop-to-drink-this-is-australia-20080228-gds2we.html>.
[22] Ibid.
[23] Nathan Cooper et al, 'Environmental Justice Analyses May Hide Inequalities in Indigenous People's Exposure to Lead in Mount Isa, Queensland' (2018) 13(1) *Environmental Research Letters* 8.
[24] Queensland Government, *Queensland Climate Adaptation Strategy: Human Health and Wellbeing Climate Change Adaptation Plan for Queensland* (Sector Adaptation Plan, 2018) 1, 4, 8, 9, 16, 19, 24, 25.
[25] Ibid.

In a robust review of our environmental laws in Australia, the Australian Panel of Experts in Environmental Law ('APEEL') has recommended, *inter alia*, legislating 'a substantive right to a safe, clean and healthy environment', recognising the benefits that a right to a healthy environment would provide.[26] This, coupled with procedural environmental rights (including the right to information, to public participation and to access to justice in environmental matters), is considered by APEEL to be a core element of improving environmental laws in Australia, and would assist with rectifying failings of the regulatory and governance frameworks around environmental protection.[27]

Given that Australia's environmental laws are not providing adequate protection for the environment, whilst permitting environmental injustices to occur, the question as to whether the human right to a healthy environment can assist is pertinent.

III HOW DOES A RIGHT TO A HEALTHY ENVIRONMENT OPERATE IN PRACTICE?

More than 150 nations have recognised the right to a healthy environment in various forms, be it through their constitutions, regional agreements, other national laws or court decisions.[28] The effect of entrenchment of the right has varied between countries, with some methods proving merely symbolic. However, in many countries the right has led to its practical application.[29] For example, in *Ashgar Leghari v Federation of Pakistan,* a citizen brought a suit against the government alleging that their failure to implement climate policy offended his fundamental rights, including the right to a healthy environment.[30] The Court ultimately held that the delay in implementing policy 'offends the fundamental rights of the citizens which need to be safeguarded', agreeing that these fundamental rights include a right to a 'healthy and clean environment'.[31]

Despite its successful use in some jurisdictions, the right to a healthy environment has also been criticized as being too diffused and void of a precise meaning, such that it is

[26] Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017) 3.
[27] Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017) 5.
[28] Knox (n 6) 42.
[29] Boyd (n 3).
[30] *Ashgar Leghari v Federation of Pakistan (W.P. No. 25501/2015)*, Lahore High Court Green Bench, Orders of 4 Sept and 14 Sept 2015.
[31] Ibid [8].

difficult to enforce.[32] Indeed, successful application of the right is predicated upon finding answers to a number of critical questions, including: how do we define what is a 'healthy environment'? What standard/s should we use? Are we referring to every element of our environment and/or the interactions between all of these elements, or should only certain elements of the environment be our determiners, such as air and water quality? Must the health of the environment be determined against how it impacts the health of humans, or is it assessed in accordance with the normal health of that environmental element regardless of its impact on humans?

Ilie argues that in order to be effective, a right to a healthy environment must be underpinned by the following elements: precise legal rules which regulate conduct around the environment; standards and accepted limits, both individually from projects, and overall in a more ambient form; and, sufficient, enforced liability for environmental damage to act as a deterrent.[33] Interestingly, these are the same key concepts underpinning current environmental laws in Australia. However, Ilie also argues that to be effective, the right must be matched by cultural awareness of the need to protect the environment,[34] as laws are always most effective if backed by social awareness of the utility of those laws. This aspect may be more challenging in the Australian context.

Thus, while the right to a healthy environment has been successfully utilised in overseas jurisdictions, there are a number of issues which must be considered as part of its implementation.

IV COULD OTHER HUMAN RIGHTS PROVIDE FOR A RIGHT TO A HEALTHY ENVIRONMENT?

The Australian legal landscape is not entirely void of human rights protections — Victoria, the Australian Capital Territory and Queensland all have legislative protection for human rights.[35] Whilst none of these Acts recognise a specific right to a healthy environment, they do recognise other rights that may be used as a vehicle to argue for the right to a healthy environment. One of the clearest rights which may be read to include a right to a healthy environment is the right to life.

[32] Barbu, Ilie Adrian, 'The Right to a Healthy Environment – between a Basic Human Right and a Policy of Form without Substance' (2016) 52(1) *Revista de Stinte Politice* 14.
[33] Ibid.
[34] Ibid 22.
[35] *Human Rights Act 2018* (Qld); *Human Rights Act 2004* (ACT); *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Internationally, the right to life has been used in the context of environmental harm. For example, in *Taskin v Turkey,* the European Court of Human Rights found a violation of the right to life had occurred in relation to a community's concerns over the use of cyanide in a prospective gold mine and its potential effects on human health in future years.[36] In the Colombian case of *Future Generations v Minister for the Environment*, citizens alleged that the government's failure to reduce deforestation and ensure compliance with a target for zero-net deforestation in the Amazon by 2020 threatens plaintiffs' fundamental rights, including a right to life and health.[37] The Court found that, in the absence of a healthy environment, humans will not be able to survive. Therefore, increasing deterioration of the environment is a violation of the right to life and other fundamental rights.

A more recent Hague Court of Appeal decision, *State of Netherland v Urgenda Foundation,* provided more precedent demonstrating internationally that the right to life includes environment-related situations that threaten or affect the right to life.[38] Of relevance closer to home, but also taking place in the international law arena, a group of Torres Strait Islander people has lodged a complaint with the United Nations Human Rights Committee against the Australian Government.[39] The group is asserting that the Australian Government has failed to take action to reduce greenhouse gas emissions and failed to fund adequate coastal defences against sea level rise to address the climate change crisis in a way that has breached their fundamental human rights obligations to Torres Strait Islander people living on a low lying island.[40] The human rights claimed to be impacted include the right to culture, the right to be free from arbitrary interference with privacy, family and home, and the right to life. It is yet to be seen whether the right to life will here also be interpreted with reflection on the right to a healthy environment in this instance.

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[36] *Taskin v Turkey* [2004] Eur Court HR 179, 208.
[37] *Demanda Generaciones Futuras v Minambiente* (2018) STC4360-2018 (unofficial translation).
[38] Court of Appeal of The Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment)* v *Urgenda Foundation*, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018, available at: <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610> (*Urgenda 2*) [40], [43].
[39] Kristen Lyons, 'Torres Strait Islanders Ask UN to Hold Australia to Account on Climate 'Human Rights Abuses', *The Conversation* (online, 27 May 2019) <https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>.
[40] Ibid.

While the interpretation of the right to life as incorporating a right to a healthy environment has not yet been tested in jurisdictions with human rights laws, there is no reason in principle why the human right to life cannot also be used in the Australian context as a vehicle for environmental-based claims. For example, there is widespread evidence regarding the human health impacts from climate change in Australia, including health impacts from heatwaves, increased incidence of infectious diseases, and mental health impacts.[41] It could be argued that a failure to implement climate change policy therefore violates the right to life.

Lewis argues that an enshrined right to a healthy environment is not a precursor to environmental protection via human rights regimes.[42] Rather, she argues that effort might be better placed in improving human-rights based approaches utilising existing rights.[43] Whilst this may be true, the symbolic and other benefits of an enshrined human right to a healthy environment must also be borne in mind.

V THE BENEFITS OF THE RIGHT TO A HEALTHY ENVIRONMENT

There are a myriad of other benefits associated with specifically recognizing the right to a healthy environment. Canadian environmental lawyer and current Special Rapporteur to human rights and the environment, David Boyd, has examined the repercussions of introducing the right to a healthy environment across dozens of nations which have this right represented in their legal frameworks. Boyd found that recognition of the right has assisted in strengthening the environmental legal frameworks of those countries, including improving governance and democratic process around environmental decision making.[44] It has also facilitated successful litigation to achieve better protection against exploitation of natural resources, in order to ensure they are enduring for current and future generations.[45] Further, it has guarded against regression of existing laws under multiple governments.[46] This is because some countries have supplemented the right to a healthy environment with the doctrine of non-regression, which comes from the principle of progressivity recognised as a norm from international human

[41] Ying Zhang et al, 'The MJA-Lancet Countdown on Health and Climate Change: Australian Policy Inaction Threatens Lives' (2018) 209(11) *Medical Journal of Australia-Lancet* 474.
[42] Lewis (n 2).
[43] Ibid.
[44] Boyd (n 3).
[45] Ibid.
[46] Ibid.

rights law.[47] This is a helpful means of ensuring that environmental laws cannot be rolled back from where they are today; they can only be improved upon. In a country plagued by significant politicization around environmental laws, where countless election cycles have led to panic clearing and significant peaks and troughs in clearing rates in Queensland alone, the introduction of the doctrine of non-regression would be a wonderful antidote to remove ourselves from this enduringly destructive cycle.

In March 2012, the United Nations Human Rights Council established a mandate on human rights and the environment, which studied the human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, and promoted best practices relating to the use of human rights in environmental policymaking. The first report of the then UN Special Rapporteur on human rights and the environment, John Knox, to the UN General Assembly recommended that the UN recognise a right to a healthy environment for numerous reasons.[48] In this report, Knox firstly argued that recognition of the right raises awareness of, and reinforces the concept that, the enjoyment of human rights relies on protection of the environment and vice versa.[49] Further, it assists in ensuring the continued, coherent and integrated development of human rights norms relating to the environment, providing a more unified and integrated presence of environmental laws into the legal system. Additionally, acknowledging this right assists in highlighting and seeking to prevent environmental injustices which so frequently are not addressed in our environmental or other laws. Finally, Knox recognized that entrenching the right to a healthy environment leads to stronger environmental laws generally and can empower citizens to more effectively defend against environmental impacts.[50]

Indeed, implementing a right to a healthy environment may enable the further introduction of, or at least dialogue around, the role of the 16 Framework Principles developed by Knox to clarify what the right should entail in practice.[51] In order to ensure the right is not merely symbolic, but is practically sought to be achieved, the 16

[47] Lynda Collins and David Boyd, 'Non-Regression and the Charter Right to a Healthy Environment' (2016) 29(1) *Journal of Environmental Law and Practice* 285.
[48] John Knox and David Boyd, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment,* 73rd sess, UN Doc A/73/188 (19 July 2018).
[49] Ibid.
[50] Ibid.
[51] Ibid.

Principles provide for a range of actions for States to seek to undertake. The Principles include ensuring environmental justice through prohibiting discrimination to ensure equal and effective achievement of the right, the right of peaceful assembly in relation to environmental matters, the right to access environmental information in a timely and effective manner, public participation in decision making, and proper prior assessment of possible environmental impacts, amongst other things. These are worthy Principles that Australia could benefit from, even in the context of benchmarking current environmental laws against to assess how adequately their objectives are being achieved.

One benefit of enshrining a right to a healthy environment, rather than relying on existing forms of environmental law, is that the rights framework taps into the well-established narratives built around human rights that help them act as a 'trump' against injustice.[52] For example, the UN General Assembly stated that 'each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms'.[53] This duty is expected to trump domestic laws that may be contrary to the right, empowering the right to a healthy environment to overcome the typical application of environmental laws which favour economic gain over environmental protection.[54]

The expression and form of implementation of the right to a healthy environment would be the determiners as to how much benefit Australia or any of its jurisdictions could gain from introducing this right. The existing human rights instruments in Victoria, the ACT and Queensland have introduced human rights through the 'dialogue model', in which responsibility for the interpretation and enforcement of human rights is shared between courts and parliaments, with judicial powers limited to considering human rights arguments only when they are 'piggybacked' onto another legal claim.[55] Although the dialogue model has its drawbacks,[56] including that Parliament has discretion to pass

[52] Bratspies (n 16) 265.
[53] *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* UN GAOR, A/RES/53/144 (8 March 1999), art 2[1] UN General Assembly Resolution 53/144, (1999).
[54] Bratspies (n 16) 268.
[55] Irina Kolodizner, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(1) *Australian International Law Journal* 219.
[56] See, eg, Michael Brett Young, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Review, 2015).

legislation which may be incompatible with human rights, incorporating the right to a healthy environment would still have considerable benefits, including normalizing the concept in general discourse.[57] The numerous determiners suggested by Ilie, referred to above,[58] would need to be considered in the effective introduction of this right, to ensure it is more than just symbolic and has practical beneficial applications in our legal system and interactions with the environment.

VI CONCLUSION

The former Special Rapporteur on human rights and the environment, John Knox, stated that '[w]ithout a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity.'[59] Knox has drawn a link between environmental harm and threats to a vast range of human rights, including rights to life, health, property, home and family life, food, water, culture and self-determination.[60] While those jurisdictions that enjoy recognition and protection of human rights generally may have the ability to argue substantively for the right to a healthy environment to be protected within other rights (eg the right to life), recognizing the right to a healthy environment directly in our legal instruments will have multiple benefits. Clear recognition of the right can lead to broader recognition of our dependence on the health of the environment for our own health, more effective environmental laws and governance around environmental decision making, and improved environmental justice. Ideally, Australia would entrench this right, along with all basic human rights, in our national Constitution. However, given that this seems unlikely in the current political climate, states and territories are encouraged to consider introducing the right to a healthy environment, along with other human rights where not already recognised, into their legal frameworks. This would enable all

[57] Meg Good, 'Should Australia Recognise the Human Right to a Healthy Environment?' *The Conversation* (online, February 22 2018) <https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>.
[58] Ibid at [28].
[59] John Knox, Special Rapporteur on human rights and the environment (former Independent Expert on human rights and the environment), United Nations Human Rights, Office of the High Commissioner, accessed online 21 April 2016, <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>
[60] John H Knox, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/25/53 (30 December 2013).

citizens to gain the benefits that a legislated human right to a healthy environment can bring for communities around Australia, and the environments we all depend on.

REFERENCE LIST

A *Articles/Books/Reports*

Asia Pacific Forum, *Human Rights and The Environment* (Background Paper, 24-27 September 2007)

Australian Conservation Foundation, World Wildlife Fund, The Wilderness Society and The University of Queensland, *Fast-tracking Extinction: Australia's National Environmental Law* (Report, 2018)

Australian Panel of Experts on Environmental Law, *The Future of Australian Environmental Laws* (Overview Paper, 2017)

Australian Panel of Experts on Environmental Law, *Democracy and the Environment* (Technical Paper 8, 2017)

Barbu, Ilie Adrian, 'The Right to a Healthy Environment – between a Basic Human Right and a Policy of Form without Substance' (2016) 52(1) *Revista de Stinte Politice* 14

Boyd, David, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights and the Environment* (UBC Press, 2011)

Bratspies, Rebecca, 'Claimed Not Granted: Finding a Human Right to a Healthy Environment' (2017) 26 *Transnational Law and Contemporary Problems* 263

Brett Young, Michael, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006* (Review, 2015)

Chakaraborty, Jayajit and Donna Green, 'Australia's First National Level Quantitative Environmental Justice Assessment of Industrial Air Pollution' (2014) 9(4) *Environmental Research Letters* 1

Collins, Lynda and David Boyd, 'Non-Regression and the Charter Right to a Healthy Environment' (2016) 29(1) *Journal of Environmental Law and Practice* 285

Cooper, Nathan, Donna, Green, Marianne, Sullivan and David, Cohen, 'Environmental Justice Analyses May Hide Inequalities in Indigenous People's Exposure to Lead in Mount Isa, Queensland' (2018) 13(1) *Environmental Research Letters* 8

Department of Environment and Energy, *State of the Environment* (Report, 2016)

Dobbie, Brendan and Green, Donna, 'Australians Are Not Equally Protected from Industrial Air Pollution' (2015) 10(5) *Environmental Research Letters* 1

Gunther, Handl, "Human Rights and Protection of the Environment: A Mildly Revisionist View" in A. Cançado Trindade (ed), *Human Rights and Environmental Protection* (1995) 117

Human Rights and Equal Opportunity Commission, *Human Rights and Climate Change* (Background Paper, April 2008)

Hillebrecht, Anna, 'Disrobing Rights: The Privilege of Being Human in the Rights of Nature Discourse' (2017) 6 *Rachel Carson Center Perspectives* 15

Knox, John, 'The Global Pact for the Environment: at the Crossroads of Human Rights and the Environment' (2019) 28(1) *Review of European, Comparative & International Environmental Law* 40

Knox, John H and Pejan, Ramin (eds) *The Human Right to a Healthy Environment* (Cambridge University Press, 2018)

Kolodizner Irina, 'The Charter of Rights Debate: A Battle of the Models' (2009) 10(1) *Australian International Law Journal* 219

Lewis, Bridget, *Environmental Human Rights and Climate Change: Current Status and Future Prospects* (Springer, 2018)

Maloney, Michelle, 'Rights of Nature, Earth democracy and the Future of Environmental Governance' in The Green Institute *Rebalancing rights: Communities Corporations and Nature* (Report, March 2019) 11

Parliament of Australia, *Environment and Communications References Committee: Australia's Faunal Extinction Crisis* (Interim Report, 2019)

Queensland Government, *Queensland Climate Adaptation Strategy: Human Health and Wellbeing Climate Change Adaptation Plan for Queensland* (Sector Adaptation Plan, 2018)

Rose, Deborah Bird, *Nourishing Terrains: Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission, 1996)

Woinarski, John CZ, Sarah Legge, Sarah, James A Fitzsimons, Barry J Traill, Andrew A Burbidge, Alaric Fisher, Ron SC Firth, Iain J Gordon, Anthony D Griffiths, Christopher N Johnson, Norm L McKenzie, Carol Palmer, Ian Radford, Brooke Rankmore, Euan G. Ritchie, Simon Ward and Mark Ziembicki, 'The Disappearing Mammal Fauna of northern Australia: Context, Cause, and Response' (2011) 4(3) *Conservation Letters* 192

Zhang, Ying, Paul Beggs, Hillary Bambrick, Helen L Berry, Martina K Linnenluecke, Stefan Trueck, Robyn Alders, Peng Bi, Sinead M Boylan, Donna Green, Yuming Guo, Ivan C Hanigan, Elizabeth G Hanna, Arunima Malik, Geoffrey G Morgan, Mark Stevenson, Shilu Tong, Nick Watts, Anthony G Capon, 'The MJA-Lancet Countdown on Health and Climate Change: Australian Policy Inaction Threatens Lives' (2018) 209(11) *Medical Journal of Australia-Lancet* 474

B *Cases*

Ashgar Leghari v Federation of Pakistan (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept and 14 Sept 2015

Court of Appeal of The Hague, *The State of the Netherlands (Ministry of Infrastructure and the Environment)* v *Urgenda Foundation*, C/09/456689 / HA ZA 13-1396, 9 Oct. 2018, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2018:2610>

Demanda Generaciones Futuras v Minambiente (2018) STC4360-2018 (unofficial translation)

New Acland Coal Pty Ltd v Ashman & Ors and Chief Executive, Department of Environment and Heritage Protection (No. 4) [2017] QLC 24

Taskin v Turkey [2004] Eur Court HR 179

C *Legislation*

Charter of Human Rights and Responsibilities Act 2006 (Vic)

Human Rights Act 2004 (ACT)

Human Rights Act 2018 (Qld)

National Environment Protection (Ambient Air Quality) Measure 2015 (Cth)

D *Treaties*

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

E *Other*

Afshin Akhtar-Khavari, Elizabeth MacPherson, Erin O'Donnell, Katie Woolaston, Julian Yates, Alessandro Pelizzon and Rebecca Nelson, 'Why do Australia's Environmental Law Fail to Save Our Species from Extinction' *IUCN News* (online, 13 July 2019) https://www.iucn.org/news/world-commission-environmental-law/201907/why-do-australias-environmental-laws-fail-save-our-species-extinction

Declaration of the United Nations Conference on the Human Environment in 'Report of the United Nations Conference on the Human Environment' UN Doc A/CONF.48/14/Rev.1 (1973) Principle 1

Department of the Environment and Energy, *International Activities,* Australian Government (Webpage) <https://www.environment.gov.au/about-us/international>

Gabcikovo Nagymaros Project (*Hungary v Slovakia*) ICJ 97 [1997] (Separate Opinion of Vice President Weeramantry)

Good, Meg 'Should Australia Recognise the Human Right to a Healthy Environment?' *The Conversation* (online, February 22 2018) <https://theconversation.com/should-australia-recognise-the-human-right-to-a-healthy-environment-92104>

Human Rights Council, Report of the Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment (2018) A/HRC/37/58

IUCN, Red List: Table 6a: Red List Category Summary Country Totals (Animals) (Webpage, 2018) <http://cmsdocs.s3.amazonaws.com/summarystats/2018-1_Summary_Stats_Page_Documents/2018_1_RL_Stats_Table_6a.pdf>

Knox, John, Special Rapporteur on Human Rights and the Environment, United Nations Human Rights, Office of the High Commissioner (Webpage, 21 April 2016) <http://www.ohchr.org/EN/Issues/Environment/SREnvironment/Pages/SRenvironmentIndex.aspx>

Knox, John H, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment* UN Doc A/HRC/25/53 (30 December 2013)

Knox, John and David Boyd, Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, 73rd sess, UN Doc A/73/188 (19 July 2018)

Lyons, Kristen, 'Torres Strait Islanders ask UN to Hold Australia to Account on Climate 'Human Rights Abuses' *The Conversation* (online, 27 May 2019) <https://theconversation.com/torres-strait-islanders-ask-un-to-hold-australia-to-account-on-climate-human-rights-abuses-117262>

Report of the United Nations Conference on Environment and Development, UN Doc A/CONF/151/26 (12 August 1992) annex I ('*Rio Declaration on Environment and Development*')

Skelton, Russell, 'Not a Single Drop to Drink: This is Australia', *The Sydney Morning Herald* (online, 28 February 2008) <https://www.smh.com.au/national/not-a-single-drop-to-drink-this-is-australia-20080228-gds2we.html>

PROTECTING SOURCES OF EMBEDDED JOURNALISTS

SIMON LEVETT*

The secrecy around the journalist source protection safeguard is not always in the public interest, especially for the embedded journalist in times of war. The first section of this paper assesses the secrecy aspect of source protection in the context of embedded journalism and finds it as detrimental to the public interest because of the often nefarious motivations of government and military sources in the dissemination of fake news and propaganda. This paper then examines how tensions in embedded journalism have been managed in three legal paradigms in local, regional, and international courts and tribunals — the United States Supreme Court, the International Criminal Tribunal for the Former Yugoslavia, and the European Court of Human Rights. It concludes that the European Court of Human Rights provides the most pertinent approach by considering the behaviour of the source in a broad range of criminal contexts.[1]

CONTENT

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[1] Qualitative Data was gathered through interviews in Sydney, Melbourne, Brisbane in Australia and Tel Aviv, Ramallah and Jerusalem in Israel in 2018 and 2019 under the research project 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law' Western Sydney University ethics approval H12860. This research was enabled with an Australian Government Research Training Program scholarship.

I INTRODUCTION

In times of war, secrecy can augment but also undermine the public interest, as this paper will demonstrate. Jean Baudrillard, a post-structuralist who wrote in 1995 about the corruption of the ordinary flow of information and ideas in wartime, criticised the frequency of secrecy in war. Baudrillard, writing about the circulation of propaganda in the Gulf War from 1990-1991 through the media, placed emphasis on the relationship between officialdom and the media. He described such secrecy as part of 'a deceptive world in which an entire culture labours assiduously at its counterfeit'.[2] He referred to 'the orgy of material, the systematic manipulation of data, the artificial dramatisation'.[3]

This paper has focused on secrecy in the context of embedded journalism — understood as 'reporters traveling with military units, seeing what they see'.[4] The obligation of keeping journalist sources secret — or confidential with regards to professional relationships — has both upheld and degraded the protection of the human right to free speech.[5] This obligation of confidentiality has generated further information and invoked the public's right to know, while it has also protected confidential information (although there are limitations on restricting all classified information).[6] In some respects, secrecy, and the obligation of confidence, has weakened the flow of propaganda or fake news because sources have told the truth under the belief that their identity will be protected. This confidentiality has been a significant aspect of the journalist-source professional relationship and, in itself, has been understood as a public good.[7] Soldiers have also provided journalists with intelligence in volatile locations such as Iraq, Syria, and Afghanistan which can ultimately help inform the public about foreign wars. In part,

[2] Jean Baudrillard, *The Gulf War Did Not Take Place* (Power Publications, 1995) 43.
[3] Ibid 58.
[4] Christopher Paul and James J Kim, *Reporters on the Battlefield: The Embedded Press System in Historical Context* (RAND Corporation, 2004) 67.
[5] Cees J Hamelink, 'Media Monitoring and Individual Duties Under International Law' in Kaarle Nordenstreng and Michael S Griffin (ed), *Media Monitoring and Individual Duties under International Law* (Hampton Press, 1999), 264.
[6] Ryan K McIntosh, 'Protecting Whistleblowers in the Uniformed Services: A Unique National Security Dilemma' (2013) 64(3) *Labor Law Journal* 148, 162.
[7] See Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books, 1983).

journalists have agreed to participate in the embedded program because of the amelioration of the risk to life and the life of the crew,[8] (although the risks to safety are not eliminated).[9]

However, there has been a convergence with the interests of the State in their distribution of propaganda and fake news, that is, the spread of ideas or attitudes that influence opinions or behaviour,[10] through the misuse of the journalist source protection safeguard. Australian freelance journalist and author, Antony Loewenstein, has been critical of the use of anonymous sourcing. He said 'in the majority of the western media, anonymous sourcing is a disgrace. It's used far too often. It's used excessively, it's used by all the mainstream media. It's used unnecessarily'.[11] There has been the promotion of propaganda and fake news through an exclusive dependence on the military as an information source, undermining the credibility of the media organisation.[12] Some forms of propaganda and fake news are increasingly illegal,[13] warranting the disclosure of confidential information in courts and tribunals. At the same time, confidentiality has undermined the establishment and verification of reliable and accurate facts by the journalist. In 1917, Senator Hiram Johnson had stated that the 'truth is the first casualty of war';[14] in 1958, Martin had stated, 'it is through the choice of truth that States deliver their most stinging darts'.[15]

In this paper, firstly, I will establish the competing interests of the journalist source protection safeguard for embedded journalists. I will also refer to interviews about journalist ethics with war correspondents based in Australia and Israel as part of my Field Research in 2018 and 2019. Their narratives have provided professional insights into the

[8] Interview with Bel Trew (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 8 February 2019) ('Trew').
[9] Interview with Peter Greste (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 18 December 2018).
[10] Leslie John Martin, *International Propaganda: Its Legal and Diplomatic Control* (University of Minnesota Press, 1958) 10 ('Martin').
[11] Interview with Antony Loewenstein (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 22 January 2019) ('Loewenstein').
[12] See Arthur S Hayes, Jane B Singer and Jerry Ceppos, 'Shifting Roles, Enduring Values: The Credible Journalist in the Digital Age' (2007) 22(4) *Journal of Mass Media Ethics* 262, 270, who state that the media have suffered a steady decline in public assessment of their credibility.
[13] Ibid 60; See also Human Rights Committee, *General Comment No 11: Prohibition of Propaganda for War and Inciting National, Racial, or Religious Hatred (Article 20 of the International Covenant on Civil and Political Rights)*, 19th sess, UN Doc CCPR/C/GC/11 (29 July 1983), which states that 'any propaganda for war shall be prohibited by law'.
[14] Phillip Knightley, *The First Casualty* (The John Hopkins University Press, 2004).
[15] Martin (n 10) 82.

strengths of the legal arguments in free speech protection. Secondly, I will assess different perspectives in the law on journalist source protection pertinent to the embedded journalist. I will refer to jurisprudence from the Supreme Court of the United States, International Criminal Tribunal for the former Yugoslavia ('ICTY') and the European Court of Human Rights ('ECHR'). These three jurisdictions have referred to local, regional, and international contexts and ultimately established parameters of source protection rather than endangering sacred cows. This section has agreed with the emerging test in the ECHR, which has guided journalists into making preliminary assessments on the credibility of a source.

II EMBEDDED JOURNALISTS IN ETHICS

The eagerness of the media to undertake a Faustian pact to embed is due to enhanced access to information and the assurances of safety.[16] These trends followed complaints about military selected 'pools' of journalism in the United States Sidle Report during the First Gulf War in 1990–1991.[17] Formal embedding with the military in Bosnia started in 1995 and had continued in Afghanistan from 2001 and Iraq from 2002. Embedding has extended to non-state actors such as the Peshmerga who are in Syria or Iraq,[18] as well as other informal exchanges.[19] In Operation Iraqi Freedom in 2002, over 600 journalists had embedded with the United States military.[20] There were also around 2100 'unilateral' journalists in Iraq,[21] as well as some who accompanied the military in an informal capacity.[22]

Australian journalist Ben Doherty, now working with The Guardian, undertook several embeds in Iraq and Afghanistan. Despite the benefits of freedom of movement in an

[16] Trew (n 8).
[17] Brendan R McLane, 'Reporting From The Sand-Storm: An Apprasal Of Embedding' (2004) 34(1) *Parameters* 77, 80 ('McLane').
[18] Interview with Paula Slier (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 24 February 2019).
[19] Loewenstein (n 11).
[20] McLane (n 17) 81.
[21] Elana J Zeide, 'In Bed with the Military: First Amendment Implications of Embedded Journalism' (2005) 80(4) *New York University Law School* 1309, 1318 ('Ziede').
[22] Michael Massing, 'The High Price of an Unforgiving War (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 33; Gordon Dillow, 'Grunts and Pogues: The Embedded Life (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 32; John Donvan, 'For the Unilaterals, No Neutral Ground (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 35; Antony Shadid 'Baghdad: Minding Your Minder (Dispatches: Slices of the War)' (2003) 42(1) *Columbia Journalism Review* 36.

embed, Doherty said that the military has overarching control of the journalist in a Foucauldian sense. He said that they have control over what stories had been filed through 'operating security' and there had often been censorship and self-censorship.[23] Australian Dylan Welch, now working for the Australian Broadcasting Corporation (ABC), undertook several embeds in Afghanistan with the Australian Defence Force.[24] Welch discussed the obligation of confidentiality as inhibiting the truth-seeking, democratic function of the media. Welch spoke in broad terms — he said that journalists had to be aware when they were being 'used' by people, particularly those in authority who speak 'anonymously in order to perpetuate a particular world view'.[25]

The embed program has encouraged propaganda and fake news to the detriment of free speech. Nohrstedt and Ottosen linked unacknowledged sources as a layer of propaganda.[26] Zeide suggested that 'the structure of an embed program cannot help but tilt coverage in the government's favour. It exploits the psychological, professional, and economic pressures faced by both individual journalists and their organisations'.[27] Zeide also noted that 'most reporters will be reluctant to publish anything that the officers and soldiers around them might receive badly' even if it is to the detriment of the spread of information about war and foreign policy.[28]

Dr Christopher Kremmer, a former war correspondent and author of 'the Carpet Wars',[29] explained that the obligation of confidence extended to contextual information rather than just the identity of a source. Dr Kremmer said that even if he agreed not to identify a source, there has been other identifying information that he had been obliged to keep a secret.[30] This worked in addition to formal agreements over state secrets or other

[23] Interview with Ben Doherty (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 3 December 2018).
[24] Interview with Dylan Welch (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 4 December 2018). Welch, a journalist with the ABC, referred to the Australian Media, Entertainment and Arts Alliance ('MEAA') Code of Ethics, 1994, which he said guided him while he was working as a journalist in Afghanistan. Article 3 of the MEAA Code of Ethics states 'aim to attribute information to its source. Where a source seeks anonymity, do not agree without first considering the source's motives and any alternative attributable source. Where confidences are accepted, respect them in all circumstances'.
[25] Ibid.
[26] Stig A Nohrstedt and Rune Ottosen, *New Wars, New Media and New War Journalism* (Nordicom, 2014) 37.
[27] Zeide (n 21) 1320.
[28] Ibid 1321.
[29] Dr Christopher Kremmer, *The Carpet Wars* (Harper Collins, 2002).
[30] Interview with Dr Christopher Kremmer (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 30 November 2018).

sensitive, national security information (including specific numbers of troops, equipment or vehicles, future operations, security levels, intelligence collection, or information about the effectiveness of enemy action).[31] The result has been that embedded journalists lose the ability to fully exercise a key journalistic function — checking whether information is accurate and reliable (also the first casualty of war).[32]

III EMBEDDED JOURNALIST IN THE LAW

Shield Laws have provided an explicit if incomplete layer of protection for war correspondents including embedded journalists; in Australia, shield laws have recently been relevant to war correspondents in the context of Australian Federal Police ('AFP') raids in June 2019 on the Australian Broadcasting Corporation ('ABC') ostensibly on the grounds of national security.[33] The public debate about the right to know has invoked the need for strong shield laws but international jurisprudential advances are increasingly focused on limitations of the source protection safeguard. Any potential media bill of rights in Australia could benefit from the following discussion of the jurisprudence of qualified privilege in the courts and tribunals following.[34]

The United States Supreme Court established a high threshold for the protection of journalists' sources. In *Branzburg v Hayes*,[35] the United States Supreme Court ruled to inform the public of decisions in a democracy and the right to know over the rights of journalist to keep identities of sources a secret (but only in the context of criminal allegations). The 1972 landmark decision has value for embedded journalists who are compelled to give evidence at a criminal trial in the United States (although the Court is ambiguous towards protecting all types of information).[36] However, the right to know has

[31] Zeide (n 21) 1315.
[32] Mark Pedelty, *War Stories: the Culture of Foreign Correspondents* (Routledge, 1995) 43.
[33] Laura Tingle, 'Australia's National Security Laws Should Protect the Country, Not Its Politicians in Power', *ABC News* (online, 24 June 2019) <https://www.abc.net.au/news/2019-06-08/afp-raids-journalist-house-abc-headquarters-laura-tingle/11191446>.
[34] Tony Walker, 'Press Freedom Must Be Enshrined in a Charter of Rights', *Sydney Morning Herald* (online, 3 November 2019) <https://www.smh.com.au/national/press-freedom-must-be-enshrined-in-a-charter-of-rights-20191031-p5368c.html>.
[35] 408 US 655 (1972).
[36] Ibid 691.

been held broader than criminal justice; it includes positive measures of free speech (which have been difficult to calculate in war).[37]

Information about the criminal behaviour of a source explicitly has equated the public interest with the prosecution of crimes presumably including illegal propaganda and false news. Justice White stated that 'the preference for anonymity of those confidential informants… is presumably a product of their desire to escape criminal prosecution, and this preference, while understandable, is hardly deserving of constitutional protection'.[38] White suggested that 'although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune to such conduct, whatever the impact on the flow of news'.[39] In this way, Justice White noted that the testimonial privilege should be only 'limited' or 'exceptional'[40] rather than confidential relationships being protected per se. The United States Supreme Court stated that 'testimony relevant to the prosecution of crime' has been required, being 'further information that this exposure might prevent'.[41] This has accorded with the theory in the First Amendment jurisprudence referred to by Nestler, where journalists lack any special rights over citizens and that the press is regulated by the government authorities.[42]

A radical United States Supreme Court in *Branzburg v Hayes* has undermined journalist source protection (although in concurrence, Justice Powell is more friendly to the media).[43] The Court has discounted the 'chilling effect' on the media;[44] Justice White in *Branzburg v Hayes* asserted that

> the argument that the flow of news will be diminished by compelling reporters to aid the grand jury in a criminal investigation is not irrational, nor are the records before us silent on the matter. But we remain unclear how often and to what extent informers are actually deterred from

[37] Nina Burri, *Bravery or Bravado? The Protection of News Providers in Armed Conflict* (Brill – Nijhoff, 2015) 223.
[38] *Branzburg v Hayes* (n 35) 691.
[39] Ibid.
[40] Ibid 674.
[41] Ibid 698.
[42] Jeffrey S Nestler, 'The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154(1) *University of Pennyslvania Law Review* 201, 208.
[43] Ibid 222.
[44] Robert A Sedler, 'Self-Censorshp and the First Amendment' (2012) 25(1) *Notre Dame Journal of Law, Ethics and Public Policy* 13, 14.

> furnishing information when newsmen are forced to testify before a grand jury.[45]

However, while there is no federal shield law in the United States, shield laws have provided some protection in forty-eight states and the District of Columbia,[46] with an absolute privilege existing in a minority of cases.[47]

Justice White's reasoning — and his focus on crime — has not dismissed the use of embedded journalism in criminal trials because of their lack of impartiality.[48] Justice White states that

> this conclusion itself involves no restraint on what newspapers may publish or on the type or quality of information between reporters and their sources. Grand juries address themselves to the issues of whether crimes have been committed and who committed them. Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.[49]

Similarly, many constitutional and statutory shield laws in the United States have avoided making judgements on the content of the information despite challenges from non-traditional forms of journalists such as bloggers.[50] However, Justice White's reasoning has meant that, while the threshold of source protection has been kept high, non-criminal information relevant to the embedded journalist has still been withheld from a court (requiring illegality for scrutiny of all propaganda and fake news).

In 2002, the ICTY enshrined source protection for war correspondents in the context of incriminating evidence by journalists into alleged war crimes committed by officials Radoslav Brdjanin and Momir Talic;[51] given the application of United States Security

[45] *Branzburg v Hayes* (n 35) 693.
[46] Nia Y McDonald, 'Under Fire: the Fight for the War Correspondent's Privilege' (2003) 47(1) *Howard Law Journal* 133, 139.
[47] Ibid 140.
[48] Ibid.
[49] *Branzburg v Hayes* (n 35) [691].
[50] Linda L Berger, 'Shielding The Unmedia: Using The Process of Journalism to Protect the Journalist's Privilege in a Infinite Universe of Publication' (2003) 39(5) *Houston Law Review* 1371, 1410.
[51] *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 7 June 2002); *Prosecutor v Radoslav Brdjanin and Momir Talic* (*Decision on Interlocutory*

Council Resolution 827 (1993) establishing the ICTY,[52] the decision has been the closest principle to a global shield law specifically for war correspondents. However, the lack of influence of the decision has been demonstrated by several rebellious journalists who gave testimony based on their confidential information to international bodies about violations of international law. Their actions assisted in convicting the perpetrators of other alleged international crimes during the war in Yugoslavia in 1991-2001. Jackie Rowlands, a BBC reporter throughout the war, testified in 2002 at the war crimes tribunal of former President of Serbia Slobodan Milosevic; she issued a statement stating:

> this was something I ought to do — had to do… I don't accept the argument that giving evidence will make my life significantly more dangerous for journalists in the future…. I don't believe that journalists are exempt from moral obligations or international justice.[53]

The Guardian journalist, Ed Vulliamy, similarly testified against the former commander of Croatian forces in Bosnia Tihomeir Blaskic. He stated in 1999 in an academic article that 'my belief is that we must do our professional duty to our papers and our moral and legal duty to the new enterprise'.[54] The approach of Rowlands and Vulliamy indicated that the pursuit of justice before the international courts and tribunals might void journalists' and their sources' safety and security. This reflected the high threshold for source protection at the United States Supreme Court, implying that embedded journalists should be regarded as active participants in a conflict with moral obligations, and as human beings and citizens, in any conflict.[55]

Yet the ICTY in the *Prosecutor v Radoslav Brdjanin & Momir Talic* (or Randal's decision)[56] created a reactionary and stronger source protection safeguard for the war correspondent that lowered the source protection threshold. The Appeals Chamber in Randal's decision argued that

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Appeal) (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-AR73 9, 11 December 2002).

[52] United Nations Security Council, Res 827, UN Doc S/RES/827 (25 May 1993).

[53] Howard Tumber, 'Journalists, War Crimes and International Justice' (2008) 1(3) *Media, War and Conflict* 261, 263.

[54] Ibid 264.

[55] Burri (n 37).

[56] *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (n 51); *Prosecutor v Radoslav Brdjanin and Momir Talic* (*Decision on Interlocutory Appeal)* (n 51).

> a two-pronged test must be satisfied, [f]irst, the petitioning party must demonstrate that the evidence sought is of direct and important value in determining a core issue in the case. Second, it must demonstrate that the evidence sought cannot reasonably be obtained elsewhere.[57]

This protected the rights of embedded journalists to safeguard their sources in the public interest in criminal proceedings in times of conflict.

The ICTY protected the information gathering role of the war correspondent in the context of free speech (as opposed to the local journalist). The Trial Chamber stated '[j]ournalists reporting on conflict areas play a vital role in bringing to the attention of the international community the horrors and reality of the conflict'.[58] The Appeal Chamber subsequently discussed the activities of war correspondents in detail, where they stated that 'the Appeals Chamber is of the view that society's interest in protecting the integrity of the newsgathering process is particularly clear and weighty in the case of war correspondents'.[59] Indeed, retired war correspondents have been protected by the safeguard,[60] contravening the argument that privileges ought to be defined narrowly.[61] However, domestic, local journalists — who are also more immediately associated with partial information,[62] and unsafe journalistic practices[63] — have been excluded from the threshold.[64] Although the use of domestic journalism could benefit international criminal justice, information by local journalists has been classified as a lesser standard of protection in Randal's decision.

The low threshold for protection means that war correspondents such as embedded journalists who may be a direct witness to war crimes might abstain from court testimony. In the opposite direction to the United States Supreme Court, 2002 decisions

[57] *Prosecutor v Radoslav Brdjanin and Momir Talic* (*Decision on Interlocutory Appeal)* (n 51) [50].
[58] *Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence)* (n 51) [25].
[59] *Prosecutor v Radoslav Brdjanin, Momir Talic* (*Decision on Interlocutory Appeal)* (n 51) [36].
[60] Ibid [9].
[61] Michael D Saperstein, 'Federal Shield Law: Protecting Free Speech or Endangering the Nation?' (2006) 14(2) *Journal of Communications Law and Technology Policy* 543, 556.
[62] Interview with Eric Tsolek, (Simon Levett, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law', 20 January 2019).
[63] Interview with Joseph Dyke (Simon Levett, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law', 19 January 2019).
[64] Nina Kraut, 'A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law' (2004) 35(1) *Columbia Human Rights Law Review* 337, 342.

at the Special Court for Sierra Leone have extended the safeguard to human rights workers as rights bearers and guardians of the public interest.[65] It is likely that future rulings of the International Criminal Court will provide even broader protections for editors and supervisors.[66] The risk is that other, non-media information will be relied upon by international courts and tribunals, for example, information from non-governmental organisations that is of a less probative nature.[67]

The ECHR, to which all the 47 members of the Council of Europe belong and for which human rights apply on an extra-territorial basis,[68] including war-torn countries such as Ukraine, has balanced an interest in Freedom of Expression alongside the administration of criminal justice, national security, and other legitimate aims.[69] Article 10 of the ECHR is the basis for the exception to the journalist source protection safeguard where 'it is justified by an overriding requirement in the public interest'.[70] However, the Council of Europe suggested that more information about the embed ought to be made public; a 2008 report suggested that 'if a system of embedded journalists needs to be maintained and journalists choose to make use of it, they are advised to make this clear in their reports and to point out the source of their information'.[71]

Unlike the proceeding courts and tribunals, embeds have a right to source protection before the ECHR despite concerns about reliability of information. In *Pasko v Russia* (2009),[72] the applicant was a Naval Officer as well as a military and freelance journalist on the Russian Pacific Fleet's newspaper *Boyevaya*.[73] Most of his articles focused on the issue of environmental pollution but others related to the activity of the Russian Pacific

[65] *Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu* (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007) [33].

[66] Anastasia Heeger, 'Securing a Journalist's Testimonial Privilege in the International Criminal Court' (2005) 6(2) *San Diego International Law Journal* 209, 221.

[67] Matthew Powers, 'Contemporary NGO-Journalist Relations: Reviewing and Evaluating an Emergent Area of Research' (2015) 9(6) *Sociology Compass* 427, 428.

[68] *Al-Saadoon and Mufdhi v the United Kingdom* (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010).

[69] Article 10 of the *European Convention on Human Rights* ('ECHR'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953).

[70] *Goodwin v the United Kingdom* (European Court of Human Rights, Grand Chamber, Application Nos 17488/90, 27 March 1986) [39].

[71] Council of Europe, Committee of Ministers, *Freedom of Expression and Information in Times of Crisis Guidelines of the Committee of Ministers of the Council of Europe*, CM/Del/Dec(2007)1005/5.3, 1005th mtg, 26 September 2007, 24.

[72] *Pasko v Russia* (European Court of Human Rights, First Section, Application No 69519/01, 22 October 2009).

[73] Ibid [8].

Fleet.[74] In that case, the Court noted that the applicant's Freedom of Expression had been held intact in the context of his role as a military officer with duties to the State rather than as a journalist.[75] However, the EHCR in *Handyside v the United Kingdom* (1975)[76] stated that 'information' and 'ideas' that 'offend, shock or disturb' are all governed by the right to Freedom of Expression in peace and war, intimating that all journalists retain the same protections.[77]

Similar to the United States Supreme Court, the ECHR explicitly prevented the forced disclosure of the identity of a source because alternative measures to disclosure had been possible. In *Roemen and Schmit v Luxemburg* (2003),[78] the ECHR adjudicated on search warrants issued in relation to misconduct allegations of a Minister. The Court found that 'measures other than searches of the applicant's home and workplace … might have enabled the investigating judge to find the perpetrators of the offences referred to in the public prosecutor's submissions'.[79]

The ECHR has progressively indicated that the illegitimate behaviour of a source has overridden the notion of secrecy in the courtroom potentially on the grounds of crime or national security on a high threshold of source protection. This has arguably represented a shift towards recognising the 'motive' of a source for a journalist. Some sources have been vulnerable — for example, whistle-blowers[80] — but others have nefarious motives such as the commission of crimes. In the context of embedded journalism, military sources have been in fact 'quite powerful'.[81] Sources have been opportunistic; they have taken advantage of the 'chance to provide information that promotes their interests, to publicise their ideas, or in some cases, just to get their names and faces into the news'.[82]

[74] Ibid [7].
[75] Ibid [87].
[76] *Handyside v the United Kingdom* (European Court of Human Rights, Court (Plenary), Application No 5493/72, 7 December 1976).
[77] Ibid [49].
[78] *Roemen and Schmit v Luxembourg* (European Court of Human Rights, Fourth Section, Application No 51772/99, 25 February 2003).
[79] Ibid [56].
[80] *Guja v Moldova* (European Court of Human Rights, Grand Chamber, Application No 14277/04, 12 February 2008).
[81] Herbert J Gans, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek and Time* (Northwestern University Press, 2004) 119.
[82] Ibid 117.

As discussed, the military has not been a neutral channel of information; rather, they can be linked to propaganda and fake news.

In *Financial Times Ltd v the United Kingdom* (2009),[83] applications had been made to facilitate disclosure of confidential information belonging to a Belgian brewery company under section 10 of the *Contempt of Court Act 1981*. In that case, the ECHR suggested that evidence of source behaviour — including national security information — could be a public interest justification for disclosure. However, the ECHR retreated, finding that although 'the public perception of the principle of non-disclosure of sources would suffer no real damage where it was overridden in circumstances where a source was clearly acting in bad faith with a harmful purpose and disclosed intentionally falsified information', 'compelling evidence' was necessary to void the journalist source protection safeguard.[84] Ultimately, the ECHR suggested that 'the conduct of the source can never be decisive in determining whether a disclosure order ought to be made but will merely operate as one, albeit important, factor to be taken into consideration in carrying out the balancing exercise required under Article 10(2)'.[85] Certainly, notice of a source's motivations will be taken into account by courts — including potentially embedded journalists.

IV CONCLUSION

Embedded journalists have the vital role of gathering news from powerful groups in war-torn societies in a relatively safe environment. When embedded journalists interview sources in war, including official and military authorities, the source protection safeguard has provided assurances in countries such as Australia that the information remains confidential. However, as seen by interviews with journalists, there is a concern about the over-reliance upon official and military sources by embedded journalists. Building upon the applicability of shield laws, decisions in national, regional, and international courts and tribunals provide a range of jurisdictional standards for any exception to journalist source protection. Notably, the jurisprudence of the ECHR has indicated the behaviour of the source as a potential factor in source protection in the context of issues

[83] *Financial Times Ltd and Others v the United Kingdom* (European Court of Human Rights, Fourth Section, Application No 821/03, 15 December 2009).
[84] Ibid [63].
[85] Ibid.

such as crime and national security; this decision will have relevance for the 47 members of the Council of Europe and its extra-territorial jurisdiction but also for other judicial mechanisms.

Law is applicable in war and can assist to build a system of ethical journalism. Ultimately, the approach of the ECHR has aimed not only for the protection of the information of the embedded journalist but simultaneously for a fairer approach to war journalism that respects the contribution of all sources. This scrutiny of growing embedded journalism has the potential for a more 'honest' journalism,[86] empowering war correspondents to enter into new and beneficial relationships of confidence with a range of sources.

[86] Pedelty (n 32) 227.

REFERENCE LIST

A *Articles/Books/Reports*

Baudrillard, Jean, *The Gulf War Did Not Take Place* (Power Publications, 1995)

Berger, Linda L, 'Shielding The Unmedia: Using The Process of Journalism to Protect the Journalist's Privilege in a Infinite Universe of Publication' (2003) 39(5) *Houston Law Review* 1371

Bok, Sissela, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books, 1983)

Burri, Nina, *Bravery or Bravado? The Protection of News Providers in Armed Conflict* (Brill - Nijhoff, 2015)

Dillow, Gordan, 'Grunts and Pogues: The Embedded Life (Dispatches: Slices of the War) 42(1) *Columbia Journalism Review* 32

Donvan, John, 'For the Unilaterals, No Neutral Ground (Dispatches: Slices of the War) 42(1) *Columbia Journalism Review* 35

Gans, Herbert J, *Deciding What's News: A Study of CBS Evening News, NBC Nightly News, Newsweek and Time* (Northwestern University Press, 2004)

Hamelink, Cees J, 'Media Monitoring and Individual Duties under International Law' in Kaarle Nordenstreng and Michael S. Griffin (ed), *Media Monitoring and Individual Duties under International Law* (Hampton Press, 1999)

Hayes, Arthur S, Jane B. Singer and Jerry Ceppos, 'Shifting Roles, Enduring Values: The Credible Journalist in the Digital Age' (2007) 22(4) *Journal of Mass Media Ethics* 262

Heeger, Anastasia, 'Securing a Journalist's Testimonial Privilege in the International Criminal Court' (2005) 6(2) *San Diego International Law Journal* 209

Knightley, Phillip, *The First Casualty* (The John Hopkins University Press, 2004)

Kraut, Nina, 'A Critical Analysis of One Aspect of Randal in Light of International, European, and American Human Rights Conventions and Case Law' (2004) 35(1) *Columbia Human Rights Law Review* 337

Kremmer, Christopher Dr., *The Carpet Wars* (Harper Collins, 2002)

Levett, Simon, 'Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law' (Interview Series, Western Sydney University, November 2018 - February 2019)

Martin, Leslie John, *International Propaganda: its Legal and Diplomatic Control* (University of Minnesota Press, 1958)

Massing, Michael 'The High Price of an Unforgiving War (Dispatches: Slices of the War)' 42(1) *Columbia Journalism Review* 33

McDonald, Nia Y, 'Under Fire: the Fight for the War Correspondent's Privilege' (2003) 47(1) *Howard Law Journal* 133

McIntosh, Ryan K, "Protecting whistleblowers in the uniformed services: a unique national security dilemma" (2013) 64(3) *Labor Law Journal* 148

McLane, Brendan R., 'Reporting From The Sand-Storm: An Apprasal Of Embedding' (2004) 34(1) *Parameters* 77

Nestler, Jeffrey S, 'The Underprivileged Profession: the Case for Supreme Court Recognition of the Journalist's Privilege' (2005) 154(1) *University of Pennyslvania Law Review* 201

Nohrstedt, Stig A and Rune Ottosen, *New Wars, New Media and New War Journalism* (Nordicom, 2014)

Paul, Christopher and James J Kim, *Reporters on the Battlefield: the Embedded Press System in Historical Context* (RAND Corporation, 2004)

Pedelty, Mark, *War Stories: the Culture of Foreign Correspondents* (Routledge, 1995)

Powers, Matthew, 'Contemporary NGO-Journalist Relations: Reviewing and Evaluating an Emergent Area of Research' (2015) 9(6) *Sociology Compass* 427

Saperstein, Michael D, 'Federal Shield Law: Protecting Free Speech or Endangering the Nation?' (2006) 14(2) *Journal of Communications Law and Technology Policy* 543

Sedler, Robert A, 'Self-Censorshp and the First Amendment' (2012) 25(1) *Notre Dame Journal of Law, Ethics and Public Policy*, 13

Shadid, Anthony, 'Baghdad: Minding Your Minder (Dispatches: Slices of the War)' (2003) 42(1) *Columbia Journalism Review* 36

Tumber, Howard, 'Journalists, War Crimes and International Justice' (2008) 1(3) *Media, War and Conflict* 261

Zeide, Elana J, 'In Bed with the Military: First Amendment Implications of Embedded Journalism' (2005) 80(4) *New York University Law School* 1309

B *Cases*

Al-Saadoon and Mufdhi v the United Kingdom (European Court of Human Rights, Fourth Section, Application No 61498/08, 2 March 2010)

Branzburg v Hayes 408 US 655 (1972)

Financial Times Ltd and Others v the United Kingdom (European Court of Human Rights, Fourth Section, Application No 821/03, 15 December 2009)

Goodwin v the United Kingdom (European Court of Human Rights, Grand Chamber, Application Nos 17488/90, 27 March 1986)

Guja v Moldova (European Court of Human Rights, Grand Chamber, Application No 14277/04, 12 February 2008)

Handyside v the United Kingdom (European Court of Human Rights, Court (Plenary), Application No 5493/72, 7 December 1976)

Pasko v Russia (European Court of Human Rights, First Section, Application No 69519/01, 22 October 2009)

Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-04-16-T, 20 June 2007)

Prosecutor v Radoslav Brdjanin and Momir Talic (Decision on Motion to Set Aside Confidential Subpoena to Give Evidence) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-99-36-T, 7 June 2002)

Prosecutor v Radoslav Brdjanin and Momir Talic (*Decision on Interlocutory Appeal)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-99-36-AR73 9, 11 December 2002)

Roemen and Schmit v Luxembourg (European Court of Human Rights, Fourth Section, Application No 51772/99, 25 February 2003)

C *Treaties*

European Convention on Human Rights ('ECHR'), opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953)

United Nations Security Council Res 827, UN Doc S/RES/827 (25 May 1993)

D *Other*

Council of Europe, Committee of Ministers, *Freedom of Expression and Information in Times of Crisis Guidelines of the Committee of Ministers of the Council of Europe*, CM/Del/Dec(2007)1005/5.3, 1005th mtg, 26 September 2007

Human Rights Committee, *General Comment No. 11: Prohibition of propaganda for war and inciting national, racial or religious hatred (Article 20 of the International Covenant on Civil and Political Rights),* 19th sess, UN Doc CCPR/C/GC/11 (29 July 1983)

Interview with Antony Loewenstein (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 22 January 2019)

Interview with Bel Trew (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 8 February 2019)

Interview with Ben Doherty (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 3 December 2018)

Interview with Dr Christopher Kremmer (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 30 November 2018)

Interview with Dylan Welch (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 4 December 2018)

Interview with Eric Tsolek, (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 20 January 2019)

Interview with Joseph Dyke (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 19 January 2019)

Interview with Paula Slier (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 24 February 2019)

Interview with Peter Greste (Simon Levett, Enhancing the Framework for Journalists Reporting on Armed Conflict in International Law, 18 December 2018)

Tingle, Laura, 'Australia's National Security Laws Should Protect The Country, Not Its Politicians in Power', *ABC News* (online, 24 June 2019) <https://www.abc.net.au/news/2019-06-08/afp-raids-journalist-house-abc-headquarters-laura-tingle/11191446>

Walker, Tony, 'Press Freedom Must Be Enshrined in a Charter of Rights', *Sydney Morning Herald* (online, 3 November 2019) <https://www.smh.com.au/national/press-freedom-must-be-enshrined-in-a-charter-of-rights-20191031-p5368c.html>

ORPHANAGE TRAFFICKING, MODERN SLAVERY AND THE AUSTRALIAN RESPONSE

KATHRYN E. VAN DOORE* AND REBECCA NHEP**

Orphanage trafficking is fast becoming a highly profiled form of child trafficking involving the transfer and recruitment of children into orphanages or institutional care for the purpose of exploitation and profit. In 2018, the Australian government stated that they were leading the world in recognising orphanage trafficking as a form of modern slavery under the newly enacted Modern Slavery Act 2018 *(Cth). This article describes how orphanage trafficking occurs as a process of child trafficking. It then clarifies that whilst orphanage trafficking is a form of modern slavery, orphanage tourism and child institutionalisation are not. The article then considers Australia's recognition of orphanage trafficking as modern slavery, and the limits of that recognition. To maintain the growing momentum on curbing orphanage trafficking, the article argues that Australia needs to ensure that ensure that orphanage trafficking is criminalised as an offence. The article makes two alternative recommendations to achieve this. The first is to amend the elements of the current legislation on trafficking in Australia to ensure that orphanage trafficking is encapsulated. The second is for the Australian government to explicitly criminalise the offence of orphanage trafficking.*

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CONTENT

I INTRODUCTION

In 2018, the Australian government stated that it was the first to recognise orphanage trafficking as a form of modern slavery.[1] Orphanage trafficking is regarded as an 'emerging form of exploitation'[2] described as the transfer or recruitment of a child into an orphanage or residential care institution for the purpose of exploitation and profit.[3] Orphanage trafficking occurs in developing nation contexts which exhibit an over-use of institutional care for children in combination with a lack of appropriate gatekeeping, monitoring, or enforcement of child protection regulatory frameworks.

It is estimated that there are between 3.5 to 5.5 million children growing up in residential care institutions, or orphanages, globally,[4] and that up to 80% of these children have one or both parents living who, with the provision of support, could raise their children themselves.[5] In a 2019 report, the Independent Expert leading the United Nations Global

[1] Assistant Minister for Home Affairs Senator the Hon Linda Reynolds CSC, 'Modern Slavery Bill Passes the Parliament' (Media Release, 30 November 2018) <https://minister.homeaffairs.gov.au/lindareynolds/Pages/modern-slavery-bill-passes-parliament.aspx>.

[2] Kevin Bales, Bodean Hedwards and Bernard Silverman, 'Modern Slavery Research: the UK Picture', (Report, Office of the Independent Anti-Slavery Commissioner and the University of Nottingham's Rights Lab, 2018) 9.

[3] Kathryn E van Doore, 'Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages' (2016) 24(2) *International Journal of Children's Rights* 378.

[4] Manfred Nowak, 'Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty' (2019) UN Doc A/74/136, 13/23.

[5] Corinna Csáky, 'Keeping Children Out of Harmful Institutions: Why We Should Be Investing in Family-Based Care' (Report, 2009) vii.

Study on Children Deprived of Liberty noted that child protection systems that favoured institutionalisation were characterised by 'profit motives or the commodification of the care of children'.[6] Orphanage trafficking is a result of such systems. In some countries, the 'orphanage industry' has emerged due to the high levels of tourist, volunteer, and foreign donor interest in assisting orphaned children.[7] The orphanage industry relies upon orphanages harbouring a sufficient number of children in institutional care to meet the demands of orphanage tourism and foreign funding. Orphanage trafficking is a means by which the deficit between supply of children requiring institutional care and this demand for orphanage tourism and funding is met. The exploitation of institutional care as a profit driven business model has resulted in the commodification of the vulnerable child as a tourist attraction to manipulate the good intentions of tourists and volunteers.[8]

Orphanage trafficking is a global issue. Whilst the trafficking act takes place in low-and middle-income countries, demand for orphanage trafficking is often driven by funding, volunteers, and visitors sent from high income countries. As a high income country, Australia is impacted by orphanage trafficking in a 'sending country capacity', as the funding and volunteers sent to support institutional care overseas can create a demand for children to be trafficked into orphanages.[9] Additionally, Australian residents and citizens may be involved in the actual trafficking and exploitation of children in orphanages overseas. Orphanage trafficking was one of the major issues considered in the Inquiry into whether Australia should have a Modern Slavery Act in 2017 and was the subject of an entire chapter in the final report of the Inquiry, 'Hidden in Plain Sight'.[10]

This article explores the recent emergence of orphanage trafficking being identified as a form of modern slavery globally and Australia's efforts to combat it as a sending country. First, we describe the process of orphanage trafficking as a form of modern slavery.

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[6] Nowak (n 4).
[7] Kristen Cheney and Karen Smith Rotabi, 'Addicted to Orphans: How the Global Orphan Industrial Complex Jeopardizes Local Child Protection Systems' in Kathrin Hörschelmann, Christopher Harker and Tracey Skelton (eds), *Geographies of Children and Young People* (Springer, 2015) vol 11.
[8] Tess Guiney, '"Hug-an-orphan Vacations": "Love" and Emotion in Orphanage Tourism' (2018) 184(2) *The Geographical Journal* 125, 126.
[9] Samantha Lyneham and Lachlan Facchini, 'Benevolent Harm: Orphanages, Voluntourism and Child Sexual Exploitation in South-East Asia' (2019)(574) *Trends and Issues in Crime and Criminal Justice* 1, 3.
[10] Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, Joint Standing Committee on Foreign Affairs Defence and Trade, 2017) ('*Hidden in Plain* Sight') chp 8.

Second, we clarify the differences between orphanage trafficking, orphanage tourism, and the institutionalisation of children. Third, we outline the emergence of orphanage trafficking as a phenomenon of modern slavery by considering Australia's approach to orphanage trafficking. Finally, we make recommendations for strengthening the legislative framework against orphanage trafficking in Australia.

II WHAT IS ORPHANAGE TRAFFICKING?

Orphanage trafficking is not a term explicitly defined in law. Orphanage trafficking is described as a form of child trafficking where children are recruited or transferred into orphanages, or institutional care, for the purpose of exploitation and profit.[11] Regarded as an emerging form of child trafficking and exploitation,[12] the practice has been detailed in non-government organisation reports,[13] government reports,[14] a report by the United Nations Special Rapporteur on contemporary forms of slavery,[15] and recent academic research.[16]

In international law, child trafficking is detailed in article 3(c) of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime 2000,*[17] as the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation.[18] Article 3 elucidates that exploitation 'shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of

[11] van Doore (n 3).
[12] Bales, Hedwards and Silverman (n 2).
[13] See, eg, Martin Punaks and Katie Feit, *The Paradox of Orphanage Volunteering: Combating Child Trafficking Through Ethical Voluntourism* (Report, Next Generation Nepal, 2014); Georgette Mulheir and Mara Cavanagh, *Orphanage Enterpreneurs: The Trafficking of Haiti's Invisible Children* (Report, Lumos, 2016); Jamie Vernaelde, *Funding Haitian Orphanages at the Cost of Children's Rights* (Report, Lumos, 2017).
[14] *Hidden in Plain Sight* (n 10); United States Department of State, *Trafficking in Persons Report 2018* (Report, 2018).
[15] Urmila Bhoola, 'Report of the Special Rapporteur on Contemporary Forms of Slavery Including Its Causes and Consequences: Current and Emerging Forms of Slavery ' (2019) UN Doc A/HRC/42/44.
[16] Martin Punaks and Katie Feit, 'Orphanage Voluntourism in Nepal and Its Links to the Displacement and Unnecessary Institutionalisation of Children' (2014) 1(2) *Institutionalised Children Explorations and Beyond* 179; van Doore (n 3); Lyneham and Facchini (n 9).
[17] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003) ('*Trafficking Protocol*').
[18] Ibid art 3(c).

organs'.[19] Article 3(d) provides that a 'Child shall mean any person under eighteen years of age'.[20]

As a form of child trafficking, orphanage trafficking involves the act (recruitment, transportation, transfer, harbouring, or receipt of a child) for a purpose of exploitation occurring within an orphanage or institutional care. The forms of exploitation present in orphanage trafficking may include those listed in article 3(a) of the *Trafficking Protocol* such as sexual exploitation, forced labour, or a practice similar to slavery, or exploitation may be experienced through ongoing institutionalisation for the purpose of profit or the use of children as a commodity in the orphanage tourism product. Recognition of these latter forms of exploitation are largely dependent on how domestic law interprets and applies the element of exploitation in its trafficking jurisprudence.

Orphanage trafficking largely occurs in developing nations where children may be subject to a range of vulnerabilities including poverty and a lack of access to medical, educational, and social services. Child finders, recruiters, and traffickers may recruit children into institutional care by offering families an opportunity for their child to access education, medical care, or better opportunities. Families accept these offers often believing their child will be attending an educational facility and that their life opportunities will be enhanced. In other instances, families may be duped or coerced into placing their children in institutional care.[21]

At this juncture, new documentation may be created for the child, including death certificates for parents or abandonment documentation, to identify them as an 'orphan'. This process is known as 'paper orphaning'.[22] This construction as an orphan means that their placement in care is able to be commodified through orphanage tourism (where people pay to visit or volunteer in an orphanage) and foreign aid funding. The orphan narrative and associated notion of vulnerability is then used to elicit the sympathy of tourists, volunteers and overseas donors to solicit funding. Orphanages have been documented as proliferating in tourist hot spots where there is no associated increase in

[19] Ibid art 3(a).
[20] Ibid art 3(d).
[21] Punaks and Feit (n 16).
[22] van Doore (n 3).

child vulnerability that might require higher rates of institutional care.[23] Once in the orphanage, children are sometimes kept in poor conditions, malnourished, and without proper healthcare or schooling in order to encourage donations and further funding from volunteers and visitors.[24] In some instances, children from orphanages are made to perform traditional dances and concerts for visitors and volunteers to raise money. There have been cases of children being sent out to beg for funds in bars at night and to hand out flyers promoting visits to the orphanage.[25]

In 2018, the United States Department of State Trafficking in Persons Report included a special interest topic on 'Child Institutionalization and Human Trafficking'[26] which acknowledged that children were being trafficked into orphanages for the purpose of exploitation by espousing that:

> Voluntourism not only has unintended consequences for the children, but also the profits made through volunteer-paid program fees or donations to orphanages from tourists incentivize nefarious orphanage owners to increase revenue by expanding child recruitment operations in order to open more facilities. These orphanages facilitate child trafficking rings by using false promises to recruit children and exploit them to profit from donations. This practice has been well-documented in several countries, including Nepal, Cambodia, and Haiti.[27]

As espoused in the report, the primary motivation driving orphanage trafficking is profit made from volunteer and visitor fees and donations. Such links between profit, the recruitment of children into institutional care, and an inappropriate over-reliance on child institutionalisation without due gatekeeping process have been reported in low and

[23] P Jane Reas, '"So, Child Protection, I'll Make a Quick Point of It Now": Broadening the Notion of Child Abuse in Volunteering Vacations in Siem Reap, Cambodia' (2015) 18(4) *Tourism Review International* 295.
[24] Better Volunteering Better Care, 'Collected Viewpoints on International Volunteering in Residential Care Centres: An Overview' (Report, 2014).
[25] UNICEF, *With the Best Intentions: A Study of Attitudes Towards Residential Care in Cambodia* (Report, UNICEF & Ministry of Social Affairs, Veterans and Youth Rehabilitation, Cambodia, 2011).
[26] United States Department of State, *Trafficking in Persons Report 2018* (Report, 2018) 22.
[27] Ibid.

middle income countries including Liberia,[28] Uganda,[29] Ghana,[30] Nepal,[31] Guatemala,[32] Haiti,[33] Cambodia,[34] Indonesia,[35] Botswana,[36] and South Africa,[37] as well as many other countries,[38] indicating that the enabling environment for orphanage trafficking is prevalent globally.

III ORPHANAGE TRAFFICKING, ORPHANAGE TOURISM, AND THE INSTITUTIONALISATION OF CHILDREN

It is important to delineate the differences between orphanage trafficking, orphanage tourism, and the institutional care of children. Some reports have intimated that either orphanage tourism or institutional care and modern slavery are synonymous.[39] This is not the case. As discussed above, orphanage trafficking is a form of modern slavery that has links to the orphanage industry and the broader issue of the inappropriate over-use of institutional care. However, it must be made clear that institutionalisation is not synonymous with modern slavery. Orphanage trafficking is a serious crime involving the exploitation of children and as such must be addressed via criminal law mechanisms. Because the over-use of institutional care has been regarded as a child protection or social welfare issue, potential criminal actions including the recruitment of children into orphanages for profit have not been examined as systemic breaches of criminal law.

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[28] Samantha Chaitkin et al, *Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems — Africa, Asia, Latin America* (Report, European Union, 2017).
[29] Hope Among, *Study on Legal Guardianship and Adoption Practices in Uganda* (Report, Ministry of Gender, Labour and Social Development and UNICEF, 2015).
[30] Kwabena Frimpong-Manso, 'Residential Care For Children in Ghana: Strengths and Challenges' (2016) *Global Perspectives* 172.
[31] Punaks and Feit (n 16).
[32] Red Latinoamericano de Acogimiento Familiar, *Children and Adolescents Without Parental Care in Latin America: Contexts, Causes and Consequences of Being Deprived of the Right to Family and Community Life* (Report, RELAF & SOS Children's Villages International, 2010).
[33] Mulheir and Cavanagh (n 13).
[34] UNICEF (n 26).
[35] Florence Martin and Tata Sudrajat, *Someone that Matters: The Quality of Care in Childcare Institutions in Indonesia* (Report, Save the Children, 2007).
[36] Kelly Virginia Phelan, 'Elephants, Orphans and HIV/AIDS: Examining the Voluntourist Experience in Botswana' (2015) 7(2) *Worldwide Hospitality and Tourism Themes* 127.
[37] Linda M Richter and Amy Norman, 'AIDS Orphan Tourism: A Threat to Young Children in Residential Care' (2010) 5(3) *Vulnerable Children and Youth Studies* 217.
[38] Better Volunteering Better Care (n 24).
[39] 'Australia Officially Recognises Orphanage Tourism as Modern Slavery', *Travel Weekly* (online, 30 November 2018) <http://www.travelweekly.com.au/article/australia-officially-recognises-orphanage-tourism-as-modern-slavery/>.

Orphanage tourism includes the 'donation of money and goods, attending performances, or volunteering on a short-term basis at orphanages as part of one's holiday'.[40] Orphanage tourism activities often comprise 'informal English practice, and can also include formal lessons, medical or other professional services, playing sports or games, participating in art or music activities or watching dance performances'.[41] This definition covers a wide range of activities, from short visits to orphanages to engage with the children; to structured activities held between tourists and orphans; to long term volunteer positions where tourists may stay onsite at the orphanage for a period of months. The demand for orphanage tourism is a driver for the recruitment and trafficking of children into orphanages. However, orphanage tourism is not a form of modern slavery, as has been reported in some instances.[42]

The use of institutional care as a first port of call for vulnerability has become prolific in some countries and poses a serious child protection issue. The inappropriate use of institutional care violates of a number of rights enshrined in the *Convention on the Rights of the Child.*[43] The issue of over-use of institutional care must be addressed through child protection and alternative care systems reforms and by securing time bound commitments to deinstitutionalisation from governments. These reforms should incorporate strategies to encourage foreign donor and volunteer sending countries and entities to divest from supporting institutional care. The United Nations *Guidelines for the Alternative Care for Children*[44] operate as an approved set of principles guiding 'desirable orientations for policy and practice'[45] for the alternative care of children for the 'protection and well-being of children who are deprived of parental care or who are at risk of being so'.[46] The purpose of the Guidelines is to 'support efforts to keep children in, or return them to, the care of their family or, failing this, to find another appropriate and

[40] Tess Guiney and Mary Mostafanezhad, 'The Political Economy of Orphanage Tourism in Cambodia' (2014) 15(2) *Tourist Studies* 132.
[41] Kathie Carpenter, 'Using Orphanage Spaces to Combat Envy and Stigma' (2014) 24(1) *Children, Youth and Environments* 124, 136.
[42] Ruby Jones, 'Campaign Against Orphanage Tourism Builds, As Second Global Agency Quits Business', *ABC News* (online, 8 November 2017) <https://www.abc.net.au/news/2017-11-08/campaign-against-orphanage-tourism-builds/9127950>.
[43] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*Convention on the Rights of the Child*').
[44] *United Nations Guidelines for the Alternative Care of Children*, UN Doc A/RES/64/142, (18 December 2009, adopted 24 February 2010) ('*Alternative Care Guidelines*').
[45] Ibid guideline 2.
[46] Ibid guideline 1.

permanent solution'.[47] The *Guidelines* provide a best-practice framework for preventing family separation,[48] and promote family reintegration where separation has already occurred.[49] They are not binding, and do not impose mandatory obligations on States. Enshrining the Guidelines in child protection legislation provides a robust child rights-based response to the over-use of institutional care for children which forms part of the enabling environment for orphanage trafficking.

It cannot be said that orphanage tourism and/or child institutionalisation are synonymous with either orphanage trafficking or modern slavery. It is very important that this distinction is made clear, as a lack of clarity risks inappropriate mechanisms being implemented to address each of the issues. In practice, due to the interwoven nature of this issue, criminal law mechanisms designed to combat orphanage trafficking cannot be unlinked from child protection reform processes which should include measures to address the potential harms of orphanage tourism.

IV IDENTIFYING ORPHANAGE TRAFFICKING AS MODERN SLAVERY: THE CASE OF AUSTRALIA

It has been reported that Australia is amongst the largest donor and volunteer sending country investing in overseas orphanages, particularly those in the South East Asian region.[50] A mapping report of Australia's contribution to residential care overseas found that orphanage volunteering and tourism is promoted and offered through university placements (comprising both volunteer placements and overseas internships for course credit), international volunteering and travel agencies, private and public school overseas trips, mission trips facilitated by churches or faith-based organizations, volunteer placements organised by Australian NGOs, corporate social responsibility programs, and general tourism.[51]

In 2017, a substantial number of submissions regarding how Australia contributes to 'orphanage trafficking' internationally were made to a Parliamentary Inquiry into

[47] Ibid guideline 2(a).
[48] Ibid guidelines 39–48.
[49] Ibid guideline 45.
[50] Christopher Knaus, 'The Race to Rescue Cambodian Children from Orphanages Exploiting Them for Profit', *The Guardian* (online, 19 August 2017) <https://www.theguardian.com/world/2017/aug/19/the-race-to-rescue-cambodian-children-from-orphanages-exploiting-them-for-profit>.
[51] Kathryn E van Doore, Laura Healy and Megan Jones, *Mapping Australia's Support for the Institutionalisation of Children Overseas* (Report, ReThink Orphanages, 2016) 4.

whether Australia should establish a Modern Slavery Act. As part of the Parliamentary Inquiry, the Committee heard extensive evidence from non-government organisations and academics pertaining to Australia's potential involvement in orphanage trafficking through the charity, tourism, education, and faith-based sectors.[52]

The final report of the Modern Slavery Inquiry, 'Hidden in Plain Sight', made significant recommendations with respect to orphanage trafficking.[53] On the basis of the evidence submitted, the Committee undertaking the Inquiry concluded that orphanage trafficking should be recognised as a form of modern slavery:

> The Committee agrees that orphanage trafficking should be recognised as a form of modern slavery in Australia's legislative and policy frameworks, and under the proposed Modern Slavery Act. The Committee agrees that this formal recognition would assist in raising awareness of orphanage trafficking and assist in the implementation of policies to combat it.[54]

Chapter Eight of the report made eleven recommendations concerning orphanage trafficking including advocating for awareness raising, funding stream reforms, support for divestment and transition of charity and other organisation's involvement in residential care institutions, a mechanism to register organisations operating institutional care for children in accordance with the *Convention on the Rights of the Child* and *United Nations Guidelines for the Alternative Care of Children*; it also recommended

[52] See, eg, ReThink Orphanages, Submission 23 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Cambodian Children's Trust, Submission 25 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Kathryn E van Doore, Submission 52 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; ACFID Child Rights Community of Practice, Submission 55 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Save the Children, Submission 97 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Andrea Nave and Forget Me Not, Submission 114 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia,* 2017; ACC international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017; Forget Me Not Nepal, The Himalayan Innovative Society, Adara Development, Submission 155 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017.
[53] *Hidden in Plain Sight* (n 10).
[54] Ibid 237 [8.45].

the introduction of offences under the potential *Modern Slavery Act*.[55] Pertinent to the criminalisation of orphanage trafficking, recommendation 43 provided:

> The Committee recommends that the Australian Government introduce offences and penalties for individuals, businesses, organisations and other entities that facilitate, enable, organise, benefit from, or profit from tourist visits to overseas residential institutions, and/or who donate to or fund overseas residential institutions, that do not operate in compliance with the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Alternative Care for Children and the proposed Australian Government register.[56]

As a result, Australia became the first government to consider legislating for orphanage trafficking as a form of modern slavery. However, the resulting *Modern Slavery Act 2018* (Cth) failed to realise the recommendations of the Joint Standing Committee in many respects, including recommendation 43. Whilst the Committee had recommended a robust modern slavery law, the Australian government instead passed an Act focused on supply chain reporting that did not incorporate offences.

The resulting *Modern Slavery Act 2018* (Cth) commenced on 1 January 2019. Section 4 of the Modern Slavery Act 2018 (Cth) states:

> *modern slavery* means conduct which would constitute:
>
> (a) an offence under Division 270 or 271 of the *Criminal Code*; or
>
> (b) an offence under either of those Divisions if the conduct took place in Australia; or
>
> (c) trafficking in persons, as defined in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, done at New York on 15 November 2000 ([2005] ATS 27); or

[55] Ibid.
[56] Ibid 267 [8.159].

> (d) the worst forms of child labour, as defined in Article 3 of the ILO Convention (No. 182) concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, done at Geneva on 17 June 1999 ([2007] ATS 38).

As can be seen, the definition of modern slavery in the Act does not elucidate the contexts in which exploitation occurs and there is no explicit reference to orphanage trafficking in the Act itself. However, the 'Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities' clarifies that 'the Act defines modern slavery as including eight types of serious exploitation' and identifies orphanage trafficking as falling into at least two types of exploitation: trafficking in persons,[57] and the worst forms of child labour.[58] Indeed, on the occasion of the passing of the Act by Parliament, the Honourable Senator Linda Reynolds CSC, the Assistant Minister for Home Affairs at the time, expressly noted that 'the passage of this Bill also means Australia is now the first nation to recognise orphanage trafficking as a form of modern slavery'.[59]

There are two ways that orphanage trafficking can be construed as falling within the definition of modern slavery for the purposes of the Act. The first is that orphanage trafficking can be regarded as falling within the definition of child trafficking found in article 3 of the *Trafficking Protocol* as specified in section 4(c) of the *Modern Slavery Act 2018* (Cth). This argument has been made in academic research.[60] The second is that orphanage trafficking may be regarded as falling under the existing sections of the *Criminal Code 1995* (Cth) regarding slavery and trafficking referred to in section 4(a) of the *Modern Slavery Act 2018* (Cth). The Explanatory Memorandum accompanying the Modern Slavery Bill 2018 (Cth) supports this interpretation by explicitly stating:

> The offences in Divisions 270 and 271 of the Criminal Code apply irrespective of the purpose for which a person is trafficked, or the industry or context in which they are exploited. For example, these

[57] Commonwealth of Australia, *Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities* (Legislative Guidance, 2019) 76.
[58] Ibid 78.
[59] Assistant Minister for Home Affairs Senator the Hon Linda Reynolds CSC (n 1).
[60] van Doore (n 3).

> offences could apply to exploitation in mining and agricultural contexts, as well as the trafficking and/or exploitation of children in orphanages.[61]

The result of orphanage trafficking being identified as a form of modern slavery means that for the purpose of the current *Modern Slavery Act 2018* (Cth), large businesses with a consolidated revenue of over AUD$100 million over a 12 month reporting period who have links to orphanages or institutional care in their operations or supply chains should report on how they are assessing and mitigating the risk of orphanage trafficking and child exploitation in orphanages. This is particularly pertinent for any large travel companies still offering orphanage tourism products or large corporations with charitable foundations that support orphanages. Although it is mandatory for reporting entities to prepare annual statements, there are no penalties for entities who fail to report.

For large tourism companies who facilitate orphanage tourism products, the associated *Commonwealth Modern Slavery Act 2018* Guidance for Reporting Entities provides a case study illustrating how tourism companies may be involved in orphanage trafficking:

> Everfree Travel is an Australian wholesale travel company that specialises in arranging overseas volunteering 'adventures' for students and young adults. Everfree's packages are sold by many of the large travel retailers in Australia. The most popular package Everfree offers is a 'volunteering experience' at an overseas orphanage. This involves participants taking part in short-term placements at the orphanage to provide 'social and emotional support' to children. The orphanage operators appear legitimate and claim fees paid by Everfree are directly used to support the children. Everfree has not taken any steps to verify this is the case. After several years, Everfree is approached by an NGO with evidence the orphanage is trafficking children and exploiting them in the orphanage, including for the purpose of orphanage tourism. The orphanage actively recruits children from poor communities, often 'purchasing' children from their families. The children are not permitted to have contact with their families or leave the facility and are regularly abused by staff. The children are forced to lie to volunteers about being orphaned or abandoned. Further investigation revealed that donations

[61] Explanatory Memorandum, Modern Slavery Bill 2018, 8 [50].

> from volunteers and fees paid by Everfree were pocketed by the orphanage operators.[62]

In the context of orphanage trafficking, the *Modern Slavery Act 2018* (Cth) requires reporting entities who have relationships with orphanages or residential care institutions to prepare a Modern Slavery Statement that describes the risks of orphanage trafficking in their operations and supply chains; describes the actions that the reporting entity has taken to assess and address these risks; describes how the reporting entity assesses the effectiveness of these actions; and describes how they have consulted with any entity they own or control.[63]

V RECOMMENDATIONS

Whilst the intended incorporation of orphanage trafficking for the purposes of modern slavery reporting is clear, whether orphanage trafficking could be prosecuted as an offence under the current *Criminal Code 1995* (Cth) provisions is not as straightforward. This is due to the construction of the clauses criminalising trafficking found in the Code. In this section, we make recommendations for how Australia can strengthen the response to orphanage trafficking via either a broadening of the present trafficking provisions, or alternatively, explicit criminalisation.

The offence of 'trafficking in children' is found in section 271.4 of the *Criminal Code 1995* (Cth) and reads as follows:

> 271.4 Offence of trafficking in children
>
> (1) A person (the *first person*) commits an offence of trafficking in children if:
>
> (a) the first person organises or facilitates the entry or proposed entry into Australia, or the receipt in Australia, of another person; and
>
> (b) the other person is under the age of 18; and

[62] Commonwealth of Australia (n 57) 12.
[63] Ibid 29.

> (c) in organising or facilitating that entry or proposed entry, or that receipt, the first person:
>
> (i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt; or
>
> (ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that entry or receipt.
>
> Penalty: Imprisonment for 25 years.
>
> (2) A person (the *first person*) commits an offence of trafficking in children if:
>
> (a) the first person organises or facilitates the exit or proposed exit from Australia of another person; and
>
> (b) the other person is under the age of 18; and
>
> (c) in organising or facilitating that exit or proposed exit, the first person:
>
> (i) intends that the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit; or
>
> (ii) is reckless as to whether the other person will be used to provide sexual services or will be otherwise exploited, either by the first person or another, after that exit.
>
> Penalty: Imprisonment for 25 years.

The jurisdiction for trafficking offences is extended extra-territorially for Australian residents and citizens by section 15.2 (extended geographical jurisdiction — category B) of the *Criminal Code 1995* (Cth). However, as can be seen above, the definition of trafficking in children for the purposes of the *Criminal Code 1995* (Cth) limits the crime

of trafficking in children to offences involving the 'entry or proposed entry to, or exit or proposed exit from' Australia.[64] This means that actual or proposed border crossing into or out of Australia is currently a required element of the offence of trafficking in children. As orphanage trafficking does not take place entering or exiting Australia, but rather in foreign jurisdictions, this precludes Australian offenders being able to be prosecuted under Australian law.

We suggest that there are two different ways to address this issue and ensure that orphanage trafficking can be prosecuted under Australian law. The first is to broaden the current definitional contours of the offence by removing the words 'entry or proposed entry to, or exit or proposed exit from' Australia in the relevant provisions. This would have the effect of enabling operation of the extraterritorial effect of the trafficking provisions such that Australian citizens, residents, or entities that commit the offence of orphanage trafficking in other jurisdictions are able to be prosecuted under Australian law. This would have the added benefit of also encompassing trafficking in persons offences in which Australian citizens, residents, and entities may be involved in other jurisdictions, which are not predicated on entering or exiting Australia, and which are therefore not able to be prosecuted under the existing provisions.

The second is to establish an explicit offence for orphanage trafficking in the *Criminal Code 1995* (Cth). This would see recommendation 43 of the 'Hidden in Plain Sight' Report enacted, cementing Australia's growing reputation as world leaders in addressing orphanage trafficking. We recommend that the proposed offences be included in the *Criminal Code 1995* (Cth) under Division 271 which currently provides for the offence of trafficking. The recommended inclusion of an offence for orphanage trafficking in the *Criminal Code 1995* (Cth) accords with the existing legislative framework on human trafficking providing a consistent criminal response to the offence. The term 'orphanage trafficking' is suggested as it succinctly encapsulates the offence as a form of trafficking. The offence of orphanage trafficking could be included as an additional form of trafficking in Division 271 in the *Criminal Code 1995* (Cth) with a tailored section as follows:

[64] *Criminal Code 1995* (Cth) s 271.4.

> Subdivision BC 271.8 Offence of orphanage trafficking in children
>
> A person commits an offence of orphanage trafficking in children if:
>
> (a) the first-mentioned person organises or facilitates the transportation of another person to an orphanage or institutional facility; and
>
> (b) the other person is under the age of 18; and
>
> (c) in organising or facilitating that transportation, the first-mentioned person:
>
> (i) intends that the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place; or
>
> (ii) is reckless as to whether the other person will be exploited, either by the first-mentioned person or another, during or following the transportation to that other place.
>
> Penalty: Imprisonment for 25 years.

It is suggested that the offences be given an extra-territorial application, modelled on section 273.2 of the *Criminal Code* (Extended geographical jurisdiction — Category C) which reads:[65]

> 273.2 Who can be prosecuted for an offence committed outside Australia
>
> A person must not be charged with an offence against this Division that the person allegedly committed outside Australia unless, at the time of the offence, the person was:
>
> (a) an Australian citizen; or
>
> (b) a resident of Australia; or

[65] *Criminal Code 1995* (Cth) s 273.2(a)–(d).

> (c) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
>
> (d) any other body corporate that carries on its activities principally in Australia.

This would apply to both Australian citizens and residents, but also include any incorporated bodies (such as charities or not for profit organisations) and any organisations that may be registered or incorporated overseas but have their principal place of activity in Australia in accordance with section 273.2(d). [66]

The recommendation for an explicit offence does not represent a unique innovation for Australia. Having recognised the issue of Australian tourists travelling internationally for the purpose of sexually abusing children, Australia legislated to criminalise child sex tourism implementing a similar framework in the *Criminal Code 1995* (Cth) in 2017.[67] Australia was the first country to legislate to allow a competent government authority to request that the Minister of Foreign Affairs and Trade refuse to issue, cancel, or order the surrender of a person's Australian passport if that person's name is entered on a child protection offender register of an Australian state or territory and has reporting obligations in connection with that entry.[68] As such, this recommendation for an explicit provision aligns with previous legislative action the Australian government has taken.

VI CONCLUSION

Australia's decision to regard orphanage trafficking as a form of modern slavery set a global precedent, not only for other countries looking to legislate against modern slavery, but also for countries with a high prevalence of children in institutional care. In identifying orphanage trafficking as a form of modern slavery, Australia has sought to address the demand drivers of orphanage trafficking by ensuring that reporting entities that have orphanages or residential care in their supply chains and operations are required to report on how they identify and mitigate the risks of orphanage trafficking. However, whilst the inclusion of orphanage trafficking as a form of reportable modern slavery is a commendable and proactive step, whether Australian citizens, residents, or

[66] *Criminal Code 1995 (Cth)* s 273.2(d).
[67] Ibid s 272.
[68] *Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017* (Cth).

entities that commit orphanage trafficking could be prosecuted under the trafficking in children provisions of the *Criminal Code 1995* (Cth) is doubtful. This is because the definitional contours of the offence of trafficking in children are limited to entry into or out of Australia. As such, Australian citizens, residents, or entities who commit orphanage trafficking in other jurisdictions presently have impunity under the trafficking provisions found in Australian law.

To rectify this, we argue that amendment is required to the trafficking provisions in Division 271 of the *Criminal Code 1995* (Cth). We provide two alternative mechanisms for ensuring that orphanage trafficking is able to be prosecuted under Australian law. The first mechanism is to remove the requirement for trafficking offences to either occur, or intend to occur, entering or exiting the Australian border. Removal of this requirement would broaden the offence of trafficking in persons to include trafficking offences occurring in foreign jurisdictions that are committed by Australian citizens, residents, and entities. The removal of this requirement would mean that orphanage trafficking is able to be prosecuted under the trafficking in children provision found in section 271.4 of the *Criminal Code 1995* (Cth).

The second proposed mechanism is to explicitly criminalise the offence of orphanage trafficking. This proposal is akin to the explicit criminalisation of child sex tourism found in the *Criminal Code 1995* (Cth) despite being just one form of child sexual exploitation. Explicit criminalisation has the potential to provide a clear pathway to the prosecution of Australian citizens, residents, and entities that commit the offence of orphanage trafficking. We posit that explicit criminalisation may have the added benefit of reducing the potential confusion regarding orphanage trafficking, orphanage tourism, and institutionalisation being regarded as synonymous by delineating orphanage trafficking as a criminal offence.

However, it would be remiss to believe that such an amendment would resolve the intersected issues of child institutionalisation, orphanage trafficking, and child exploitation entirely. It is clear that orphanage trafficking predominantly occurs in contexts where the over-use of institutionalisation is the first port of call as a means of addressing child vulnerability. As such, ensuring that orphanage trafficking can be prosecuted in a country such as Australia is a small but important part of addressing the

overlapping issues of child institutionalisation and child exploitation. Criminal law mechanisms, such as those addressing orphanage trafficking, must be coupled with social mechanisms for addressing child vulnerability to trafficking and exploitation to see significant impact.

REFERENCE LIST

A *Articles/Books/Reports*

Among, Hope, *Study on Legal Guardianship and Adoption Practices in Uganda* (Report, Ministry of Gender, Labour and Social Development and UNICEF, 2015)

Bales, Kevin, Bodean Hedwards and Bernard Silverman, *Modern Slavery Research: the UK Picture* (Report, Office of the Independent Anti-Slavery Commissioner and the University of Nottingham's Rights Lab, 2018)

Better Volunteering Better Care, *Collected Viewpoints on International Volunteering in Residential Care Centres: An Overview* (Report, 2014)

Bhoola, Urmila, 'Report of the Special Rapporteur on Contemporary Forms of Slavery Including its Causes and Consequences: Current and Emerging Forms of Slavery ' (2019) UN Doc A/HRC/42/44

Carpenter, Kathie, 'Using Orphanage Spaces to Combat Envy and Stigma' (2014) 24(1) *Children, Youth and Environments* 124

Chaitkin, Samantha, Nigel Cantwell, Chrissie Gale, Ian Milligan, Catherine Flagothier, Claire O'Kane, Graham Connelly, *Towards the Right Care for Children: Orientations for Reforming Alternative Care Systems – Africa, Asia, Latin America* (Report, European Union, 2017)

Cheney, Kristen and Karen Smith Rotabi, 'Addicted to Orphans: How the Global Orphan Industrial Complex Jeopardizes Local Child Protection Systems' in Kathrin Hörschelmann Christopher Harker, Tracey Skelton (ed), *Geographies of Children and Young People* (Springer, 2015) vol 11

Commonwealth of Australia, *Hidden in Plain Sight: An Inquiry into Establishing a Modern Slavery Act in Australia* (Report, Joint Standing Committee on Foreign Affairs Defence and Trade, 2017)

Csáky, Corinna, *Keeping children out of harmful institutions: Why we should be investing in family-based care* (Report, 2009)

Feit, Martin Punaks and Katie, *The Paradox of Orphanage Volunteering: Combating child trafficking through ethical voluntourism* (Report, Next Generation Nepal, 2014)

Frimpong-Manso, Kwabena, 'Residential Care For Children in Ghana: Strengths and Challenges' (2016) *Global Perspectives* 172

Guiney, Tess, '"Hug-an-orphan Vacations": "Love" and Emotion in Orphanage Tourism' (2018) 184(2) *The Geographical Journal* 125

Guiney, Tess and Mary Mostafanezhad, 'The political economy of orphanage tourism in Cambodia' (2014) 15(2) *Tourist Studies* 132

Lyneham, Samantha and Lachlan Facchini, 'Benevolent harm: Orphanages, voluntourism and child sexual exploitation in South-East Asia' (2019) (574) *Trends and Issues in Crime and Criminal Justice* 1

Martin, Florence and Tata Sudrajat, *Someone that Matters: The quality of care in childcare institutions in Indonesia* (Report, Save the Children, 2007)

Mulheir, Georgette and Mara Cavanagh, *Orphanage Enterpreneurs: The Trafficking of Haiti's Invisible Children* (Report, Lumos, 2016)

Nowak, Manfred, 'Report of the Independent Expert leading the United Nations Global Study on Children Deprived of Liberty' (2019) UN Doc A/74/136

Passas, Nikos et al, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (Legislative Guide, United Nations Office on Drugs and Crime, 2004)

Phelan, Kelly Virginia, 'Elephants, orphans and HIV/AIDS: Examining the Voluntourist Experience in Botswana' (2015) 7(2) *Worldwide Hospitality and Tourism Themes* 127

Punaks, Martin and Katie Feit, 'Orphanage voluntourism in Nepal and its links to the displacement and unnecessary institutionalisation of children' (2014) 1(2) *Institutionalised Children Explorations and Beyond* 179

Reas, P Jane, '"So, Child Protection, I'll Make a Quick Point of It Now": Broadening the Notion of Child Abuse in Volunteering Vacations in Siem Reap, Cambodia' (2015) 18(4) *Tourism Review International* 295

Red Latinoamericano de Acogimiento Familiar, *Children and Adolescents Without Parental Care in Latin America: Contexts, Causes and Consequences of Being Deprived of the Right to Family and Community Life* (Report, RELAF & SOS Children's Villages International, 2010)

Richter, Linda M and Amy Norman, 'AIDS orphan tourism: A threat to young children in residential care' (2010) 5(3) *Vulnerable Children and Youth Studies* 217

UNICEF, *With the Best intentions: A study of attitudes towards residential care in Cambodia* (Report, UNICEF & Ministry of Social Affairs, Veterans and Youth Rehabilitation, Cambodia, 2011)

United Nations, 'Guidelines for the Alternative Care of Children', (18 December 2009, adopted 24 February 2010) UN Doc A/RES/64/142

United States Department of State, *Trafficking in Persons Report 2018* (Report, 2018)

van Doore, Kathryn E, 'Paper Orphans: Exploring Child Trafficking for the Purpose of Orphanages' (2016) 24(2) *International Journal of Children's Rights* 378

van Doore, Kathryn E, Laura Healy and Megan Jones, *Mapping Australia's Support for the Institutionalisation of Children Overseas* (Report, ReThink Orphanages, 2016)

Vernaelde, Jamie, *Funding Haitian Orphanages at the Cost of Children's Rights* (Report, Lumos, 2017)

B *Legislation*

Criminal Code 1995 (Cth)

Modern Slavery Act 2018 (Cth)

Passports Legislation Amendment (Overseas Travel by Child Sex Offenders) Act 2017 (Cth)

C *Treaties*

Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990)

Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, opened for signature 15 November 2000, 2237 UNTS 319 (entered into force 25 December 2003)

D *Other*

ACC international, Submission 140 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

ACFID Child Rights Community of Practice, Submission 55 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

'Australia Officially Recognises Orphanage Tourism as Modern Slavery', *Travel Weekly* (online, 30 November 2018) <http://www.travelweekly.com.au/article/australia-officially-recognises-orphanage-tourism-as-modern-slavery/>

Cambodian Children's Trust, Submission 25 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

Commonwealth of Australia, 'Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities' (Legislative Guidance, 2019)

Explanatory Memorandum, Modern Slavery Bill 2018

Forget Me Not Nepal, The Himalayan Innovative Society, Adara Development, Submission 155 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

Jones, Ruby, 'Campaign Against Orphanage Tourism Builds, as Second Global Agency Quits Business', *ABC News* (online, 8 November 2017) <https://www.abc.net.au/news/2017-11-08/campaign-against-orphanage-tourism-builds/9127950>

Knaus, Christopher, 'The Race to Rescue Cambodian Children from Orphanages Exploiting them for Profit', *The Guardian* (online, 19 August 2017)

<https://www.theguardian.com/world/2017/aug/19/the-race-to-rescue-cambodian-children-from-orphanages-exploiting-them-for-profit>

Nave Andrea and Forget Me Not, Submission 114 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

ReThink Orphanages, Submission 23 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

Reynolds, Assistant Minister for Home Affairs Senator the Hon Linda, 'Modern Slavery Bill passes the Parliament' (Media Release, 30 November 2018) <https://minister.homeaffairs.gov.au/lindareynolds/Pages/modern-slavery-bill-passes-parliament.aspx>

Save the Children, Submission 97 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia*, 2017

van Doore, Kathryn E, Submission 52 to the Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry to establish a Modern Slavery Act in Australia,* 2017

THE INDIGNITY OF ABSTRACTION: DATAMINING AND AUTONOMY IN THE AGE OF DIRECT-TO-CONSUMER GENOMICS

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Direct-to-consumer genomics services such as 23AndMe and Ancestry.com promise to foster medical research and deepen personal connections through sharing information about the human genome. This article contextualises those promises by asking questions about dignity, the services, and the legal frameworks in which they operate — which are predicated on abstracting people as sets of genetic data. The commonality of that data among biological relatives means that individuals who gift a service with data about themselves are disregarding the autonomy of relatives who might not want to be genetically datamined. Law about such genomics should acknowledge Kant's wariness about abstracting people as a means to an end.

CONTENTS

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I INTRODUCTION

What is the nature of dignity in the era of recreational genomics, where individuals contribute data about themselves and biological relatives to global enterprises engaged in genomic data-mining? Does Australian and international law provide an adequate framework for affirmation of that dignity through protection of human rights? This article offers a perspective on the significance of dignity for recreational genomics and other population-scale genomic data-mining initiatives that elide autonomy and, in abstracting people as genomic profiles, improperly treat their data subjects as a lucrative means to an end.[1]

The article begins by providing an introduction to the recreational genomics sector. This sector is diverse but unevenly monitored. It features well-known global enterprises such as 23AndMe and Ancestry.com alongside an increasing number of less prominent businesses, many of which will exist only fleetingly, leaving unresolved issues about the disposal and custodianship of their data assets following the demise of the business. Some operate in ways that might be deemed fraudulent or unconscionable. The following paragraphs then discuss concerns regarding autonomy, reward, and abstraction. The article draws on Kant to critique claims about the benefit and potential harms of profit-centred genomic data mining. It concludes by discussing Australian privacy, health law, and consumer protection law in relation to recreational genomics marketing and practice, suggesting that a more equitable and respectful global regime is achievable.

II READING THE 'BOOK OF LIFE'

The past sixty years have brought growing recognition regarding the significance of genomics, particularly in the identification and understanding of the genetic code that is the basis of life in human animals, non-human animals, and other life forms. Governments, businesses, and not-for-profit entities are seeking to map, analyse and

[1] Bruce Baer Arnold and Wendy Bonython, 'Not As Good as Gold: Genomics, Data and Dignity' in Monique Mann, Kate Devitt and Angela Daly (eds), *Good Data* (Institute of Network Culture, 2019) 135; Kazimierz Krzysztofek, 'The Algorithmic Society: Digitarians of the World Unite', in Paul Kidd (ed), *European Visions for the Knowledge Age. A Quest for New Horizons in the Information Society* (Cheshire Henbury, 2007) 57.

(increasingly) manipulate what journalists have dubbed the 'book of life'.[2] That endeavour is based on awareness that some ailments or disabilities such as Down Syndrome, Haemophilia, or Huntington's Disease are predetermined by the genetics of the individual, while other conditions, such as predisposition to certain cancers, may have a more complex, multifactorial causal basis involving genetic variations and exposure to environmental or lifestyle factors. One consequence is that researchers and investors see a potential role for genomics in the early identification and treatment of illnesses, alongside visions of a highly-personalised and effective 'precision medicine' that tailors diagnostics and therapeutics to each individual in ways that bring together lifestyle guidance, pharmaceuticals and testing.[3]

Making sense of the book of life is facilitated by the accumulation and analysis of population-scale data about the genome, ailments, treatments, and behaviours. Understanding requires associating a map of an individual's genes and a population's genes with information about their health, occupations, consumption patterns, and so forth. Scale and association are thus profoundly important, raising questions about privacy, confidentiality, consent, discrimination, rent-seeking by patent holders, and other issues.

The genomics 'new frontier' has the potential for profound community benefit. It also has the potential, akin to other frontiers, to be an opportunistic and egregiously exploitative wild west. Such a market space is one in which human rights are disregarded and regulatory incapacity fails to address profit-seeking by corporations that exploit consumer naivety and new technologies across jurisdictional borders.

III RECREATIONAL GENOMICS

Decreasing costs in genomic analysis and popular excitement about genetic medicine, alongside a yearning for 'connectedness' through internet-based family history services,

[2] Elizabeth Pennisi, 'Finally, The Book of Life and Instructions for Navigating It' (2000) 288(5475) *Science* 2304; and Kean Birch, 'The Neoliberal Underpinnings of the Bioeconomy: The Ideological Discourses and Practices of Economic Competitiveness' (2006) 2(3) *Genomics, Society and Policy* 1.

[3] Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4(3) *Laws* 377. See generally Reza Mirnezami, Jeremy Nicholson and Ara Darzi, 'Preparing for Precision Medicine' (2012) 366(6) *New England Journal of Medicine* 489; Robert Williamson et al, *The Future of Precision Medicine in Australia: Report for the Australian Council of Learned Academies* (Australian Council of Learned Academies, 2018).

has fostered the emergence in the past decade of what have variously been dubbed direct-to-consumer genomics services, recreational genomics, personal genomics, or commercial genomics services.[4] Those services are based in a specific jurisdiction, typically the United States, but use the internet to market globally. They operate on a for-profit basis, alongside government initiatives that seek to map the human genome.[5] Examples of commercial enterprises include 23andMe,[6] FamilyTreeDNA,[7] and Ancestry.com.[8] Some originated as traditional genealogical services, bringing together information from consumers to build large-scale family histories.[9] Others were established expressly to gather genomic data for clinical or research purposes rather than to link an enthusiast with a distant uncle, Queen Elizabeth II, or Abraham Lincoln. Low regulatory thresholds (discussed below) and declining costs mean that the sector is vibrant, with the departure or takeover of numerous businesses over the past decade, and competition among enterprises that,[10] in contrast to the examples above, have not gained global brand recognition among consumers. Some services emphasise ancestral connection (including indicia of ethnicity);[11] others claim to provide predictive guidance

[4] International Human Genome Sequencing Consortium, 'Initial Sequencing and Analysis of the Human Genome' (2001) 409 *Nature* 860; Kevin Davies, *The $1,000 Genome: The Revolution in DNA Sequencing and the New Era of Personalized Medicine* (Simon and Schuster, 2010).
[5] James P Evans, 'Recreational Genomics; What's in it for You?' (2008) 10(10) *Genetics in Medicine* 709; Arnold and Bonython (n 1).
[6] '23andMe' *23andMe* (Web Page, 2019) <http://www.23andme.com>; Henri-Corto Stoeklé et al, '23andMe: A New Two-Sided Data-Banking Market Model' (2016) 17(1) *BMC Medical Ethics* 19.
[7] 'Family Tree DNA', *Family Tree DNA* (Web Page, 2019) <https://familytreedna.com>.
[8] 'DNA', *Ancestry* (Web Page, 2019) <https://www.ancestry.com/dna/>.
[9] Spencer Wells, *Deep Ancestry: Inside the Genographic Project* (National Geographic Books, 2006); Jennifer Wagner et al, 'Tilting at Windmills No Longer: A Data-Driven Discussion of DTC DNA Ancestry Tests' (2012) 14(6) *Genetics in Medicine* 586; Ugo Perego et al, 'The Science of Molecular Genealogy' (2005) 93(1) *National Genealogical Society Quarterly* 245.
[10] Examples are the takeover of Navigenics and DeCODE/DeCODEme (now part of WuXi NextCODE), which, as discussed in Michael Fortun, *Promising Genomics: Iceland and deCODE Genetics in a World of Speculation* (University of California Press, 2008), attracted attention for activity in Iceland. See Andelka M Phillips, 'Think Before You Click' (2015) 11(2) *The SciTech Lawyer* 1, for estimates of the number of enterprises.
[11] For an Australian perspective on 'ethnicity services' see Elizabeth Watts, Emma Kowal and Shaun Lehman, 'A DNA Test Says You've Got Indigenous Australian Ancestry. Now What?', *The Conversation* (online, 3 May 2018) <https://theconversation.com/a-dna-test-says-youve-got-indigenous-australian-ancestry-now-what-95785>; A US perspective is offered in Eric Beckenhauer, 'Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?' (2003) 56(1) *Stanford Law Review* 161; Troy Duster, 'Ancestry Testing and DNA: Uses, Limits–and Caveat Emptor' in Barbara Prainsack, Silke Schicktanz and Gabriele Werner-Felmayer (eds), *Genetics as Social Practice* (Routledge, 2016) 75.

regarding athletic or scholastic aptitudes,[12] and some function as overt/covert paternity test providers.[13]

The services are direct-to-consumer because data collection (provision of a swab from the individual's cheek) and analysis is not intermediated by a hospital, pathology service provider, medical practitioner, or other clinical/diagnostic body. Reference to 'recreational' reflects the marketing and, more subtly, the legal status of the services. Consumers pay a small fee to the service provider for a report on the genetic sample that they have provided, with the service using data from analysis of the sample to link the consumer to other people, or to provide guidance about supposed traits. In essence, the services are marketed as entertainment rather than as advice for which an Australian clinician would be legally liable.

IV WHAT'S YOURS IS MINE?

Dignitarian philosophers such as Kant, Nussbaum, Gewirth, and Foster have argued that we are individuals — to be respected in our own right regardless of our social status and familial relationships.[14] An under-recognised aspect of recreational genomics is that there is substantial commonality between the genetic makeup of an individual and that person's biological relatives. Access to genetic data about an individual, for example, allows inferences of varying accuracy about the data of their siblings.

Recreational genomics is founded on depth and breadth: collecting highly-detailed genomic data from as many people as possible. Marketing encourages people to contribute data on the basis that provision will be fun, provide connection, assist self-management and, altruistically, benefit science. This type of marketing elides questions about commonality and thereby erodes dignity. It does so because few people who contribute data to 23andMe or other services appear to recognise that they are implicitly

[12] *Ancestry* (Web Page, 2019) <https://www.ancestry.com>.
[13] 'Paternity Tests', *EasyDNA* (Webpage, 2019) <https://easydna.com.au/paternity-tests/>.
[14] See, eg, George Kateb, *Human Dignity* (Harvard University Press, 2011); Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006); Jürgen Habermas, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 44(4) *Metaphilosophy* 444; Susan Shell, 'Kant on Human Dignity', in Robert Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (University of Notre Dame Press, 2003) 53; Charles Foster, *Human Dignity in Bioethics and Law* (Bloomsbury, 2011).

contributing data about their relatives. It appears to be rare for a contributor to seek the consent of siblings, parents, offspring or other relatives.

Such disregard of the autonomy of relatives is a denial of agency and dignity.[15] It is, however, unsurprising given the low levels of understanding about genetics among many people, and the silence of service providers regarding consent on the part of relatives. It is also unsurprising given the paucity of law within and across jurisdictions about proprietorial rights in genomic data and body parts.[16] Recreational genomics service providers rely on traditional contract law, which has not been substantially challenged in Australia or elsewhere. It covers payment by the consumer for access to information that the service provider has generated, through processing the swab provided by the consumer. The service provider discards the biological sample embodied in that swab, thus stepping outside restrictions on biobanks (repositories of blood, organs, and other material), and adds the data derived from the sample to its genomic database.

The database as a whole, or sets of its component data, can be sold outright or licensed to a range of users such as pharmaceutical companies and insurers. What is entertainment for the contributor of a genomic sample is a treasure trove of data for life-sciences and associated businesses; data that can be mined on an ongoing, rather than one-off basis, to answer an indefinite number of questions. It is data that few fully-informed people would volunteer directly to an insurer, drug company, medical device developer, or similar entity, particularly in the absence of a meaningful regulatory framework that provides remedies for deception, unjust enrichment, and subversion of procedure relating to law enforcement. Gifting, as scholars such as Richard Titmuss have noted, [17] is ethically valuable and conducive to social solidarity, but altruism or

[15] Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988); Jerome Schneewind, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge University Press, 1998).
[16] Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4(3) *Laws* 377; Maureen Dorney, 'Moore v. The Regents of the University of California: Balancing the Need for Biotechnology Innovation Against the Right of Informed Consent' (1989) 5(2) *High Technology Law Journal* 333; Jasper Bovenberg, 'Inalienably Yours? The New Case for an Inalienable Property Right in Human Biological Material: Empowerment of Sample Donors or a Recipe for a Tragic Anti-Commons' (2004) 1 *SCRIPT-ed* 545.
[17] Richard Titmuss, *The Gift Relationship, From Human Blood to Social Policy* (Allen & Unwin, 1971); Iain McLean and Jo Poulton, 'Good Blood, Bad Blood, and the Market: The Gift Relationship Revisited' (1986) 6(4) *Journal of Public Policy* 431.

unawareness of intergenerational impacts does not erase concerns about susceptibility to exploitation.

Substantively informed consent in online transactions is increasingly seen by regulators, consumer advocates, and scholars as a foundation of trust in electronic commerce and regulatory legitimacy enshrined, for example, in the European Union's consumer protection framework and in the General Data Protection Regulation ('GDPR').[18] A salient concern regarding the marketing of recreational genomics, particularly across borders, is whether consumers are aware of what is being agreed to, in particular what a service provider — or the provider's unidentified partners — might do with data in the future. Terms and conditions for recreational genomics services do not allow contributors to revoke consent, and privity does not provide for intervention by a familial member who wishes to restrict a sibling or other relative from sharing data with a local or overseas service provider. There is increasing recognition that consumers may have difficulty exercising autonomy due to poor website design and maintenance.[19] Boilerplate, a text that is reused for separate applications and which does not require substantial alterations, may be unreadable by non-expert consumers.[20] Privacy statements may provide inadequate disclosure,[21] and, in the absence of effective action by regulators or a cause of action through a tort of privacy or confidentiality, may preclude meaningful remedies.

[18] Among case studies see Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) *The Antitrust Bulletin* 428; Iris van Ooijen and Helena Vrabec, 'Does the GDPR Enhance Consumers' Control Over Personal Data? An Analysis from a Behavioural Perspective' (2019) 42(1) *Journal of Consumer Policy* 91. Note also expressions of concern by the Australian Competition & Consumer Commission in its 2019 *Digital Platforms* inquiry report and Andelka M Phillips, 'All Your Data Will Be Held Against You: Secondary Use of Data from Personal Genomics and Wearable ' in (ed) Susan Sterett and Lee Walker, *Research Handbook on Law and Courts* (Elgar, 2019) 404.

[19] See, eg, Brett Frischmann and Evan Selinger, 'Engineering Humans with Contracts' (Cardozo Legal Studies Research Paper No 493, 2016).

[20] Andelka M Phillips, 'Reading the Fine Print When Buying Your Genetic Self Online: Direct-to-Consumer Genetic Testing Terms and Conditions' (2017) 36(3) *New Genetics and Society* 273; Uri Benoliel and Sschmuel Becher, 'The Duty to Read the Unreadable' (2019) 60 *Boston College Law Review* 2255. See generally Margaret Radin, *Boilerplate: Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013).

[21] James W Hazel and Christopher Slobogin, 'Who Knows What, and When? A Survey of the Privacy Policies Proffered by US Direct-to-Consumer Genetic Testing Companies' (2018) 28(35) *Cornell Journal of Law and Public Policy* 35; Andelka M Phillips, *Buying Your Self on the Internet: Wrap Contracts and Personal Genomics* (Edinburgh University Press, 2019).

Those inadequacies may have a utilitarian benefit for investors in services but, in eliding consent and disregarding autonomy, they disrespect individuals and thereby deny dignity in favour of data exploitation.

V PEOPLE ARE NOT JUST GENOMIC ARTEFACTS

Kant famously and persuasively argued that people are not merely means to an end.[22] The recreational genomics business model is predicated on abstracting people as sets of genetic data.[23] Compilations of such abstractions may benefit society as a whole through, for example, sustained profitability of pharmaceutical enterprises that have drawn on genomic data to develop novel diagnostics and therapeutics, or through lower public/private health costs and greater individual flourishing through the use of such products. In using a dignitarian lens we should, however, be wary about assuming that what is good for 23andMe, DNATribes and Pfizer is necessarily good for society.

A salient concern is that people are not merely genomic artefacts; individual profiles in a population-scale database of profiles are collected for data-mining from people who may not understand the consequences of participation, and who may not preempt any decision by relatives through unilateral contribution of a sample.

Another concern, consistent with controversy over the worldwide commercial exploitation of cells extracted from Henrietta Lacks, is the fairness of reward for recreation service participants and third parties such as relatives.[24] Those relatives are not necessarily given access to data derived from the service providers' analysis of the sample provided without their knowledge and/or express consent by a family member.[25] They have no legal standing to prevent that member from gifting the service provider with, what will be turned into, data about the family. Along with everyone who provides a sample for analysis, they will not receive remuneration from the service provider when

[22] Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in Mary Gregor (ed and trans), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 82, 92.
[23] Bruce Baer Arnold and Wendy Bonython, 'Not As Good as Gold: Genomics, Data and Dignity' in Monique Mann, Kate Devitt and Angela Daly (eds), *Good Data* (Institute of Network Culture, 2019) 135, 135.
[24] Rebecca Skloot, *The Immortal Life of Henrietta Lacks* (Crown, 2010).
[25] Wendy Bonython and Bruce Baer Arnold, 'Direct to Consumer Genetic Testing and the Libertarian Right to Test' (2018) 44(11) *Journal of Medical Ethics* 787, 788.

that enterprise sells a data set outright, or licences it for several hundred million dollars to a pharmaceutical corporation.[26]

Recreational genomics accordingly disregards self-determination and remuneration, with the reward for an individual's gifting of data that is common to that person, and the individual's relatives, being enjoyed by the investor in the service. There has been little discussion of those issues, in contrast to controversy in popular and specialist media about privacy aspects of recreational genomics. Privacy, conceptualised as freedom from inappropriate interference (including illicit or disproportionate observation), is a human right and a basis for individual and collective flourishing.[27] Recreational genomics services assemble data that relates to individuals. Such data is immutable, unlike a name, credit card number, nationality or gender (all of which can be changed). The services analyse some data themselves and, as noted above, provide data to other parties such as pharmaceutical companies. Subject to a participant's agreement, of which a family member might be unaware and which a family member cannot prevent, law does not prevent such commercial access.

That is potentially of concern, given the growing body of authoritative studies questioning assumptions about the effectiveness of 'deidentification' or 'anonymisation' — mechanisms conventionally perceived as protecting the privacy of individuals whose attributes have been abstracted through genomic or other profiling.[28] Non-commercial access is also of potential concern, evident in the controversy over claimed identification of the so-called Golden State serial killer through the warrantless use, by law enforcement officials, of genomic data on a 'family tree' site.[29] It is axiomatic that a private genomics

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[26] Megan Molteni, '23andMe's Pharma Deals Have Been the Plan All Along', *Wired* (online, 2018) <https://www.wired.com/story/23andme-glaxosmithkline-pharma-deal/>.

[27] See, eg, *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) art 12.

[28] Khaled El Emam et al, 'A Systematic Review of Re-Identification Attacks on Health Data' (2011) 6(12) *PloS one* e28071; Liangyuan Na et al, 'Feasibility of Reidentifying Individuals in Large National Physical Activity Data Sets From Which Protected Health Information Has Been Removed With Use of Machine Learning' (2018) 1(8) *JAMA Network Open* e186040; Luc Rocher, Julien M Hendrickx and Yves-Alexandre de Montjoye, 'Estimating the Success of Re-Identifications in Incomplete Datasets Using Generative Models' (2019) 10 *Nature Communications* 3069; Chris Culnane, Benjamin IP Rubinstein and Vanessa Teague, 'Health Data in an Open World', *Cornell University* (Web Page, 2017) <https://arxiv.org/abs/1712.05627>.

[29] Felix Ralph, 'Convictions Through Kith and Kin: Legal, Policy and Ethical Issues in DNA Familial Matching and Genetic Metadata' (2018) 29(3) *Current Issues in Criminal Justice* 243, 244; George M. Dery III, 'Can a Distant Relative Allow the Government Access to Your DNA? The Fourth Amendment Implications of Law Enforcement's Genealogical Search for the Golden State Killer and Other Genetic Genealogy Investigations' (2019) 10(2) *Hastings Science and Technology Law Journal* 103, 121

database does not have the legal basis of official criminal forensics databases, generated through the collection of DNA under authority of law from criminal offenders or suspects.[30]

One response to such concerns is that they are simply misplaced, with questions on how people are harmed when genomic data is used to catch serial killers, or when they do not receive income from commercial exploitation of genomic data provided through recreational genomics services? A salient answer is that use of genomic databases for law enforcement, alongside any other databases, must take place within a coherent and transparent legal framework: process and procedure is important, as is evident from the evolution of procedures such as warrants, which exist to protect citizens against abuse of civil liberties. In a liberal democratic state, just because a search is administratively convenient does not make it appropriate and legitimate. As discussed above, dignitarian theorists have encouraged gifting. However, principles underlying individual efforts to better society are that giving is both voluntary and informed (a potential problem where one family member silently gifts genomic data that is common to siblings and other biological relatives),[31] and not unconscionably exploited.

Consumers of course exercise their autonomy by providing data through loyalty programs involving supermarkets and utilities, without a direct reward when the program operator bundles data for on-sale to other entities. That practice is traditional but it raises questions, akin to those in recreational genomics, about informed choice, a bad bargain sufficient for regulatory intervention, and even deception.[32]

VI INADEQUATE UNDERSTANDING, INEFFECTIVE LAW

Regulators have been slow to address concerns regarding consumer protection aspects of recreational genomics. This is primarily because of uncertainties about responsibility and the inadequate resourcing of agencies such as the US Food and Drug Administration

[30] Sheldon Krimsky and Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, 2013); David Lazer (ed), *DNA and the Criminal Justice System: The Technology of Justice* (The MIT Press, 2004).
[31] This issue was discussed in Arnold and Bonython (n 1); Wendy Bonython and Bruce Baer Arnold, 'Direct to Consumer Genetic Testing and the Libertarian Right to Test' (2018) 44(11) *Journal of Medical Ethics* 787.
[32] One point of reference is the Australian Competition & Consumer Commission, *Customer Loyalty Schemes* (Draft Report, September 2019).

('FDA'), Australia's Therapeutic Goods Administration ('TGA') and the Australian Competition and Consumer Commission ('ACCC').[33]

The services do not neatly fall into traditional categories of pharmaceuticals and medical devices. Given the claimed recreational status, unmediated by a health practitioner and often marketed online across national boundaries (exacerbating regulatory incapacity given that gatekeepers concentrate on entities based in their own jurisdictions), consumers have been expected to engage in self-help in interpreting claims by service providers. This relates to the accuracy of data provided to an individual participant, or about the consequences of that data. Variation in data on an individual from competing service providers should result in caution. There have also been indications that data analysis from some of the less prominent services was bogus — a fraud addressable under consumer protection law.[34] In-house ethics frameworks regarding data analysis and sale are problematic,[35] largely because, in the absence of statutory requirements and effective monitoring by regulators with sufficient expertise, there is the potential for enterprises to obfuscate accountability and place corporate interests ahead of those of DNA contributors and third parties such as the biological relatives of those contributors

VII BUILDING A DIGNITARIAN FRAMEWORK

There are benefits from the development and extension of biobanks and of genomics databases on a population scale. Although precision medicine is often over-sold because it is misunderstood, or because of institutional imperatives in a competition for investment and research funding, there are potentially significant benefits from deepening our understanding of the 'book of life' and its interaction with factors like

[33] In Australia the TGA can draw on power under the *Therapeutic Goods Act 1989* (Cth) and *Customs Act 1901* (Cth) but in contrast to the FDA (which issued a 'desist' letter to 23andMe in 2013) has relied on a hands-off strategy. The ACCC, which has adopted a more activist and effective strategy in addressing claims regarding health goods and services, has scope under the *Competition & Consumer Act 2010* (Cth). For a view of resourcing, institutional culture, and prioritisation in the regulation of health products see Daniel Carpenter, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton University Press, 2014); Editorial Board, '80,000 Deaths. 2 Million Injuries. It's Time for a Reckoning on Medical Devices' *The New York Times* (New York, 4 May 2019).

[34] See Jorge Barrera and Tiffany Foxcroft, 'Heredity or Hoax?' *CBC News* (Webpage, 13 June 2018) <https://newsinteractives.cbc.ca/longform/dna-ancestry-test> regarding a report that canine samples were misinterpreted or misrepresented as indicating First Nations ancestry.

[35] Rachel Kalf, Rachel Bakker, and Cecile Janssens, 'Predictive Ability of Direct to Consumer Pharmacogenetic Testing: When is Lack of Evidence Really Lack of Evidence?' (2013) 14(4) *Pharmacogenomics* 341; Michael Murray, 'Why We Should Care About What You Get for 'Only $99' from a Personal Genomic Service' (2014) 160(7) *Annals of Internal Medicine* 507.

lifestyle.[36] Recreational genomics is not necessarily an evil and precluded by human rights law.

Law and public policy about such services should, however, clearly acknowledge Kant's wariness about abstracting people as a means to an end,[37] and more recent debate about the allocation of rewards. From those perspectives, dignity might be respected through law reform that addresses several concerns.

Dignity is a matter of self-respect and mutual respect. It is as much a matter of shared understanding as it is of values enforced by public/private law, such as the privacy tort most recently advocated by the Australian Competition and Consumer Commission.[38] Community education about genomics and its consequences is achievable, and may foster discussion within families about the legitimacy of an enthusiastic individual unilaterally sharing data about siblings or other relatives. That is a matter of self-determination.

Education might also foster understanding of data provided by the services to participants, with consumers having a sense that data needs to be interpreted, and that there is particular value in seeking guidance from expert clinicians.[39] In practice, law in Australia and other jurisdictions could go further in requiring service providers to expressly state that participants should seek guidance and that the data is not a medical service. Such express requirements would necessarily require further clarification of the law governing disclosure of the results of genetic testing, including for the purpose of obtaining insurance. Recognition of these services as medical services, with the authority such recognition entails, requires closer scrutiny by adequately resourced regulators and appropriate supervision by independent ethics bodies. Close involvement of clinicians in advising consumers about the status and interpretation of data from recreational genomics services will, of course, require effort by clinicians alongside a public education

[36] See, eg, Pekka Martikainen, Mel Bartley and Eero Lahelma, 'Psychosocial Determinants of Health in Social Epidemiology' (2002) 31(6) *International Journal of Epidemiology* 1091; Sheldon Cohen, 'Psychosocial Models of the Role of Social Support in the Etiology of Physical Disease' (1988) 7(3) *Health Psychology* 269.
[37] Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in Mary Gregor (ed and trans), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1997) 14, 31.
[38] Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019).
[39] Michael G Artin, Deborah Stiles, Krzysztof Kiryluk and Wendy K Chung, 'Cases in Precision Medicine: When Patients Present with Direct-to-Consumer Genetic Test Results' (2019) 170(9) *Annals of internal medicine* 643.

campaign. However, that effort does not impose a disproportionate or unduly large burden on the public/private health systems and, apart from its general educative value, is consistent with the sort of engagement needed as Australians embrace the promises of precision medicine.[40]

Law enforcement and other officials should be precluded from using community-based or other private genomic search tools and recreational genomics services as proxies for forensic databases are properly bounded by rules about access and authority. Bureaucratic convenience is not identical to legitimacy, a confusion evident in the controversy about unauthorised and creeping access to telecommunications metadata in Australia.[41]

Given the indelibility of genomic data, it is necessary to ensure best practice in relation to privacy both within and across borders. Earlier paragraphs have also noted the absence of a global monitoring regime regarding the performance of current and new entrants into the market for recreational genomics services. Australia's privacy framework is not systematic and regulators are under-resourced. More forward-looking law would address concerns regarding data breach, informed consent (a focus of development in the European Union) and use, or misuse, of data by third parties.

Finally, law might grapple with questions about the proprietorial rights that underpin the business models of the recreational genomics sector.[42] One response is to conceptualise the human genome as a data commons.[43] In practice, people might be encouraged to contribute samples to a not-for-profit repository that operates under independent

[40] See Michael Murray, 'Why We Should Care About What You Get for 'Only $99' From a Personal Genomic Service' (2014) 160(7) *Annals of Internal Medicine* 507; Heidi Howard and Pascal Borry, 'Personal Genome Testing: Do You Know What You are Buying?' (2009) 9(6-7) *The American Journal of Bioethics* 11; Amy L McGuire and Wylie Burke, 'Health System Implications of Direct-to-Consumer Personal Genome Testing' (2011) 14(1) *Public Health Genomics* 53.

[41] Rick Sarre, 'Metadata Retention as a Means of Combatting Terrorism and Organised Crime: A Perspective from Australia' (2017) 12(3) *Asian Journal of Criminology* 167; Nicolas P Suzor, Kylie M Pappalardo and Natalie McIntosh, 'The Passage of Australia's Data Retention Regime: National Security, Human Rights, and Media Scrutiny' (2017) 6(1) *Internet Policy Review* 1.

[42] Richard Spinello, 'Property Rights in Genetic Information' (2004) 6(1) *Ethics and Information Technology* 29; Alexandra George, 'The Difficulty of Defining 'Property'' (2005) 25(4) *Oxford Journal of Legal Studies* 793; Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4(3) *Laws* 377.

[43] Amy McGuire and Wylie Burke, 'An Unwelcome Side Effect of Direct to Consumer Personal Genome Testing: Raiding the Medical Commons' (2008) 300(22) *Journal of the American Medical Association* 2669; Wendy Bonython and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4(3) *Laws* 377.

supervision with a strict ethical code and is not captured by a private sector partner, taking on board lessons from the United Kingdom's flawed care data initiative.[44] Such contribution might foster community goods and — in embodying choice — offer a competitor to the commercial services. In a neoliberal economy, it is politically impractical to nationalise or close enterprises such as 23andMe or GoogleHealth but, in exercising our agency, we do not need to feed them. As a good global citizen, Australia might correspondingly agitate for an international genomics framework that has more bite than aspirational declarations by UNESCO.[45]

[44] Pam Carter, Graeme Laurie, and Mary Dixon-Woods, 'The Social Licence for Research: Why care.data Ran into Trouble' (2015) 41(5) *Journal of Medical Ethics* 404; Justin Keen et al, 'Big Data + Politics = Open Data: The Case of Health Care Data in England' (2013) 5(2) *Policy and Internet* 228; Jon Hoeksma, 'The NHS's Care.Data Scheme: What are the Risks to Privacy?' (2014) 348 *British Medical Journal* 1547; Paraskevas Vezyridis and Stephen Timmons, 'Understanding the Care.Data Conundrum: New Information Flows for Economic Growth' (2017) 4(1) *Big Data & Society* 1.

[45] Shawn Harmon, 'The Significance of UNESCO's Universal Declaration on the Human Genome and Human Rights' 2005) 2(1) *SCRIPT-ed* 20; David Winickoff and Larissa B Neumann, 'Towards a Social Contract for Genomics: Property and the Public in the "Biotrust" Model' (2005) 1(3) *Life Sciences Society and Policy* 8; Bastian Greshake Tzovaras and Athina Tzovara, 'The Personal Data is Political' in Jenny Krutzinna and Luciano Floridi (eds), *The Ethics of Medical Data Donation* (Springer, 2019) 133; Shawn Harmon, 'Ethical Rhetoric: Genomics and the Moral Content of UNESCO's 'Universal' Declarations' (2008) 34 *Journal of Medical Ethics* e24.

REFERENCE LIST

A *Article/Books/Reports*

Arnold, Bruce Baer and Wendy Bonython, 'Not As Good as Gold: Genomics, Data and Dignity' in Monique Mann, Kate Devitt and Angela Daly (eds), *Good Data* (Institute of Network Culture, 2019) 135

Artin, Michael G, Deborah Stiles, Krzysztof Kiryluk and Wendy K Chung 'Cases in Precision Medicine: When Patients Present With Direct-to-Consumer Genetic Test Results' (2019) 170(9) *Annals of Internal Medicine* 643

Australian Competition & Consumer Commission, *Customer Loyalty Schemes* (Draft Report, September 2019)

Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019)

Beckenhauer, Eric, 'Redefining Race: Can Genetic Testing Provide Biological Proof of Indian Ethnicity?' (2003) 56(1) *Stanford Law Review* 161

Benoliel, Uri and Sschmuel Becher, 'The Duty to Read the Unreadable' (2019) 60 *Boston College Law Review* 2255

Birch, Kean, 'The Neoliberal Underpinnings of the Bioeconomy: The Ideological Discourses and Practices of Economic Competitiveness' (2006) 2(3) *Genomics, Society and Policy* 1

Bonython, Wendy and Bruce Baer Arnold, 'Direct to consumer genetic testing and the libertarian right to test' (2018) 44(11) *Journal of Medical Ethics* 787

Bonython, Wendy and Bruce Baer Arnold, 'Privacy, Personhood, and Property in the Age of Genomics' (2015) 4(3) *Laws* 377

Botta, Marco and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma in the Facebook Odyssey' (2019) 64(3) *The Antitrust Bulletin* 428

Bovenberg, Jasper, 'Inalienably yours? The New Case for an Inalienable Property Right in Human Biological Material: Empowerment of Sample Donors or a Recipe for a Tragic Anti-Commons' (2004) 1 *SCRIPT-ed* 545

Carpenter, Daniel, *Reputation and Power: Organizational Image and Pharmaceutical Regulation at the FDA* (Princeton University Press, 2014)

Carter, Pam, Graeme T Laurie and Mary Dixon-Woods, 'The Social Licence for Research: Why care.data Ran into Trouble' (2015) 41(5) *Journal of Medical Ethics* 404

Cohen, Sheldon, 'Psychosocial Models of the Role of Social Support in the Etiology of Physical Disease' (1988) 7(3) *Health Psychology* 269

Davies, Kevin, *The $1,000 Genome: The Revolution in DNA Sequencing and the New Era of Personalized Medicine* (Simon and Schuster, 2010)

Dery, George M. III, 'Can a Distant Relative Allow the Government Access to Your DNA? The Fourth Amendment Implications of Law Enforcement's Genealogical Search for the Golden State Killer and Other Genetic Genealogy Investigations' (2019) 10(2) *Hastings Science and Technology Law Journal* 103

Dorney, Maureen, 'Moore v. The Regents of the University of California: Balancing The Need for Biotechnology Innovation Against the Right of Informed Consent' (1989) 5(2) *High Technology Law Journal* 333

Duster, Troy, 'Ancestry testing and DNA: uses, limits–and caveat emptor' in Barbara Prainsack, Silke Schicktanz and Gabriele Werner-Felmayer (eds), *Genetics as Social Practice* (Routledge, 2016) 75

Dworkin, Gerald, *The Theory and Practice of Autonomy* (Cambridge University Press, 1988)

El Emam, Khaled, Elizabeth Jonker, Luk Arbuckle and Bradley Malin, 'A Systematic Review of Re-Identification Attacks on Health Data' (2011) 6(12) *PLOS one* e28071

Evans, James P, 'Recreational Genomics; What's in it for You?' (2008) 10(10) *Genetics in Medicine* 709

Fortun, Michael, *Promising Genomics: Iceland and deCODE Genetics in a World of Speculation* (University of California Press, 2008)

Foster, Charles, *Human Dignity in Bioethics and Law* (Bloomsbury, 2011)

Frischmann. Brett, and Evan Selinger, 'Engineering Humans with Contracts' (Cardozo Legal Studies Research Paper No 493, 2016)

George, Alexandra, 'The Difficulty of Defining 'Property' (2005) 25(4) *Oxford Journal of Legal Studies* 793

Habermas, Jürgen, 'The Concept of Human Dignity and the Realistic Utopia of Human Rights' (2010) 44(4) *Metaphilosophy* 444

Harmon, Shawn, 'Ethical Rhetoric: Genomics and the Moral Content of UNESCO's 'Universal' Declarations' (2008) 34 *Journal of Medical Ethics* e24

Harmon, Shawn, 'The Significance of UNESCO's Universal Declaration on the Human Genome and Human Rights' (2005) 2(1) *SCRIPT-ed* 20

Hazel, James W and Christopher Slobogin, 'Who Knows What, and When?: A Survey of the Privacy Policies Proffered by US Direct-to-Consumer Genetic Testing Companies' (2018) 28(35) *Cornell Journal of Law and Public Policy* 35

Hoeksma, Jon, 'The NHS's care.data scheme: What are the risks to privacy?' (2014) 348 *British Medical Journal* g1547

Howard, Heidi, and Pascal Borry, 'Personal Genome Testing: Do You Know What You Are Buying?' (2009) 9(6-7) *The American Journal of Bioethics* 11

International Human Genome Sequencing Consortium, 'Initial Sequencing and Analysis of the Human Genome' (2001) 409 *Nature* 860

Kalf, Rachel, Rachel Bakker, and Cecile Janssens, 'Predictive Ability of Direct to Consumer Pharmacogenetic Testing: When is Lack of Evidence Really Lack of Evidence?' (2013) 14(4) *Pharmacogenomics* 341

Kant, Immanuel, 'Groundwork of the Metaphysics of Morals' in Mary Gregor (ed and trans), *Practical Philosophy: The Cambridge Edition of the Works of Immanuel Kant* (Cambridge University Press, 1996) 82

Kateb, George, *Human Dignity* (Harvard University Press, 2011)

Keen, Justin, Radu Calinescu, Richard Paige and John Rooksby, 'Big Data + Politics = Open data: The Case of Health Care Data in England' (2013) 5(2) *Policy and Internet* 228

Krimsky, Sheldon and Tania Simoncelli, *Genetic Justice: DNA Data Banks, Criminal Investigations, and Civil Liberties* (Columbia University Press, 2013)

Krzysztofek, Kazimierz, 'The Algorithmic Society: Digitarians of the World Unite', in Paul Kidd (ed) *European Visions for the Knowledge Age. A Quest for New Horizons in the Information Society* (Cheshire Henbury, 2007) 57

Lazer, David (ed), *DNA and the Criminal Justice System: The Technology of Justice* (The MIT Press, 2004)

Martikainen, Pekka, Mel Bartley and Eero Lahelma, 'Psychosocial Determinants of Health in Social Epidemiology' (2002) 31(6) *International Journal of Epidemiology* 1091

McGuire, Amy L and Wylie Burke, 'An Unwelcome Side Effect of Direct-to-Consumer Personal Genome Testing: Raiding the Medical Commons' (2008) 300(22) *Journal of the American Medical Association* 2669

McGuire, Amy L and Wylie Burke, 'Health System Implications of Direct-to-Consumer Personal Genome Testing' (2011) 14(1) *Public Health Genomics* 53

McLean, Iain and Jo Poulton, 'Good Blood, Bad Blood, and the Market: The Gift Relationship Revisited' (1986) 6(4) *Journal of Public Policy* 431

Mirnezami, Reza, Jeremy Nicholson, and Ara Darzi, 'Preparing for Precision Medicine' (2012) 366(6) *New England Journal of Medicine* 489

Murray, Michael, 'Why We Should Care About What You Get for 'Only $99' from a Personal Genomic Service' (2014) 160(7) *Annals of Internal Medicine* 507

Na, Liangyuan, Cong Yang, Chi-Cheng Lo, Fangyuan Zhao, Yoshimi Fukuoka and Anil Aswani, 'Feasibility of Reidentifying Individuals in Large National Physical Activity Data Sets From Which Protected Health Information Has Been Removed With Use of Machine Learning' (2018) 1(8) *JAMA Network Open* e186040

Nussbaum, Martha, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006)

Ooijen, Iris van and Helena U. Vrabec, 'Does the GDPR Enhance Consumers' Control Over Personal data? An Analysis from a Behavioural Perspective' (2019) 42(1) *Journal of Consumer Policy* 91

Pennisi, Elizabeth, 'Finally, The Book of Life and Instructions for Navigating It' (2000) 288(5475) *Science* 2304

Perego, Ugo, Ann Turner, Jayne E. Ekins, and Scott R. Woodward, 'The Science of Molecular Genealogy' (2005) 93(1) *National Genealogical Society Quarterly* 245

Phillips, Andelka M, 'All Your Data Will Be Held Against You: Secondary Use of Data from Personal Genomics and Wearable Tech' in (ed) Susan Sterett and Lee Walker, *Research Handbook on Law and Courts* (Elgar, 2019) 404

Phillips, Andelka M, *Buying Your Self on the Internet: Wrap Contracts and Personal Genomics* (Edinburgh University Press, 2019)

Phillips, Andelka M, 'Reading the Fine Print When Buying Your Genetic Self Online: Direct-to-Consumer Genetic Testing Terms and Conditions' (2017) 36(3) *New Genetics and Society* 273

Phillips, Andelka M, 'Think Before You Click' (2015) 11(2) *The SciTech Lawyer* 1

Radin, Margaret, *Boilerplate: Fine Print, Vanishing Rights and the Rule of Law* (Princeton University Press, 2013)

Ralph, Felix, 'Convictions Through Kith and Kin: Legal, Policy and Ethical Issues in DNA Familial Matching and Genetic Metadata' (2018) 29(3) *Current Issues in Criminal Justice* 243

Rocher, Luc, Julien M Hendrickx, and Yves-Alexandre de Montjoye, 'Estimating the success of re-identifications in incomplete datasets using generative models' (2019) 10(1) *Nature Communications* 3069

Sarre, Rick, 'Metadata Retention as a Means of Combatting Terrorism and Organised Crime: A Perspective from Australia' (2017) 12(3) *Asian Journal of Criminology* 167

Schneewind, Jerome, *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge University Press, 1998)

Shell, Susan, 'Kant on Human Dignity', in Robert Kraynak and Glenn Tinder (eds), *In Defense of Human Dignity: Essays for Our Times* (University of Notre Dame Press, 2003) 53

Skloot, Rebecca, *The Immortal Life of Henrietta Lacks* (Crown, 2010)

Spinello, Richard, 'Property Rights in Genetic Information' (2004) 6(1) *Ethics and Information Technology* 29

Stoeklé, Henri-Corto, Marie-France Mamzer-Bruneel, Guillaume Vogt and Christian Hervé, '23andMe: A New Two-Sided Data-Banking Market Model' (2016) 17(1) *BMC Medical Ethics* 19

Suzor Nicolas P, Kylie M Pappalardo and Natalie McIntosh, 'The Passage of Australia's Data Retention Regime: National Security, Human Rights, and Media Scrutiny' (2017) 6(1) *Internet Policy Review* 1

Titmuss, Richard, *The Gift Relationship, From Human Blood to Social Policy* (Allen & Unwin, 1971)

Tzovaras, Bastian Greshake and Athina Tzovara, 'The Personal Data is Political' in Jenny Krutzinna and Luciano Floridi (eds), *The Ethics of Medical Data Donation* (Springer, 2019) 133

Vezyridis, Paraskevas and Stephen Timmons, 'Understanding the care.data Conundrum: New Information Flows for Economic Growth' (2017) 4(1) *Big Data & Society* 1

Wagner, Jennifer, Jill D Cooper, Rene Sterling and Charmaine D Royal, 'Tilting at Windmills No Longer: A Data-Driven Discussion of DTC DNA Ancestry Tests' (2012) 14(6) *Genetics in Medicine* 586

Wells, Spencer, *Deep Ancestry: Inside the Genographic Project* (National Geographic Books, 2006)

Williamson, Robert, Warwick Anderson, Stephen Duckett, Ian Frazer, Carrie Hillyard, Emma Kowal, John Mattick, Catriona McLean, Kathryn North and Adrian Turner, *The Future of Precision Medicine in Australia: Report for the Australian Council of Learned Academies* (Australian Council of Learned Academies, 2018)

Winickoff, David and Larissa B. Neumann, 'Towards a Social Contract for Genomics: Property and the Public in the "Biotrust" Model' (2005) 1(3) *Life Sciences Society and Policy* 8

B *Legislation*

Competition & Consumer Act 2010 (Cth)

Customs Act 1901 (Cth)

Therapeutic Goods Act 1989 (Cth)

C *Treaties*

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948)

D *Other*

Ancestry (Web Page, 2019) <https://www.ancestry.com>

Barrera, Jorge and Foxcroft, Tiffany, 'Heredity or Hoax?', *CBC News* (Webpage, 13 June 2018) <https://newsinteractives.cbc.ca/longform/dna-ancestry-test>

Culnane, Chris, Rubinstein, Benjamin IP, and Teague, Vanessa, 'Health Data in an Open World' *Cornell University* (Webpage, 2017) <https://arxiv.org/abs/1712.05627>

'DNA', *Ancestry* (Web Page, 2019) <https://www.ancestry.com/dna/>

Editorial Board, '80,000 Deaths. 2 Million Injuries. It's Time for a Reckoning on Medical Devices' *The New York Times* (online, 4 May 2019)

'Family Tree DNA', *Family Tree DNA* (Web Page, 2019) <https://familytreedna.com>

Molteni, Megan, '23andMe's Pharma Deals Have Been the Plan All Along', *Wired* (online, 2018) <https://www.wired.com/story/23andme-glaxosmithkline-pharma-deal/>

'Paternity Tests', *EasyDNA* (Webpage, 2019) <https://easydna.com.au/paternity-tests/>

Watts, Elizabeth, Emma Kowal and Shaun Lehman, 'A DNA Test Says You've Got Indigenous Australian Ancestry. Now What?' *The Conversation* (online, 3 May 2018) <https://theconversation.com/a-dna-test-says-youve-got-indigenous-australian-ancestry-now-what-95785>

'23andMe' *23andMe* (Web Page, 2019) <http://www.23andme.com>

'DIVORCE WITH DIGNITY' AS A JUSTIFICATION FOR PUBLICATION RESTRICTIONS ON PROCEEDINGS UNDER THE *FAMILY LAW ACT 1975* (CTH) IN AN ERA OF LITIGANT SELF-PUBLICATION

GEORGINA DIMOPOULOS*

Upon its enactment, the Family Law Act 1975 *(Cth) closed the Family Court of Australia to the general public and imposed a total prohibition on the publication of proceedings. Such privacy protection, together with the advent of 'no-fault' divorce, were intended to serve the objective of 'divorce with dignity' by ridding divorce of its stigma which had made it a public spectacle and prime media fodder. Subsequent legislative amendments opened the Family Court to the media and permitted the publication of non-identifying accounts of proceedings. In their current form, the publication restrictions imposed by section 121 of the* Family Law Act 1975 *(Cth) prohibit the publication or dissemination of identifying details of family law proceedings. Adopting a personhood account of privacy, this paper asks whether the privacy protection embodied by section 121 remains justifiable in terms of human dignity, in light of litigants self-publishing details of their family law litigation on digital and social media platforms. It considers how the balance between privacy and free speech should be struck in these circumstances and explains how online self-publication by litigants may violate privacy as well as be an affront to dignity. The paper argues that, notwithstanding the privacy paradox, section 121 can still be justified by 'divorce with dignity' to which the* Family Law Act 1975 *(Cth) aspired but should be redrafted to make explicit that it captures litigant self-publication on digital and social media.*

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CONTENTS

I INTRODUCTION

Upon its enactment, the *Family Law Act 1975* (Cth) ('the Act') placed a presumptive weight on privacy by closing the Family Court of Australia to the general public, along with imposing a total prohibition on the publication of proceedings. These privacy measures were intended to serve the objective of 'divorce with dignity' to which the Act aspired. Subsequent legislative amendments opened the Family Court to the media and the public, permitting the publication of non-identifying accounts of proceedings. In their current form, the publication restrictions imposed by section 121 of the Act prohibit the publication or dissemination of an account of family law proceedings that could identify a party, witness, or other person associated with the proceedings.

The underlying rationale for imposing publication restrictions on family law proceedings — to uphold the dignity of separating spouses and their children, by shielding them from the harms of mainstream media publication — has been challenged by the 'privacy paradox' permeating contemporary liberal societies. People now insist upon the protection of their privacy yet freely divulge intimate details of their lives on a multitude of digital and social media platforms. As a Family Court judge has duly noted, 'the Facebook and Twitter generation … seems to horde information about other people and other things as much as they share information about themselves'.[1] Crucially, I ask: is the privacy protection offered by section 121 of the Act still justifiable in terms of human dignity in the contemporary media and communications environment?

To answer this question, I begin with an overview of the meaning and value of the broad and contested notion of privacy (Part II). I elaborate on the argument that the value of privacy inheres in protecting human dignity, which features in 'personhood' accounts of privacy. I then adopt a personhood account to explain the impetus for the introduction of privacy protection for litigants in proceedings under the Act (Part III). I highlight the indignity which previously attended divorce proceedings, stemming from the social and moral stigma attached to fault-based divorce, which made it a public spectacle that encouraged salacious media coverage. With this historical understanding, I challenge the 'divorce with dignity' justification for publication restrictions in section 121 of the Act in light of the 'privacy paradox' afflicting Australian family law (Part IV).

I argue that section 121 of the Act is out of step with a phenomenon that the drafters of that provision clearly did not anticipate: litigants (and sometimes their children) self-publishing details of their family law litigation online. Litigant self-publication invokes the fraught task of balancing privacy and free speech. While section 121 has been held to capture self-publication on social media platforms,[2] I submit that the provision should be redrafted to make this explicit.[3] In developing this argument, I respond to two criticisms of the personhood account of privacy.

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[1] *Gaylard & Cain* [2012] FMCAfam 501 (30 May 2012) [85].

[2] *Sloan & Stephenson* [2011] FMCAfam 771 (9 February 2011) [52]: 'Section 121 specifically refers to publication in a newspaper or periodical, or by radio broadcast, television, or other electronic means. That would clearly capture Facebook, My Space, Twitter and any other social networking site.'

[3] In support of this argument, see Sharon Rodrick and Adiva Sifris, 'The Reach and Efficacy of s 121 of the Family Law Act' (2017) 7(1) *Family Law Review* 30, 53; Australian Law Reform Commission (ALRC), *Family*

The first criticism is that the personhood account is silent on how to balance free speech interests — which can also be justified in terms of protecting and promoting human dignity — against privacy interests in circumstances of litigant self-publication. I argue that the nature of family law proceedings (particularly those involving children) weighs in favour of privacy protection in the form of restrictions on publication, even where it might be considered to violate the free speech interests of litigants who desire to self-publish. The second criticism to which I respond is that the personhood account of privacy fails to identify when a privacy violation would amount to an indignity, in circumstances where litigants themselves share the intimacies of their private lives online. I explain that legitimate privacy interests are at stake even when one voluntarily discloses and shares information about his or her family law proceedings online. I suggest that litigant self-publication may constitute both a privacy violation and an indignity to both the litigant himself or herself (in regards to control over the information that is published) and to other participants in those proceedings (in terms of knowledge of or consent to the publication).

Notwithstanding the conceptual and practical challenges posed by litigant self-publication to 'divorce with dignity' as a justification for the value of privacy in proceedings under the Act, I conclude that the privacy protection embodied by section 121 must be strengthened. To do otherwise — that is, to maintain the *status quo*, or more radically, to do away with the publication restrictions on family law proceedings — would swing the pendulum in favour of free speech. This would enable the media dragon that preyed on litigants and their children prior to the enactment of the Family Law Act (albeit in a different form) to again rear its voyeuristic head. Given the realities of contemporary family law litigation, to ignore the perils of social media publication would indeed amount to an affront to the dignity of those involved.

Law for the Future — An Inquiry into the Family Law System (Report No 135, March 2019), 441-2 [14.73], [14.75]–14.76] and submissions cited therein.

II THE MEANING AND VALUE OF PRIVACY

Privacy is often labelled as an 'umbrella term', capturing a broad range of interests.[4] Some theories endeavour to explain privacy's meaning through a single defining feature. The most enduring and influential of these accounts include: the right to be let alone;[5] secrecy;[6] limited access to the self;[7] control over information;[8] intimacy;[9] and personhood.[10] Recent privacy law scholarship has emphasised theories which position social context as pivotal to understanding, defining, and justifying privacy.[11] A minority of scholars has argued against an independent right to privacy.[12]

The widespread disagreement about 'privacy' as a concept emanates from disagreements about the values that privacy serves and how those values are conceptualised. Consequentialist approaches view privacy as instrumental to something which is assumed or known to be valuable. The value of privacy lies, for instance, in its ability to foster intimate relationships,[13] to enable individual autonomy,[14] to protect human

[4] Judith Wagner DeCew, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997) 13; Daniel Solove, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477, 486; Annabelle Lever, *On Privacy* (Routledge, 2012) 4, 7.

[5] Samuel Warren and Louis Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193, 193, 195 (citation omitted).

[6] Sissela Bok, *Secrecy: On the Ethics of Concealment and Revelation* (Vintage Books, 1983) 11; Sidney Jourard, 'Some Psychological Aspects of Privacy' (1966) 31(2) *Law and Contemporary Problems* 307, 307.

[7] Ruth Gavison, 'Privacy and the Limits of Law' (1980) 89(3) *Yale Law Journal* 421, 423; Hyman Gross, 'The Concept of Privacy' (1967) 42(1) *New York University Law Review* 34, 35–36.

[8] Alan Westin, *Privacy and Freedom* (Atheneum, 1967) 7; Arthur Miller, *The Assault on Privacy: Computers, Data Banks and Dossiers* (University of Michigan Press, 1971) 25; Jerry Kang, 'Information Privacy in Cyberspace Transactions' (1998) 50(1) Sta*nford Law Review* 1193, 1205; Charles Fried, 'Privacy' (1968) 77(3) *Yale Law Journal* 475, 482.

[9] Julie Inness, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992) 56; Robert Gerstein, 'Intimacy and Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 265, 265, 270-71.

[10] Stanley Benn, 'Privacy, Freedom and Respect for Persons' in Schoeman (n 9) 223, 228-9; Jeffrey Reiman, 'Privacy, Intimacy and Personhood' (1976) 6(1) *Philosophy and Public Affairs* 26, 37.

[11] Daniel Solove, 'Conceptualizing Privacy' (2002) 90(1) *California Law Review* 1088; Solove, 'A Taxonomy of Privacy' (n 4); Helen Nissenbaum, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010).

[12] See Judith Jarvis Thomson, 'The Right to Privacy' (1975) 4(4) *Philosophy and Public Affairs* 295, 306, 312-13: Thomson argues that privacy is a 'cluster of rights' and is 'derivative' of other, more fundamental rights, particularly property rights and rights over the person, and so should be reduced to these other rights.

[13] James Rachels, 'Why Privacy is Important' (1975) 4(4) *Philosophy and Public Affairs* 323, 326; Fried (n 8) 477–8.

[14] Beate Rossler, *The Value of Privacy* (Polity, 2005) 1, 75; Joseph Kupfer, 'Privacy, Autonomy and Self-Concept' (1987) 24(1) *American Philosophical Quarterly* 81, 81.

dignity,[15] and to facilitate the effective functioning of democratic governments.[16] Privacy is worthy of protection for its beneficial consequences. By contrast, deontological approaches treat privacy as inherently or intrinsically valuable; privacy derives its value for what it 'is', rather than what it 'does'.[17] The instrumental and intrinsic values of privacy are not necessarily mutually exclusive. Indeed, the claim that privacy is valuable for the protection of human dignity is defensible on both consequentialist grounds (dignity is valuable because it maximises the individual's capacity to construct and act upon his or her own set of values and life goals in pursuit of the good life)[18] and deontological grounds (dignity is an end in itself, valued for its own sake).[19] In this paper, I adopt a personhood account of privacy to elucidate and critique the justification offered by the original drafters of the Act for the privacy measures introduced — namely, that privacy's value inheres in respect for human dignity.

A *Privacy as Personhood and Respect for Human Dignity*

Human dignity as a justification for privacy's value is a common feature of 'personhood' accounts of privacy: the protection of 'those attributes of an individual which are irreducible to his [or her] selfhood'.[20] Privacy, on such accounts, serves to shield individuals from conduct that is 'demeaning to individuality' and 'an affront to personal dignity'.[21] In their seminal article which formulated privacy as the 'right to be let alone', Samuel Warren and Louis Brandeis wrote that the principle of 'an inviolate personality' underscored the right to privacy.[22] Ferdinand Schoeman described a 'specific privacy interest, connected in a profound way with the recognition of human moral character'.[23] A right to privacy, on this understanding, is a moral right, possessed by all humans by

[15] Edward Bloustein, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39(1) *New York University Law Review* 962, 973–74.
[16] Priscilla Regan, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press, 1995) 225-27.
[17] Lever (n 4) 17. See, for example, Katrin Schatz Byford, 'Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment' (1998) 24(1) *Rutgers Computer and Technology Law Journal* 1, 6 (privacy has an 'inherently positive value'); Benn (n 10) 243; Inness (n 9) 95.
[18] Eric Mitnick, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006) 21; David Cummiskey, 'Dignity, Contractualism and Consequentialism' (2008) 20(4) *Utilitas* 383, 383; Philip Pettit, 'Consequentialism and Respect for Persons' (1989) 100 *Ethics* 116, 120, 124.
[19] See Bloustein (n 15) 973-74; Benn (n 10) 229.
[20] Professor Paul Freund, quoted in J Braxton Craven Jr, 'Personhood: The Right to Be Let Alone' (1976) 4 *Duke Law Journal* 699, 702 (n 16).
[21] Bloustein (n 15) 973.
[22] Warren and Brandeis (n 5) 205.
[23] Ferdinand Schoeman, 'Privacy: Philosophical Dimensions of the Literature' in Schoeman (n 9) 1, 14.

virtue of their shared humanity.[24] It protects an individual's 'interest in becoming, being, and remaining a person'.[25] In the United States, the conceptualisation of privacy as personhood has found concrete expression as a legal right in Supreme Court constitutional cases regarding family decision-making in matters of reproductive control.[26]

The essence of the privacy-dignity nexus in liberal societies is that the 'very essence of personal freedom and dignity' is the individual's ability to control access to (certain aspects of) himself or herself.[27] The liberal concept of privacy is constructed around three domains,[28] which are predicated on an ideological separation of life into seemingly opposite spheres of 'private' and 'public' responsibilities and activities. The spatial domain of privacy covers personal space and relationships, selective access to certain areas, as well as the intimate and the family. The informational domain encompasses an individual's ability to control and access information about himself or herself. The decisional domain protects an individual's ability to make decisions which contribute to defining his or her identity, free from the interference of other individuals or the state.[29] It creates an area for choices, the development of 'plans of life'[30] and a sense of self. Through its three domains, privacy delineates the realms required to protect human dignity and the inviolability of the person.[31] Each domain of privacy serves the value of human dignity in different ways, by regulating access to the individual; by regulating the selective withholding and disclosure of information by, and about, the individual; and by protecting the individual's capacity to make decisions, behave, take action, and pursue a way of life of his or her choosing.

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[24] Fried (n 8) 478 (privacy is one of the 'basic rights in persons, rights to which all are entitled equally, by virtue of their status as persons').
[25] Reiman (n 10) 44.
[26] See *Griswold v Connecticut,* 381 US 479 (1965); *Eisenstadt v Baird*, 405 US 438 (1972); *Roe v Wade* 410 US 113 (1973). In *Planned Parenthood v Casey*, 505 US 833, 851 (1992), the Supreme Court explained that the constitutional right to privacy protected 'matters … involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy … At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood where they formed under compulsion of the State'.
[27] Bloustein (n 15) 973.
[28] DeCew (n 4) 75–8; Anita Allen, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988) 15; Rossler (n 14) 9; Kang (n 8) 1202-03.
[29] DeCew (n 4) 77–8.
[30] John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 407–15, §63.
[31] Rossler (n 14) 70.

According to Edward Bloustein, 'our Western culture defines individuality as including the right to be free from certain types of intrusions'.[32] However, in my view, personhood is not merely a negative freedom — the absence of unwanted intrusion and interference — but also a positive freedom, in the sense of an individual having the 'capacity to choose his or her own roles and identities, and to rethink those choices'.[33] Privacy in liberal societies is valuable and necessary for both freedom *from* intervention by the state and other individuals; and freedom *to* forge a life plan and fulfil that plan in pursuit of a rewarding life.[34] Stanley Benn's personhood conception of privacy refers to 'respect for someone as a person, as a chooser'.[35] On Benn's view, this implies respect for the individual as 'one engaged on a kind of self-creative enterprise, which could be disrupted, distorted, or frustrated even by so limited an intrusion as watching'.[36] The notion of self-presentation illustrates the active role that individuals play in constructing their social identity, by acting so as to be seen by others in the way they want to be seen.[37] So the clandestine observation of an individual — the classic 'Peeping Tom' — would amount to a violation of privacy, even in the absence of any actual harm to the individual being observed, because it would be an affront to the individual's dignity.[38] Both secret observation (Peeping Tom) and known or obvious, yet unwanted, observation of an individual (such as by others reading an account of the individual's family law proceedings in a newspaper or on the internet) would, on the personhood account, violate the individual's privacy and also his or her dignity. They would do so by fundamentally altering the conditions in which the individual acts and makes choices.[39] Understood thus, human dignity has an integral connection with human agency, and the ability of individuals to exercise free will. Privacy justified in terms of human dignity does indeed overlap with autonomy and liberty,[40] yet they remain distinct concepts and justifications for privacy's value.

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[32] Bloustein (n 15) 973.
[33] Helen Reece, *Divorcing Responsibly* (Hart Publishing, 2003) 13.
[34] Rossler (n 14) 44.
[35] Benn (n 10) 242. For an analysis of the notion of respect for persons as an ethical principle, see Stephen D Hudson, 'The Nature of Respect' (1980) 6(1) *Social Theory and Practice* 69.
[36] Benn (n 10) 242.
[37] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989) 15–16.
[38] Benn (n 10) 228-30.
[39] Reimann (n 10) 37.
[40] DeCew (n 4) 44; Michael Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996) 93.

A distinction must also be drawn between a dignity interest and a reputation interest. Some judges have identified a connection between dignity and reputation, conceptualising reputation as part of the individual's inherent or innate dignity.[41] However, Robert Post has noted that 'it is not immediately clear how reputation, which is social and public, and which resides in the "common or general estimate of a person," can possibly affect the "essential dignity" of a person's "private personality"'.[42] Post adds that a 'gulf' separates reputation and dignity, as well as the 'the private and public aspects of the self'.[43] A case that illuminates the distinction between the two interests well is *Bonome v Kaysen*.[44]

In *Bonome*, Joseph Bonome, the ex-partner of prominent author Susanna Kaysen (of *Girl, Interrupted* fame), brought an action against Kaysen and the publisher of Kaysen's memoir, *The Camera My Mother Gave Me*, alleging an invasion of privacy. Bonome's complaint arose out of several passages from Kaysen's memoir, which recounted details of the intimate relationship between the two. Kaysen's memoir did not refer to Bonome by name and changed details of his life (such as his occupation and place of origin). However, following publication, Bonome discovered that many of his friends and family members had read the memoir and understood that the portrayal of 'the boyfriend' therein depicted him. Muse J accepted that 'undoubtedly, the information revealed was of an intensely intimate and personal nature' and 'lay at the core of the most intimate and highly personal sphere of one's life', describing as it did, in at times graphic detail, the sexual relationship between Bonome and Kaysen.[45] The exposure of this information violated Bonome's dignity, by revealing what Daniel Solove has called 'certain physical and emotional attributes … that people view as deeply primordial',[46] which caused Bonome to suffer 'severe personal humiliation'.[47] The information disclosed about Bonome in Kaysen's memoir (albeit not identifying him by name) simultaneously offended Bonome's reputation interest, in that it revealed information about Bonome that

[41] See, for example, *Hill v Church of Scientology* (1995) 126 DLR (4th) 129, 162-3 (Cory J); *Reynolds v Times Newspapers* [2001] 2 AC 127, 201 (Lord Nicholls of Birkenhead).
[42] Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(1) *California Law Review* 691, 708 (citation omitted).
[43] Ibid.
[44] 17 Mass L Rep 695 (2004).
[45] Ibid 4.
[46] Solove, 'A Taxonomy of Privacy' (n 4) 536.
[47] *Bonome v Kaysen*, 17 Mass L Rep 695 (2004) 2.

was used by others to judge his character — in particular, the depiction of Bonome as 'being emotionally unavailable and insensitive to Kaysen's condition [severe vaginal pain]' and 'the suggestion that he raped her'.[48] The Court found that Bonome's reputation had been 'severely damaged among a substantial percentage of his clients and acquaintances'.[49] The intimate, embarrassing details that Kaysen revealed in her memoir about her relationship with Bonome thus adversely impacted both Bonome's dignity (affecting his subjective sense of self) and his reputation (the 'public' aspect of the self, causing him to lose friends and clients).

Personhood accounts of privacy have been labelled insufficient or problematic for their reductive nature (to say that privacy is inherently valuable by equating it with human dignity makes a separate theory of privacy redundant),[50] and for their lack of clarity regarding the concepts of 'personhood' and 'dignity'.[51] Another challenge is that the dignity justification for privacy's value is silent on how to accommodate or balance competing rights or interests — in particular, free speech — which can also be justified in terms of protecting and promoting human dignity.[52] An additional criticism of personhood accounts of privacy is that they are vague about when a privacy violation would be an indignity, and which privacy protections are required to preserve human dignity.[53] I respond to these criticisms in Part IV below through an analysis of the privacy paradox afflicting contemporary family law proceedings. But first, I adopt the aforementioned personhood account of privacy to elucidate the 'divorce with dignity' justification for privacy's value in the development of the Act.

[48] Ibid 4.
[49] Ibid 2. See also Benn (n 10) 226, who refers to 'publishing details of someone's sex life and ruining his career'.
[50] Rossler (n 14) 71.
[51] Solove, 'Conceptualizing Privacy' (n 11) 1118; Post (n 42) 715. See also Dieter Grimm, Alexandra Kemmerer and Christoph Mollers (eds), *Human Dignity in Context: Explorations of a Contested Concept* (Hart, 2018).
[52] Mark Tunick, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media* (Routledge, 2014) 57.
[53] Ibid 56–7; Daniel Solove, *Understanding Privacy* (Harvard University Press, 2008) 85–6; Eugene Volokh, 'Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You' (2000) 52(1) *Stanford Law Review* 1, 53; Gavison (n 7) 438. Ruth Gavison has argued that an individual's dignity may be affronted in ways other than by violating the individual's privacy. She gives as examples begging and selling one's body in order to survive.

III NO-FAULT DIVORCE, NO MORE SALACIOUS STORIES – PROMOTING 'DIVORCE WITH DIGNITY' WITH THE *FAMILY LAW ACT 1975* (CTH)

The regulation of media publication of proceedings under the Act was directed to protecting family law litigants and their children from the humiliation, indignities, and tarnished reputations that arose in divorce proceedings in the state courts prior to its enactment. In this Part, I contextualise the justification articulated by the original drafters of the legislation for two legal mechanisms that sought to protect litigant privacy: restrictions on access to the Family Court and a total prohibition on the publication of its proceedings.

A *The Public Spectacle of Divorce prior to the* Family Law Act 1975 *(Cth)*

Prior to the enactment of the Act, the social and moral stigma attached to fault-based divorce made divorce a public spectacle: media reports of adultery, cruelty, and desertion, replete with 'gory details', thrived.[54] State courts exercising family law jurisdiction had a symbiotic relationship with the mainstream press,[55] as the 'disgrace of publicity' was intended to act as a deterrent to divorce and to have a 'salutary effect' on family life,[56] upholding the sanctity of marriage as a significant social institution. The absence of privacy reflected public policy goals of family law to deter misconduct in marriage through 'punishment, stigma and public shaming' of 'blameworthy' spouses.[57] The punitive purpose of fault-based divorce was thus for the 'guilty' party to think less of himself or herself when contemplating how he or she was perceived by others.[58]

Separating spouses were degraded by having their lives exposed to public view. On the personhood account of privacy, the damage was 'to an individual's self-respect in being made a public spectacle'.[59] For separating spouses to seek the legal termination of their marriage was to have information about them — such as details of their sexual

[54] Shurlee Swain, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012) 11.
[55] Deborah Cohen, *Family Secrets: Shame and Privacy in Modern Britain* (Oxford University Press, 2013) 45. See also Lisa Waller and Kristy Hess, 'The Pillory Effect: Media, the Courts and the Punitive Role of Public Shaming in Australia' (2001) 16(3) *Media and Arts Law Review* 229, 237.
[56] Cohen (n 55) 39. See also Gail Savage, 'Erotic Stories and Public Decency: Newspaper Reporting of Divorce Proceedings in England' (1998) 41(2) *Historical Journal* 511.
[57] John Dewar and Stephen Parker, 'English Family Law since World War II: From Status to Chaos' in Sandford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) 123, 126.
[58] James David Velleman, 'The Genesis of Shame' (2001) 30(1) *Philosophy and Public Affairs* 27, 28.
[59] Bloustein (n 15) 981.

behaviours and drinking habits — disclosed to a broad, undefined audience, which was unlikely to align with how the parties sought to present themselves to other known or even unknown individuals. An aim of some family law reform advocates was to eliminate this unsavoury aspect of divorce proceedings by 'tak[ing] away the dreadful stories'.[60] The genesis of privacy protection lay in the fundamental philosophical shift in family law which occurred with the introduction of the Act. This legislation was a response to Australia's changing social mores, including increasing urbanisation and industrialisation, the growing number of married women entering the paid workforce, and the diminishing role of religion in society.[61] Also influential were the lessening stigma of de facto relationships and 'illegitimate' births amidst a sexual revolution.[62] Public sentiment largely favoured ridding existing divorce laws, which were described as 'archaic, unrealistic, cruel, and so completely at variance with modern thought',[63] of matrimonial fault. The Act sought to transform a punitive, fault-based divorce regime and thereby rid divorce of its public shame and stigma.

B *Overcoming Indignity Through Closed Courts and Prohibition on Publication of Proceedings*

Then Commonwealth Attorney-General, Lionel Murphy, had aspired that the Act would offer a solution to problems arising from marriage breakdown that was 'compatible with the dignity of the individual'.[64] Parliamentary debates over the Family Law Bill stressed that the inquiry into fault under the existing family law legislation, the *Matrimonial Causes Act 1959* (Cth), involved 'indignity and humiliation' to the parties. By contrast, a 'good' divorce law would remove the provisions 'that crush the human dignity of those who face the courts in sorrow of marriage dissolution'.[65] Dignity in this context invoked the value

[60] Swain (n 54) 11-12, 85.
[61] For a detailed overview of the changes in society that provided an impetus for the reforms introduced by the *Family Law Act 1975* (Cth), see Leonie Star, *Counsel of Perfection: The Family Court of Australia (Oxford University Press, 1996)* 51–71. See also Elizabeth Evatt, 'Foreword' in Henry Finlay, *To Have, But Not To Hold: A History of Attitudes to Marriage and Divorce in Australia, 1858–1975* (Federation Press, 2005) viii-ix.
[62] Helen Rhoades and Shurlee Swain, 'A Bold Experiment? Reflections on the Early History of the Family Court' (2011) 22 *Australian Family Lawyer* 1, 2.
[63] Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974, 2017 (Petition, Family Law Bill).
[64] Commonwealth, *Parliamentary Debates*, Senate, 1 August 1974, 760 (Lionel Murphy, Attorney-General). See also Star (n 61) 137; Lawrie Moloney, 'Lionel Murphy and the Dignified Divorce: Of Dreams and Data' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 245, 245–48, 255–56.
[65] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 1975, 182 (Phillip Lynch); Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1975, 928 (Ralph Hunt).

of privacy to the 'core self'[66] and privacy protection was considered vital because it demonstrated that family law litigants deserved respect during an emotionally fraught period of their lives. Many shared the view that '[p]eople should have the right to go through this unfortunate, sad, depressing, dismal business of divorce … with a maximum degree of privacy and the retention of such dignity as they may possibly hope to retain in the circumstances'.[67] This view echoed Bloustein's argument that an individual whose thoughts, desires, and 'private' realms of life are exposed to public scrutiny 'has been deprived of his [or her] individuality and human dignity'.[68] Henceforth, the aspiration for 'divorce with dignity' became something of a mantra for the promotion of the Act.

To this end, the Act abolished the various fault-based matrimonial offences as grounds for divorce and replaced these with a single, no-fault ground: irretrievable breakdown of the marriage evidenced by 12 months' separation.[69] This ground would, according to legislators, introduce a significant feature into Australian family law, namely, that 'adult people should be given the credit and the dignity of being able to make decisions for themselves'.[70] The Act also dramatically altered the media's traditional role in relation to court proceedings. Section 97 provided that proceedings in the Family Court of Australia, or in another court exercising jurisdiction under the Act, shall be heard in closed court. Section 121 imposed a total prohibition on the publication of any statement or report that proceedings had been instituted under the Family Law Act, and any account of evidence given or other particulars in proceedings. These two prohibitions — no public access and no publication — reflected Bloustein's understanding that '[p]hysical intrusion upon a private life and publicity concerning intimate affairs are simply two different ways of affronting individuality and human dignity'.[71] These provisions were a legislative pronouncement that relationship breakdown, while previously 'the preserve of public morality'[72] and a matter of public shame, was now a private process deserving of respect, in which the media and the general public had no legitimate interest. Sections 97 and 121

[66] Westin (n 8) 32.
[67] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1385 (Bill Graham).
[68] Bloustein (n 15) 1003.
[69] *Family Law Act 1975* (Cth) ss 48, 49(2). For a more detailed overview of the history of legislative change in Australian family law, including the advent of the *Family Law Act 1975* (Cth), and the underlying policy of its provisions, see Kep Enderby, 'The *Family Law Act*: Background to the legislation' (1975) 1(1) *University of New South Wales Law Journal* 10.
[70] Commonwealth, *Parliamentary Debates*, Senate, 19 May 1975, 2419 (Kep Enderby).
[71] Bloustein (n 15) 982.
[72] Elizabeth S Scott, 'Rehabilitating Liberalism in Modern Divorce Law' (1994) 2 *Utah Law Review* 687, 706.

served to maintain the dignity of separating spouses by restricting — and indeed eliminating — publicity, which would otherwise make them a public spectacle. This subversion of open justice signalled a major shift in what society regarded as both an invasion of privacy and an affront to dignity.

The Act was subsequently amended by the *Family Law Amendment Act 1983* (Cth) to provide for proceedings to be held in open court. Privacy remained the prerogative of separating spouses, while secrecy — which had manifested itself most notably with the closure of the Family Court — was considered destructive, particularly for the Court's integrity.[73] The reporting restrictions imposed by section 121 now permitted the publication of reports of family law proceedings, provided that participants were not identified. The amendments made to sections 97 and 121 struck what legislators considered to be a 'fair balance between the conflicting, but equally valid, needs for public scrutiny of courts and for personal privacy' in this 'delicate area' of personal relationships.[74] In its current form, section 121 of the Act prohibits the publication or dissemination of an account of family law proceedings that could identify a party, witness, or other person associated with the proceedings. Section 121 relevantly provides:

> (1) A person who publishes in a newspaper or periodical publication, by radio broadcast or television, or by any other electronic means, or otherwise disseminates to the public or to a section of the public by any means, any account of any proceedings, or of any part of any proceedings, under this Act that identifies:
>
> (a) a party to the proceedings;
>
> (b) a person who is related to, or associated with, a party to the proceedings or is, or is alleged to be, in any other way concerned in the matter to which the proceedings relate; or
>
> (c) a witness in the proceedings;

[73] Swain (n 54) viii, 85-6; Star (n 61) 138; John Fogarty, 'Thirty Years of Change' (2006) 18 *Australian Family Lawyer* 4, 7; Peter Nygh, 'Publicity and the Family Court' (1998) 12 *Australian Journal of Family Law* 1, 1.
[74] Commonwealth, *Parliamentary Debates*, Senate, 20 October 1981, 1373–74 (Peter Durack).

> is guilty of an offence punishable, upon conviction by imprisonment for a period not exceeding one year.[75]

The term 'other electronic means' was inserted into sub-section 121(1) in 2000,[76] intended to capture 'all forms of electronic means in order to cover current forms of dissemination of information'.[77] Sub-section 121(3) lists the particulars sufficient to 'identify' a person for the purposes of violating the publication restrictions imposed by that section.[78]

Neither the original drafters of section 121 of the Act, nor those who subsequently amended that provision, anticipated the phenomenon of litigants (and sometimes their children) self-publishing details of their own involvement in family law proceedings on digital and social media platforms. Technological developments have transformed the issue of *whether* individuals involved in family law proceedings should be known and identified, into one of *how* individuals involved in those proceedings are known and identified — by whom, to whom, how, and for what purpose they are made visible.[79] In light of this phenomenon, can it still be said that the value of privacy for family law litigants lies in promoting 'divorce with dignity'? I grapple with this question in Part IV and argue that the publication restrictions in section 121 of the Act remain justifiable in terms of human dignity — notwithstanding the privacy paradox.

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[75] Section 121(2) of the Family Law Act contains a further prohibition: 'A person who, except as permitted by the applicable Rules of Court … publishes in a newspaper or periodical publication, by radio broadcast or television or by other electronic means, or otherwise disseminates to the public or to a section of the public by any means (otherwise than by the display of a notice in the premises of the court), a list of proceedings under this Act, identified by reference to the names of the parties to the proceedings, that are to be dealt with by a court commits an offence punishable, upon conviction by imprisonment for a period not exceeding one year.' Prosecutions for breach of section 121 are extremely rare, with only seven such prosecutions completed since that provision was enacted: see ALRC (n 3) 437 [14.57].

[76] *Family Law Amendment Act 2000* (Cth) s 100. 'Electronic means' is defined in section 121(11) of the Family Law Act.

[77] Explanatory Memorandum, Family Law Amendment Bill *1999* (Cth) item 100.

[78] These particulars include the person's: name, title, pseudonym or alias; address of residence or work; physical description or dress style; any employment, occupation or profession engaged in; relationship to identified relatives or association with identified friends or acquaintances; recreational interests or political, philosophical or religious beliefs or interests; and any property interests. In a written or televised account of proceedings, a picture of the person is a particular considered sufficient to identify the person; as is the inclusion of the person's voice in a broadcast or televised account of proceedings: see *Family Law Act 1975* (Cth) s 121(3).

[79] David Phillips, 'From Privacy to Visibility: Context, Identity, and Power in Ubiquitous Computing Environments' (2005) 23(2) *Social Text* 95, 95.

IV MAKING SENSE OF THE PRIVACY PARADOX: LITIGANT SELF-PUBLICATION IN PROCEEDINGS UNDER THE *FAMILY LAW ACT 1975* (CTH)

Thus far in this paper, I have offered a conceptualisation of privacy in terms of personhood in the context of Australian family law and have explained its value as protecting and upholding human dignity. I have shown that protecting the privacy of separating spouses and their children — initially through the closure of the Family Court to the general public and by prohibiting publication of accounts of its proceedings — was intended to serve the objective of 'divorce with dignity' to which the Act aspired. In this Part, I argue that the privacy paradox permeating contemporary liberal societies has challenged the underlying rationale for protecting the privacy interests of litigants in proceedings under the Act. This paradox enlivens two criticisms of the personhood account of privacy noted in Part II: first, that it does not satisfactorily accommodate competing interests such as free speech; secondly, that identifying when a privacy violation will amount to an indignity, and the form of privacy protection required to preserve human dignity, are problematic. I now turn to respond to these criticisms. I propose some factors that may be used to balance free speech and privacy in the context of litigant self-publication on social media in family law proceedings and suggest that privacy should outweigh free speech in these circumstances. I also propose two ways in which online self-publication by litigants about their family law proceedings can violate privacy and be an affront to dignity. In doing so, I advance the argument that the publication restrictions imposed by section 121 of the Act may appear difficult to reconcile with the phenomenon of litigant self-publication, but those publication restrictions can still be justified in terms of human dignity. I also argue, from a practical perspective, that section 121 should be redrafted to make explicit that the provision captures litigants who self-publish details of their own litigation on social media.

A *The Privacy Paradox: Demanding both Privacy and Publicity*

The rapid development of digital and social media technologies has threatened to disrupt, and in many instances has disrupted, settled expectations of audience segregation and of 'public' and 'private' realms of life. As Daniel Solove has noted, 'our activities often take

place in the twilight between public and private'.[80] Individuals now act in contexts where there are ambiguous social practices (such as with social media sites) or in which established social practices are disturbed (such as the nature of exposure in 'public'). Litigant self-publication illustrates what has been described as the 'privacy paradox' permeating contemporary liberal societies.[81] People now insist upon the protection of their privacy, yet freely divulge intimate details of their lives on digital and social media which facilitate the free and ongoing availability of information. In the words of an unattributed 'meme' that appeared recently on my Facebook news feed: 'People used to keep diaries, and got mad when anyone read them. Now we post stuff online, and get mad when people don't read it'. Jill Lepore has described the privacy paradox as

> [a] … culture obsessed, at once, with being seen and with being hidden, a world in which the only thing more cherished than privacy is publicity. In this world, we chronicle our lives on Facebook while demanding the latest and best form of privacy protection … so that no one can violate the selves we have so entirely contrived to expose.[82]

Australian family law is experiencing this privacy paradox too, particularly in proceedings under Part VII of the Act which deals with children's matters, including the making of parenting orders. In some cases, parents have self-published details of their family law proceedings online (in *prima facie* breach of section 121)[83] and in others, they have sought permission from the Family Court to publish or to restrain publication by the other parent.[84] Parents have also sought to procure publication of accounts of their litigation in mainstream media outlets.[85] Judges have made orders restraining parents

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[80] Daniel Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007) 166.

[81] See Patricia A Norberg, Daniel R Horne and David A Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors' (2007) 41(1) *The Journal of Consumer Affairs* 100.

[82] Jill Lepore, 'The Prism: Privacy in an Age of Publicity', *New Yorker* (online, 24 June 2013) <https://www.newyorker.com/magazine/2013/06/24/the-prism>. See also Robert Carey and Jacquelyn Burkell, 'A Heuristics Approach to Understanding Privacy-Protecting Behaviours in Digital Social Environments' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 65, 67–8; Nissenbaum (n 11) 104–05; Cohen (n 55) xv, xviii, 252.

[83] For example, *Lackey & Mae* [2013] FMCAfam 284 (4 April 2013); *Xuarez & Vitela* [2012] FamCA 574 (25 July 2012); *Prentice & Bellas* [2012] FamCA 108 (24 February 2012); *Ellershaw & Survant* [2013] FamCA 510 (9 July 2013); *Longford v Byrne* [2015] FCCA 2504 (28 August 2015).

[84] For example, *Seaward & MacDuff (No 4)* [2012] FamCA 1147 (19 October 2012).

[85] For example, *Denny & Purdy* [2009] FamCA 547 (26 June 2009); *Samuels & Errington (No 2)* [2007] FamCA 507 (5 June 2007); *Love & Shillington (No 2) [*2007] FamCA 566 (5 April 2007); *G & B* [2007] FamCA 343 (20 April 2007).

from digital or social media publication,[86] and requiring removal of already published material.[87] The impact on children's privacy and dignity of their parents' social media usage in this context is a topic for another paper. My present concern is to consider how litigant self-publication bears on the 'divorce with dignity' justification for imposing publication restrictions on proceedings under the Act, as a means of protecting the privacy of litigants.

However, viewed in this light, section 121 can be understood as 'coercing privacy'[88] for those litigants who desire to self-publish details of their family law proceedings on digital and social media, by impeding selective and self-controlled information disclosure. 'Coercing privacy' is a phrase coined by Anita Allen to describe the problem of the law imposing privacy norms to ensure that individuals live according to a particular understanding of privacy as a 'foundation' or 'precondition' of a liberal society.[89] Allen asks, 'Are we forced to be private? Should we be? Should liberals urge government to force people to … keep sexual and family matters confidential…?'.[90] In circumstances where individuals themselves are willing to share with their online networks (of hundreds, potentially thousands) that they are engaged in family law proceedings, could this proclivity for publicity be said to violate the dignity of those individuals?

The privacy paradox, then, enlivens an interest that seemingly tugs in the opposite direction to privacy: free speech. In the following section, I consider how privacy interests may be weighed against free speech interests in family law proceedings that involve litigant self-publication on social media.

B *Balancing Act: Privacy and Free Speech as 'Flip Sides of the Same … Coin'*

If privacy interests legitimately are at stake in cases of litigant self-publication,[91] whether free speech interests should outweigh those privacy interests in proceedings under the Act will involve a balancing exercise. The task will be influenced by factors such as the

[86] For example, *Darcy & Cameroon (No 4)* [2010] FamCA 351 (16 April 2010); *Snell & Snell (No 5)* [2015] FamCA 420 (12 May 2015).
[87] For example, *Sullivan & Tyler* [2015] FamCAFC 167 (28 August 2015); *Darcy & Cameroon (No 3)* [2010] FamCA 347 (25 March 2010); *Snell & Snell (No 5)* [2015] FamCA 420 (12 May 2015).
[88] Anita Allen, 'Coercing Privacy' (1999) 40(3) *William and Mary Law Review* 723, 728–9.
[89] Ibid 740, 756.
[90] Ibid 728. See also Anita Allen, 'Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm' (2000) 32(1) *Connecticut Law Review* 861, 871–72.
[91] Cf Tunick (n 52) 130.

extent to which the free speech discloses or exposes private, intimate details of the lives, feelings, thoughts, or activities of others,[92] including the self-publishing litigant's former spouse or children (which may tend towards salacious gossip of the kind that thrived in reports of divorce proceedings prior to the Act); and the extent to which the free speech addresses a matter of public concern (and how broadly or narrowly this might be construed).[93] In cases where the Family Court of Australia has been tasked with balancing privacy and free speech interests, the need to protect the best interests of children involved in the proceedings has weighed heavily in favour of curtailing the free speech interests of the parties.[94]

Where Family Court litigation involves public figures, should the balance between privacy and free speech be calibrated differently? In my view, the status of the participants should not shift the balance between these two interests. Privacy concerns and the desire to maintain anonymity through the maintenance of publication restrictions have been made explicit in proceedings under the Act involving public figures of 'international repute'.[95] This includes prominent people for whom media publication of information about even the fact of their involvement in Family Court proceedings would purportedly cause embarrassment and reputational damage.[96] Whilst a stronger argument might be made that publication is a matter of legitimate public interest in these cases, for free speech to outweigh privacy would be to violate the dignity of those public figures by transforming an aspect of their private lives (which they may not want showcased) into an object of public interest.[97] In the process, the public figures

[92] Steven J Heyman, *Free Speech and Human Dignity* (Yale University Press, 2008) 155.

[93] Ibid.

[94] *Hermann & Hermann* [2014] FamCA 213 (28 March 2014) [31]; see also *Monticelli & Campbell* (1995) FLC 92-617 (13 April 1995) [111]–[114] (noting that 'the court engages in what has been called a "balancing exercise", in which the child's welfare is considered together with other interests and policies' and citing UK authorities where the child's welfare has been balanced against other interests, including free speech (at [111]).

[95] *In the Marriage of Simpson* (1978) 4 FamLR 679, 683.

[96] These were arguments advanced by the applicants in the cases of *In the Marriage of Simpson* (1978) 4 Fam LR 679; *In the marriage of Gibb & Gibb* (1978) FLC 90-405; and *In the Marriage of Gibb & Gibb (No 2)* (1979) FLC 90-694. The applicants in these cases — who were high-profile figures in the music industry — sought injunctions against their former spouse or other family members, or against media organisations, to prevent the publication of details of their personal lives and the fact of their involvement in Family Court proceedings.

[97] Cf *In the Marriage of Simpson* (1978) 4 Fam LR 679, where Frederico J referred to 'the difficulties and frustrations inherent in any attempt to prevent the dissemination by the press of information relating to matters which might be broadly described as being of public interest': at 682–83.

themselves would be transformed into means of entertainment, amusement, pity or ridicule.[98]

Accepting the relationship between privacy and free speech as a 'symbiotic' one, Sonja West has argued that they are difficult interests to reconcile largely because 'they are in essence the same interest': '"the right to withdraw from the public gaze at such times as a person may see fit", and "the right of one to exhibit oneself to the public" are … flipsides of the same … coin'.[99] The value of privacy and the value of free speech can both be justified on dignity grounds. The communicative activities that free speech entails,[100] including posting on digital and social media about one's involvement in Family Court proceedings, contribute to the individual's engagement in what Benn has called a 'self-creative enterprise'[101] and the individual's ability to define his or her own self-presentation to others. Yet as I explained earlier, privacy protection also enables individuals to express themselves to others in different roles and in different ways, uninhibited by feelings of 'embarrassment, self-consciousness, shyness, the desire not to offend, the fear of boring others, or of exposing our ignorance'.[102] While the publication restrictions imposed by section 121 of the Act do impede the free speech of litigants who desire to self-publish information about their family law proceedings, the disclosure of such information may very well 'inhibit the very interests free speech protects'.[103]

The obvious difficulty in balancing free speech and privacy, given that they can be understood as 'flip sides … of the same coin', is that the lives of separating spouses and their children engaged in family law proceedings are inextricably interlinked. Even post-separation, a litigant posting or blogging about his or her Family Court litigation — in the exercise of his or her free speech — will simultaneously (and inevitably) implicate the privacy interests of that litigant's ex-partner and/or children (as publication of the memoir did in *Bonome v Kaysen*, discussed earlier). As already noted, digital and social

[98] As Beate Rossler has observed, 'not *everywhere* is everything talked about, and not everywhere does everyone *want* to talk about everything': Rossler (n 14) 177 (emphasis in original).
[99] Sonja R West, 'The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy' (2010) 67(2) *Washington & Lee Law Review* 589, 604-05, citing *Pavesich v New England Life Insurance Co*, 50 SE 68, 70 (Ga 1905).
[100] Jan Oster, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57, 73; see also Solove, 'A Taxonomy of Privacy' (n 4) 532.
[101] Benn (n 10) 242.
[102] Lever (n 4) 36.
[103] Solove, 'A Taxonomy of Privacy' (n 4) 532.

media have blurred the boundaries between 'public' and 'private' realms of life. Where this blurring becomes problematic is where human dignity is devalued in an individual's social relations.[104] As Mark Tunick has observed, what individuals in any given society consider to be an invasion of privacy or an insult to human dignity are historically and culturally variable.[105] In the context of section 121 of the Act, free speech is — and I argue should continue to be — limited by privacy, which is founded on respect for the dignity of participants in Family Court proceedings. This is so even in light of the diminishing stigma attached to divorce in contemporary Australian society, considering the objective of the Act is to shed divorce from its 'shameful connotations' and to make it a socially acceptable 'administrative process in the transition from marriage to single life'.[106]

I have now articulated the 'privacy paradox' and its manifestation in balancing privacy interests and free speech interests in proceedings under the Act involving litigant self-publication. In the final section below, I propose two circumstances in which self-publication by a family law litigant might be said, on the personhood account of privacy, to amount to both a privacy violation and an affront to dignity to the litigant himself or herself, and to others.

C *Litigant Self-Publication as a Violation of Privacy and an Affront to Dignity*

An understanding shared among philosophers who ascribe to a personhood account of privacy is that a failure to show respect to a person amounts to an indignity.[107] Unwanted media attention can amount to a violation of privacy, on the personhood account, by failing to show respect for an individual as a person.[108] It does so by violating the negative freedom of the individual, by intruding on his or her private realm, and also the individual's positive freedom, by impairing his or her ability to make decisions that contribute to defining and shaping the individual's identity. The individual's positive freedom includes freedom from the 'interpretative sovereignty' of others (whether in the form of commentary, criticism, objections, or influence) that may restrict or hamper the

[104] Rossler (n 14) 178-9.
[105] Tunick (n 52) 57.
[106] Helen Rhoades, 'Children, families and the law: A view of the past with an eye to the future' in Hayes and Higgins (n 64) 169, 170. See also Finlay (n 61) 414, 419.
[107] See Benn (n 10); Thomas Hill, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press, 1992); Denise Réaume, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28(1) *Queens Law Journal* 61, 79.
[108] Tunick (n 52) 155.

individual in his or her decision-making, behaviour, and way of life.[109] Publication by a litigant on his or her own social media about his or her involvement in family law proceedings may constitute both a privacy violation and an indignity not only to the self-publishing litigant, but also to other participants in those proceedings.

Addressing first the privacy and dignity of the self-publishing litigant, a valid question that arises in this context, foreshadowed earlier, is whether a privacy interest is legitimately at stake if an individual willingly discloses and publishes information. Self-publication by family law litigants of information about their court proceedings may be considered both shameless and public behaviour: that is, in revealing the intimate details of their relationship breakdown and its consequences, litigants freely relinquish both their privacy and their shame. Yet the act of self-publication alone, on the personhood account of privacy, would not amount to the litigant having ceded his or her privacy (although it might constitute an indignity, depending on the nature of the information shared, and it would likely violate the privacy of others).

It would not be a sweeping statement to assert, as Lior Strahilevitz has, that courts have displayed 'substantial uncertainty with respect to how much disclosure can occur before … information becomes "public"'.[110] Recall the wording of section 121(1) of the Act, which refers to publication or dissemination 'to the public or to a section of the public'. The Family Court of Australia has interpreted the phrase 'dissemination to the public' to mean 'widespread communication with the aim of reaching a wide audience'.[111] In its recent inquiry into Australia's family law system, the Australian Law Reform Commission (ALRC) recommended that section 121 be redrafted to explicitly clarify that it *can* apply to 'dissemination on social media or other internet-based media … if the potential audience is sufficiently wide in the circumstances'.[112] A challenge for judges in determining what amounts to a 'section of the public' for the purposes of this provision simultaneously enlivens the broader question of where the boundary between 'private'

[109] Rossler (n 14) 84, 88.
[110] Lior Jacob Strahilevitz, 'A Social Networks Theory of Privacy' (2005) 72(1) *University of Chicago Law Review* 919, 973.
[111] *Re Edelsten; Ex parte Donnelly* (1988) 18 FCR 434, 436, cited with approval in *Hinchcliffe v Commissioner of the Australian Federal Police* [2001] FCA 1747 (10 December 2001) [54].
[112] ALRC (n 3) 436 [14.54].

and 'public' information is, and should be, drawn, in light of the law's conventional binary distinction between the two.

In the US, courts have held that limited or selective disclosure of private information by the plaintiff does not necessarily make that information 'public' for the purposes of the privacy torts of public disclosure of private facts and intrusion upon seclusion.[113] By contrast, in Canada, the Ontario Superior Court of Justice in *Murphy v Perger*[114] and *Leduc v Roman*[115] inferred the existence of relevant and discoverable content on a limited access Facebook profile on the basis that some information on that profile was publicly available. The Court in *Leduc* went further, holding that '[the respondent] exercised control over a social networking and information site to which he allowed designated "friends" access. It is reasonable to infer that his social networking site likely contains some content relevant to the issue of how [the respondent] has been able to lead his life since the accident'.[116] The mere existence of a Facebook profile and the individual's ability to control access to that profile, according to the Court, suggested that the individual had waived his or her privacy interests by posting information to the profile. However, in the more recent decisions of *Stewart v Kempster,*[117] and *Knox v Nathan Applebaum Holdings Ltd*,[118] the same Court recognised a privacy interest in information that an individual posts to a restricted audience of his or her Facebook 'friends'. The following observation of Justice Heeney in *Stewart* suggests a judicial appreciation of control over information as a vital component of privacy:

> At present, Facebook has about one billion users. Out of those, the plaintiff in the present case has permitted only 139 people to view her private content. That means that she has excluded roughly one billion people from doing so, including the defendants. That supports, in my

[113] See, for example, *Times Mirror Co v Superior Court,* 244 Cal Rptr 556 (Ct App 1988); *Multimedia WMAZ, Inc v Kubach*, 443 SE 2d 491 (Ga Ct App 1994); *Y G v Jewish Hospital*, 795 SW 2d 488 (Mo Ct App 1990). Cf *Sipple v Chronicle Publishing Co*, 201 Cal Rptr 665 (Ct App 1984); *Duran v Detroit News, Inc*, 504 NW 2d 715 (Mich Ct App 1993).
[114] [2007] OJ No 5511.
[115] [2009] OJ No 681.
[116] Ibid [32].
[117] [2012] OJ No 6145.
[118] [2013] OJ No 5981.

> view, the conclusion that she has a real privacy interest in the content of her Facebook account.[119]

It is important to elaborate on how the privacy interests of a self-publishing litigant might be implicated if the litigant knew that by revealing information to others, the disclosure might cause that information to be shared with a broader audience. Consider litigant self-publication on Facebook, which is Australia's most widely-used social media platform.[120] The litigant's act of posting on his or her Facebook profile is not a secret (indeed, quite the opposite!), nor is it unwanted by the self-publisher. However, the self-publishing litigant's privacy might be infringed if what is published is subsequently shared by others beyond the audience intended — known as 'context collapse'.[121] Facebook offers an 'audience selector' for status updates, photographs, and other material posted. It also enables users to 'organise' their 'friends' using 'lists', and to post updates for specific groups of people; the default lists are 'close friends' and 'acquaintances'. Yet the material posted might be 'shared' by friends of the self-publisher, depending on the privacy settings of the original post.

The sharing of (perhaps only parts of) the self-publishing litigant's online account of the family law litigation, beyond that litigant's intended audience of 'friends' or 'followers', would amount to both a privacy violation and an indignity to that litigant. As discussed earlier, privacy offers the individual the ability to 'compartmentalize information' about himself or herself,[122] and in doing so protects human dignity by promoting 'respect for someone as a person, as a chooser'.[123] Benn's notion of the individual as a 'chooser' — choosing what information to disclose and to whom — is vital to the argument that the personhood account of privacy would still apply if an individual knowingly self-published with respect to his or her own dignity. The harm in this instance, the violation of human dignity, lies in the 'spreading of information beyond expected boundaries'.[124] In the case

[119] *Stewart v Kempster* [2012] OJ No 6145, [24].
[120] Roy Morgan, 'Facebook on top but Instagram and Pinterest growing fastest' (Press Release No 7979, 17 May 2019) <http://www.roymorgan.com/findings/7979-social-media-trends-march-2019-201905170731>.
[121] Jenny L Davis and Nathan Jurgenson, 'Context Collapse: Theorizing Context Collusions and Collisions' (2014) 17(4) *Information, Communication & Society* 476. See also Tunick (n 52) 130.
[122] Tunick (n 52) 45; see also Bloustein (n 15) 973.
[123] Benn (n 10) 242.
[124] Solove, 'A Taxonomy of Privacy' (n 4) 535; see also Strahilevitz (n 110) 921, who argues that the law should focus on 'the extent of dissemination the plaintiff should have expected to follow his disclosure of … information to others'.

of individuals who knowingly self-publish private and intimate details of their lives on a website or on a social media profile that is freely accessible to all internet users, it would be difficult to argue that a privacy interest is legitimately at stake. A Family Court judge described the 'particularly insidious nature' of a parent's publication on a website about the Family Court litigation, the fact that the information was 'available for any person, anywhere in the world, to access … quickly and easily at any time of the day or night on an ongoing basis'.[125] However, for those individuals who actively seek to restrict the disclosure of information that they post online, whether by having a 'private' Facebook profile or by limiting the 'friends' who can view their posts, then contrary to the views of the Ontario Superior Court of Justice in *Murphy* and *Leduc*, the fact that recipients of that information might subsequently share it with a broader audience does not diminish the self-publishing litigant's privacy interest. Indeed, on a personhood account, a privacy violation can occur not only where previously concealed information is revealed but also where information already made available is made more accessible.[126]

Turning to consider other participants in family law proceedings that are the subject of a litigant's online publication. The insult to the privacy and dignity of those other participants is clearer: their privacy and dignity would be violated by the self-publishing litigant disseminating information about them without their consent — unwanted media attention (much like the tabloid press of accounts of divorce proceedings prior to the Act). This commonly occurs in Part VII proceedings where one parent posts (usually disparaging) remarks about the other parent on social media. In one such case, a judge lambasted a parent for making 'derogatory, cruel and nasty comments (regularly peppered with disgusting language and equally vile photographs)' on Facebook about the Family Court, the other parent, and the court process, seemingly encouraged by an online audience 'that waits to join the ghoulish, jeering crowd in the nether-world of cyber-space'.[127]

The indignity attending the privacy violation in the instances presented derives from the self-publishing litigant or the individual referred to (or derided) in the self-publishing litigant's account of the family law proceedings (as the case may be), being deprived of

[125] *Xuarez & Vitela* [2012] FamCA 574 (25 July 2012) [55].
[126] Solove, *The Future of Reputation* (n 80) 170; Tunick (n 52) 151.
[127] *Lackey & Mae* [2013] FMCAfam 284 (4 April 2013) [10].

the ability to determine the 'self' that he or she seeks to present to others, what information he or she seeks to disclose, and to whom. That the litigant may be unaware that others beyond his or her 'friends' or 'followers' have read the self-published post, update, or tweet (in the first scenario) or that the individual may be unaware that information about his or her involvement in family law proceedings has even been published online (in the second), would not diminish the violation of that individual's dignity. Both scenarios illustrate the Kantian view that privacy protection emanates from the imperative to respect individuals as human beings by treating them as ends in themselves, not as means to ends,[128] such as entertainment, edification, pity, ridicule, or amusement.[129] I have sought to show, through these two scenarios of litigant self-publication in family law proceedings, that the 'divorce with dignity' justification for privacy's value in this context has been challenged by the privacy paradox but remains defensible from privacy as a personhood perspective. In these circumstances (and enforceability issues aside), section 121 of the Act is ripe for amendment to specify that it applies to publication by litigants on digital and social media platforms.

V CONCLUSION

The ALRC, in its final report, *Family Law for the Future — An Inquiry into the Family Law System*, noted that

> [m]any of the provisions of the Family Law Act as originally enacted, and as subsequently amended, illustrate how the objectives of informality, privacy, and respect for the dignity of separating couples were translated into legislation. They illustrate Parliament's intention to identify and treat family law as being different in character from other areas of civil law because of the emotional and financial consequences of relationship breakdown, and its public policy impacts on the wider society.[130]

The ALRC also acknowledged the reality that 'social media and similar technologies will continue to evolve and pose difficult questions for the law generally, well beyond the

[128] Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr and ed Mary Gregor (Cambridge University Press, 1997) 42 [4:435].
[129] Lever (n 4) 34.
[130] ALRC (n 3) 357 [12.1].

family law context'.[131] The advent of the printing press, the circulation of newspapers, and other forms of mass media and communication made the destruction of human dignity and individuality through public disclosure of the intimacies of private life a 'legally significant reality' in the context of divorce.[132] The same can now be said of digital and social media technologies: they, too, undermine human dignity where private details are made public. The fundamental difference, I have proposed in this paper, is that it is litigants themselves who now make those details public. The litigant self-publication phenomenon does not, I have argued, necessitate doing away with the publication restrictions in section 121 of the Act in favour of free speech. These restrictions remain justifiable as a form of privacy protection concerned with promoting 'divorce with dignity'. The phenomenon demands a redrafting of section 121, to make clear that this provision captures litigant self-publication on digital and social media platforms. Ultimately, if we accept Beate Rossler's observation that 'the history of privacy may include more than what counts as "private" at any particular time',[133] then the challenge for Australian family law lies in better understanding and responding to the differences between the privacy problems of old and new.

[131] Ibid 441 [14.75]. See also Rodrick and Sifris (n 3) 53. Writing of section 121 of the Family Law Act, Rodrick and Sifris have suggested that 'it is difficult to draft legislation to contain the ubiquitous internet, which, in turn, makes it difficult to maintain the integrity and purpose of the section'.
[132] Bloustein (n 15) 984.
[133] Rossler (n 14) 4.

REFERENCE LIST

A *Articles/Books/Reports*

Allen, Anita, 'Coercing Privacy' (1999) 40(3) *William and Mary Law Review* 723

Allen, Anita, 'Privacy-as-Data Control: Conceptual, Practical, and Moral Limits of the Paradigm' (2000) 32(1) *Connecticut Law Review* 861

Allen, Anita, *Uneasy Access: Privacy for Women in a Free Society* (Rowman & Littlefield, 1988)

Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, March 2019)

Benn, Stanley, 'Privacy, Freedom and Respect for Persons' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 223

Bloustein, Edward, 'Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser' (1964) 39(1) *New York University Law Review* 962

Bok, Sissela, *Secrecy: On the Ethics of Concealment and Revelation* (Vintage Books, 1983)

Byford, Katrin Schatz, 'Privacy in Cyberspace: Constructing a Model of Privacy for the Electronic Communications Environment' (1998) 24(1) *Rutgers Computer and Technology Law Journal* 1

Carey, Robert and Jacquelyn Burkell, 'A Heuristics Approach to Understanding Privacy-Protecting Behaviours in Digital Social Environments' in Ian Kerr, Valerie Steeves and Carole Lucock (eds), *Lessons from the Identity Trail: Anonymity, Privacy and Identity in a Networked Society* (Oxford University Press, 2009) 65

Cohen, Deborah, *Family Secrets: Shame and Privacy in Modern Britain* (Oxford University Press, 2013)

Craven Jr, J Braxton, 'Personhood: The Right to Be Let Alone' (1976) 4 *Duke Law Journal* 699

Cummiskey, David, 'Dignity, Contractualism and Consequentialism' (2008) 20(4) *Utilitas* 383

Davis, Jenny L and Nathan Jurgenson, 'Context Collapse: Theorizing Context Collusions and Collisions' (2014) 17(4) *Information, Communication & Society* 476

DeCew, Judith Wagner, *In Pursuit of Privacy: Law, Ethics and the Rise of Technology* (Cornell University Press, 1997)

Dewar, John and Stephen Parker, 'English Family Law since World War II: From Status to Chaos' in Sandford Katz, John Eekelaar and Mavis Maclean (eds), *Cross Currents: Family Law and Policy in the US and England* (Oxford University Press, 2000) 123

Enderby, Kep, 'The *Family Law Act*: Background to the legislation' (1975) 1(1) *University of New South Wales Law Journal* 10

Finlay, Henry, *To Have, But Not To Hold: A History of Attitudes to Marriage and Divorce in Australia, 1858-1975* (Federation Press, 2005)

Fogarty, John, 'Thirty Years of Change' (2006) 18 *Australian Family Lawyer* 4

Fried, Charles, 'Privacy' (1968) 77(3) *Yale Law Journal* 475

Gavison, Ruth, 'Privacy and the Limits of Law' (1980) 89(3) *Yale Law Journal* 421

Gerstein, Robert, 'Intimacy and Privacy' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 265

Grimm, Dieter, Alexandra Kemmerer and Christoph Mollers (eds), *Human Dignity in Context: Explorations of a Contested Concept* (Hart, 2018)

Gross, Hyman, 'The Concept of Privacy' (1967) 42(1) *New York University Law Review* 34

Heyman, Steven J, *Free Speech and Human Dignity* (Yale University Press, 2008)

Hill, Thomas, *Dignity and Practical Reason in Kant's Moral Theory* (Cornell University Press, 1992)

Hudson, Stephen D, 'The Nature of Respect' (1980) 6(1) *Social Theory and Practice* 69

Inness, Julie, *Privacy, Intimacy and Isolation* (Oxford University Press, 1992)

Jourard, Sidney, 'Some Psychological Aspects of Privacy' (1966) 31(2) *Law and Contemporary Problems* 307

Kang, Jerry, 'Information Privacy in Cyberspace Transactions' (1998) 50(1) Sta*nford Law Review* 1193

Immanuel Kant, *Groundwork of the Metaphysics of Morals*, tr and ed Mary Gregor (Cambridge University Press, 1997) 42

Kupfer, Joseph, 'Privacy, Autonomy and Self-Concept' (1987) 24(1) *American Philosophical Quarterly* 81

Lever, Annabel, *On Privacy* (Routledge, 2012)

Miller, Arthur, *The Assault on Privacy: Computers, Data Banks and Dossiers* (University of Michigan Press, 1971)

Mitnick, Eric, *Rights, Groups, and Self-Invention: Group-Differentiated Rights in Liberal Theory* (Ashgate, 2006)

Moloney, Lawrie, 'Lionel Murphy and the Dignified Divorce: Of Dreams and Data' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 245

Nissenbaum, Helen, *Privacy in Context: Technology, Policy, and the Integrity of Social Life* (Stanford Law Books, 2010)

Norberg, Patricia A, Daniel R Horne and David A Horne, 'The Privacy Paradox: Personal Information Disclosure Intentions versus Behaviors' (2007) 41(1) *The Journal of Consumer Affairs* 100

Nygh, Peter, 'Publicity and the Family Court' (1998) 12 *Australian Journal of Family Law* 1

Oster, Jan, 'Theory and Doctrine of "Media Freedom" as a Legal Concept' (2013) 5(1) *Journal of Media Law* 57

Pettit, Philip, 'Consequentialism and Respect for Persons' (1989) 100 *Ethics* 116

Phillips, David, 'From Privacy to Visibility: Context, Identity, and Power in Ubiquitous Computing Environments' (2005) 23(2) *Social Text* 95

Post, Robert C, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(1) *California Law Review* 691

Rachels, James, 'Why Privacy is Important' (1975) 4(4) *Philosophy and Public Affairs* 323

Rawls, John, *A Theory of Justice* (Harvard University Press, 1971)

Réaume, Denise, 'Indignities: Making a Place for Dignity in Modern Legal Thought' (2002) 28(1) *Queens Law Journal* 61

Reece, Helen, *Divorcing Responsibly* (Hart Publishing, 2003)

Regan, Priscilla, *Legislating Privacy: Technology, Social Values and Public Policy* (University of North Carolina Press, 1995)

Reiman, Jeffrey, 'Privacy, Intimacy and Personhood' (1976) 6(1) *Philosophy and Public Affairs* 26

Rhoades, Helen, 'Children, families and the law: A view of the past with an eye to the future' in Alan Hayes and Daryl Higgins (eds), *Families, Policy and the Law: Selected Essays on Contemporary Issues for Australia* (Australian Institute of Family Studies, 2014) 169

Rhoades, Helen and Shurlee Swain, 'A Bold Experiment? Reflections on the Early History of the Family Court' (2011) 22 *Australian Family Lawyer* 1

Rodrick, Sharon and Adiva Sifris, 'The Reach and Efficacy of s 121 of the Family Law Act' (2017) 7(1) *Family Law Review* 30

Rossler, Beate, *The Value of Privacy* (Polity, 2005)

Sandel, Michael, *Democracy's Discontent: America in Search of a Public Philosophy* (Harvard University Press, 1996)

Savage, Gail, 'Erotic Stories and Public Decency: Newspaper Reporting of Divorce Proceedings in England' (1998) 41(2) *Historical Journal* 511

Schoeman, Ferdinand, 'Privacy: Philosophical Dimensions of the Literature' in Ferdinand Schoeman (ed), *Philosophical Dimensions of Privacy: An Anthology* (Cambridge University Press, 1984) 1

Scott, Elizabeth S, 'Rehabilitating Liberalism in Modern Divorce Law' (1994) 2 *Utah Law Review* 687

Solove, Daniel, 'A Taxonomy of Privacy' (2006) 154(3) *University of Pennsylvania Law Review* 477

Solove, Daniel, 'Conceptualizing Privacy' (2002) 90(1) *California Law Review* 1088

Solove, Daniel, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007)

Solove, Daniel, *Understanding Privacy* (Harvard University Press, 2008)

Star, Leonie, *Counsel of Perfection: The Family Court of Australia* (Oxford University Press, 1996)

Strahilevitz, Lior Jacob, 'A Social Networks Theory of Privacy' (2005) 72(1) *University of Chicago Law Review* 919

Swain, Shurlee, *Born in Hope: The Early Years of the Family Court of Australia* (UNSW Press, 2012)

Taylor, Charles, *Sources of the Self: The Making of the Modern Identity* (Harvard University Press, 1989)

Thomson, Judith Jarvis, 'The Right to Privacy' (1975) 4(4) *Philosophy and Public Affairs* 295

Tunick, Mark, *Balancing Privacy and Free Speech: Unwanted Attention in the Age of Social Media* (Routledge, 2014)

Velleman, James David, 'The Genesis of Shame' (2001) 30(1) *Philosophy and Public Affairs* 27

Volokh, Eugene, 'Freedom of Speech, Information Privacy, and the Troubling Implications of a Right to Stop People from Speaking About You' (2000) 52(1) *Stanford Law Review* 1

Waller, Lisa and Kristy Hess, 'The Pillory Effect: Media, the Courts and the Punitive Role of Public Shaming in Australia' (2001) 16(3) *Media and Arts Law Review* 229

Warren, Samuel and Louis Brandeis, 'The Right to Privacy' (1890) 4(5) *Harvard Law Review* 193

West, Sonja R, 'The Story of Us: Resolving the Face-Off Between Autobiographical Speech and Information Privacy' (2010) 67(2) *Washington & Lee Law Review* 589

Westin, Alan, *Privacy and Freedom* (Atheneum, 1967)

B *Cases*

Bonome v Kaysen, 17 Mass L Rep 695 (2004)

Darcy & Cameroon (No 3) [2010] FamCA 347 (25 March 2010)

Darcy & Cameroon (No 4) [2010] FamCA 351 (16 April 2010)

Denny & Purdy [2009] FamCA 547 (26 June 2009)

Duran v Detroit News, Inc, 504 NW 2d 715 (Mich Ct App 1993)

Eisenstadt v Baird, 405 US 438 (1972)

Ellershaw & Survant [2013] FamCA 510 (9 July 2013)

G & B [2007] FamCA 343 (20 April 2007)

Gaylard & Cain [2012] FMCAfam 501 (30 May 2012)

Griswold v Connecticut, 381 US 479 (1965)

Hermann & Hermann [2014] FamCA 213 (28 March 2014)

Hill v Church of Scientology (1995) 126 DLR (4th) 129

Hinchcliffe v Commissioner of the Australian Federal Police [2001] FCA 1747 (10 December 2001)

In the Marriage of Gibb & Gibb (1978) FLC 90-405

In the Marriage of Gibb & Gibb (No 2) (1979) FLC 90-694

In the Marriage of Simpson (1978) 4 Fam LR 679

Knox v Nathan Applebaum Holdings Ltd [2013] OJ No 5981

Lackey & Mae [2013] FMCAfam 284 (4 April 2013)

Leduc v Roman [2009] OJ No 681

Longford v Byrne [2015] FCCA 2504 (28 August 2015)

*Love & Shillington (No 2) [*2007] FamCA 566 (5 April 2007)

Monticelli & Campbell (1995) FLC 92-617 (13 April 1995)

Multimedia WMAZ, Inc v Kubach, 443 SE 2d 491 (Ga Ct App 1994)

Murphy v Perger [2007] OJ No 5511

Pavesich v New England Life Insurance Co, 50 SE 68, 70 (Ga 1905)

Planned Parenthood v Casey, 505 US 833 (1992)

Prentice & Bellas [2012] FamCA 108 (24 February 2012)

Re Edelsten; Ex parte Donnelly (1988) 18 FCR 434

Reynolds v Times Newspapers [2001] 2 AC 127

Roe v Wade 410 US 113 (1973)

Samuels & Errington (No 2) [2007] FamCA 507 (5 June 2007)

Seaward & MacDuff (No 4) [2012] FamCA 1147 (19 October 2012)

Sipple v Chronicle Publishing Co, 201 Cal Rptr 665 (Ct App 1984)

Sloan & Stephenson [2011] FMCAfam 771 (9 February 2011)

Snell & Snell (No 5) [2015] FamCA 420 (12 May 2015)

Stewart v Kempster [2012] OJ No 6145

Sullivan & Tyler [2015] FamCAFC 167 (28 August 2015)

Times Mirror Co v Superior Court, 244 Cal Rptr 556 (Ct App 1988)

Xuarez & Vitela [2012] FamCA 574 (25 July 2012)

Y G v Jewish Hospital, 795 SW 2d 488 (Mo Ct App 1990

C *Legislation*

Family Law Amendment Act 1983 (Cth)

Family Law Amendment Act 2000 (Cth)

Family Law Act 1975 (Cth)

Family Law Amendment Bill 1999 (Cth)

Matrimonial Causes Act 1959 (Cth)

D *Other*

Commonwealth, *Parliamentary Debates*, House of Representatives, 12 February 1975

Commonwealth, *Parliamentary Debates*, House of Representatives, 28 February 1975

Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975

Commonwealth, *Parliamentary Debates*, Senate, 1 August 1974

Commonwealth, *Parliamentary Debates*, Senate, 29 October 1974

Commonwealth, *Parliamentary Debates*, Senate, 19 May 1975

Commonwealth, *Parliamentary Debates*, Senate, 20 October 1981

Lepore, Jill, 'The Prism: Privacy in an Age of Publicity', *New Yorker* (online, 24 June 2013) <https://www.newyorker.com/magazine/2013/06/24/the-prism>

Roy Morgan, 'Facebook on top but Instagram and Pinterest growing fastest' (Press Release No 7979, 17 May 2019) <http://www.roymorgan.com/findings/7979-social-media-trends-march-2019-201905170731>

DIGNITY AND THE FUTURE OF FAMILY LAW

MICHEIL PATON* AND PHOEBE TAPLEY**

In April 2019 the Australian Law Reform Commission ('ALRC') published the final report of its inquiry into Australia's family law system, making 60 recommendations for reform. This article explores the extent to which, and the ways in which, the ALRC family law inquiry engaged with and promoted concepts of 'human dignity'. Human dignity is a contested, but frequently invoked concept in international human rights law. The relevance of human dignity to family law arises as a result of the potential impact of the family law system on a range of human rights. In addition, there is an expectation that the family law system will uphold the 'dignity' of persons in the ordinary sense of the term. This article observes that although there was no explicit adoption of a human dignity framework in the ALRC family law inquiry, considerations of human dignity arguably informed the referral and conduct of the inquiry. The article reviews a selection of the ALRC recommendations through a human dignity lens, considering, in particular, their impact on rights relating to privacy and protection from harm, and whether they promote dignity in the ordinary sense of the term. The article concludes by suggesting that while many ALRC recommendations arguably seek to promote human dignity, the explicit incorporation of a human dignity framework may have added value to the inquiry in a number of ways.

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I INTRODUCTION

Arguably, few areas of law are as 'human' as family law. Family law dissects the most intimate of human relationships, in all their diversity and fragility. From one perspective, family law represents the intrusion of public legal principles and institutions into spheres of life that were traditionally seen as private or 'domestic'.[1] The appropriate level and nature of intervention by states in the lives of their constituents has always been contentious and in recent decades, minimum standards have been expressed partly in terms of 'human dignity'. Most prominently, this concept has taken root in the context of international human rights law.

In April 2019, the Australian Law Reform Commission ('ALRC') published the final report of its broad-ranging 18-month inquiry into the overall functioning of Australia's family law system. The report contains 60 recommendations and covers areas including substantive law, dispute resolution procedures, system governance, and ancillary services.

The ALRC did not explicitly adopt a human dignity framework in the conduct of its inquiry. However, considerations of human dignity arguably informed the Terms of Reference for the inquiry, as well as the ALRC's conduct of the inquiry. This article

[1] Danaya Wright, 'Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History' [2012] *Australia & New Zealand Law and History E-Journal* 44.

therefore explores the extent to which, and the ways in which, the ALRC family law inquiry engaged with and promoted concepts of human dignity.

The next section of this article investigates the nexus between family law and human dignity, setting out three aspects of human dignity that are relevant to the design and operation of the family law system. The following sections then examine particular themes and recommendations of the ALRC inquiry in relation to their potential impact on human dignity, as illustrative examples. In particular, the recommendations relate to: the jurisdictional gap between federal courts and state and territory courts; information sharing; case management powers; approaches to property division; and, a statutory tort for family violence. The article concludes by arguing that while many ALRC recommendations effectively seek to promote human dignity, the explicit incorporation of a human dignity framework may have added value to the inquiry in a number of ways.

II DIGNITY AND FAMILY LAW

It has been observed that the concept of 'human dignity' was introduced relatively recently into international and national legal instruments; the first appearance of the term in international law is in the Universal Declaration of Human Rights ('UDHR').[2] It has been asserted that human dignity represents both the normative boundaries of international law,[3] and also 'the condition that would be achieved if there were good governance and respect for human rights'.[4] Demonstrating the wide appeal of the concept, human dignity has been described as 'one of the Western world's greatest examples of ethical consensus',[5] although there remains the danger that in practice it 'functions merely as a mirror onto which each person projects his or her own values'.[6] The precise parameters of the legal meaning of 'human dignity' are indeed contested, but attempted definitions commonly recognise its universal and inherent nature, such

[2] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948) Preamble and art 1; see Rinie Steinmann, 'The Core Meaning of Human Dignity' (2016) 19(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1.
[3] Patrick Capps, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009).
[4] Stephen Riley, 'Architectures of Intergenerational Justice: Human Dignity, International Law and Duties to Future Generations' (2016) 15(2) *Journal of Human Rights* 272.
[5] Luis Barroso, 'Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35(2) *Boston College International & Comparative Law Review* 331, 332.
[6] Ibid.

that all human beings are of equal value and they should never be used merely as a means to an end.[7]

The concept of human dignity finds expression beyond the UDHR in international treaties that require state parties to observe and protect enumerated human rights. Under international law, Australia is bound to give effect to its treaty obligations in respect of human rights.[8] The family law system is one arena that engages these human rights obligations. There are a number of human rights that may have implications for the operation and design of family law, including the provisions of the *United Nations Convention on the Rights of the Child* ('UNCRC'),[9] the *Convention on the Elimination of All Forms of Discrimination Against Women* ('CEDAW'),[10] and the *International Covenant on Civil and Political Rights* ('ICCPR').[11] Each of these treaties affirms that human dignity is a fundamental value underpinning human rights.[12]

The UNCRC provides, for example, that children's best interests must be a primary consideration in all actions concerning children,[13] children have a right to 'maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests',[14] and that children should be 'provided the opportunity to be heard in any judicial and administrative proceedings affecting the child'.[15] In addition, CEDAW recognises 'the common responsibility of men and women in the upbringing and development of their children'[16] and requires state parties to ensure that women and men have the 'same rights and responsibilities during marriage and at its dissolution'.[17] Similarly, the ICCPR provides for equal rights and

[7] Steinmann (n 2).
[8] Though treaty obligations do not have legal force in Australian domestic law unless and until the obligations have been implemented in domestic law by Parliament: see, eg, *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7.
[9] *Convention on the Rights of the Child*, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[10] *Convention on the Elimination of All Forms of Discrimination Against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) ('*CEDAW*').
[11] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').
[12] *Convention on the Rights of the Child* (n 9) Preamble; *CEDAW* (n 10) Preamble; *lCCPR* (n 11) Preamble.
[13] *Convention on the Rights of the Child* (n 9) art 3(1).
[14] Ibid art 9(3).
[15] Ibid art 12(2).
[16] *CEDAW* (n 10) art 5.
[17] Ibid art 16(1)(c).

responsibilities of spouses during marriage and at dissolution, as well as 'the necessary protection of any children'.[18]

Giving effect to the UNCRC is one of the stated objects of Pt VII of the *Family Law Act 1975* (Cth) (*'Family Law Act*').[19] Incidentally, one of the ALRC recommendations is that this entire 'objects clause' be repealed in the interests of legislative simplification.[20] This recommendation was made partly on the basis that removing this reference to the UNCRC is not likely to materially affect the interpretation of the Act. Namely, existing common law principles provide that in the event of any ambiguity in a statute, courts should interpret the statute in a manner consistent with Australia's obligations under international conventions.[21]

It would not be possible in this article to analyse all aspects of human dignity relevant to family law. Instead, this article focuses on human rights relating to protection from harm, as well as rights to privacy and reputation. In addition to considering human dignity through the lens of these two categories of human rights, this article will engage with the ordinary (rather than necessarily legal) conception of 'dignity', which connotes treatment with respect.

A *Protection from Harm*

Protection from harm is integral to the family law system. This is due to the nature of the decisions made by courts exercising family law jurisdiction (such as determining the living arrangements of children), as well as the prevalence of risk factors among users of the family law system. The nature of contemporary family law disputes that require court adjudication is that, overwhelmingly, they are overshadowed by complex risk factors, including family violence and child abuse, as well as substance abuse and serious mental health issues.[22] Human rights engaged in this context include the general obligation to ensure for each child 'such protection and care as is necessary for his or

[18] *ICCPR* (n 11) art 23(4).
[19] *Family Law Act 1975* (Cth) s 60B(4) ('*Family Law Act*').
[20] Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, March 2019) Recommendation 4.
[21] Ibid 163 [5.34], citing *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 27; Dennis Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014).
[22] Australian Law Reform Commission (n 20) 135 [4.86].

her well-being',[23] the right of children to be protected from harm,[24] and the provisions of CEDAW.[25]

There is explicit recognition of the importance of protecting parties and their children from harm in the *Family Law Act.* The Act provides that courts exercising family law jurisdiction are required to have regard to 'the need to protect the rights of children and to promote their welfare' as well as 'the need to ensure protection from family violence'.[26]

B *Privacy and Reputation*

The highly personal nature of the disputes governed by family law inevitably engages human rights obligations in relation to privacy and reputation (or 'protection against attacks on a person's honour').[27] Ordinarily, court proceedings and judgments are required to be made public, but there may be restrictions 'when the interest of the private lives of the parties so requires', and specifically when 'the proceedings concern matrimonial disputes or the guardianship of children'.[28] The relevance of these rights is reflected in concerns identified at the time the *Family Law Act* was contemplated, which included 'a desire to eliminate the indignities associated with the former fault-based divorce regime, where the names of co-respondents to adultery petitions were often reported in the tabloid press'.[29] This aspect of privacy encompasses concerns in relation to maintaining reputations against prurient public curiosity and scandal. Beyond matters of reputation, privacy concerns also arise in relation to how personal details of parties may be shared between different actors within the system (eg, courts, support services, police, and government agencies), or between the parties to a family law dispute.

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[23] *Convention on the Rights of the Child* (n 9) art 3.
[24] Ibid art 19.
[25] *CEDAW* (n 10). Although CEDAW does not explicitly refer to family violence, it has been recognised that reducing the incidence of violence against women will complement the rights enumerated in CEDAW, and vice versa; see the *Declaration on the Elimination of Violence against Women,* GA Res 48/104, UN Doc A/48.104 (23 February 1994, adopted 20 December 1993), particularly the Preamble.
[26] *Family Law Act* (n 19) s 43(1)(c), (ca).
[27] *ICCPR* (n 11) art 17; see also *Universal Declaration of Human Rights* (n 2) art 12.
[28] *ICCPR* (n 11) art 17.
[29] Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018) 401, citing the Hon John Fogarty, 'Establishment of the Family Court of Australia and its Early Years' (2001) 60 *Family Matters* 90, 97; see also *AH & SS* [2005] FamCA 854.

C *Calls for Dignity from Family Law System Users*

Questions of 'dignity' in family law arise not only with respect to human rights obligations but also in accordance with the common or ordinary usage of the term. This aspect of dignity is related to the subjective experiences of individuals as they engage with the family law system, and connotes an expectation of a basic level of respect. This conception of dignity is broadly consistent with the fundamental tenets of human dignity as understood in international human rights law, reflecting a general concern that family law users are treated in a manner that is consistent with their inherent value as human beings. Contributions to the ALRC inquiry suggested that being treated 'with dignity' is a key concern for many family law system users. A number of individuals who confidentially provided to the ALRC their personal stories of experience with courts exercising family law jurisdiction, recounted experiences that failed to meet their expectation of being treated with dignity.[30] For example, some felt they were humiliated by the other party, lawyers, judicial officers, or court staff. Conversely, several submissions to the ALRC inquiry emphasised the importance of affording dignity to those using the family law system.[31] Thus, there appears to be a more general call for dignity in family law that extends beyond the parameters of specific human rights obligations.

III DIGNITY AND THE ALRC INQUIRY

The foregoing analysis has highlighted that there is a clear nexus between human dignity (and the human rights that emanate from this fundamental concept) and the family law system. However, the Terms of Reference for the ALRC family law inquiry did not explicitly refer to human rights, nor to the concept of 'human dignity'. The ALRC, in turn, did not explicitly adopt a human dignity or human rights framework in the conduct of its inquiry. There is, nonetheless, evidence that considerations of human

[30] These stories were submitted to '*Tell Us Your Story*', a confidential online portal established by the ALRC for the purposes of its review of the family law system. See Australian Law Reform Commission, *Family Law - Summary of Tell Us Your Story Responses* (ALRC News, June 2019) <https://www.alrc.gov.au/news/family-law-summary-of-tell-us-your-story-responses/>.

[31] See, eg, Western Sydney CLC, Submission No 8; Australian Dispute Resolution Advisory Council ('*ADRAC*'), Submission No 12; Royal Australian and New Zealand College of Psychiatrists, Submission No 18; PeakCare Queensland, Submission No 72; R Alexander, Submission No 131; Farrar Gesini Dunn, Submission 140; CatholicCare Diocese of Broken Bay, Submission No 197.

dignity underpinned both the referral of this inquiry to the ALRC and the ALRC's conduct of the inquiry.

Notably, protection from harm was identified by the ALRC as a key theme of the inquiry. The ALRC observed that a number of elements of the Terms of Reference could be categorised as aiming to 'protect vulnerable parties'.[32] For example, the ALRC was asked to consider 'the protection of the best interests of children and their safety', including in the context of family violence and child abuse.[33] A focus on protection is also borne out in the overarching principles said to inform the ALRC's recommendations, which include integrating adjudication pathways for the protection of vulnerable parties.[34]

There is also explicit reference to privacy and dignity in the framing of the ALRC inquiry. One of the circumstances to which the Attorney-General is recorded as having regard in developing the Terms of Reference is 'the importance of affording dignity and privacy to separating families'.[35]

In addition, the ALRC described its recommendations as being 'necessary to provide a *dignified* and efficient process that resolves disputes between parties to intimate relationships at the lowest financial, emotional, and psychological costs'.[36] These references to dignity seem to reflect the concept of affording due respect to individuals, rather than the concept of human dignity which underlies human rights realisation more generally.

The ALRC is specifically directed in its governing legislation to consider Australia's international obligations, as well as 'personal rights and liberties', when making recommendations.[37] The close relationship between such rights and human dignity provides a substantial basis for incorporating a human dignity framework into the ALRC's work.

The following sections consider whether and how certain recommendations from the ALRC's final report promote aspects of human dignity. In view of the nexus between the

[32] Australian Law Reform Commission (n 20) 30 [1.3].
[33] George Brandis, Attorney-General of Australia, 'Review of the Family Law System' (Terms of Reference, Australian Law Reform Commission, 17 August 2017); reproduced in ibid 5–6.
[34] Australian Law Reform Commission (n 20) 36 [1.25].
[35] Brandis (n 33).
[36] Australian Law Reform Commission (n 20) 31 [1.6] (emphasis added).
[37] *Australian Law Reform Commission Act 1996* (Cth) s 24.

family law system and concepts of human dignity, it may be observed that all of the ALRC's 60 recommendations will have some bearing on matters of human dignity. For example, a number of recommendations affect how determinations of a child's best interests would be made,[38] while other recommendations consider cultural issues relating to Aboriginal and Torres Strait Islander children,[39] and therefore engage cultural rights.[40] A discussion on the duties of independent children's lawyers highlighted the importance of children's input in proceedings, echoing the right of the child to express views freely in all matters affecting the child.[41] However, the focus of these recommendations was more on simplification and clarification of the law and codifying existing guidelines, rather than substantive change to processes or outcomes.[42]

For the purposes of this article, analysis has been restricted to recommendations relating to the jurisdictional gap between federal courts and state and territory courts, information sharing, case management powers, property division, and a statutory tort of family violence. These recommendations were chosen on the basis of their direct bearing and potential impact on the particular aspects of human dignity discussed above: protection from harm, privacy and reputational matters, and expectations of being treated with dignity.

A *The Jurisdictional Gap*

Arguably the most significant recommendation made by the ALRC in the family law inquiry is that state and territory courts should become the primary fora for family law litigation, and that first instance federal family courts should be ultimately abolished.[43] The implementation of this recommendation would not include devolving legislative power in relation to family law to the states and territories. Rather, the *Family Law Act*, together with a single set of family court rules, would provide the legislative framework applying in all states and territories. The ALRC further discussed that a federal family

[38] Australian Law Reform Commission (n 20) Recommendations 4–10.
[39] Ibid Recommendations 6, 9.
[40] *Convention on the Rights of the Child* (n 9) art 30; *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) art 15(1).
[41] *Convention on the Rights of the Child* (n 9) art 12.
[42] See Australian Law Reform Commission (n 20) Chapters 5 and 12.
[43] Ibid Recommendation 1.

court of appeal could be retained to promote consistency in the development of family law jurisprudence.[44]

This recommendation sought to address fundamental structural problems within the Australian family law system that have been identified in a number of previous reports, and which were seen as compromising the safety of families in the family law system.[45] Fundamentally underlying the structural problems is a bifurcated legislative regime: federal legislation dealing primarily with parenting and property matters (with an associated federal court structure), running in parallel with state and territory legislation on child protection and domestic violence (and state and territory courts vested with jurisdiction to deal with those matters).

The ALRC cited empirical evidence that a large proportion of family disputes requiring court adjudication involve complex risk factors, including family violence and child abuse, as well as substance abuse and serious mental health issues.[46] For example, a significant number of matters involved the filing of a formal notice alleging a risk of child abuse or family violence,[47] and/or a referral to a child protection agency.[48] Previous studies have found that 85% of parents who litigate parenting issues report a history of emotional abuse and more than half (54%) report physical hurt from their former partner.[49]

Previous inquiries had expressed concern that 'the very design of the current family law system' contributes to a failure to protect and support families experiencing ongoing

[44] Ibid 136–7 [4.92].
[45] See, eg, Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001) 100–1; Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, 30 June 2015) 96–8; House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, 2003) 69–72. For a comprehensive discussion of previous inquiries see Australian Law Reform Commission (n 20) 114–123.
[46] Australian Law Reform Commission (n 20) 103–5.
[47] In around 30% of final parenting order matters in the Family Court of Australia: Family Court of Australia, *Family Court of Australia 2017–18 Annual Report* (2018), Figures 3.18-3.19. In the Federal Circuit Court of Australia a Notice of Risk must be filed by all parties to a final order application seeking parenting orders.
[48] In around 45% of cases in the Federal Circuit Court of Australia: Federal Circuit Court of Australia, Private Correspondence (22 January 2019), cited in Australian Law Reform Commission (n 20) 105 [3.94].
[49] Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015) 16.

violence.[50] A former Family Court judge had also highlighted the additional risk of inconsistent orders in different jurisdictions.[51] The ALRC concluded that these risks would best be overcome by having family law, family violence, and child protection matters for the same family heard in the same place at the same time.[52] Perhaps ironically, this approach echoes the original intent that the Family Court of Australia would constitute a 'one-stop shop' for family legal matters.[53]

The ALRC highlighted potential models for the establishment of family courts in the states and territories, such as the Family Court of Western Australia and Unified Family courts in Canada,[54] but stopped short of recommending any particular model, and instead suggested the establishment of a task force to undertake this work.

Having one court with jurisdiction to hear and determine a broader range of family disputes, which often involve a complex mix of risk factors, is potentially a significant step in the promotion of human dignity. First, it may contribute to the realisation of human rights to protection from harm because it may reduce the likelihood of courts being unaware of information relevant to an assessment of risk. Secondly, it may promote a more 'dignified' experience for users of the court system, because it may reduce the need for parties to repeatedly tell their story in multiple proceedings.

This ALRC recommendation has not been uncontroversial. Of note, one Commissioner queried the effectiveness of the recommended model and instead proposed that existing court structures be maintained, while simplifying pathways between them to provide continuity, support, and less confusion for litigants.[55] Dr Richard Ingleby has written that establishing state family courts would be 'far more logistically problematic' than

[50] House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, 2017) [3.82], cited in Australian Law Reform Commission (n 20) 112 [4.3].
[51] The Hon Justice Linda Dessau, 'A Unified Family Court' (Paper, Third National Family Court Conference, 23 October 1998).
[52] The ALRC noted that the same conclusion has been reached by a number of previous inquiries: Australian Law Reform Commission (n 20) 111 [4.2].
[53] Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974) 14 [44]; Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4321–23 (Mr Whitlam) 4322 ('*Parliamentary Debates*').
[54] Department of Justice (Canada), *Unified Family Court Summative Evaluation* (Final Report, 2009).
[55] See dissenting view of Commissioner Faulks, Australian Law Reform Commission (n 20) 139–43.

granting the federal family courts responsibility for child protection matters.[56] On 19 September 2019, without the Government having formally responded to the ALRC report, the Parliament appointed a Joint Select Committee on Australia's Family Law System, and the first issue listed in its Terms of Reference relates to the interaction between the family law, child protection, and family violence systems.[57] That Committee has also been asked to investigate reforms to the structure of the federal family courts. It may therefore be expected that the implications and limitations of this ALRC recommendation will receive further attention in 2020.

B *Information Sharing*

While maintaining that a fundamental restructure of the family law system is necessary in the long-term, the ALRC also made recommendations in respect of appropriate information-sharing arrangements between various courts and ancillary family law services, with the aim of reducing harm in the short-term.

The ALRC noted evidence of barriers to effective information sharing between federal family courts, state and territory courts and related services such as police, child protection and health services. These barriers are particularly significant in the context of family law because federal family courts have limited investigative powers or capacity to follow up allegations made in family law proceedings that indicate potential risks of harm and abuse. The federal family courts are often reliant on information from state and territory courts and agencies about risks to families to inform decision making.[58]

The ALRC referenced a number of initiatives facilitating information sharing in this area and acknowledged the valuable role they play in promoting the safety and wellbeing of families. It recommended that federal, state and territory governments should work together to develop and implement a national framework to guide the sharing of information about the safety, welfare, and wellbeing of families and children between

[56] Richard Ingleby, 'Family Law for the Future – A Response to the ALRC "Radical" Recommendation' (2019) 93 *Australian Law Journal* 815, 816.
[57] Parliament of Australia, Terms of Reference, Joint Select Committee on Australia's Family Law System (19 September 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw/Terms_of_Reference>.
[58] Australian Law Reform Commission (n 20) 143 [4.129].

the family law, family violence, and child protection systems.[59] The ALRC further recommended the expansion of the National Domestic Violence Order Scheme to include federal family court orders, and state and territory child protection orders.[60]

Some stakeholders expressed concerns about the effect of section 121 of the *Family Law Act* on the ability of family court users to share information about their own experiences. Section 121 makes it a criminal offence to publish an account of any family law proceedings that identifies a party or witness to the proceedings, subject to a number of exceptions. While some stakeholders argued that section 121 does not provide adequate scope for family court users to share their experiences publicly, others cautioned that the existing restrictions provide an important safeguard for dignity and privacy, and should be maintained.[61] The ALRC noted that objectives relating to privacy must be qualified by the principle of 'open justice', which is fundamental to ensuring that courts remain transparent and accountable for their decisions.[62] The ALRC concluded, however, that concerns regarding section 121 of the *Family Law Act* misunderstood the effect of the provision, and therefore recommended it be redrafted for greater clarity.[63]

The ALRC acknowledged some stakeholder concerns with the potential for overly facilitative information sharing frameworks to inadvertently cause further harm. For example, it cited Aboriginal and Torres Strait Islander legal services warning that the 'perception and fear that information could be shared with child protection may mean that Aboriginal and Torres Strait Islander women choose not to access much-needed support'.[64]

The ALRC further acknowledged broader concerns about breaches of privacy and confidentiality, often without the parties' consent.[65] These concerns suggest the potential for tensions between human rights to privacy and human rights to protection

[59] Ibid Recommendation 2. The ALRC considered that legislation in New South Wales and Victoria may provide a helpful model of facilitative information sharing provisions: ibid 151.
[60] Ibid Recommendation 3.
[61] Victorian Women Lawyers, Submission No 84; Law Council of Australia, Submission No 43; Australian Law Reform Commission (n 29) 88.
[62] *Family Law Act* (n 19) s 97(1).
[63] Australian Law Reform Commission (n 20) Recommendation 56. See also Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, 2018) 304.
[64] National Family Violence Prevention Legal Services Forum, Submission No 293, quoted in Australian Law Reform Commission (n 20) 150 [4.154].
[65] Ibid 149.

from harm. In turn, these tensions between human rights raise difficult questions about how 'human dignity' is to be most appropriately promoted in the context of information sharing. However, the ALRC did not undertake a detailed analysis of the optimal balance between these potentially competing aspects of human dignity.

As outlined above, the ALRC did categorise these information sharing recommendations as contributing to the 'protection of vulnerable parties'.[66] Commentators such as Fineman have critiqued the tendency to describe particular populations as 'vulnerable', arguing instead that vulnerability is universal and constant.[67] Arguably, focusing on the 'vulnerability' of particular populations to justify the sharing of information without their consent may further erode their agency and may distract from the task of finding an appropriate balance between rights to protection, and rights to privacy.

Ultimately, the ALRC did not further specify how information sharing provisions might be appropriately formulated across the broad and complex landscape of differing existing federal, state and territory provisions, nor how the concerns of Aboriginal and Torres Strait Islander services or other stakeholders in relation to privacy may be appropriately accommodated. Rather, this more detailed and difficult work remains to be done.[68]

C *Case Management Powers*

A common theme among the personal stories submitted to the confidential online portal established for the ALRC's family law inquiry was that their engagement with the family law system was emotionally and financially taxing, and escalated tensions.[69] These sentiments echo the findings of a number of earlier inquiries — that the adversarial nature of courts exercising family law jurisdiction is inappropriate for resolving family law disputes.[70] One submission suggested that the current 'court-centric process' was

[66] Australian Law Reform Commission (n 20) 30 [1.3].
[67] Martha Albertson Fineman, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133, 142.
[68] Attorney-General's Department, 'Family Violence' (Webpage) <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>.
[69] Australian Law Reform Commission, *Family Law - Summary of Tell Us Your Story Responses* (ALRC News, June 2019) <https://www.alrc.gov.au/news/family-law-summary-of-tell-us-your-story-responses/>; Australian Law Reform Commission (n 20) 107–8 [3.106].
[70] See, eg, Family Law Pathways Advisory Group (n 45); House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia (n 45); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia (n 50).

initially developed to provide a 'private and dignified process of legal separation', but that the adversarial nature of that process is no longer appropriate, particularly in terms of fostering ongoing co-parenting relationships.[71]

Recommendations in Chapter 10 of the ALRC's report contemplate ensuring 'as far as possible, that court processes do not unduly exacerbate existing conflict and trauma'.[72] The key recommendation in this chapter relates to amendment of the *Family Law Act* to provide that the overarching purpose of family law practice and procedure is to facilitate the just resolution of disputes according to law, as quickly, inexpensively, and efficiently as possible, and with the least acrimony so as to minimise harm to children and families.[73] This statutory overarching purpose would be reinforced by costs consequences for parties, their lawyers and third parties who fail to act in accordance with the overarching purpose.[74]

Furthermore, the ALRC recommended the introduction of powers to enable judges to take on a supervisory role in certain cases where a party is causing harm to the respondent and/or any children involved in the proceedings through the use of court processes in a manner that is inconsistent with the overarching purpose. This recommendation would empower the court to require a party to seek leave before making further applications and serving them on the other party.[75]

Granting additional powers and statutory impetus to courts to manage cases more proactively, including by reference to the duration of proceedings, has the potential to limit the opportunity for parties to participate in those proceedings. Participation in court proceedings may itself constitute an expression of human dignity.[76] However, protracted proceedings (with associated costs), repeated applications of questionable merit, and inflammatory conduct may also effectively limit parties' meaningful participation. Utilising a human dignity framework may be a useful method of analysing these competing rights and of determining an appropriate balance of such interests.

[71] Relationships Australia, Submission No 317.
[72] Australian Law Reform Commission (n 20) 296 [10.2].
[73] Ibid Recommendation 30.
[74] Ibid Recommendation 31.
[75] Ibid Recommendation 32.
[76] For example, as a component of equality before courts: *ICCPR* (n 11) art 14(1).

In addition to the introduction of costs consequences for non-adherence to the overarching purpose, the ALRC recommended removal of the general rule that parties bear their own costs in family court proceedings. The high costs involved in family court proceedings raise questions about the extent to which the system is advancing the interests of its users, as opposed to the interests of those who participate in the system. The ALRC cited a number of cases where judges have commented on the excessive costs in family law proceedings, noting the use of phrases such as 'obscene',[77] 'eye watering',[78] and 'extraordinary [and] grossly disproportionate to the subject matter of the litigation'.[79] The ALRC's recommendation was presented as a necessary 'brake … on the ability of either, or both parties, to unnecessarily engage in expensive legal skirmishes to the detriment of each other and the children without the risk, except in exceptional circumstances, of a costs order being made against them'.[80]

Implementation of these recommendations would give the courts additional tools to limit the 'indignity' of family law proceedings, and to protect children and other parties from harm caused by the misuse of court proceedings. Other complementary aspects of the inquiry report include recommendations seeking to increase the use of non-court dispute resolution processes in appropriate financial and children's cases.[81]

D *Property Division*

Parliamentary debates at the time of the *Family Law Act*'s development reveal that one aim of the new legislation was to create a less punitive and more dignified divorce process than had existed under the former fault-based divorce system.[82] One aspect of family law proceedings that arguably retains in some ways a fault-based approach, is property division based on assessments of each party's contributions to the relationship. The ALRC instead recommended the introduction of a presumption of equal contributions. In many cases, this may have the benefit of circumventing unproductive disputes, potentially furthering the aim of less acrimonious, more

[77] *Finazzi & Finazzi* [2012] FamCA 102.
[78] *Simic & Norton* [2017] FamCA 1007.
[79] *Newport & Newport* [2018] FamCA 472.
[80] Australian Law Reform Commission (n 20) 332 [10.137].
[81] See ibid ch 8.
[82] *Parliamentary Debates* (n 53) 4323; Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1375–1377 (Dr JF Cairns) 1375.

'dignified' family law proceedings. In a joint submission to the ALRC inquiry, private law firms Moores and MELCA submitted that

> the effect of introducing a 50/50 presumption would be that much of the criticism by one party of the other about their supposedly inadequate contributions would be removed from most affidavit material and from most trials.[83]

Currently the *Family Law Act* provides for significant judicial discretion in the division of property following separation. The starting point under Australian law is that the legal and equitable property interests of the parties prevail on separation.[84] However, the court has the power to 'make such order as it considers appropriate' to alter the respective property interests of the parties where 'it is satisfied that, in all the circumstances, it is just and equitable to do so'.[85] In determining which orders should be made, the court is required to take into account seven factors which are listed in section 79(4).[86] One of the factors under section 79(4) is relevant matters contained in section 75(2),[87] which provides a further list of factors to be considered in respect of the 'future needs' of the parties.

It has been argued that a discretionary approach to property division is necessary to accommodate the diverse circumstances of separated couples.[88] However, the ALRC's recommendations ultimately reflect the view that for the majority of separated couples — who divide their property without the benefit of a judicial determination[89] — a more prescriptive approach to property division may be preferable. It is noted that the lengthy list of relevant factors in the legislation, with no clear guidance on their relative weight or quantification, provides little assistance to separated couples attempting to understand what constitutes a fair division of property in their circumstances.

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[83] Moores and MELCA, Submission No 222.
[84] Patrick Parkinson, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380, 386.
[85] *Family Law Act* (n 19) ss 79, 90SM.
[86] Ibid s 90SM(4) for de facto relationships.
[87] Ibid s 90SF(3) for de facto relationships.
[88] This view informed Commissioner Geoff Sinclair's dissent on Recommendations 12 and 16; see Australian Law Reform Commission (n 20) 239 [7.97].
[89] In the Longitudinal Study of Separated Families, only 7% of couples reported resolving their property arrangements through the courts, with approximately 60% reporting that arrangements were made through discussions or that it 'just happened'; a further 29% reported using the services of a lawyer and 4% used mediation: Lixia Qu et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years* (Attorney General's Department (Cth), 2014) 98.

Key recommendations from the ALRC contemplate simplification of the provisions governing property division,[90] and the introduction of a presumption of equal contributions to the relationship.[91] These recommendations are aimed at affording separated couples with greater guidance in reaching a just and equitable property division without formal legal assistance. The Productivity Commission's 2014 report on access to justice suggests this is an important goal, as the costs of using the court to reach a property settlement are likely to be disproportionate to the relatively small property pool of the majority of separated couples in Australia, and legal costs will be prohibitive in many cases.[92]

In making this recommendation, the ALRC noted evidence that mothers typically receive greater than 50% of the property pool under current arrangements.[93] In particular, assessing the 'future needs' of the parties commonly involves making an adjustment in favour of mothers, based on factors such as their caring responsibilities and lower earning capacity. The ALRC recommended that the legislation explicitly state the steps that must be taken in determining what adjustment should be made to the parties' interests in property, including consideration of a revised list of factors relating to 'future need'.[94] The ALRC was thus of the view that its recommendation should not lead to any diminution in the share of property received by parents with greater caring responsibilities, an outcome which it said would be 'unacceptable'.[95]

Nevertheless, critics of a presumption of equal contributions argue that a 50/50 starting point may represent a step backward for women.[96] For example, women with caring responsibilities may misunderstand that they are only entitled to 50% of the property, or may not be sufficiently empowered to argue for a greater share of the assets, particularly if they do not access legal representation. This raises the question of

[90] Australian Law Reform Commission (n 20) Recommendation 11.
[91] Ibid Recommendation 12. See also Recommendation 16 in respect of a presumption of equal sharing of the value of superannuation assets accumulated during a relationship.
[92] Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014) 872. Most separated couples who participated in the Longitudinal Study of Separated Families reported asset pools of less than $300,000: Qu et al (n 89) 92.
[93] Australian Law Reform Commission (n 20) 201 [6.23], citing Qu et al (n 89) 102; Rae Kaspiew and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(1) *Australian Journal of Family Law* 1, 19; Christopher Turnbull, 'Family Law Property Settlements: Principled Law Reform for Separated Families' (PhD Thesis, Queensland University of Technology, 2017) 203.
[94] Australian Law Reform Commission (n 20) Recommendation 11; see also 219 [7.8].
[95] Ibid 225 [7.36].
[96] See, eg, Belinda Fehlberg, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 *Federal Law Review* 367.

whether this recommendation is inconsistent with the respect of human dignity, and particularly with implementation of article 3 of CEDAW, which calls for state parties to take appropriate measures to ensure the full development and advancement of women. However, it is not clear that the recommended reform would present any additional challenges than under the current law, which requires parties to argue for any adjustment to existing legal and equitable interests in property. Indeed, carers who have little or no assets 'in their name' may particularly benefit from a presumption of equal contributions to property during the relationship. The recommended reform would need to be monitored using empirical research, in order to assess its impact on couples across a diverse range of financial circumstances.

E *A Statutory Tort for Family Violence*

The ALRC also recommended the introduction of a statutory tort that would allow compensation for harm caused by family violence to be pursued in the family courts as part of property proceedings.[97] This recommendation is consistent with the general imperative in human rights instruments to ensure that any persons whose rights or freedoms have been violated have an effective legal remedy.[98] In particular, the *Declaration on the Elimination of Violence against Women* provides that states should ensure that women who are subjected to violence have access to appropriate remedies for the harm they have suffered.[99]

The recommended cause of action would replace the common law principles that currently govern how family violence is taken into account in property division proceedings. In accordance with the decision in *Kennon & Kennon*,[100] an adjustment to property interests may be made in 'exceptional' cases to address the impact of a course of violent conduct on a party's 'contributions' to the marriage. The work of Professors Easteal, Warden and Young suggests that adjustments on this basis are rare and, typically, modest.[101]

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[97] Australian Law Reform Commission (n 20) Recommendation 19.
[98] *ICCPR* (n 11) art 2; *Universal Declaration of Human Rights* (n 2) art 8.
[99] *Declaration on the Elimination of Violence Against Women* (n 25) art 4(d).
[100] *Kennon & Kennon* (1997) 22 FamLR 1.
[101] Patricia Easteal, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1, 9.

In a judgment that post-dates the law reflected in the ALRC's final report, the Full Court of the Family Court of Australia clarified that the *Kennon* principle does not require evidence that permits 'quantification' of the impact of the violent conduct on the claimant party's contributions.[102] There must, however, be 'an evidentiary nexus between the conduct complained of and the capacity (and or effort expended) to make relevant contributions'.[103]

The shift away from a contributions framework (per *Kennon*) to a compensatory framework, as contemplated by the ALRC's recommendation, may be seen to have merit from the perspective of upholding the dignity of persons who have experienced family violence. Compensation involves the recognition of harms caused by conduct that is held out to be wrong, rather than asking how the conduct may have limited the victim's contribution to the relationship per *Kennon*. Incorporating a statutory tort within the *Family Law Act* would also notably enable compensation to be sought in conjunction with the resolution of property matters upon separation, whereas existing common law causes of actions would require the institution of separate civil proceedings.

From another perspective, promoting the importance of family violence in property division may be seen as re-introducing, to some extent, a 'fault-based' approach and so detracts from the aim of dignified proceedings sought by a presumption of equal contribution. However, where acts of violence have caused substantial harm to a party, it would arguably be an abrogation of duties to protect human dignity to ignore the impact of those acts when dividing up the parties' property.

IV CONCLUSION

Issues pertaining to human dignity were of relevance in a number of ways throughout the ALRC family law inquiry. This is perhaps unsurprising, given that family law deals primarily with intimate human relationships. It is not suggested that a human dignity framework is the only appropriate lens through which the ALRC could properly have conducted the family law inquiry. The inquiry was broad-ranging, involving consideration of a diverse range of topics, and a number of issues of principle were raised. However, the examples in this paper arguably demonstrate that explicitly

[102] *Keating & Keating* (2019) 59 FamLR 158, 165–6 [38]–[39], [43].
[103] Ibid 166 [39].

incorporating human dignity concepts into the inquiry's approach may have added value in a number of ways.

First, a human dignity framework would reflect the strong links between family law and human rights. It would facilitate and promote consideration of the many human rights obligations that are relevant to the design and operation of the family law system. This article has particularly focused on rights such as protection from harm and privacy. However, a human dignity framework would accommodate explicit consideration of the wide spectrum of human rights that are relevant to family law.

Secondly, this article has highlighted that it is often not a straightforward matter to identify whether a particular measure will ultimately be the best option for promoting human dignity. For example, there are sometimes tensions between multiple relevant human rights that need to be managed. A human dignity framework may have provided a useful tool for balancing these competing aspects of human dignity.

Thirdly, dignity was evidently a prominent concern for a significant proportion of people engaging with the inquiry process, including individuals and professional stakeholders. Highlighting the importance of human dignity in the inquiry approach may assist to reflect that concern and thereby demonstrate active engagement with it.

Fourthly, a focus on human dignity would appear consistent with legislation that requires the ALRC to consider Australia's international obligations.

In any event, a number of ALRC recommendations arguably seek to enhance human dignity. For example, this article has highlighted measures aiming to protect parties from harm and minimise the 'indignity' of litigation. It is relatively common ground that these are worthy goals. It remains to be seen how the ALRC inquiry will influence progress towards their achievement.

REFERENCE LIST

A *Articles/Books/Reports*

Australian Law Reform Commission, *Family Law for the Future — An Inquiry into the Family Law System* (Report No 135, March 2019)

Australian Law Reform Commission, *Review of the Family Law System* (Discussion Paper No 86, October 2018)

Australian Law Reform Commission, *Review of the Family Law System* (Issues Paper No 48, March 2018)

Barroso, Luis, 'Here, There and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse' (2012) 35(2) *Boston College International & Comparative Law Review* 331

Capps, Patrick, *Human Dignity and the Foundations of International Law* (Hart Publishing, 2009)

Department of Justice (Canada), *Unified Family Court Summative Evaluation* (Final Report, 2009)

Easteal, Patricia, Catherine Warden and Lisa Young, 'The Kennon "Factor": Issues of Indeterminacy and Floodgates' (2014) 28(1) *Australian Journal of Family Law* 1

Family Court of Australia, *Family Court of Australia 2017–18 Annual Report* (2018)

Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection System* (Interim Report, 30 June 2015)

Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001)

Fehlberg, Belinda, Lisa Sarmas and Jenny Morgan, 'The Perils and Pitfalls of Formal Equality in Australian Family Law Reform' (2018) 46 *Federal Law Review* 367

Fineman, Martha Albertson, 'Vulnerability and Inevitable Inequality' (2017) 4(3) *Oslo Law Review* 133

Fogarty, John, 'Establishment of the Family Court of Australia and its Early Years' (2001) 60 *Family Matters* 90

House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, 2003)

House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, 2017)

Ingleby, Richard, 'Family Law for the Future – A Response to the ALRC "Radical" Recommendation' (2019) 93 *Australian Law Journal* 815

Kaspiew, Rae et al, *Evaluation of the 2012 Family Violence Amendments: Synthesis Report* (Australian Institute of Family Studies, 2015)

Kaspiew, Rae and Lixia Qu, 'Property Division after Separation: Recent Research Evidence' (2016) 30(1) *Australian Journal of Family Law* 1

Parkinson, Patrick, 'Family Property Division and the Principle of Judicial Restraint' (2018) 41(2) *University of New South Wales Law Journal* 380

Pearce, Dennis and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014)

Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, Vol 2, 2014)

Qu, Lixia et al, *Post-Separation Parenting, Property and Relationship Dynamics after Five Years* (Attorney General's Department (Cth), 2014)

Riley, Stephen, 'Architectures of Intergenerational Justice: Human Dignity, International Law and Duties to Future Generations' (2016) 15(2) *Journal of Human Rights* 272

Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Report on the Law and Administration of Divorce and Related Matters and the Clauses of the Family Law Bill 1974* (Parliamentary Paper, No 133, October 1974) 44

Steinmann, Rinie, 'The Core Meaning of Human Dignity' (2016) 19(1) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 1

Wright, Danaya, 'Theorizing History: Separate Spheres, the Public/Private Binary and a New Analytic for Family Law History' [2012] *Australia & New Zealand Law and History E-journal* 44

B *Cases*

AH & SS [2005] FamCA 854

Finazzi & Finazzi [2012] FamCA 102

Keating & Keating (2019) 59 FamLR 158

Kennon & Kennon (1997) 22 FamLR 1

Minister for Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273

Newport & Newport [2018] FamCA 472

Simic & Norton [2017] FamCA 1007

C *Legislation*

Australian Law Reform Commission Act 1996 (Cth)

Family Law Act 1975 (Cth)

D *Treaties*

Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981)

Convention on the Rights of the Child, opened for signature 20 December 1989, 1577 UNTS 3 (entered into force 2 September 1990)

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

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

E *Submissions to Australian Law Reform Commission, Review of the Family Law System*

Australian Dispute Resolution Advisory Council (ADRAC), Submission No 12

CatholicCare Diocese of Broken Bay, Submission No 197

Farrar Gesini Dunn, Submission 140

Law Council of Australia, Submission No 43

Moores and MELCA, Submission No 222

National Family Violence Prevention Legal Services Forum, Submission No 293

PeakCare Queensland, Submission No 72

R Alexander, Submission No 131

Relationships Australia, Submission No 317

Royal Australian and New Zealand College of Psychiatrists, Submission No 18

Victorian Women Lawyers, Submission No 84

Western Sydney CLC, Submission No 8

F *Other*

Attorney-General's Department, 'Family Violence' (Webpage) <www.ag.gov.au/FamiliesAndMarriage/Families/FamilyViolence/Pages/default.aspx>

Australian Law Reform Commission, *Family Law - Summary of Tell Us Your Story Responses* (ALRC News, June 2019) <https://www.alrc.gov.au/news/family-law-summary-of-tell-us-your-story-responses/>

Brandis, George, Attorney-General of Australia, 'Review of the Family Law System' (Terms of Reference, Australian Law Reform Commission, 17 August 2017)

Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1975, 1375–1377 (Dr JF Cairns)

Commonwealth, *Parliamentary Debates*, House of Representatives, 28 November 1974, 4321–23 (Mr Whitlam)

Declaration on the Elimination of Violence Against Women, GA Res 48/104, UN Doc A/48.104 (23 February 1994, adopted 20 December 1993)

Dessau, Justice Linda 'A Unified Family Court' (Paper, Third National Family Court Conference, 23 October 1998)

Parliament of Australia, Terms of Reference, Joint Select Committee on Australia's Family Law System (19 September 2019) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Family_Law_System/FamilyLaw/Terms_of_Reference>

Turnbull, Christopher, 'Family Law Property Settlements: Principled Law Reform for Separated Families' (PhD Thesis, Queensland University of Technology, 2017)

Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd Sess, 183rd Plen Mtg, UN Doc A/810 (10 December 1948)

United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, UN Doc E/CN.4/1985/4, Annex (28 September 1984)

ABANDONING THE INNOCENT: RECOMMENDATIONS FOR THE LONG-TERM HOLISTIC SUPPORT OF EXONEREES

LAURA ENSINGER*

This article discusses some of the key issues surrounding Australia's current approach to supporting exonerees after exoneration. It outlines the lack of holistic support available in Australia. The article makes recommendations to address the current short fallings of holistic support services available to victims of wrongful conviction in Australia.

CONTENTS

* Laura Ensinger is a Griffith University law student on the Gold Coast and is in her final year. Laura continues to advocate for exonerees, and hopes to work alongside individuals to implement a national support network for exonerees in the near future. Sincere thanks to the interviewees; John Button, Henry Keogh, Lindy Chamberlain and Deanna Maclellan, for without them this article would not have been possible. Further thanks to Phillipa England, Joel Almond and Samantha Evans.

I INTRODUCTION

Imagine being convicted for a crime you did not commit,[1] forced to serve a sentence that belongs to someone else. The system that was meant to protect you has failed. If you are one of the fortunate, you may have a family member waiting for you upon release. Many do not. Every day you continue to endure ongoing trauma — you struggle to sleep, eat, and gain employment or housing. You are left unsupported, and the system that inflicted this burden on you has failed you once again.

Exonerees are frequently isolated by their unique and individualised experience. No one can understand the distinct trauma they continue to experience daily. Individuals are faced with the presumption that exoneration alleviates the trauma that has been inflicted, but this is not the case. Exonerees are expected to revert back to their lives before incarceration without assistance or support. There is already a significant amount of research that currently addresses the known causal factors of wrongful conviction, difficulties exonerees face gaining exoneration, and the requirement for exonerees to be compensated. However, there is insufficient research available domestic to Australia that address the availability of support and services offered to exonerees after exoneration. It is acknowledged these areas of research are paramount to exonerees, however this article will focus exclusively on holistic support or lack thereof, and the effects that such shortcomings have on exonerees.

This article proposes the following recommendations to address the support requirements of victims of wrongful conviction:

1. Access to individualised mental health support services;
2. A national peer support network service; and

[1] Lynne Weathered, 'Reflections on the Role of Innocence Organisations in Australia' (2015) 17(2) *Flinders Law Journal* 515, 525.

3. Transitional services for exonerees to assist with successful reintegration back into society.

This article presents the views and evidence of four individuals' experiences in relation to wrongful conviction in Australia. The data obtained from the interviews is based on the personal experiences of the interviewees in relation to proposed recommendations for transitional support services, ongoing mental health services and the role of peer support groups. It will assess the current avenues of support available domestically used to support exonerees and will compare international approaches. It will analyse Australia's current support avenues by examining the personal experiences of the four Australian's affected by wrongful conviction.

II RESEARCH AND METHODOLOGY

The article seeks to provide feedback from exonerees on the article's proposed recommendations. Fixed open-ended questions were prepared in order to obtain the data required for the article. The interview questions were adapted from a similar study,[2] undertaken in 2013 by Irazola.[3] This study examined the victim experiences of exonerees. The structure of the questions were formulated under the following headings:

(a) Background information;
(b) Impact;
(c) Access to information; and
(d) Exonerees views of the articles proposed recommendations.

Each question was posed to the interviewees in an open-ended manner to encourage each participant to explore areas in which they wished to provide extended answers. In addition to the fixed questions, the interviewees were encouraged to engage more broadly in the conversation, thus allowing participants to explore their views and experiences in line with accepted qualitative case study interviewing methods.[4]

[2] Annexure 1.
[3] Seri Irazola et al, 'Study of Victim Experiences of Wrongful Conviction' (Final Report 244084, September 2013).
[4] Raymond Opdenakker, 'Advantages and Disadvantages of Four Interview Techniques in Qualitative Research' (2006) 7(4) *Forum: Qualitative Social Research* 11; Stacy Jacob and S. Paige Furgerson, 'Writing Interview Protocols and Conducting Interviews: Tips for Students New to the Field of Qualitative Research' (2012) 17(42) *The Qualitative Report* 1; Irazola (n 3).

The interview method used to obtain the data was email correspondence, allowing for a greater reach of interviewees rather than being limited to geographical location by face-to-face interviews. The interviewees were individually selected by undertaking research of well-known Australian cases of wrongful conviction and recruited by personal invitation. This method provided the article with rich, qualitative data — albeit from a small group of respondents.

The article examines interviews undertaken with John Button,[5] Henry Keogh,[6] Lindy Chamberlain,[7] and Deanna MacLellan. This approach seeks to highlight the interviewees' personal experiences of the support available for exonerees within Australia.

A *John Button*

Button was incarcerated for 19 years after he was wrongfully convicted of the manslaughter of his girlfriend, Rosemary Anderson. Button was accused of causing the death of Rosemary after evidence was found that his car had sustained damage, allegedly consistent with killing Rosemary. Button falsely confessed to causing Rosemary's death due to overwhelming pressure and abuse from the interviewing officers. In addition to this confession, a contributing factor was the incorrect findings of expert evidence that the damage on Button's car was consistent with an accident that would have caused the death of Rosemary. In 2000, Button appealed his conviction, which was later overturned in 2002. The conviction was overturned largely due to new expert evidence that found the damage to his car was incorrect and was inconsistent to the injuries Rosemary had suffered. Button is currently an active advocate for exonerees, establishing the Perth chapter of the Innocence Project at Edith Cowan University, as well as appearing in TV segments,[8] and documentaries.[9] Button answered all interview questions and provided additional feedback in regard to the recommendation of the peer support network.

B *Henry Keogh*

[5] *Button v The Queen* [2002] WASCA 35.
[6] *R v Keogh (No 2)* (2014) 121 SASR 307.
[7] *Chamberlain v R* (1983) 153 CLR 514; *Chamberlain v R* (1983) ALR 493; *Chamberlain v R (No 2)* (1984) 153 CLR 521; and *Inquest into the death of Azaria Chantel Loren Chamberlain* [2012] NTMA 020.
[8] 'Wrongfully Convicted', *SBS Insight* (SBS, 2019); 'Murder He Wrote', *Australian Story* (ABC, 2002).
[9] Ibid.

Keogh was wrongfully convicted and served 20 years for the murder of his fiancée Anna, due to evidence that he held several insurance policies against her. However, it was submitted by Keogh that the multiple policies were in place to prevent lapses. There were also significant issues surrounding expert evidence submitted at the trial and contamination of the crime scene. It was also found that Anna's body was released for cremation the same day her death was considered a murder, leaving no avenue for review of the original autopsy. After serving a significant amount of his sentence, Keogh was released on parole before successfully gaining exoneration in 2014. Since his exoneration, Keogh has been heavily involved in advocacy projects for the wrongfully convicted,[10] also appearing on an SBS Insight segment in 2019.[11] Keogh answered all interview questions and provided additional feedback in regard to the recommendation of the peer support network. He also made further suggestions regarding a need for independent domestic research of wrongful conviction occurrences.

C *Lindy Chamberlain*

Chamberlain is arguably one of the most high-profile Australian cases of wrongful conviction. Chamberlain was wrongfully convicted of murdering her baby Azealia and profusely asserted her innocence, claiming a dingo had taken the baby from their campsite at Uluru. Chamberlain has faced immense public scrutiny since baby Azaria's death. She spent three years in prison and was later released when pieces of Azaria's clothing were found. There were also significant issues surrounding the handling of her case and incorrect forensic evidence. Since her exoneration, Chamberlain has continued to fight for proper recognition of how baby Azaria was killed. In 2010, she petitioned the coroner to amend the final report to reflect that Azaria's cause of death was due to a dingo. She was successful, and in 2012 the coroner's final report was amended. Chamberlain did not answer the fixed questions. Instead, she provided a statement that she allowed to be implemented into the data to reflect her contrasting opinion.

D *Deanna MacLellan*

This interviewee is not an exoneree, but a family member directly affected by wrongful conviction. MacLellan was sought as an interviewee to illustrate the needs of family

[10] 'Wrongfully Convicted' (n 8).
[11] Ibid.

members who are adversely affected by a lack of support for exonerees in Australia. MacLellan's father was wrongfully accused and convicted of sexually assaulting a younger family member. He was convicted based on purely circumstantial evidence and the testimony of an allegedly disgruntled family member. He was later acquitted of all charges upon appeal due to insufficient evidence when the family member's testimony was revoked, and was permitted to retain his residency. MacLellan's interview highlighted that her family faced compounding issues regarding her father's exportation due to the possible revocation of his visa for the criminal charges previously held against him. MacLellan continues to be an advocate for those who have been affected by wrongful conviction, particularly through a Facebook page where she seeks to educate others on the impact that convictions can have on family members. MacLellan answered all interview questions but did not provide additional data outside the fixed questions provided.

III DATA, ANALYSIS, DISCUSSION AND RECOMMENDATIONS

After exoneration, exonerees face a magnitude of hurdles. These often include limited mental health support, homelessness, unemployment and isolation. Currently, in Australia, there are limited organisations that specifically assist exonerees. A report prepared by the United Kingdom organisation 'Justice', highlighted the complex situation exonerees face,[12] stating that '[e]xonerees are an anomaly in the criminal justice system, with no state department responsible for them upon release, as they should never have been imprisoned in the first place'.[13] There is a lack of research analysing the support currently offered to exonerees. One organisation that has attempted to address this concern is the Innocence Project. The organisation initially started in the United States, however it is now an internationally recognised advocate. It has played a fundamental role in raising global awareness of wrongful convictions. To date, it has assisted with the exoneration of '367 people in the United States … by DNA testing, including 21 who served time on death row, and 162 real perpetrators have been identified'.[14] In addition

[12] Justice, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (Report, 2018).
[13] Ibid 8.
[14] 'Exonerate', *The Innocence Project* (Web Page, 2019) <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>.

to exoneration cases, the project also provides much needed support for exonerees by helping individuals to rebuild their lives with informal counselling and support services.

A similar approach has been implemented in Australia, with a chapter of the Innocence Project located on the Gold Coast with Griffith University. The Griffith University Innocence Project currently provides assistance to individuals seeking exoneration through the retesting of DNA evidence. Unfortunately, the Australian chapter does not provide additional support that is critically needed, such as peer networking or support services. These kinds of domestic advocacy projects are quite limited in support in comparison to a number of United States chapters. Whilst Australia's implementation of such advocacy projects is arguably a positive step, there is an urgent requirement to address all aspects of support required for exonerees rather than just compensation or exoneration. In Australia, the primary focus of advocacy organisations is compensation or exoneration. The data obtained from the interviews was supportive of this finding. It found that all four of the interviewees did not have any access to domestic organisations who provided any kind of holistic support.

A *Access to Individualised Mental Health Support Services*

During incarceration, exonerees experience severe isolation from family members and their support networks. They are also at an increased risk of permanent psychological injuries such as Post Traumatic Stress Disorder, anxiety and depression.[15] While incarcerated, individuals have an increased risk of significant mental health issues that are likely to adversely affect their long-term physical and emotional wellbeing. There are currently no specialised mental health services within Australia that specifically deal with treating exonerees. Therefore, there is an urgent need to implement ongoing domestic mental health support services.

As well as an increased risk of psychological injury, exonerees face prolonged trauma which is likely to extend beyond the initial incarceration period. A study undertaken by

[15] Christing Kregg, 'Right to Council: Mental Health Approaches to Support the Exonerated' [2016] *Advocates Forum* 31; see also Seri Irazola et al, 'Study of Victim Experiences of Wrongful Conviction' (Final Report No 244084, September 2013); Leslie Scott, 'It Never, Ever Ends: The Psychological Impact of Wrongful Conviction' (2010) 5(2) *American University Criminal Law Brief* 10.

Grounds oversaw the post-exoneration psychiatric care of 18 American exonerees.[16] Grounds found that exonerees had a significant increased risk of psychological harm compared to regular inmates who were incarcerated.[17] The psychological harm was found to continue long after individuals had been exonerated. Grounds argued that regular support services would not be sufficient to treat the ongoing trauma of exonerees.[18] This is due to the unique trauma that exonerees experience. Further research in this area by Grounds also found the trauma experienced was similar to the suffering endured by prisoners in prisoner-of-war camps.[19] He asserted the traumatic experiences of exonerees was so unique it required customised treatment plans, dependent on each exonerees individual circumstances and needs.[20] This finding is also supported by Professor Haney, who specialises in psychology. Haney highlighted that the trauma exonerees suffered was so unique, it was classified as an 'irrational form of suffering'.[21] He further categorised this kind of trauma as suffering that had 'no justification or meaning', which often resulted in victims suffering permanent injuries to their psychological health.[22]

Grounds and Haney's findings are further supported by a 2018 study of exonerees in the United Kingdom.[23] This study focused on the mental health of exonerees from before their arrest, to two years after exoneration. Similarly, it found the trauma caused by wrongful convictions did not end after an individual was exonerated.[24] The findings were also analogous in that exonerees required specialist individualised treatment to specifically address the lost years in prison. It is therefore essential to implement the proposed recommended mental health support services, in order to provide sufficient support to exonerees. Additionally, mental health support services must be tailored to each exonerees' individual personal mental health needs.

[16] Adrian Grounds, 'Understanding the Effects of Wrongful Imprisonment' (2005) 32(1) *Crime and Justice* 1.
[17] Ibid 15–6.
[18] Ibid 43–4.
[19] Ibid 41–2; see also Scott (n 15) 13–7.
[20] Ibid 44.
[21] Interview by Frontline with Craig Haney, Psychology Professor, University of California Santa Cruz, in Santa Cruz, Cal (December 10, 2002) <https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/haney.html>; see also Scott (n 15) 16.
[22] Ibid.
[23] Justice (n 12); see also Scott (n 15) 16.
[24] Justice (n 12) 7.

The data obtained from the interviews support the recommendation for long term, individualised mental health support services for exonerees. This data found that three out of the four interviewees found current mental health services were inadequate in assisting them with their own individualised needs. One interviewee, Button stated 'psychiatric help was not of much help as many had not dealt with wrongful convictions and could only assume that it was similar to PTSD, when in fact it is much worse'. The data collected from the interviews further supported the findings highlighted in Grounds study.[25] The data found that three out of the four interviewees suffered from ongoing mental health concerns due to their wrongful conviction. One example of this was Keogh's personal experience with his mental health, which highlighted how individualised each exonerees trauma is:

> There is no standard method for staving off a full and frank depressive episode. What works on one occasion is not guaranteed to work the next or, indeed, ever again. I casted about desperately in the hope of jagging even just a temporary remedy if not a magic bullet. Sometimes I did. However, when I didn't have luck finding any kind of a remedy, I'd go into my default position; which was a 'siege mentality on steroids. My emotional pain was too intense to articulate. I didn't want help – no one could help anyway. And the last thing I wanted was sympathy — from anyone.

Chamberlain's account also reflected an individualised approach for mental health support. This interviewee provided a contrasting opinion that outlined not all exonerees require support services. Chamberlain found she did not require ongoing support, her approach to address her trauma was to not categorise herself as a 'victim'. Chamberlain described her approach as 'a personal choice as to whether I would be a victim or not. I chose to not let them do this to me and continue to choose so. I took back for myself, my head space and freedom by not perpetuating internally what they had started externally'. She further stated that she recognised many exonerees require considerable assistance and that there was a need to address those needs. However, she noted that 'her personality is such that she did not require resources beyond what she could provide for herself'.

[25] Grounds (n 16).

During incarceration, exonerees are often faced with the compounding trauma of losing family members through death or purely from isolation. The data from the interviews found two of the four interviewees suffered from additional emotional trauma due to the death of a family member while incarcerated. One significant example of this was MacLellan and her personal experience with her father's wrongful conviction. She highlighted how, during the period her father was wrongfully incarcerated, she experienced significant emotional and psychological trauma. During her father's incarceration, her uncle committed suicide as a result of his brothers' wrongful conviction. As a result, MacLellan endured ongoing periods of severe depression and anxiety, which led to two suicide attempts:

> It became so bad to a point where I did not want to leave the house most days, because of this fear, it got to the point where I did not want to live anymore, as my trust issues, fear and anger for the world all became too much for me to handle. Any kind of emotional support would have been greatly appreciated. But we received nothing.

There is an urgent need to implement ongoing mental health support services for exonerees domestically. Presently, there are no services within Australia that specifically support exonerees. The research and data analysed from the interviews supports this finding, and further outlines the serious need to implement the recommended individualised mental health support services for exonerees. The research further indicates it is likely exonerees will experience prolonged and aggravated psychological damage without the required individualised mental health support services.

B *The Implementation of Peer Support Networks*

The experiences exonerees face are so unique, they often find the support available is unhelpful. This issue was examined by a study undertaken by Konvisser and Werry.[26] The study examined a group of 70 exonerees and their involvement in advocacy for wrongful conviction through education, reform, and policy changes.[27] A causal link was established between each exonerees rehabilitation and their participation in advocacy and

[26] Zieva Dauber Konvisser and Ashley Werry, 'Exoneree Engagement in Policy Reform Work: An Exploratory Study of the Innocence Movement Policy Reform Process' (2017) 33(1) *Journal of Contemporary Criminal Justice* 43, 50.
[27] Ibid.

supporting others. It concluded that exonerees benefitted from involvement in advocacy projects with other exonerees. This finding was also explored by Rebecca Brown from the New York chapter of the Innocence Project. Brown highlighted the significance of exonerees advocating for others:

> Many exonerees have expressed to me that they want to feel like they are now a part of changing the larger system. Exonerees are our best advocates for innocence reform and so obviously we are always looking for opportunities for them to educate the public about wrongful conviction. They really are the human face of the problem [they] are in the best position to describe the unique horror of a wrongful conviction and what it feels like to bring home to lawmakers or other policy makers the reality of this tragedy. They might not be able to speak to all the scientific research that informs the basis for our reform recommendations, but nobody can speak about what it feels like better than they can.[28]

One approach to address the shortfalls of targeted support services for exonerees would be to implement a peer support network. Presently, there is no network or organisation that provides a platform or service where exonerees can meet, converse and support one another. This is despite of the supporting research that shows the positive impact advocacy has on exonerees mental health and well-being.[29]

The data obtained from the interviews found that three out of four of the interviewees agreed that some form of peer support network after exoneration would have been beneficial to their mental health. One interviewee, Button, highlighted that chapters of the American Innocence Project had already implemented an email-based support service and noted that 'it surprisingly seems to have worked'. This recommendation seeks to implement a support service that would see individuals supporting each other due to their own unique experiences with wrongful convictions. It has been implemented in several American chapters of the Innocence Project. Exonerees are heavily involved in ongoing advocacy projects, policy reform conversations and peer support networks throughout the United States. Button agreed with introducing a similar peer support

[28] Ibid.
[29] Ibid.

network domestically and stated the 'proposed recommendations were right on track'. He also argued that 'there were likely a large number of cases where the accused may not have had justice and is just looking for someone to listen to them'. This finding was also consistent with Mr Henry Keogh's response. However, MacLellan argued the importance of a peer support group and how it was fundamental for exonerees on their road to rehabilitation and recovery. She argued for the mandatory introduction of a peer support network, highlighting that 'there needs to be programs in place to help relieve the anxiety that is left to rot within these innocent victims'.

One issue that may arise with this recommendation may be the financial costs associated with the service. However, the financial costs to provide this kind of service would arguably be minimal. In order to mitigate any significant costs required to implement a peer support network, the support service could be provided online through a networking platform. This approach would potentially increase exposure to exonerees by not limiting the service to specific locations. In the data obtained from the interviews, feedback was sought from the interviewees regarding whether a starting point for a peer support network could be an online support platform. This proposal could be facilitated by a social media network group such as Facebook, where exonerees could converse and support each other online. Similarly, this approach is often implemented by people who seek support from others who share the same experience such as sexual assault victims and mothers with post-natal depression.[30] In an age of online networking and globalisation, the importance of online support networks should not be overlooked. The data obtained from the interviews found that three out of the four interviewees agreed that an online peer support network would be a beneficial starting point. Button highlighted his personal views on this recommendation:

> Reflecting back on my own personal journey, there where years of trying to get people to listen to me. When I think back on those hard times, I would have loved to have someone to speak to that understood what I was going through - a means to move forward. I think a Facebook page would be the way to go, however one of the difficulties I am concerned

[30] Bethany Lerman, 'Teen Depression Groups on Facebook: A Content Analysis' (2017) 32(6) *Journal of Adolescent Research* 719; Ruth Webber and Rosetta Moors, 'Engaging in Cyberspace: Seeking Help for Sexual Assault' (2015) 20(1) *Child & Family Social Work* 40; César Filipa, Patrício Costa, Alexandra Oliveria and Anne Marie Fontaine, '"To Suffer in Paradis": Feelings Mothers Share on Portuguese Facebook Sites' (2018) 9(1) *Frontiers in Psychology* 1.

> with is in getting the details out to victims. I would be happy to be involved with something like this.

There is an overwhelming need to implement a national peer support network for exonerees domestically. Therefore, upon reflection of the data obtained by the interviews and international studies undertaken by Grounds,[31] Konvisser and Werry,[32] a national peer support network for exonerees should be implemented immediately in Australia. It would be more beneficial to exonerees if this kind of rehabilitation and support service was not provided by a government agency. This conclusion was based on the overall distrust held by the interviewees in a system that has already failed them. Therefore, it would likely be more beneficial for exonerees for this avenue of support was to be provided by a private organisation or advocacy project.

C *Transitional Services for Exonerees to Assist with Successful Reintegration Back Into Society*

After exoneration, exonerees frequently struggle to find secure employment and long-term housing. This is further aggravated by the absence of referrals to corresponding services or case workers. Exonerees are often left institutionalised, having become accustomed to having no control over their personal choices for the duration of their incarceration.[33] It is therefore critical to implement domestic transitional services for exonerees. These support services should be initiated prior to an exonerees release from prison to mitigate the risk of homelessness. This recommendation is also supported by the study undertaken by Grounds in the United Kingdom. In Grounds' findings, he argued it was necessary to implement transitional support prior to an exonerees release in order to prevent further psychological harm.[34]

In the research undertaken from the interviews, the data showed there was an absence of available transitional services for exonerees within Australia. An international approach seeking to address this issue is the United Kingdom's *Citizens' Advice Bureau*

[31] Grounds (n 16).
[32] Konvisser and Werry (n 26).
[33] Scott (n 15); John Wilson, *A Perpetual Battle of the Mind* (Web Page, 31 October 2002) <https://www.pbs.org/wgbh/pages/frontline/shows/burden/cameras/memo.html>.
[34] Grounds (n 16) 43–44.

Miscarriages of Justice Support Service ('CABMOJSS').[35] The organisation was founded around the idea that 'stable, appropriate accommodation is required to help maximise and secure the benefits of other related support services for exonerees'.[36] It currently provides assistance to 30 exonerees annually, by aiding individuals with resettlement and housing.[37] In 2012, CABMOJSS assisted 164 exonerees with housing solutions.[38] Fortunately, there are no time limits for applications. However, before receiving support, individuals must be exonerated or cleared from any wrong doings. It could be argued that one downfall to this approach is the difficulty individuals who have not yet been exonerated may face accessing support. Australia does not currently have any transitional services for exonerees, therefore it is critical that an approach similar to CABMOJSS is integrated and adopted in order to assist exonerees with reintegration.

This recommendation is supported by the data obtained from the interviews: two out of the four interviewees identified they were not provided any kind of transitional support such as income support, employment, housing assistance or reintegration services. Furthermore, three out of the four interviewees agreed that transitional services should have been provided to them upon exoneration. The one exception to this finding was Keogh, however he noted he was only offered transitional support because he was released on parole before later being exonerated. Keogh detailed his experience further, highlighting the difficulties he endured despite having access to limited parolee support:

> I was released on parole not as an exoneree, so the parole board found me a job, so I had a weekly wage. However, my social life was non-existent, as all my friends had married and moved on with their lives and I didn't fit in society anymore. This led to a severe depression that has continued to be with me ever since.

In order to address this shortfall, it is necessary to implement readily available transitional services domestically. These services should seek to provide exonerees with short-term and long-term accommodation solutions and support, in order to mitigate the potential further re-traumatisation of individuals. It is critical the support focuses on

[35] 'How We Work', *Commonweal Housing* (Web Page) <https://www.commonwealhousing.org.uk/about-us/how-we-work> (*'Commonweal Housing'*).
[36] Rebecca Dillion, 'Miscarriages of Justice', *Commonweal Housing* (Web Page, 13 February 2012) <https://www.commonwealhousing.org.uk/miscarriages-of-justice-2>.
[37] *Commonweal Housing* (n 35).
[38] Ibid.

assisting exonerees to overcome hurdles accessing income, housing support, and employment services. This is often a difficult area for exonerees to navigate after release. One example of the complications exonerees face, was the financial difficulties *Keogh* experienced:

> I was released with only the funds I had managed to save from 20 years of prison wages. I got nothing from Centrelink because of my new partner's superannuation assets which were continually eroded by the costs of my treatment; medical, surgical, dental, optical, hearing aids and health insurance. Furthermore, my opportunities to obtain work as a 60-year old were extremely limited. What work I did find was compromised by having to attend court for countless direction hearings and conferences with my legal team.

Most of the interviewees experienced frustration with the lack of support that is presently available in Australia. One interviewee, MacLellan, spoke about her personal frustration with the availability of transitional services currently available for exonerees:

> It is simply unjust to expect these people to walk out of such an environment and continue their everyday duties, work, pay taxes, continue payments of bills, mortgages and to pick up where they left off in society, it is unrealistic, unreasonable and morally wrong.

Another example was illustrated by Keogh's experience following his release:

> I fell into a no-man's land. Corrections were no longer responsible for me. Centrelink were less than helpful –they were more interested in giving my partner a financial enema than informing me how they could be of any assistance with my re-entering society after more than 20 years.

Due to the lack of available services, the data obtained from the interviews found most of the interviewees relied heavily on ongoing support from their families and support networks. However, it is important to note not all individuals are afforded this support. Additional international studies show that many exonerees face expulsion from their support networks due to the belief they are not innocent.[39] By analysing the findings of the interviews, it is evident the State and Federal governments have failed to take any

[39] Grounds (n 16).

responsibility for supporting exonerees with no available support services. Consequently, both the State and Federal governments should seek to implement transitional support services. Exonerees that are left unsupported and unassisted upon release have an increased likelihood of re-traumatisation and adverse long-term psychological consequences. Therefore, the recommendation to implement transition support services for exonerees is essential and must be made readily available, and effortless to access and navigate.

IV CONCLUSION

The current available support in Australia for exonerees is insufficient to address the ongoing trauma which individuals continue to endure. By failing to address the ongoing needs of exonerees, the State and Federal governments have turned a blind eye to the lifelong consequences that wrongful convictions inflict on individuals. Therefore, the recommendations outlined in this article should be implemented to provide sufficient future support for exonerees. There is currently no support available within Australia that sufficiently addresses exonerees holistic needs after exoneration. Consequently, there is a critical requirement to implement the proposed recommendations. The recommendations outlined in this article seek to support exonerees with the trauma they continue to experience. The data obtained from the interviews found there was significant support for the proposed recommendations from the exonerees themselves.

Therefore, it is argued that exonerees desperately require re-integration programs and mental health services in order to mitigate the lifelong psychological conditions many are faced with. Furthermore, specialist services must be made available to provide the individualised treatment exonerees require. In addition to this, support services should be implemented prior to exoneration, by extending support services to families to reintegrate exonerees back into society and the family home. Australian advocacy organisations who work alongside the wrongfully convicted require significant national funding, in order to expand their services to include holistic support. This article recommends Australian advocacy projects implement a support network of wrongfully convicted individuals, who meet regularly and encourage other exonerees to work alongside advocacy projects. The proposed recommendations are a starting point for meeting the holistic support needs of exonerees. The individual needs of each exoneree

requires long-term support and assistance that should be reviewed frequently. Australia currently fails to provide any kind of short term or long-term holistic support for exonerees. The recommendations outlined in this article, if implemented, would provide exonerees with the steppingstones required to re-establish their lives and address the trauma they continue to endure daily.

V ANNEXURE 1 – INTERVIEW QUESTIONS [40]

BACKGROUND INFORMATION

1. Please provide any relevant background information on your own personal experience with wrongful conviction;
   (a) The facts of the events and case
   (b) How long was your incarcerated period?

2. Can you describe when and how (who and what form) you first heard or learnt about the possibility of being exonerated?
   (a) Was this approach helpful
   (b) Please describe what wasn't helpful
   (c) Were there any ways the notification could be improved?
   (d) What initial reaction did you and your family have when first learning about the possibility of exoneration?
   (e) Were you provided information on the exoneration process?
   (f) Was there information or services that you did not receive that would have been helpful?

3. Did your case receive media attention?
   (a) What impact did the media coverage have on you and your family?

IMPACT

4. What, impact was there on you and your family after the incarceration period
   (a) Physical
   (b) Financial
   (c) Social
   (d) Emotional
   (e) Spiritual
   (f) Other

[40] Please note the interview questions were implemented and adapted by using the approach and study materials by Sera Irazola, et al in 'Study of Victim Experiences of Wrongful Conviction' (Final report 244084, September 2013).

ACCESS TO INFORMATION

5. Were you able to access all the information you felt you needed after being released from prison?
   (a) If yes, please describe

6. Were there any circumstances that were made worse for you or your family member due to a lack of available information, support or support services?

7. Did you receive information and/or services following the incarceration period? If yes, what services did you receive
   (a) compensation claim assistance
   (b) court accompaniment
   (c) crisis intervention
   (d) information/referrals
   (e) legal and/or criminal justice system advocacy
   (f) legal services
   (g) safety planning
   (h) short-term/long-term counselling
   (i) transportation assistance
   (j) victim compensation
   (k) victim impact statement assistance
   (l) counselling services
   (m) group therapy
   (n) support groups

8. Was there information that you did not receive that would have been helpful? If yes, please describe

ACCESS TO SERVICES

9. Were you able to access all the services you felt you needed after being released from prison?
   - If yes, please describe

10. Did you receive information about available services following the incarceration period? If yes, what services did you receive
    (a) compensation claim assistance
    (b) court accompaniment
    (c) crisis intervention
    (d) information/referrals
    (e) legal and/or criminal justice system advocacy
    (f) legal services
    (g) safety planning
    (h) short-term/long-term counselling
    (i) transportation assistance
    (j) victim compensation
    (k) victim impact statement assistance
    (l) counselling services
    (m) group therapy
    (n) support groups
    (o) accommodation support

11. Were there any services that you did not receive that would have been helpful? If yes, please describe.

YOUR VIEWS

12. What are your personal views on the articles proposed recommendations to holistically supporting victims of wrongful conviction?
    (a) Informal support groups run by advocates/ victims
        (i) What are your recommendations for this suggestion?
        (ii) Who should provide this?
        (iii) If they government does not support victims, who should?

    (b) Interim short-term housing centres after incarceration for victims to assist with reintegrating into society
        (i) What are your recommendations for this suggestion?
        (ii) Who should provide this?

(iii) If they government does not support victims, who should?

(c) Support information publications distributed to prisoners whilst they are still incarcerated
   (i) What are your recommendations for this suggestion?
   (ii) Who should provide this?
   (iii) If they government does not support victims, who should?

(d) Implementation of a government funded individualised psychological support for victims upon release
   (i) What are your recommendations for this suggestion?
   (ii) Who should provide this?
   (iii) If they government does not support victims, who should?

(e) Packages for victims that contain necessaries upon release (clothing, mobile phone, bus pass, food vouchers, gift cards to purchase essential items).
   (i) What are your recommendations for this suggestion?
   (ii) Who should provide this?
   (iii) If they government does not support victims, who should?

(f) The implementation of a national database of wrongful conviction cases
   (i) What are your recommendations for this suggestion?
   (ii) Who should provide this?
   (iii) If they government does not support victims, who should?

13. Any other recommendations, opinions or information from your own personal experience issues the article should be address?

REFERENCE LIST

A *Articles/Books/Reports*

Filipa, César, Patrício Costa, Alexandra Oliveria and Anne Marie Fontaine, '"To Suffer in Paradis": Feelings Mothers Share on Portuguese Facebook Sites' (2018) 9(1) *Frontiers in Psychology* 1

Grounds, Adrian, 'Understanding the Effects of Wrongful Imprisonment' (2005) 32(1) *Crime and Justice* 1

Irazola, Seri, Erin Williamson, Julie Stricker and Emily Niedzwiecki, Emily, *Study of Victim Experiences of Wrongful Conviction* (Final Report No 244084, September 2013)

Jacob, Stacy and Furgerson, S. Paige, 'Writing Interview Protocols and Conducting Interviews: Tips for Students New to the Field of Qualitative Research' (2012) 17(42) *The Qualitative Report* 1

Justice, *Supporting Exonerees: Ensuring accessible, consistent and continuing support* (Report, 2018)

Konvisser, Zieva Dauber, and Ashley Werry, 'Exoneree Engagement in Policy Reform Work: An Exploratory Study of the Innocence Movement Policy Reform Process' (2017) 33(1) *Journal of Contemporary Criminal Justice* 43

Kregg, Christing 'Right to Council: Mental Health Approaches to Support the Exonerated' [2016] *Advocates Forum* 31

Lerman, Bethany 'Teen Depression Groups on Facebook: A Content Analysis' (2017) 32(6) *Journal of Adolescent Research* 719

Opdenakker, Raymond, 'Advantages and Disadvantages of Four Interview Techniques in Qualitative Research' (2006) 7(4) *Forum: Qualitative Social Research* 11

Scott, Leslie, 'It Never, Ever Ends: The Psychological Impact of Wrongful Conviction' (2010) 5(2) *American University Criminal Law Brief* 10

Weathered, Lynne, 'Reflections on the Role of Innocence Organisations in Australia' (2015) 17(2) *Flinders Law Journal* 515

Webber, Ruth and Rosetta Moors, 'Engaging in Cyberspace: Seeking Help for Sexual Assault' (2015) 20(1) *Child & Family Social Work* 40

B *Cases*

Button v The Queen [2002] WASCA 35

Chamberlain v R (1983) 153 CLR 514

Chamberlain v R (1983) 46 ALR 493

Chamberlain v R (No 2) (1984) 153 CLR 521

Inquest into the death of Azaria Chantel Loren Chamberlain [2012] NTMC 020

R v Keogh (No 2) (2014) 121 SASR 307

C *Other*

'Exonerate', *The Innocence Project* (Web Page, 2019) <https://www.innocenceproject.org/dna-exonerations-in-the-united-states/>

Dillion, Rebecca, 'Miscarriages of Justice', *Innocence Project* (Web Page, 13 February 2012) <https://www.commonwealhousing.org.uk/miscarriages-of-justice-2>

'How we work', *Commonweal Housing* (Web Page) <https://www.commonwealhousing.org.uk/about-us/how-we-work>

Interview by Frontline with Craig Haney, Psychology Professor, University of California Santa Cruz, in Santa Cruz, Cal (December 10, 2002) <https://www.pbs.org/wgbh/pages/frontline/shows/burden/interviews/haney.html>

'Murder He Wrote', *Australian Story* (ABC, 2002)

SBS Insight (SBS, 2019)

Wilson, John *A Perpetual Battle of the Mind* (Web Page, 31 October 2002) <https://www.pbs.org/wgbh/pages/frontline/shows/burden/cameras/memo.html>

MAKING THE INVISIBLE VISIBLE AGAIN: PATHWAYS FOR LEGAL RECOGNITION OF SEX AND GENDER DIVERSITY IN AUSTRALIAN LAW

DR SARAH MOULDS*

People that identify as gender diverse or who are born with non-binary sex characteristics have traditionally been excluded from the law, lawfully discriminated against, or been made invisible by the law. In recent years, this has begun to shift as law reform bodies in Australian explore pathways for providing legal recognition of sex and gender diversity within our community. This article explores the legislative reforms that have taken place in this area in recent years, which has resulted in significant changes to State and Territory laws regulating the way sex and gender is recorded and altered on Birth Deaths and Marriages Registers, with important consequences for the way sex and gender is legally recognised in those jurisdictions. The article then explores the extent to which the new provisions align with the self-identification model of reform and whether these new forms of legal recognition have translated into meaningful legal protection for sex or gender diverse people in Australia. The article concludes that, despite the significant positive steps forward achieved by legislative reforms in this area, there are still many gaps when it comes to the protection and promotion of the rights of non-binary or gender diverse individuals.

CONTENTS

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I INTRODUCTION

People that identify as gender diverse, or who are born with non-binary sex characteristics, have traditionally been excluded from the law, lawfully discriminated against, or made invisible by the law. In recent years, this has begun to shift as law reform bodies in Australia explore pathways for providing legal recognition of sex and gender diversity within our community. While the results of this legislative shift have generally been positive, they continue to contain features that detract from a self-identification model of reform, and have occurred in the context of a volatile and potentially damaging public debate on the rights of lesbian, gay, transgender, bisexual and queer people in Australia. This raises questions about the extent to which legal recognition has translated into meaningful legal protection for sex or gender diverse people in Australia.

This article touches on these themes in three short parts. Part 1 explores the ways in which the law has traditionally rendered sex or gender diverse people 'invisible' and restricted their access to legal rights the rest of the community take for granted. Part 2 describes the important shift towards legal recognition of sex and gender diversity that has occurred in some Australian jurisdictions in recent years, with a particular focus on reforms relating to Births, Deaths and Marriages ('BDM') regimes in the Australian Capital Territory, South Australia, Western Australia, Victoria and Tasmania. The final Part of this article explores the challenges associated with translating legal recognition of sex or gender diversity into substantive rights protection for sex or gender diverse Australians. Some of the challenges associated with moving away from a medical model (requiring sex or gender diverse people to *prove* their non-binary status by reference to medical evidence) towards a self-identification model (where individuals have the autonomy to nominate or change their sex or gender status without the requirement of medical evidence) will be noted, as will the broader political context that serves to cloud

legal reform in this area.

This article is acutely aware of the significance of language when discussing the identities and interests of those people who fall outside binary sex and gender norms, and the contested nature of 'sex' and 'gender'. A deliberately broad approach to terminology is adopted, which aims to acknowledge and celebrate the full range of sex and gender identity and expression.[1] The term 'gender diversity' is used to describe gender identities that extend beyond simply 'male' or 'female', such as people who identify as trans or non-binary. This article recognises that gender can be conceptually separate from sex, for example 'gender' can refer to a social construct that relates to the presentation or lifestyle of a particular sex, rather than to a physiological or biological characteristic. The term 'sex diversity' is used to describe physiological or biological characteristics that are not determinatively male or female. Phrases such as 'sex and gender diversity' and 'sex or gender diverse people' are used to describe both categories discussed above, but these phrases do not intend to conflate the lived experience, rights or interests of these different groups, which can be significantly different.

II MAKING THE INVISIBLE VISIBLE AGAIN: RECOGNISING SEX AND GENDER DIVERSITY IN THE LAW

> [O]ne day, quite unexpectedly, Hush said, "Grandma, I want to know what I look like. Please could you make me visible again?"
>
> "Of course I can," said Grandma Poss, and she began to look through her magic books.
>
> She looked into this book and she looked into that. …. [B]ut the magic she was looking for wasn't there at all.[2]

Since the time of colonisation, Australia's legal system has made assumptions about sex

[1] This approach aligns broadly with that adopted by Sarah Winter, 'Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity' (2009) 15(1) *Australian Journal of Human Rights* 151, 153. For further discussion of the significance of language and terminology, see, eg, Judith Butler, (1990) *Gender Trouble: Feminism and the Subversion of Identity* (Routledge, New York); Laura Grenfell, 'Maxing Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 *Legal Studies* 66; Louis Gooren, 'The Biology of Human Psychosexual Differentiation' (2006) 50(4) *Hormones and Behaviour* 589; Dylan Vade, 'Expanding Gender and Expanding the Law: Towards a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People'(2005) 11 *Michigan Journal of Gender & Law* 253, 278-284.
[2] Mem Fox, *Possum Magic* (Scholastic, Australia, 1983).

and gender (as well as race and other attributes). It began by assuming that 'persons' with legal rights and responsibilities are men (the default pronoun was 'he'), which eventually gave way to the recognition that women may also be active agents in the law.[3] Within this context, the law became comfortable acknowledging the legal rights of 'men' and 'women' but 'not necessarily for people who transgress those categories'. [4]

Given the prevalence of binary gender norms within our legal system, the challenge of recognising the legal status and rights of gender diverse people, and people with diverse sex characteristics, is broad in scope and complex in nature. For example, when the South Australian Law Reform Institute ('SALRI') was asked to inquire into all South Australian laws to identify those that discriminated against people on the grounds of gender, sexual orientation and intersex status, it found over 146 laws that potentially discriminated on such grounds.[5] The vast majority of these laws had the effect of excluding, ignoring or disadvantaging South Australians who did not fit into assumed binary gender norms, or heteronormative relationships.[6] For example, until recently, binary pronouns ('he' or 'she') were used as a matter of course throughout South Australian laws, and laws regulating families, parentage, and relationships generally assume heterosexual arrangements (such as 'husband' and 'wife', and 'mother' and 'father').[7] These assumptions work to make non-binary, gender diverse and non-heterosexual people invisible in the law, and often have significant impacts on people's lives and wellbeing, particularly when these assumptions work to restrict access to legal rights or legal recognition of individual identity or relationships.[8]

The implications are particularly pronounced in the context of BDM regimes. As Blincoe documents, whilst most people go through life identifying as the gender of the sex assigned to them at birth (cisgender), people whose identities do not match their birth

[3] See, eg, Grenfell (n 1); Gooren (n 1); Dylan Vade (n 1).
[4] Winter (n 1) 154.
[5] South Australian Law Reform Institute, *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Report, September 2015). In 2015, the South Australian Attorney General asked the Institute, an independent law reform body based at the Adelaide University Law School, to undertake a detailed review of all South Australian laws to identify areas of discrimination on the grounds of sexual orientation, gender identity and intersex status, and to make recommendations to the Government as to how to best reform those laws.
[6] Ibid.
[7] South Australian Law Reform Institute, *Legal Registration of Sex and Gender and Laws Relating to Sex and Gender Reassignment* (Report, February 2016).
[8] Ibid.

sex are 'frequently denied legal recognition, or heavily scrutinised in order to attain it'.[9] This has flow-on consequences for a range of other legal and social rights. The Victorian Law Reform Commission ('VLRC') has observed that:

> Without a birth certificate, a person may not be able to take full advantage of their rights as a citizen. These rights include enrolling at school or to vote, obtaining a passport, a Medicare card (as an adult), driver's licence or tax file number, and accessing various government benefits.[10]

The binary gender norms and heteronormative assumptions that were found by SALRI to dominate South Australian BDM regimes were also evident in other legislative regimes, such as laws regulating family relationships and anti-discrimination laws, which generally failed to understand or protect gender diverse people and people with diverse sex characteristics from unfair or detrimental treatment.[11] As discussed below, similar 'audits' in other Australian states and territories generated similar findings. The law just simply did not 'see' gender diversity or diverse sex characteristics. For those engaged in law reform efforts or advocating for rights-enhancing change, the first challenge was to make the invisible visible again! Only then could substantive rights issues be addressed through the law.

III MAKING CHANGES TO LEGALLY RECOGNISE DIVERSITY IN SEX AND GENDER: A SPECTRUM OF REFORM OPTIONS

Whilst some legal protections against discrimination with respect to transgender status began to emerge in the late 1990s,[12] it has only been within the last decade that legislative reforms have begun to be implemented, explicitly recognising the lived experience and legal rights of gender diverse Australians and those born with diverse sex characteristics. As Blincoe explains, even under 'reformed' regimes, the legal rights and status of sex or gender diverse people is often compromised:

[9] Emily Blincoe, 'Sex Markers on Birth Certificates: Replacing Model with Self-Identification' (2015) 46(1) *Victoria University of Wellington Law Review* 57, 57–8.
[10] Victorian Law Reform Commission, *Birth Registration and Birth Certificates* (Report 2013) 13.
[11] South Australian Law Reform Institute (n 7).
[12] See, eg, *Transgender (Anti-Discrimination and Other Acts Amendment) Act 1996* (NSW).

> Trans people are frequently subjected to medical and legal scrutiny in order to achieve recognition of their sex/gender. This high standard is often impossible to attain, leaving people with identity documents that do not match their identity.[13]

One of the important landmarks in the journey towards legal recognition of gender diversity and diversity of sex characteristics is the High Court's decision in *NSW Registrar of Births, Deaths and Marriages v Norrie*.[14] This case concerned the meaning of the word 'sex' in the *Births, Deaths and Marriages Registration Act 1995* (NSW), and provided the opportunity for the High Court to clearly acknowledge the fact that sex is not necessarily a binary concept, and that a person can have sex characteristics of either male, female, neither, or of no sex — and that the person may identify as male or female, neither or both.[15] The High Court's decision in *Norrie* also follows a number of other cases raising the issues of legal recognition of sex. Through cases such as *AB v Western Australia*[16] and *Kevin v Attorney-General (Cth)*,[17] a body of jurisprudence is slowly being built that recognises that sex is more nuanced and complex than a simple 'male' and 'female' binary, and that irreversible gender affirmation surgery should not be a perquisite to changing a person's registered sex or gender. For example, in the Family Court case of *In Re Alex*,[18] Nicholson J expressed his 'regret that a number of Australian jurisdictions require surgery as a prerequisite to the alteration of a transsexual person's birth certificate in order for the record to align a person's sex with his/her chosen gender identity'.[19] These cases prompted jurisdictions around Australia to review their legal processes for recognising and registering sex and gender, and for facilitating legal and administrative processes that would accommodate changes to legally recognised sex and gender beyond binary norms.

Around the same time as these judicial developments, the Australian Human Rights Commission ('AHRC') was undergoing significant community engagement in the area of sex and gender diversity,[20] which culminated in legislative reforms in 2013, extending

[13] Blincoe (n 9) 57, 59.
[14] (2014) 250 CLR 490.
[15] Ibid [33]–[35].
[16] *AB v State of Western Australia; AH v State of Western Australia* (2011) 244 CLR 390.
[17] *Kevin v Attorney-General (Commonwealth)* (2001) 165 FLR 404
[18] *Re Alex* (hormonal treatment for gender dysphoria) (2004) 31 FamLR 503.
[19] Ibid [234].
[20] See, eg, Human Rights and Equal Opportunity Commission, *Sex Files: The Legal Recognition of Sex in*

federal anti-discrimination protections to grounds of 'sexual orientation, gender identity and intersex status'.[21] Changes were also made to certain federal administrative practices, including the Australian Passports Office, which provided applicants with the option of indicating [x] as a sex category in addition to male and female.[22] In its detailed *Resilient Individuals*, released in 2015, the AHRC also canvassed the need for extensive law reform in all Australian jurisdictions to provide for legal recognition of the status and rights of gender diverse Australians, and those born with diverse sex characteristics.[23] In the report, AHRC recommended that 'all states and territories legislate to require that a self-identified legal declaration, such as a statutory declaration, is sufficient proof to change a person's gender for the purposes of government records and proof of identity documentation'.[24]

An important leader in the area of BDM reform has been the Australian Capital Territory ('ACT') with its comprehensive 2012 *Beyond the Binary* report.[25] This recommended legislative changes to the ACT *Births Deaths and Marriages Registration Act 1997* that aimed to move away from binary notions of sex and gender, as well as away from the 'medical model' approach of moving between binary categories of sex, towards a 'self-identification' model. For example, the ACT report recommended that sex and gender diverse people who are not defined by the female/male binary be legally recognised,[26] the 'requirement to undergo sexual reassignment surgery to change the a person's recorded sex be abolished',[27] and the 'requirement for a person to change their sex and gender should not be more onerous' than that required to change these details on an Australian Passport.[28] Not all of these recommendations were adopted in full, but

Documents and Government Records – Concluding Paper on the Sex and Gender Diversity Project (Report, March 2009) ('*Sex Files*').

[21] *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013* (Cth).

[22] Australian Government Department of Foreign Affairs and Trade, 'Sex and Gender Diverse Passport Applicants: Revised Policy' *Australian Passport Office* (Web Page) <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>.

[23] Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights 2015* (Report, June 2015).

[24] Ibid 3.

[25] ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Report No 2, March 2012).

[26] Ibid Recommendation 9.

[27] Ibid Recommendation 17.

[28] Ibid Recommendation 18. This was a reference to changes made at the Commonwealth level in 2011 that allowed individuals greater ability to be issued a passport with an 'X' marker and recognised transgender people as their affirmed gender without the need for surgery. The Commonwealth has since

important legislative changes were made and the ACT reforms, and the community consultation process undertaken by the ACT Law Reform Advisory Council became an important template for other jurisdictions to follow.[29]

For example, in 2015, SALRI identified the need to reform South Australia's BDM regime and recommended the repeal of the rights-abrogating and inaccessible *Sexual Reassignment Act 1988* (SA). This legislation set up a complex, Ministerial-supervised regime that was effectively inaccessible in practice.[30] The *Sexual Reassignment Act 1988* (SA) required a person to obtain a 'recognition certificate' from the Magistrates Court that certified the person was the sex to which they had been 'reassigned',[31] by way of a 'reassignment procedure'.[32] A reassignment procedure was defined in the Act as:

> A medical or surgical procedure (or a combination of such procedures) to alter the genitals and other sexual characteristics of a person, identified by birth certificate as male or female, so that the person will be identified as a person of the opposite sex and includes, in relation to a child, any such procedure (or combination of procedures) to correct or eliminate ambiguities in the child's sexual characteristics.[33]

The legislation further provided that 'reassignment procedures' could only be carried out by hospitals or doctors approved by the South Australian Attorney General.[34]

In its review of this law, SALRI recommended that these provisions be replaced with a change of sex process based on the existing change of name process, with additional safeguards for applicants under the age of 18. SALRI explicitly rejected the suggestion that evidence of surgical intervention should be required before a person can apply to have their legally recognised sex or gender changed. The South Australian Parliament

expanded their passports policy to all government records under the Australian Government Guidelines on the Recognition of Sex and Gender.

[29] This approach is detailed in the Council's Report: see ibid, pt 2.

[30] South Australian Law Reform Institute (n 7) 19.

[31] *Sexual Reassignment Act 1988* (SA) ss 7-9.

[32] Ibid.

[33] Ibid s 4. As noted in South Australian Law Reform Institute (n 7) 18 n 22: 'The High Court considered a similar definition of reassignment procedure in *AB v Western Australia* (2011) 244 CLR 390. It noted that a reassignment procedure could alter genitals or other gender characteristics, whether by medical or surgical procedure. The High Court found that the Western Australian provision did not require a person to take "all possible" steps to have undergone a reassignment procedure (at 404 [32]). This would suggest that non-surgical treatment, such as hormonal therapy, could constitute a reassignment procedure in South Australia.'

[34] *Sexual Reassignment Act 1988* (n 31) s 7(8)–(9).

accepted the general framework recommended by SALRI,[35] but retained aspects of a 'medical model' (described further below). Under the enacted South Australian changes, a person can apply to the BDM Registrar for a change of sex or gender identity without the need for gender affirmation surgery.[36] However, an application of this type must be accompanied by a 'statement by a medical practitioner or psychologist certifying that the person has undertaken a sufficient amount of appropriate clinical treatment in relation to the person's sex or gender identity'.[37] 'Clinical treatment' need not involve invasive medical treatment and may include or be constituted by counselling.[38] The changes made in response to SALRI's report also allow for the recording of a person's sex or gender identity as 'male', 'female' or 'non-binary'.[39]

The need to reform the process of registering, and changing, sex and gender on birth certificates has also been subject to extensive consideration in Western Australia. Prompted by the High Court's decision in *AB v Western Australia*,[40] where the High Court upheld appeals regarding a refusal to issue recognition certificates to two applicants who had undertaken female to male gender reassignment under the *Gender Reassignment Act 2000* (WA),[41] the Law Reform Commission of Western Australia (LRCWA) was asked to conduct an inquiry into Western Australian legislation relating to the recognition of a person's sex, change of sex, or intersex status. Among the LRCWA's terms of reference was whether another category for classification of sex should be introduced and how any new category should be designated, and whether the role of the Gender Reassignment Board should be retained or whether there should be another process administered by the Registrar of Births, Deaths and Marriages for registering change of sex or intersex status.[42] Following an extensive inquiry involving extensive community level engagement, the LRCWA recommended the *Births, Deaths and Marriages Registration Act*

[35] *Births, Deaths and Marriages Registration (Gender Identity) Amendment Bill 2016* (SA).
[36] *Births, Deaths and Marriages Registration Act 1996* (SA) s 29I ('*Births, Deaths and Marriages Registration Act').*
[37] Ibid s 29K.
[38] Ibid.
[39] *Births, Deaths and Marriages Registration Regulations 2011* (SA), reg 7A.
[40] *AB v State of Western Australia; AH v State of Western Australia* (n 16). In this case, the High Court held that, for the purposes of the Act, the physical characteristics by which a person is identified as male or female are confined to external physical characteristics that are socially recognisable. Social recognition of a person's gender does not require knowledge of a person's remnant sexual organs [33].
[41] Ibid.
[42] Law Reform Commission of Western Australia, *Review of Western Australian Legislation in Relation to the Recognition of a Person's Sex, Change of Sex or Intersex Status* (Project 108, Discussion Paper 2018).

1998 (WA) be amended to provide for the gender classifications of 'male', 'female', and 'non-binary'.[43] It further recommended that an additional category of sex be included (such as non-binary for adults seeking to change their sex and 'indeterminate' for children born with diverse sex characteristics),[44] and that the *Births, Deaths and Marriages Registration Act 1998* (WA) be amended to provide an administrative application process for a person born in Western Australia to apply for a Gender Identity Certificate (that should not require evidence of surgical intervention).[45] When making these recommendations, the LRCWA reflected on the opposition it had received to these reform proposals by some sections of the WA community, observing that:

> In many cases those opposed to this reform may not have understood the proposal in detail (for example, why it was being proposed and how it would be likely to impact on their daily lives) [...] Importantly, removal of the sex classification field from birth certificates will not make anyone less male or less female, rather it should reduce the likelihood of trans people being accidently 'outed' and it should reduce the pressure on the parents of intersex children to assign a sex to their child at a time when there can be no medical certainty that the assignment is correct.[46]

To date, no changes have been made to the *Births, Deaths and Marriages Registration Act 1998* (WA) to implement the LRCWA recommendations.

Similar reforms have been enacted in Victoria though the enactment of the Births, Deaths and Marriages Registration Amendment Bill 2019 (Vic) which seeks to remove the current requirement in the Victorian legislation for an applicant seeking to change their registered sex to have undergone gender affirmation surgery. The Bill introduces an alternative process that would permit an adult to apply to the BDM Registrar to alter their recorded sex by way of a statutory declaration made by the applicant and supported by a statement from an adult who has known the applicant for at least 12 months.[47] The categories of sex to be included in the application could include 'male', 'female' or 'any

[43] Ibid Recommendation 9.
[44] Ibid Recommendation 4.
[45] Ibid Recommendation 11.
[46] Ibid 3.
[47] Victoria, *Parliamentary Debates,* Legislative Council, Thursday 19 August 2019 (Jenny Mikakos, Minister for Health, Minister for Ambulance Services), 2575.

other gender diverse or non-binary descriptor nominated by the applicant'.[48] As the statement accompanying the Bill explains: '[t]his means a person will be able to describe their sex in a way that reflects their identity'.[49] The legislation, enacted in August 2019, also contains a process to allow the parent(s) or guardian of a child to apply to the Registrar to alter the sex recorded on the child's birth registration.[50]

More radical reforms were pursued in Tasmania during 2018,[51] removing the requirement to indicate sex on birth certificates. Under the new provisions,[52] birth registration statements and hospital records would still be required to collect information about a baby's sex for statistical purposes, but there would be no requirement to indicate sex on the formal birth certificate issued to an individual.[53] The issue of the ongoing need to indicate sex on birth certificates also formed part of a Queensland Government review of its 2018 BDM legislation.[54]

IV TOWARDS A SELF-IDENTIFICATION MODEL OF LEGAL RECOGNITION OF SEX AND GENDER

Each of the reforms described above constitutes an important step forward in the legal recognition of sex and gender diversity, which many hope is a precursor to improved legal protections for the rights of sex or gender diverse people. However, many of Australian BDM regimes continue to contain components that require sex or gender diverse people to *prove* their non-binary status by reference to medical evidence.[55] While some Australian jurisdictions have now taken steps to remove the requirement of irreversible surgical reassignment of sex as a pre-requisite to applications for changes to the BDM register,[56] many continue to require evidence of 'clinical treatment' such as

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[48] Ibid.
[49] Ibid.
[50] Ibid.
[51] See, eg, Fiona Kelly and Hannah Robert, 'Explainer: Why Removing Sex from Birth Certificates Matters to Gender Diverse People' *The Conversation* (online, 25 October 2018) <https://theconversation.com/explainer-why-removing-sex-from-birth-certificates-matters-to-gender-diverse-people-105571>.
[52] *Justice and Related Legislation (Marriage and Gender Amendments) Act 2019* (Tas) Part 4.
[53] Ibid, in particular ss 15–16.
[54] Queensland Government, *Registering Life Events: Recognising Sex and Gender Diversity and Same-sex Families – Review of the* Births, Deaths and Marriages Registration Act 2003 *(Qld)* (Discussion Paper 1, March 2018).
[55] See, eg, *Births, Deaths and Marriages Registration Act* (n 36) s 29K.
[56] See Laura Grenfell and Anne Hewitt 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761, 771–772 for what they call 'sex as congruent anatomy and psychology model'; see also Franklin Romeo 'Beyond the Medical Model: Advocating for a New Conception of Gender Identity in the Law' (2005) 36(1) *Columbia Human Rights Law Review* 713, 724.

counselling or therapy. This comes closer to what Grenfell and Hewitt have classed as the 'transformative model' of legal recognition of sex, which the authors describe as an approach that 'allows a greater degree of agency over sex without demanding substantial anatomical change',[57] facilitating change of sex more readily than previous models, but still demanding some engagement with the medical profession, rather than relying on behaviour or psychology alone.[58] An example of this 'transformative approach' is the requirement to undertake 'clinical treatment' from a medical practitioner that could include gender affirmation surgery or other forms of treatment such as hormone replacement therapy or psychological treatment.[59] While this model can be seen as representing an important compromise between the medical model and self-identification approach (discussed below), Blincoe argues that requiring any form of medical intervention as a threshold requirement for changing a person's legally recognised sex or gender is problematic as it continues to be based on normative expectations of the trans experience where some kind of external certification process is required to 'confirm' the individual's gender identity.[60] Some of these normative assumptions have been critically examined by the AHRC in its 2009 *Sex Files* report, where it found that medical treatment may be only part of the sex affirmation process that an individual undertakes, and that the process for legally changing a person's sex is inappropriately medicalised and undermines the role of self-identification of sex and gender.[61]

The alternative approach, which can be described as a 'self-identification' approach, is based on the idea that 'a person should be able to determine their own sex/gender for all purposes' and that gender is 'a healthy and legitimate expression of a person's identity'.[62] Under this approach, it is inappropriate to require an individual to 'support' their application for a particular sex or gender to be included on the legal register of births

[57] Grenfell and Hewitt (n 56) 762.
[58] Ibid 772–773.
[59] Ibid 772.
[60] Blincoe (n 9) 65.
[61] *Sex Files* (n 20) 25.
[62] Blincoe (n 9) 65; Romeo (n 56) 739. As discussed below, this approach has been subject to some criticism, see, eg, Holly Lawford-Smith, 'Talking Past Each Other about Trans/gender' *Medium* (online, 16 June 2019) <https://medium.com/@aytchellis/talking-past-each-other-about-trans-gender-1da8e058caf8>; Holly Lawford-Smith, 'Misgivings about Racial and Religious Tolerance Amendment Bill' *The Age*, (online, 21 September 2019) <https://www.theage.com.au/national/victoria/misgivings-about-racial-and-religious-tolerance-amendment-bill-20190919-p52syb.html>.

with medical evidence of any kind. Instead, the process should be akin to other administrative processes for altering or confirming legal identity, such as change of name processes.

Both the 'transformative approach' explored by Grenfell and Hewitt and the 'self-identification' approach discussed above can be described as consistent with the Yogyakarta Principles,[63] which provide persuasive guidance on how international human rights treaties should be interpreted in relation to the protection of gender diversity. For example, Yogyakarta Principle 3 explains that '[n]o one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilisation or hormonal therapy, as a requirement for legal recognition of their gender identity'.[64] These principles are reflected to varying extents within the changes recommended by SALRI, explored by LRCWA and enacted in Victoria and Tasmania.

In the course of the law reform inquiries described above, this self-identification approach has come under sustained criticism from those opposed to legal recognition of sex or gender diversity, including on the basis that such an approach could give rise to the risk of fraud being committed,[65] or that it might lead to the problem (or perception) that a person might be able to change this identity category more than once, undermining the stability and certainty of the BDM regime.[66] As SALRI observes, at least in the South Australian context, this criticism appears to lack weight having regard to the features of the regimes for legally changing a person's name, which contain no requirements to provide 'evidence' in support of the change, and have not generally been found to be misused for nefarious means.[67] The self-identification approach has also been criticised on the grounds that it would give rise to the risk of men changing their sex for the purpose

[63] *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (International Guidelines, March 2007) <yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf> ('The Yogyakarta Principles'). See also *Sex Files* (n 20) 12, which outlines that '[t]he Yogyakarta Principles are not legally binding themselves, but are an interpretation of already binding agreements from the view point of sexual orientation and gender identity. Therefore, the Yogyakarta Principles are persuasive in shaping our understanding of how existing binding human rights obligations apply and relate to people who are sex and gender diverse.'

[64] The Yogyakarta Principles (n 63) Principle 3.

[65] For a comprehensive analysis of these claims, see Alex Sharpe, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal & Ethical Debate* (Routledge, 2018); Alex Sharpe 'Endless sex: The Gender Recognition Act and the Persistence of a Legal Category' in Hale B, Monk D, Cooke E, Pearl D (eds), *The Family, Law and Society: Cases and Materials* (Oxford University Press, 6th ed, 2008).

[66] Some of these concerns were raised in the context of the SALRI inquiry; see, eg, South Australian Law Reform Institute (n 7) 53.

[67] South Australian Law Reform Institute (n 7).

of accessing special privileges or advantages only available to women, or entering places or accessing services reserved exclusively for women. Blincoe responds to this criticism by observing that

> Underlying this concern is that people with "male" genitalia will be allowed in female spaces in an implicit fear that trans women are more likely to be physically or sexually violent towards other women, which is a baseless assumption. Additionally, arguments like this tend to shift the focus away from policies which actually make those spaces safer for women.[68]

For other commentators, such as Lawford-Smith, the self-identification model gives rise to potential conflicts between rights of trans people and the rights of women, particularly where transwomen are treated as women in 'all social and legal respects' which creates a 'conflict with women's sex-based rights specifically'.[69] Regardless of the substantive basis for criticism like these, it is clear from the differences between the recommendations made by law reform bodies in the ACT and SA and the legislative response from Parliaments that there remains some hesitation from law makers when it comes to fully implementing a self-identification approach to reform in this area.

This is not surprising when the broad political context is considered, wherein the rights of sex or gender diverse people have been coarsely equated with the interests of 'progressives' or the 'gay rights lobby', and opposed by certain conservative groups who use these types of reforms as examples of 'political correctness gone mad'.[70] The intensity of this political context has increased since the 2017-2018 debate on marriage equality reforms,[71] and the more recent debate on the question of how to balance religious

[68] Blincoe (n 9) 82; see also Kristin Wenstrom '"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies' (2008) 17 *Law & Sex* 131, 148–150.

[69] See, eg, Lawford-Smith, 'Talking Past Each Other about Trans/gender' (n 62); Lawford-Smith, 'Misgivings about Racial and Religious Tolerance Amendment Bill' (n 62).

[70] For a summary of the type of media coverage of these issues see ABC TV, 'Transgender Agenda', *Media Watch* 19 August 2019 <https://www.abc.net.au/mediawatch/episodes/trans/11427782>. See also Josh Taylor 'How Children Became the Target in a Right Wing Culture War over Gender' *The Guardian Online* (online, 25 Aug 2019)<https://www.theguardian.com/society/2019/aug/24/how-children-became-the-target-in-a-rightwing-culture-war-over-gender?CMP=share_btn_link>; Joan Westenberg, 'New birth certificate laws spark anti-trans campaign' *The Saturday Paper* (online, 17-23 August) <https://www.thesaturdaypaper.com.au/news/politics/2019/08/17/new-birth-certificate-laws-spark-anti-trans-campaign/15659640008617>.

[71] For a comprehensive overview of the legislative history of the marriage equality reforms, see Shirleene Robinson and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (2018, NewSouth

freedoms with protections against discrimination on the grounds of gender identity and sexual orientation.[72]

Often the casualties in these debates are the individuals seeking to have their gender identity recognised by the law and accepted by the community in which they live,[73] whose mental and physical health is already at risk as a result of erroneous, transphobic public debate and media reporting. Dr Fiona Bisshop, a specialist in transgender healthcare and vice-president of the Sexual Health Society of Queensland, has observed that:

> Using transgender children as a conservative rallying call to arms against progressive changes in society will undoubtedly lead to an increase in stigma, discrimination, social exclusion, family rejection, bullying, harassment and assaults, and ultimately may also lead to increased rates of self-harm and suicide in this vulnerable population.[74]

This risk of harm has the potential to intensify unless and until political leaders and law-makers not only respond to recommendations for legislative reform, but are prepared to enter the broader public debate on these issues with a view to sharing the evidence-based, carefully collected information collated by the law reform bodies who have inquired into these matters.

V CONCLUSION

In *Possum Magic,* Grandma Poss and Hush travel around Australia and eventually find the many different ingredients needed to make Huss visible again. Just to be sure, once a year, they revisit these ingredients, so that Hush can stay visible forever. A similar approach may be needed to ensure that sex or gender diverse Australians remain visible within the Australian legal system, and to begin the long journey to ensuring substantive equality for all people regardless of these attributes. In recent years, many law reform bodies have identified the necessary ingredients for a self-identification approach to legal

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Books); Deirdre McKeown, *A Chronology of Same-sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide* (Research Paper Series, 2016-17, February 2018).

[72] See, eg, Department of Prime Minister and Cabinet, *Religious Freedom Review: Report of the Expert Panel* (Report, 2018) ("*Religious Freedom Review*"); Australian Government, *Australian Government Response to the Religious Freedom Review* (Report, 13 December 2018) <https://www.ag.gov.au/RightsAndProtections/HumanRights/Documents/Response-religious-freedom-2018.pdf>.

[73] Taylor (n 70).

[74] Westenberg (n 70).

recognition of sex and gender, and have collated a wealth of information for law and policy makers to reflect upon and use to prosecute legislative change. Unfortunately, the broader political debate gives rise to serious risks that these ingredients will be misunderstood or manipulated for other political goals. Like Grandma Poss and Hush, law reform advocates must be vigilant in revisiting these ingredients. We must continue to remind law and policy makers of the benefits of ensuring that each one of us can be recognised for who we are, particularly in the face of commentary that seeks to make some of us invisible again.

REFERENCE LIST

A *Articles/Books/Reports*

ACT Law Reform Advisory Council, *Beyond the Binary: Legal Recognition of Sex and Gender Diversity in the ACT* (Report No 2, March 2012)

Australian Government, *Australian Government Response to the Religious Freedom Review* (Report, 13 December 2018)

Australian Human Rights Commission, *Resilient Individuals: Sexual Orientation, Gender Identity and Intersex Rights 2015* (Report, June 2015)

Blincoe, Emily, 'Sex Markers on Birth Certificates: Replacing Model with Self-Identification' (2015) 46(1) *Victoria University of Wellington Law Review* 57

Butler, Judith, Gender Trouble: Feminism and the Subversion of Identity (Routledge, New York, 1990)

Department of Prime Minister and Cabinet, *Religious Freedom Review* (Report, 2018)

Fox, Mem *Possum Magic* (Scholastic, Australia, 1983)

Gooren, Louis 'The Biology of Human Psychosexual Differentiation' (2006) 50(4) *Hormones and Behaviour* 589

Grenfell, Laura, 'Maxing Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 *Legal Studies* 66

Grenfell, Laura and Anne Hewitt, 'Gender Regulation: Restrictive, Facilitative or Transformative Laws?' (2012) 34 *Sydney Law Review* 761

Human Rights and Equal Opportunity Commission, *Sex Files: The Legal Recognition of Sex in Documents and Government Records – Concluding Paper on the Sex and Gender Diversity Project* (Report, March 2009)

Law Reform Commission of Western Australia, *Review of Western Australian Legislation in Relation to the Recognition of a Person's Sex, Change of Sex or Intersex Status* (Project 108, Discussion Paper 2018)

McKeown, Deirdre, *A Chronology of Same-sex Marriage Bills Introduced into the Federal Parliament: A Quick Guide* (Research Paper Series, 2016-17, February 2018)

Queensland Government, *Registering Life events: Recognising Sex and Gender Diversity and Same-sex Families: Review of the Births, Deaths and Marriages Registration Act 2003 (Qld)* (Discussion Paper 1, April 2018)

Robinson, Shirleene and Alex Greenwich, *Yes Yes Yes: Australia's Journey to Marriage Equality* (NewSouth Books, 2018)

Romeo, Franklin, 'Beyond the Medical Model: Advocating for a New Conception of Gender Identity in the Law' (2005) 36(1) *Columbia Human Rights Law Review* 713

Sharpe, Alex, 'Endless sex: The Gender Recognition Act and the Persistence of a Legal Category' in Hale, B, Monk, D, Cooke, E, and Pearl, D (eds) *The Family, Law and Society: Cases and Materials* (Oxford University Press, 6th ed, 2008)

Sharpe, Alex, *Sexual Intimacy and Gender Identity 'Fraud': Reframing the Legal & Ethical Debate* (Routledge, 2018)

South Australian Law Reform Institute, *Audit Report: Discrimination on the Grounds of Sexual Orientation, Gender, Gender Identity and Intersex Status in South Australian Legislation* (Report, September 2015)

South Australian Law Reform Institute, *Legal Recognition of Sex and Gender in South Australia* (Report, February 2016)

Vade, Dylan, 'Expanding Gender and Expanding the Law: Towards a Social and Legal Conceptualization of Gender that is More Inclusive of Transgender People' (2005) 11 *Michigan Journal of Gender & Law* 253

Victorian Law Reform Commission, *Birth Registration and Birth Certificates* (Report, 2013)

Wenstrom, K '"What the Birth Certificate Shows": An Argument to Remove Surgical Requirements from Birth Certificate Amendment Policies' (2008) 17 *Law & Sex* 131

Winter, Sarah, 'Are Human Rights Capable of Liberation? The Case of Sex and Gender Diversity' (2009) 15(1) *Australian Journal of Human Rights* 151

B *Cases*

AB v State of Western Australia; AH v State of Western Australia (2011) 244 CLR 390

Kevin v Attorney-General (Commonwealth) (2001) 165 FLR 404

NSW Registrar of Births, Deaths and Marriages v Norrie (2014) 250 CLR 490

Re Alex (2004) 31 FamLR 503

C *Legislation*

Births, Deaths and Marriages Registration Act 1996 (SA)

Births, Deaths and Marriages Registration Regulations 2011 (SA)

Births, Deaths and Marriages Registration (Gender Identity) Amendment Bill 2016 (SA)

Births, Deaths and Marriages Registration Amendment Bill 2019

Justice and Related Legislation (Marriage and Gender Amendments) Act 2019 (Tas)

Sexual Reassignment Act 1988 (SA)

Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Act 2013 (Cth)

Transgender (Anti-Discrimination and Other Acts) Amendment Act 1996 (NSW)

C *Other*

ABC TV, 'Transgender Agenda', *Media Watch* 19 August 2019 <https://www.abc.net.au/mediawatch/episodes/trans/11427782>

Australian Government Department of Foreign Affairs and Trade, 'Sex and Gender Diverse Passport Applicants: Revised Policy' *Australian Passport Office* (Web Page) <https://www.passports.gov.au/passports-explained/how-apply/eligibility-citizenship-and-identity/sex-and-gender-diverse-passport>

Kelly, F and Hannah Robert, 'Explainer: Why Removing Sex from Birth Certificates Matters to Gender Diverse People' *The Conversation* (online, 25 October 2018) <https://theconversation.com/explainer-why-removing-sex-from-birth-certificates-matters-to-gender-diverse-people-105571>

Lawford-Smith, Holly, 'Talking Past Each Other about Trans/gender' *Medium* (online, 16 June 2019) <https://medium.com/@aytchellis/talking-past-each-other-about-trans-gender-1da8e058caf8>

Lawford Smith, Holly, 'Misgivings about Racial and Religious Tolerance Amendment Bill' *The Age* (online, 21 September 2019) <https://www.theage.com.au/national/victoria/misgivings-about-racial-and-religious-tolerance-amendment-bill-20190919-p52syb.html>

Taylor, Josh, 'How Children Became the Target in a Rightwing Culture War over gGnder' *The Guardian Online* (online, 25 Aug 2019) <https://www.theguardian.com/society/2019/aug/24/how-children-became-the-target-in-a-rightwing-culture-war-over-gender?CMP=share_btn_link>

'Transgender Agenda' *Media Watch* (ABC TV, 19 August 2019)

Victoria, *Parliamentary Debates,* Legislative Council, Thursday 19 August 2019 (Jenny Mikakos, Minister for Health, Minister for Ambulance Services)

Westenberg, Joan, 'New birth certificate laws spark anti-trans campaign '*Saturday Paper* (online, 17-23 August) <https://www.thesaturdaypaper.com.au/news/politics/2019/08/17/new-birth-certificate-laws-spark-anti-trans-campaign/15659640008617>

Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity (International Guidelines, March 2007) <yogyakartaprinciples.org/wp-content/uploads/2016/08/principles_en.pdf>