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CONTENTS

RESPONSE TO WHITE AND WILLMOTT

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The following article is a reply to 'A Model Voluntary Assisted Dying Bill' by Ben White and Lindy Willmott. The comments made were not subject to peer-review and reflect the opinion of Rodney and his critique of the Model Bill.

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CONTENTS

I INTRODUCTION

Ben White and Lindy Willmott once again provide a valuable contribution to the discussion of voluntary assisted dying. Their paper, *A Model Voluntary Assisted Dying Bill*,[1] is an extremely valuable and necessary contribution to this important subject. I assume that this is a Model Bill for Australia as it draws heavily on analysis of the Victorian Voluntary Assisted Dying Act, and the model has no correlation to laws or practices in Europe (Benelux countries or Switzerland).

Otto von Bismarck stated that 'politics is the art of the possible', and as a consequence, the Victorian law emerged as a mass of compromises; a bureaucratic tangle rather than an act of brevity, which White and Willmott rightly support (their Model is 27 pages compared to the Victorian Act of 130 pages). Application of existing rights under the rule of law and intelligent use of regulations will aid brevity. Described by the Victorian Premier as the safest legislation in the world, with 68 safeguards, it is as a result, a most complex piece of legislation and correspondingly difficult to implement. This difficulty in implementation has been magnified by the government's interpretation that one of the assessing doctors must be a 'specialist' in the disease leading to a request for assistance,

[1] Ben White and Lindy Willmott, 'A Model Voluntary Assisted Dying Bill' (2019) 7(2) *Griffith Journal of Law and Human Dignity* 1 ('Model Bill').

despite this not being specified in the legislation. None of the 20 other jurisdictions with assisted dying laws has such a requirement.

White and Willmott published their paper before the Western Australian parliament passed their legislation in December 2019. The WA Act thankfully avoided this 'specialist' trap — this Model also correctly avoided this mistake. This interpretative error in Victoria has proved to be a serious roadblock to effective implementation of the law.

I come to this critique from a long and deep personal association as a medical practitioner with people requesting voluntary assisted dying and from the experience of having provided assistance to several hundred people. My comments on the Model Bill come from a medical perspective rather than a legal one. The areas that concern me in this Model are: the time line for assistance and the eligibility criteria; the matter of choice in carrying out Voluntary Assisted Dying ('VAD'); the training and education of doctors; the damning requirement for a person to be an Australian citizen; and the burdensome delay between passage of legislation and its implementation.

Before addressing these matters, I would like to offer some comments on the values which must be upheld.

II VALUES

I fully support the values expressed by White and Willmott but would like to expand some of this discussion.

With regard to autonomy, I would add the complement of responsibility. If we want autonomy regarding those decisions which are vital to us, we must be prepared to take responsibility for those decisions. This relates to the value of freedom of conscience — my autonomy cannot override that of another, reflected in their conscience, who disagrees with me. If I want the autonomy to make decisions about my end of life to be respected, I must accept the freedom of conscience of a doctor to refrain from assistance. This principle applies equally to a doctor's autonomy in the decision regarding how voluntary assisted dying should be carried out. A doctor should not be put under duress to provide a lethal injection when the person making that request is quite able to take responsibility for that decision.

It is a fundamental aspect of medical practice to reduce suffering. Everything a doctor does is surely based on this principle. We must sometimes cause temporary pain in order to relieve suffering, but never cause prolonged suffering if it can be avoided. Nowhere is this principle more relevant than at the end of life. At this point, when cure is not possible, when there is intolerable suffering which the doctor cannot measure, the relief of suffering is the most important aspect of treatment. At this point it becomes not just a question of reducing suffering but of abolishing it, if that is requested by the suffering person in full knowledge of the consequences.

The rule of law is a fundamental principle of our society. In medicine, it prevents a doctor providing treatment to which the patient has not agreed and equally, it protects a doctor who refuses to provide treatment with which he or she does not agree. Thus, a doctor can refuse to provide a prescription for contraceptives, to provide for sterilisation, or to deny a request for abortion. They can refuse to provide any treatment which they believe would be harmful or have no benefit, or for moral reasons. While I fully support the right to conscientious objection in relation to VAD, I fail to see why this right to refuse a treatment needs to be enshrined in a new law — it already exists.

If conscientious objection is to be specifically enshrined in this legislation (Clauses 38-39), then the Model's requirement is that such doctors or institutions must refer a person making a request to a doctor who is likely to provide VAD , or to a body which has data as to who will or might — in Victoria no such body of data formally exists. I would argue that, in addition, this principle is enshrined in traditional medical practice and bodies (Medical Boards) that oversee medical practice, and in common law. I know of no other piece of legislation that attempts to regulate medical practice as does any voluntary assisted dying law (as passed to date in Australia). Other areas which influence end of life (abortion, refusal of treatment) are not so circumscribed. More particularly, the area of palliative care which involves practice at the end of life and affects the timing and manner of death is not regulated in any specific sense — there is no requirement for informed consent, assessment of mental competence, second medical opinion, or report of death to any authority. I do not suggest that these matters be formally addressed as they would significantly impede effective palliative care, but point out the stringency of VAD law compared to its lack in palliative care. Essentially the same group of patients are involved.

III THE SIX-MONTH TIME FRAME

The major flaw of the Victorian and WA legislation is the basic six-month prognostic time frame for qualification (it does extend to 12 months for persons with a neuro-degenerative disease). White and Willmott correctly acknowledge the prognostic difficulty of this determination and the discrimination that it creates. The six-month time frame derives from legislation in Oregon and has been slavishly continued in the US and followed into Australia. The simple reason for its use was that it was the time frame in the US for determining funding for palliative care. There is no logic for it in a medical sense. The whole aim of this legislation is to allow the legal relief of intolerable suffering (the Oregon Act does not mention suffering), and it is evident that this arbitrary time frame is exceedingly difficult to implement — the further one recedes from the actual time of death the more difficult prognosis becomes.

It is also discriminatory. Intolerable and unrelievable suffering is the root cause for requests for VAD, and intolerable suffering is not confined by time. Just as some people with terminal illnesses may have no intolerable suffering, or only in the last few weeks of their illness, others may have intolerable suffering well before the six-month deadline. Disease does not respect time. Many people, and I am noting people with terminal cardiac and respiratory diseases, may have great suffering from breathing difficulties, pain and fatigue, but not have a predictable prognosis — they tend to die suddenly from a complication of their illness. This provision also excludes the frail aged (who inhabit our aged care homes), a condition which is not a valid medical diagnosis, yet is recognised as a harbinger of demise but in which prognosis is often difficult to make — they might die tonight or survive for 12 months.

Eli Stutsman, an Oregon lawyer much involved in developing the Oregon Bill, has acknowledged that it is discriminatory for at least 20% of people with intolerable and enduring suffering. The Model Bill advocates the removal of the six-month prognostic limit, with which I fully agree, arguing (Clause 9(e)(ii)) that the person must be diagnosed with a medical condition 'that will cause death'. Here, I disagree.

IV THE DISEASE WILL CAUSE DEATH

This phrase implies that the illness must have a terminal trajectory. Again, it is evident to anyone with experience of residential care homes and other places, that there are many people with non-progressive illnesses (i.e. not terminal) who have intolerable suffering but are not dying. Take for example, a person who has survived a profound stroke, who is completely paralysed unilaterally, cannot talk, is incontinent and bedbound — they may survive in this state for years; or a high quadriplegic (or any person with profound spinal paralysis) like Christian Rossiter for example. This completely ignores a group of people with severe unrelievable pain but who are not dying. There is a not inconsiderable group of people suffering from such chronic pain — people with advanced polyarthritis; people with chronic spinal and other musculoskeletal pain; people with advanced chronic bowel conditions; and people with faecal and urinary incontinence which challenges human dignity. The time that they must continue to suffer makes their quantum of pain and suffering often far worse than a person dying of cancer.

In a perfect ethical world, all these people should be considered in a Model Bill. If we want to move forward with legislation these situations should be part of the debate. Equally, attention should be given to those people suffering from long-term psychiatric illnesses which have defied effective treatment. If the issue we are attempting to address is intolerable suffering, then we should not confine the debate to physical illness.

Going one step further, just as disease does not respect time, it also does not respect age. Disease and suffering do not unfortunately suddenly begin at 18, nor does the ability to make informed decisions not exist before then.

V WHO SHOULD MAKE THE CHOICE REGARDING METHOD OF VAD?

Respect for autonomy ought to allow a suffering individual who meets the criteria of VAD to make their choice as to method — doctor administration (by injection) or self-administration by mouth. In countries where both are available (The Netherlands and Canada) the overwhelming majority of assisted deaths are by injection. This is not surprising in The Netherlands, where the Dutch medical body (RDMA) determined in 1984 that the doctor should remain with the patient until death occurred. Death by oral ingestion intrinsically takes longer than by lethal injection, sometimes markedly so, and a

number of initial oral plans have been terminated by injection due to the time factor. For this reason, as much as any other, lethal injection is the preferred method in The Netherlands — it is a medical preference rather than a patient preference.

This does not mean to say that, given a choice, a majority of people will not choose doctor administration. They are likely to believe that it will be safer with fewer complications, and they will not have to take the responsibility for their decision. White and Willmott acknowledge that evidence for greater safety and fewer complications with injection compared to oral administration is limited, but this perception undoubtedly influences decisions. My own personal experience, supported by Swiss organisations (Dignitas and ADMD), who have data on several thousand fully observed orally assisted deaths, is that where appropriate support, information and preparation are provided, complications are virtually zero and safety is not in question. The major variable is the time to death, but the vast majority occur within 10 to 25 minutes.

Very few Australian doctors will have had any close experience of orally assisted dying. In order to be able to support and reassure people, they need appropriate training before becoming involved. I believe the training programme, in addition to legal aspects, should include medical advice.

Unfortunately, the injection process leads to a highly medicalised death by medical appointment, commonly carried out in hospital, which has shown to be an unwelcome choice for most people. I have found that when people are involved in discussion about the question of responsibility for the decision, none have disagreed with me as to where it should lie. Oral administration places control over the process entirely in the hands of the individual and has the added protection that death will not occur without consent — people do not take the medication unless their suffering is truly intolerable. They can die at home surrounded by their family at a time of their choosing, not that which suits the doctor. There is actually no need for medical attendance with oral administration, unless requested by the person — the doctor does nothing except provide confidence, important as this undoubtedly is. Nurse practitioners and well-trained volunteers can do this equally well.

There is a likelihood that the high incidence of injection in Canada was related to the rushed implementation of the legislation there without any period of education of the community or the medical profession.

VI DELAY IN IMPLEMENTATION

The Model Bill continues the 18-month delay period from the passage of the legislation to the implementation. Given that 53 persons used the Victorian Act in the first six months, it is likely that 150 or more people will be denied access by this delay. While I fully support a delay in order to have smooth implementation, given the experience already available, this time should be kept as short as possible.

VII CITIZENSHIP

During the first six months of the Victorian Act, at least five people who met the medical criteria for assistance have been denied by the requirement for citizenship or permanent residency status. This particular requirement has been included in the Victorian law, and regrettably also in WA, for the necessary reason of preventing VAD 'tourism'. However, this well-intentioned requirement failed to realise that there are many thousands of long-term Australian residents, particularly from NZ, UK, Europe and other countries who have not taken out citizenship and are thus ruled out. It takes considerable time (and expense) to complete the citizenship process when time for action is at a premium. Strictly legislated residency criteria could achieve the same end without harm to suffering people.

VIII EVALUATION OF THE MODEL BILL

This depends largely on the interpretation of 'model'. The Oxford dictionary defines it in two relevant senses — as 'exemplary or excellent of its kind' or 'an excellent example of quality' (depending on edition) but also as 'a particular design or version of a product'. This Model Bill can be evaluated in a general sense according to this definition or viewed as a practical model for future presentation to Australian parliaments, with a view to improving legislation and avoiding previous ambiguities and problems. I have taken the former approach in this analysis, while recognising the pragmatism in the latter approach.

I therefore suggest the following changes to the Model:

1. Expand the eligibility criteria to include people with intolerable and unrelievable suffering but who do not 'have a medical condition which will cause death' (i.e. further broaden the time limit) (Clause 4(a)).
2. Shorten the implementation period to 12 months or less if ready before then (Clause 2(2)).
3. Remove Clause 4(e) re refusal to participate.
4. The medical practitioner's autonomy should also be respected (Clause 5(b)).
5. Clarify the meaning of 'supervised self-administration' to indicate that this may be in the presence of a doctor, a nurse practitioner or registered trained volunteer (Clause 31(b)).
6. Delete reference to Australian citizen or permanent resident and replace with other strict residency criteria (Clause 9(b)).
7. Modify Clause 9 (e)(iii) re terminal illness.
8. Expand Clause 14 to include 'completed approved legal and **medical assessment training**.'
9. Consider reviewing Clauses 27, 28 and 29 in the interest of brevity — none of these witness requirements exist for witnessing of Advance Care Directives.
10. Clause 29(1)(ii) requires a witness to assert 'that the person appeared to have decision-making capacity in relation to voluntary assisted dying'. Clause 17 indicates that this is a medical decision, not one to be made by a lay witness (applies also to Clause 32).
11. Clause 36 is covered by common law.
12. Clause 38(1) is covered by common law.
13. Clause 39 includes a necessity for facilities which refuse to be involved in VAD to make this clearly known in all relevant notices and documents.
14. Review of the Act (Part 9) should be in 2-3 years.
15. Schedule 1 indicate clearly that access to VAD does not mean that administration must immediately follow.
16. Re Part 6 — some consideration needs to be given to reporting situations where requests are refused in order to allow the Board to assess deficiencies in the eligibility criteria.

IX AREAS THAT FALL OUTSIDE THE MODEL

1. Provision for assistance to persons with chronic unrelievable psychiatric illness.
2. Provision for persons under 18 with intolerable and unrelievable suffering.

I acknowledge that these two areas are more contentious than any matter addressed in the Model Bill, but these issues have been raised, debated, and addressed by parliament and the courts in The Netherlands and Belgium. They have been acted on, subjected to judicial scrutiny and found to have worked effectively. I accept that if the narrow view of the Model is the focus of White and Willmott, then these issues are too premature for Australian parliaments, but they are the boundaries that must not be overlooked in the broad view of the Model.

WHEN TRANSPARENCY CAN BE DEADLY: REPORTING OF IDENTIFIABLE AND LOCATABLE PERSONAL INFORMATION IN AAT COUPLE RULE DECISIONS THAT INVOLVE DOMESTIC VIOLENCE

LYNDAL SLEEP* & LUISA GRAS DIAZ**

This paper investigates the disclosure of identifiable and locatable details about domestic violence victim/ survivors in publicly available Administrative Appeals Tribunal ('AAT') reporting of decisions. The researchers investigated the frequency and type of disclosure of identifiable and locatable details of women and children in situations of domestic violence in 27 publicly available AAT couple rule decisions. It was found that victim/survivors' names were identified in 86.7% of decisions and 2120 times across all 27 decisions. This paper argues that the very high frequency of reporting identifiable and locatable details in AAT decisions is cause for alarm in situations of domestic violence. It poses serious safety risks to women and children during an already vulnerable time, and more care is needed in the reporting of these decisions. This paper recommends that the approach used in New Zealand, where names and addresses are obscured in all reporting of Social Security Appeals Authority Decisions, be adopted by AAT reporting in Australia as the only practicable way to ensure women's and children's safety in the context of domestic violence.

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I INTRODUCTION

When a person discloses domestic or family violence, it is important that identifying or locatable information be managed with appropriate protective factors in place.[1] This is because there is a very real risk of perpetrators locating their victims and their children and inflicting further harm on them. It is also due to the sensitive nature of this information.

Administrative Appeals Tribunal ('AAT') decisions are accessible to the general public online, free of charge. Sleep found that one in five 'couple rule' decisions reported by the AAT involved domestic violence and, further, that these decisions report identifiable and locatable information about domestic violence victims and their children.[2] This puts

[1] Queensland Government, Department of Communities, Child Safety and Disability Services, *Domestic and Family Violence Information Sharing Guidelines May 2017* (Report, May 2017) 11 ('Domestic and Family Violence Information Sharing Guidelines').
[2] Lyndal Sleep, 'Sex-Snooping in Australian Social Welfare Provision: The Case of Section 4(3) Surveillance' (PhD Thesis, Griffith University, 2016).

victims and their children at increased risk of further abuse from their perpetrator.

This paper analyses the extent of the reporting of identifiable and locatable details of domestic violence victims in AAT 'couple rule' decisions. It argues that more care should be taken when disclosing individual's identifiable and locatable information in reports of AAT decisions, especially in situations that involve sensitive and/or risky information like 'couple rule' decisions that involve domestic violence. It is suggested that the approach taken by New Zealand's Social Security Appeals Tribunal, to obscure all identifiable information for all decisions (not just those that involve violence), be adopted in Australia to limit the risk of disclosure in the context of domestic violence.

This is demonstrated in the following steps. First, the importance of applying appropriate protective factors when dealing with identifiable and locatable details of domestic and family violence disclosures is established. Second, the significance of AAT 'couple rule' decisions that involve domestic violence is highlighted. Third, a content analysis of AAT 'couple rule' decisions that are publicly available online and involve domestic violence is outlined, and its findings shown. Finally, what this means for disclosure of identifiable and locatable individual's details in AAT reporting is discussed.

II DOMESTIC AND FAMILY VIOLENCE, DISCLOSURE, RISK, AND THE NEED FOR APPROPRIATE PROTECTIVE FACTORS

Research by Australia's National Research Organisation for Women's Safety (ANROWS) has found that one in three Australian women over the age of 15 have experienced physical violence, and one in six women have experienced sexual or physical violence from a current or former partner.[3] These statistics are an underestimate of the actual number, because these events are often not disclosed by victims.[4] Further, the view of domestic violence as a heated argument between a couple that is their own private business has been replaced by an increased public understanding that the level of violence and control that the perpetrator inflicts can be deadly and is unacceptable.[5] This

[3] Australia's National Research Organisation for Women's Safety and Foundation to Prevent Violence Against Women and Their Children, *Violence Against Women: Key Statistics* (Fact Sheet, 2018).
[4] Janet Phillips and Malcolm Park, 'Measuring Domestic Violence and Sexual Assault against Women' (E-Brief, Parliamentary Library, Parliament of Australia, 12 December 2006).
[5] Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children*, 2010-2022, 2011.

is demonstrated by the 2017 National Community Attitudes towards Violence against Women Survey,[6] which shows a decreased acceptance of domestic violence in the Australian community and an increased understanding of its complexities, as well as the launching of *The National Plan to Reduce Violence Against Women and their Children 2010-2022.*[7]

With this increased concern comes increased reporting of domestic violence incidents by victims to authorities like police and hospitals.[8] It is generally understood that this reflects a mainstream culture of increased disclosure of this type of violence (although it is still underreported) and of the expectation of institutional support and understanding after this disclosure.[9] Hence, public institutions have a special responsibility to deal with the sensitive information contained in these disclosures in a respectful manner that does not cause harm to the victim. This is particularly important in situations of gender-based violence which historically has led to shame, ostracism, enforced poverty, taking of children and additional violence on the women who disclose.[10] In Australia, most family and domestic violence services are delivered at a state or local government level. The public caring institutions which deal with the health, safety and nurturing of women and children, hospitals, police and schools, are also state based. In awareness of this, most state governments have a set of clear protocols in how to deal with the information contained in disclosures of domestic and family violence, and how to share this information with consideration of the safety and rights of the individuals involved. For example, the Queensland Government *Domestic and Family Violence Information Sharing Guidelines May 2017,* which is supported by the *Domestic and Family Violence Protection Act 2012* (Qld), states that 'The risk of perpetrators locating victims as a result of information sharing can be countered by appropriate protective factors such as those that

[6] Kim Webster et al, 'Attitudinal Support for Violence against Women: What a Population-level Survey of the Australian Community Can and Cannot Tell Us' (2018) 54(1) *Australian Journal of Social Issues* 52.
[7] Council of Australian Governments (n 5) 2011.
[8] Janet Phillips and Malcolm Park, 'Measuring Domestic Violence and Sexual Assault against Women' (E-Brief, Parliamentary Library, Parliament of Australia, 12 December 2006).
[9] Queensland Law Reform Commission, *Domestic Violence Disclosure Scheme* (Report No 75 June 2017); Queensland Law Reform Commission, *Review About Whether a Domestic Violence Disclosure Scheme should be Introduced in Queensland* (Consultation Paper, WP No 75 December 2016). See also Heather Douglas, 'Legal Systems Abuse and Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 84-99.
[10] Alana Piper and Ana Stevenson (eds), *Gender Violence in Australia: Historical Perspectives* (Monash University Press, 2019).

take care to obscure identifying information about a victim's whereabouts.[11]

III THE PARTICULAR RELEVANCE OF AAT 'COUPLE RULE' DECISIONS THAT INVOLVE DOMESTIC VIOLENCE

A *The AAT*

The AAT is a merits review tribunal that provides independent reviews of various Commonwealth administrative matters, including social security matters. Individuals can lodge an appeal with the AAT and ask for a decision that was made about them to be re-made based on the merits of the case. As such, the AAT provides an important check on the power wielded by Australian Commonwealth government institutions over individuals. The AAT was legislatively instigated in 1975 with the *Administrative Appeals Tribunal Act 1975* (Cth) ('AAT Act'). It is legislatively permitted to make its decisions available to the public. This provides transparency to its own decision making and the actions of governmental decision makers. Transparency is particularly important as prior to the 'new administrative law' reform of the AAT and other merits review tribunals, the only freedom of information individuals had over their information held by government was through the judicial system — an expensive and inaccessible avenue.[12] Merits review tribunals like the AAT are intended to be a more accessible, free and less intimidating way for individuals to question governmental decisions made about them.[13] This is important work.

Part of the AAT's mandate to provide transparency in governmental decision making is the publication of decisions. Section 66B of the *AAT Act* provides that the tribunal may publish decisions in any form, unless prohibited by another Act. Exceptions are made when the disclosure can cause harm, and identifiable information is obscured in Child Support,[14] Migration[15] and Taxation[16] decisions.[17] No exception is currently made for

[11] Domestic and Family Violence Information Sharing Guidelines (n 1) 13.
[12] Roger Douglas and Michael Head, *Douglas and Jones's Administrative Law* (The Federation Press, 7th ed, 2014).
[13] Ibid.
[14] *Child Support (Registration and Collection) Act 1988* (Cth) s 16(2AB).
[15] *Migration Act 1958* (Cth) ss 431, 501K.
[16] *Taxation Administration Act 1953* (Cth) s 14ZZJ.
[17] *Child Support (Registration and Collection) Act 1988* (Cth) s 16(2AB); see also Administrative Appeals Tribunal , 'Guidelines', *Practice Directions, Guides and Guidelines* (Web Page) <https://www.aat.gov.au/resources/practice-directions-guides-and-guidelines>.

social security decisions that involve domestic violence, and these decisions are published without routine removal of identifiable and locatable information. However, current AAT guidelines do not mandate the publication of these details, including for social security decisions. Rather, they explain that:

> The wide availability of published decisions gives rise to the potential for misuse of information contained in written decisions … When preparing reasons for decision, Tribunal members: (a) should only include information about a party, witness or other person in reasons for decision if it is relevant to the findings or otherwise necessary for the cogency of the reasons.[18]

The policy guidelines go on to state that personal addresses should not be included.[19] Given the ease of access to AAT decisions, which are available online through AustLII, it is also important to consider additional responsibilities when managing disclosures of information in order to reduce harm to vulnerable individuals. When the legislation mandating transparency was drafted in 1975,[20] the written AAT decisions were not digitised. Remote online access was not possible. The function of the written decision was as a record, which was accessible to those who made the effort, rather than available online to the general public. The potential for perpetrators to misuse the enhanced accessibility of the information available through social security AAT decisions has increased since the original legislation.

B *The AAT and the 'Couple Rule' in the Context of Domestic Violence*

However, AAT 'couple rule' decisions disclose a plethora of sensitive and personal information as part of the reasons for the decision. These include details about sexual activities, the nature of relationships, level of commitment, and the character of a household. In fact, these details are legislatively required to be collected by Section 4(3) of the *Social Security Act 1991* (Cth). This piece of legislation is known as the 'couple rule'. The 'couple rule' decides whether an individual is a member of a couple for social security

[18] Administrative Appeals Tribunal, 'Publication of Decisions' (Web Page) <https://www.aat.gov.au/AAT/media/AAT/Files/Policies/AAT-Publication-of-Decisions-Policy.pdf>.
[19] Ibid.
[20] Administrative Appeals Tribunal Act 1975 (Cth).

purposes.[21] This is very important in Australia, as an individual's access to social security payments is tied to the income and assets of their partner.[22]

The nature of 'couple rule' decisions leads to particular vulnerabilities for women who have experienced domestic violence for multiple reasons.[23] First, the 'couple rule' effectively ties a woman's access to social security payments to the income and assets of her perpetrator. Sleep found that one of five reported AAT 'couple rule' based decisions involve domestic violence.[24] This is particularly dangerous at a time when a woman is at heightened financial and physical vulnerability when she attempts to end the violent relationship.[25] This is demonstrated by domestic and family violence being a leading cause of homelessness for Australian women.[26]

Second, it is understood by researchers and practitioners in domestic and family violence that women tend to make multiple attempts to leave the relationship. However, this is not considered in 'couple rule' decision making.[27] Rather, Easteal states that 'couple rule' decisions do not take 'battered women's reality' into account.[28] Further, in these decisions, residential addresses are particularly important for decision making, and are reported in AAT decisions. These addresses are particularly pertinent when establishing the nature of the relationship and the household in AAT 'couple rule' decisions. Short term accommodation, which is part of the context of the cycle of abusive relationships, gains the attention of decision makers but is not treated as sensitive information that could compromise the safety of the individual that the decision is about. The temporary residential addresses of women who are attempting to leave a violent and controlling relationship, and also those of relatives and friends with whom they have stayed, are

[21] Lyndal Sleep, 'Domestic Violence, Social Security and the Couple Rule' (Research Report, Australia's National Research Organisation for Women's Safety, April 2019).
[22] Lyndal Sleep, 'Sex-Snooping in Australian Social Welfare Provision: The Case of Section 4(3) Surveillance (PhD Thesis, Griffith University, 2016); Sleep (n 21).
[23] Sally Cameron, 'How Well Does Australia's Social Security System Support Victims of Family and Domestic Violence?' (Briefing Paper, National Social Security Rights Network, August 2018).
[24] Sleep (n 22).
[25] Australian Institute of Health and Welfare, *Family, Domestic and Sexual Violence in Australia 2018* (Report, 2018).
[26] Kathryn Di Nicola, Dini Liyanarachchi and Jacquelin Plummer, 'Out of the Shadows, Domestic and Family Violence: A Leading Cause of Homelessness in Australia', *Mission Australia* (Report, 11 April 2019); Australia's National Research Organisation for Women's Safety, '*Domestic and Family Violence, Housing Insecurity and Homelessness: Research Synthesis' Insights (*2nd ed, July 2019).
[27] Patricia Easteal and Derek Emerson-Elliott, 'Domestic Violence and Marriage-Like Relationships: Social Security Law at the Crossroads' (2009) *Alternative Law Journal* 34(3), 173-76.
[28] Ibid.

routinely reported in the AAT decisions.[29]

Third, it is understood by practitioners and researchers in domestic and family violence that a woman is at increased risk of escalated violence from her perpetrator when she attempts to leave the relationship as the perpetrator desperately tries to re-establish their control.[30] Hence, reporting of addresses and any other identifiable or locatable details at the time that a woman is making an attempt to leave a relationship, even if temporary, creates substantial risks for that woman and her children. AAT 'couple rule' matters that involve domestic violence have often come to the attention of the department due to the relationship's uneasy categorisation as a 'couple relationship' or 'single individuals'. The mining of these sensitive relationships for information like temporary residential addresses, and then the publishing of these details in its reasons for decisions, puts the victim at heightened risk of serious harm at the hands of her perpetrator and/or others through potential public shaming and exclusion. The next section analyses the sensitive identifiable and locatable information reported on AAT 'couple rule' decisions that involve domestic violence.

IV AN ANALYSIS OF AAT 'COUPLE RULE' DECISIONS THAT ARE PUBLICLY AVAILABLE ONLINE AND INVOLVE DOMESTIC VIOLENCE

Previous research has shown that identifiable and locatable details of women in the context of domestic violence are made available to the public through the reporting of AAT decisions, particularly in 'couple rule' decisions. However, the numerical extent of this has not been clarified. This research aims to quantify the extent of this disclosure of sensitive information that posed particular safety risks to women and children. This is done by counting the number of disclosures of identifiable and locatable information on 'couple rule' decisions that involve domestic violence.

[29] Sleep (n 21).

[30] A 2015 study by Australia's National Research Organisation for Women's Safety found that two out of five women experienced violence when temporarily separated from their violent male partner, while six out of ten women reported an increase in violence during separation. See Peta Cox, 'Violence Against Women: Additional Analysis of the Australian Bureau of Statistic' Personal Safety Survey, 2012' (Research Report, Australia's National Research Organisation for Women's Safety, 2016) 121. This is supported by a substantial body of Australian and international research. See, eg, Jacquelyn C Campbell et al, 'Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study' (2003) *American Journal for Public Health* 97(7) 1089-97; Rae Kaspiew et al, 'Domestic and Family Violence and Parenting: Mixed Methods Insights into Impact and Support Needs: Final Report' (Research Report, Australia's National Research Organisation for Women's Safety, 2017).

A *Method*

27 AAT 'couple rule' decisions involving domestic violence between 1994 and 2014 were included in the study. The sample for the current study was derived from the previous data set used by Sleep.[31] Sleep accessed the Australasian Legal Information Institute (AustLII) database, using the Administrative Appeals Tribunal of Australia database and used search terms such as 's.4(3)' and 'member of a couple' to arrive at a sample of 133 decisions. In this current study, the 133 AAT 'couple rule' decisions were further analysed using AustLII's AAT database to identify decisions that involved domestic violence. Search terms such as 'violence' and 'abuse' were used to identify 'couple rule' decisions that involved domestic violence.

The 27 AAT 'couple rule' decisions involving domestic violence were individually analysed according to criteria of personal identifiers. The following criteria were recorded for each decision: victim's name, victim's children's name, victim's address, victim's past address, victim's workplace, victim's past workplace, perpetrator's name, perpetrator's address, perpetrator's work, children's school, relative's name, relative's address, and whether a protection order was issued by the relevant state/territory.

Please note that in reporting these findings, individual decisions will not be referred to. This is to prevent further dissemination of the identifiable and locatable information available in these decisions. It is hoped that this will limit additional risks to the safety of women and children for the decisions used in this study caused by their inclusion in the study.

Major demographic characteristics of the sample were gender, ethnicity and sexuality. The gender of applicants in decisions were overwhelmingly female, with 24 female applicants. The ethnicity of the sample was overwhelmingly Caucasian Australian with one applicant identifying with Indigenous Australian culture and whose partner was also recorded as an Indigenous Australian. The remainder of the sample were recent immigrants, comprising of five from South Eastern Europe, one from Asia, and one from the Middle East. The sexuality of all couples was heterosexual.

[31] Sleep (n 22).

B *Findings*

Major findings of the analysis revealed that 86.67% (N=26) of decisions recorded the victim's name and 73.33% (N=22) of decisions recorded the perpetrator's identifiable and/or locatable information. In addition, 40% (N=12) of decisions recorded a relative's identifiable and/or locatable information; 20% (N=6) of decisions utilised anonymisation methods; and only one of these decisions did not record any personal identifying information in the decision. Almost half (N=13) of the 26 decisions involved protection orders.

The high frequency in which the victim's name was recorded was a standout among the criteria, with the highest incidence being 199 times in one decision. Of the 26 decisions that identified the victim by name (Table 1), 16 decisions identified children's names (Table 2), the majority included children's month and year of birth; two decisions included full dates of birth; and two decisions provided sufficient detail to identify the children's school (Table 2). A disturbing finding was one decision where a named adult discloses historical sexual abuse by the perpetrator, her step father, which occurred when she was a child.

Table 1. Incidences of disclosure of victims' identifiable and/or locatable details

Identifiable and/or Locatable Information	**Frequency**	**Quantity of Decisions**
Victim's name	2120	26
Victim's address	276	11
Victim's past addresses	159	9
Victim's workplace	2	2
Victim's past workplace/s	19	4

Table 2. Incidences of disclosure of victims' children's identifiable and/or locatable details

Identifiable and/or Locatable Information	**Frequency**	**Quantity of Decisions**
Victim's children's name	295	18
Victim's children's school	2	2

Perpetrators' identifiable and/or locatable information was also recorded frequently (1971 times over 22 decisions), with 12 of these decisions identifying their address, and eight decisions identifying their place of work (Table 3). One decision recorded identifiable and locatable information including: the perpetrator's name, places of work and the suburb where he lived. The perpetrator was Indigenous and lived in a suburb with a high Indigenous population, that has a maximum population of 250 people.

Table 3. Incidences of disclosure of perpetrator's identifiable and/or locatable details

Identifiable and/or Locatable Information	**Frequency**	**Quantity of Decisions**
Perpetrator's name	1971	22
Perpetrator's address	388	12
Perpetrators work	38	8

Relatives of the victim or perpetrator were also regularly identified throughout decisions with their name or address being recorded or described in the decision. See Table 4.

Table 4. Incidences of disclosure of relative's identifiable and/or locatable details

Identifiable and/or Locatable Information	**Frequency**	**Quantity of Decisions**
Relative's name	117	12
Relative's residence	45	6

Anonymisation was used in six decisions; however, only one of these decisions did not record any personal identifying information for any persons mentioned in the decision. In this particular decision, all persons were referred to by a single letter and children were

referred to by their gendered pronoun. Nil other locatable information was found in this decision. By contrast, the remaining decisions that used anonymisation in the title still disclosed identifying personal information. Three decisions identified the victim by name with one of these also identifying the children. Two of these six decisions also identified the children's names, which were unusual names, as well as other locatable information for one of the children. One decision anonymised the perpetrator's name and recorded the victim's name.

V WHAT THIS MEANS FOR DISCLOSURE OF IDENTIFIABLE AND LOCATABLE INDIVIDUAL'S DETAILS IN AAT REPORTING

Hence, the current reporting of identifiable and locatable details in AAT decisions, particularly 'couple rule' decisions, places domestic violence victims at considerable risk. The disclosure of identifiable and locatable information in situations that involve domestic violence by the AAT, puts domestic violence victims at increased risk of physical assault and potential public shaming.[32]

While the AAT has a legislated mandate to allow publication of decisions for transparency of governmental decision making, it also has a responsibility to protect vulnerable individuals from harm. The increased accessibility that is provided by the ability to access decisions online requires careful consideration, as this ease of access was not intended by the original legislators in the 1970s before the internet. Further, when reporting AAT decisions, careful consideration needs to be taken of the improved understanding of the extent and dynamics of power and control in domestic violence over the last five decades. We now know that many women rely on social security payments to establish financial independence after fleeing a violent relationship, but social security rules make women in the context of domestic violence particularly vulnerable to social security non-compliance.

However, in situations of domestic violence, women and children are frequently still identified by name and their addresses displayed, despite the considerable risk to women and children.

[32] This public shaming has been shown to be particularly risky for culturally and linguistically diverse women. See Marie Segrave, 'Temporary Migration and Family Violence: An Analysis of Victimisation, Vulnerability and Support' (Report, Monash University, September 2017).

In New Zealand's reporting of Social Security Appeals Authority Decisions, the names of the appellant and respondent are obscured, and, throughout the document, further identifiable and locatable details are redacted.[33] This is not just done for sensitive cases involving, for example, children or violence, but all social security decisions.[34] Here, the tribunal's obligation to provide transparency of governmental decision making is balanced with the need for the safety and dignity of individuals.

This paper suggests that a similar approach be adopted in Australia —that the names and addresses, and any other identifying or locating information, be obscured in all reported AAT decisions. While this study identified a number of decisions that involved domestic violence, this is not exhaustive. Domestic violence is notoriously underreported and individuals do not always disclose the violence in the course of decision making. The most reliable way to ensure women's and children's details are not publicly disclosed in situations of domestic violence through AAT reporting, is to obscure these details when reporting *all* social security decisions.

VI CONCLUSION

This paper analysed 27 AAT 'couple rule' decisions that involved domestic violence and showed very high frequencies of the disclosure of identifiable and locatable details of women and children (in 86.67% of decisions). Victim/survivors' names were identified 2120 times in the 27 decisions, with one decision reporting the victim/survivor's name 199 times.

This paper argued that the disclosure of women's identifiable and locatable information in the reporting of AAT 'couple rule' decisions that involve domestic violence, poses serious safety risks to women and children during an already vulnerable time, and more care is needed in the reporting of these decisions. The very high frequency of reporting identifiable and locatable details in AAT decisions is cause for alarm. This paper recommends that the approach used in New Zealand, where names and addresses are obscured in all reporting of Social Security Appeals Authority Decisions, be adopted by

[33] An appeal against a decision of the Benefits Review Committee, *NZSSAA 62* [2003] (21 May 2003) <http://www.nzlii.org/cgi-bin/sinodisp/nz/cases/NZSSAA/2003/62.html?query=facto%20violent>.
[34] An appeal against a decision of a Benefits Review Committee, *NZSSAA 3* [2019] (23 January 2019) <http://www.nzlii.org/nz/cases/NZSSAA/2019/3.html>.

AAT reporting in Australia as the only practicable way to ensure women's and children's safety in the context of domestic violence.

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QUEERING ASIAN VALUES

ERICH HOU*

One of the often-raised arguments against the global same-sex marriage movement in Asia is the traditional 'Asian values' which deems Eastern communitarian values such as filial piety, loyalty towards family, corporation, government or nation more important than the Western individual freedom and sexual rights. This renewed interest in the 'Asian values' debate is ever more important when the call for personal freedom in the region seems to be escalating. Starting from the Bangkok Declaration (1993), Samuel Huntington's The Clash of Civilizations (1993) and Graham Allison's Destined for War: Can America and China Escape Thucydides Trap? (2017), this paper intends to investigate the validity of 'Asian values' from an alternative viewpoint: Queer Legal Theory (QLT), a sexual minorities perspective of law and society. Using dialectic juxtapositions during the Asian values debate in the 1990s represented by Lee Kuan Yew and Kim Dae-jung, this paper also intends to explore the development of majoritarian rule, democracy and human rights in Asia. In short, it aims to answer the question: Is a democracy based on human rights and dignity feasible in Asia despite of its presumably different values from the rest of the world?

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CONTENTS

I INTRODUCTION

Shortly after Australia legalised same-sex marriage and India repealed Section 377 of the Penal Code, decriminalising private consensual sex between male adults,[1] the ex-Malaysian Prime Minister, Mahathir Mohamad, presented a speech at Chulalongkorn University, Bangkok. With the aim of protecting traditional Asian family values, he reportedly declared to the audience that Asia did not need to 'copy' the West in accepting sexual minorities and that 'we have our own values'.[2] A similar view was reiterated during his visit to the UK.[3]

Such East versus West and us versus them narratives regarding 'values' are not new. Addressing the 1993 World Conference on Human Rights in Vienna, Singapore's then foreign minister had already announced that '[h]omosexual rights are a Western issue and are not relevant to this conference'.[4]

Formalised in the 1993 Bangkok Declaration, the cultural relativist 'Asian values' narrative gained full support from several Asian states. For example, the Chinese

[1] Michael Kirby, 'Beyond Marriage Equality & Skin Curling' (2018) 6(2) *Griffith Journal of Law & Human Dignity* 1 ('Beyond Marriage Equality'); Surabhi Shukla, 'The Many Faces of Dignity in Navtej Johar' (2019) 2 *European Human Rights Law Review* 195. See also *Navtej Singh Johar v Union of India*, Writ Petition (Criminal) 76/2016.
[2] Iain Marlow and Randy Thanthong-Knight, 'Malaysia's Mahathir Says Asia Won't Follow Weston LGBT Rights', *Bloomberg News* (online at 25 October 2018) <www.bloomberg.com/news/articles/2018-10-25/malaysia-s-mahathir-says-asia-won-t-follow-west-on-lgbt-rights>.
[3] Bernama, 'We are Free to Reject LGBT, Other Unsuitable Western Influences – Dr Mahathir', *The New Straits Times* (online at 18 June 2019) <www.nst.com.my/news/nation/2019/06/497206/we-are-free-reject-lgbt-other-unsuitable-western-influences-dr-mahathir>.
[4] Baden Offord and Leon Cantrell, 'Homosexual Rights as Human Rights in Indonesia and Australia', (2001) 40(3-4) *Journal of Homosexuality* 233.

Government agrees that 'Asian values' correspond to Confucianism or similar traditional views, which sacrifice individual freedom in favour of filial piety, or loyalty towards family, corporation, government or nation.[5] For these governments, group rights are more important than individual rights under the banner of Asian values.

This paper intends to investigate the validity of 'Asian values' under an alternative view — Queer Legal Theory (QLT).[6] This non-traditional viewpoint aims to add an alternative perspective to the increasingly international and transnational Queer culture,[7] particularly in the traditional disciplines of law and the judicial system. When different cultural or religious values clash with each other such as with the issues of same-sex marriage or the content of sexual and relationship education,[8] can the conventional universal human rights discourse resolve these value-based disputes? Are gay rights really universal human rights? If yes, how? If no, are there any alternative options? Before the discussion, the first task is to examine some fundamental elements.

II THE CLASH OF CIVILISATIONS AND THE INEVITABLE WAR?

Since September 11, the discussion of 'value', 'culture' and 'civilisation' has become increasingly important, not only in law and politics, but also in other disciplines.[9] Whilst the West questions others' values, culture and civilisation, these discussions also prompt self-reflection. One example is *The Clash of Civilizations,* made popular by Samuel Huntington.[10] In response to the internationalist approach in Francis Fukuyama's *The End*

[5] Michael C Davis, 'Human Rights in Asia: China and the Bangkok Declaration' (1995-6) 2 *Buffalo Journal of International Law* 215 ('Human Rights in Asia').
[6] Francisco Valdes, 'Afterword & Prologue: Queer Legal Theory' (1995) 83 *California Law Review* 344 ('Afterword & Prologue).
[7] Michael Kirby, 'Sexuality and international law: the new dimension' (2014) 4 *European Human Rights Law Review* 350 ('Sexuality and international law'); Sally Engle Merry, 'Transnational Human Rights and Local Activism: Mapping the Middle' (2006) 108(1) *American Anthropologist* 38.
[8] Jane Haynes, 'Protest parents return to Parkfield School gates and say "it's not ok to be gay"', *Birmingham Live* (online at 9 July 2019) <www.birminghammail.co.uk/news/midlands-news/protest-parents-back-parkfield-school-16554048>.
[9] Sean Goggin, 'Human Rights, Anthropology and Securitization: Reclaiming Culture' (2009) 8 *Journal on Ethnopolitics and Minority Issues in Europe* 1.
[10] Samuel Huntington, 'The Clash of Civilizations?' (1993) 72(3) *Foreign Affairs* 22 ('The Clash of Civilizations'); Samuel Huntington, *The Clash of Civilizations and the Remaking of World Order* (Simon and Schuster, 1996) ('The Clash of Civilizations and the Remaking of World Order').

of History and the Last Man,[11] Huntington argued:

> It is my hypothesis that the fundamental course of conflict in this new world will not be primarily ideological or economic. The great divisions among humankind will be cultural… The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future.[12]

The popularity of this view reached its first peak after September 11. Using culture, religion and their interaction as the 'central dividing line', Huntington mapped the world into seven or eight civilisations.[13] His view on the 'fault line/battle line' between the West and Islam has already been debated vehemently by prominent figures; this is not the focus of this paper.[14] Instead, this paper addresses the less discussed clash between East and West, particularly from the angle of Foucauldian biopolitical power of sexuality.[15]

The impact of Huntington's cultural clash discourse is obvious. For example, Tony Blair 'marked the attacks in London by reassessing the very concept of British cultural identity'.[16] Following the Trojan Horse controversy in some Birmingham schools in 2014,[17] David Cameron also raised the 'British values' claim following his 'muscular liberalism'.[18] The hard approaches taken by the governments to enforce such discourse have been examined carefully under human rights scrutiny and will not be repeated here.[19]

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[11] Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992). Fukuyama argues that humanity is reaching the end of ideological evolution and the universalisation of Western liberal democracy is the final form of human government.
[12] Huntington, 'The Clash of Civilizations' (n 10) 22.
[13] Ibid 25. They are Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and possibly African civilisations.
[14] Steven Lukes, *Moral Relativism* (Profile Books, 2008); Amartya Sen, 'Democracy as a Universal Value' (1999) 10(3) *Journal of Democracy* 3; Michael C Davis, 'Constitutionalism and Political Culture: The Debate over Human Rights and Asian Values' (1998) 11 *Harvard Human Rights Journal* 109 ('Constitutionalism and Political Culture').
[15] Ben Golder, *Foucault and the Politics of Rights* (Stanford University Press, 2015) 140.
[16] Goggin (n 9).
[17] Education Committee, House of Commons, Education – Seventh Report: Extremism in schools: the Trojan Horse affair (Report, 17 March 2015).
[18] Ibid part V. See also David Cameron, 'On British Values', *The Mail on Sunday* (online at 15 June 2014).
[19] Conor Gearty, 'Is attacking multiculturalism a way of tackling racism – or feeding it? Reflections on the Government's Prevent Strategy' (2012) 2 *European Human Rights Law Review* 121.

In addition to Huntington's controversial view on Islam,[20] he also juxtaposed the West's Christian values with China's 'Confucian heritage, with its emphasis on authority, order, hierarchy, and supremacy of the collective over the individual.'[21] Facing all these potential clashes, he suggested North America and Europe form a moral, cultural, economic, political, and military collaboration to ensure 'the third Euro-American phase of Western economic affluence and political affluence'.[22]

Such East/West dichotomy has been reignited in Graham Allison's 'Thucydides Trap' discussion.[23] Using case studies stemming from the Greco-Roman period, he warns that history often rhymes, if not repeats, itself: When a rising power threatens a ruling power, war is almost inevitable. Despite its inevitability, he nonetheless suggests four options to avoid the conflict: a) accommodate the rise of China; b) undermine China's growth; c) negotiate a long peace; or d) redefine the Sino-American relationship.[24]

The East versus West relativist narratives in *The Clash of Civilizations* and 'Thucydides Trap' add fuel to the age-old relativist/universalist debate in the discourse of international human rights. In one of my previous papers, 'Universalism or Cultural Relativism: Case Study of Same-Sex Marriage in Taiwan', I concluded that the human rights project is an evolutionary agenda and it has the potential to destabilise the status quo supported by traditional views.[25] Since 'the relativity/universality binary division is often used by governments to justify elitist interests',[26] when universal human rights values clash with traditional values, 'a traditional culture must change for the culture of human rights to emerge'.[27]

Academically, the result of the relativist/universalist debate is arguably clear, and the detailed discussion will not be repeated here. As Afshari observes:

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[20] Lukes (n 14) 99, quoting Huntington, 'The Clash of Civilizations and Remaking of World Order' (n 10) 317: 'He [Huntington] argues that the "underlying problem for the West is not Islamic fundamentalism. It is Islam."'

[21] Huntington, 'The Clash of Civilizations and Remaking of World Order' (n 10) 238.

[22] Ibid 308.

[23] Graham Allison, Destined for War: Can America and China Escape Thucydides's Trap? (Houghton Mifflin Harcourt, 2017).

[24] Ibid 214.

[25] Erich Hou, 'Universalism or Cultural Relativism? Case Study of Same-Sex Marriage in Taiwan' (2019) 3 *The Asian Yearbook of Human Rights and Humanitarian Law* 55 ('Universalism of Cultural Relativism').

[26] Ibid 78.

[27] Ibid 63.

> Almost all discussions that once populated the relativist niche have receded into background. The field is now crowded in the middle. Those who really deserve attention place their markers close to the universalist side.[28]

Despite such academic consensus among the legal scholars, the 'Asian values' argument remains to be an over-generalised concept deserving deconstruction in regional political reality.

III ASIAN VALUES: LEE KUAN YEW AND KIM DAE JUNG

When *The Clash of Civilizations* was published, the 1993 Bangkok Declaration also took a cultural relativist view in order for some Asian states to justify the sacrifice of human rights in order to pursue economic development. It states:

> While human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious background.[29]

The Bangkok Declaration raises several questions: 'Does Asia in general keep some distance from individual rights, favouring instead the concept of duties to be complied with by everyone, by individuals as well as by governments?'[30] Is it true that Asian values are less supportive of freedom and more concerned with order and discipline than are Western values? Are the claims of human rights in the areas of political and civil liberties less relevant in Asia than in the West?[31] In short, does Asia have the philosophical and historical underpinnings suitable for democracy? Ultimately, is a human rights-based democracy achievable in Asia?[32]

These are not only theoretical but also practical questions, particularly when universal

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[28] Reza Afshari, 'Relativity in Universality: Jack Donnelly's Grand Theory in Need of Specific Illustrations' (2015) 37 *Human Rights Quarterly* 854.
[29] *Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights*, UN Doc A/CONF.157/PC/59 (2 April 1993) para 98 (Bangkok Declaration). See also Davis, 'Human Rights in Asia' (n 5).
[30] Christian Tomuschat, *Human Rights – Between Idealism and Realism* (3rd ed, OUP, 2011) 230.
[31] Amartya Sen, *Human Rights and Asian Values* (Carnegie Council on Ethics and International Affairs, 1997) 10 ('Human Rights and Asian Values').
[32] Kim Dae-jung, 'Is Culture Destiny: The Myth of Asia's Anti-Democratic Values' (1994) 73 *Foreign Affairs* 189, 190. See also Davis, 'Constitutionalism and Political Culture' (n 14) 123.

human rights are often watered down in Asia and an Asian-Pacific human rights court is yet to emerge.[33]

The 'Asian values' debate may be able to shed some light on these questions. Lee Kuan Yew (LKY), the founding father of Singapore, once commented that:

> Asians have little doubt that a society with communitarian values where the interests of the society take precedence over that of the individual suits them better than the individualism of America ... Asian cultures are so different from Western cultures that they are exempt from considerations of human rights.[34]

Lee's thesis concerning human rights exemption in Asia is based on his belief that good governance and economic development come before democracy and civil political rights.[35] The fact that Singapore is neither a member of the ICCPR, nor the ICESCR, reflects this line of policy-making.

It is understandable that LKY's communitarian leaning is a product of the 'politics of survival' in the early years of Singapore's independence from Malaysia.[36] It is also suggested that LKY's 'soft, Confucian authoritarianism' derives from his negative views towards the countercultural and anti-war movement in the West during the 1960s when stability was needed in the new island nation.[37] Consequently, LKY became 'an effective spokesman and intellectual leader of the nascent "Asian values" consensus'.[38] Also, thanks to the Singaporean people and their *kiasu* (afraid to miss out) spirit, the popularity of the Singapore model transcends cultures and national boundaries.[39] Akin to the content of 'Asian values', a similar argument of 'universal traditional values' has also been developed by Russia's anti-LGBTQ+ campaign which involves 'an explicit rejection of sexuality rights

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[33] Chang-ho Chung, 'The Emerging Asian-Pacific Court of Human Rights in the Context of State and Non-State Liability' (2016) 57 *Harvard International Law Journal* 44.
[34] Joanne R Bauer and Daniel A Bell (eds), *The East Asian Challenge for Human Rights* (Cambridge University Press, 1999) 6.
[35] Michael D Barr, 'Lee Kuan Yew and the 'Asian Values' Debate' (2000) 24(3) *Asian Studies Review* 309, 323; Graham Allison, Robert D Blackwill and Ali Wyne, *Lee Kuan Yew: The Grand Master's Insights on China, the United States, and the World* (MIT Press, 2013).
[36] Barr (n 35) 316-18, quoting Chan Heng Chee, *Singapore: The Politics of Survival*, *1965-1967* (OUP, 1971).
[37] Yash Ghai, 'Human Rights and Governance: The Asia Debate' (2000) 1(1) *Asia Pacific Journal on Human Rights & Law* 9, 10. See also Barr (n 35) 318 and Davis, 'Constitutionalism and Political Culture' (n 14) 129.
[38] Barr (n 35) 310-314.
[39] Andrea Tan and Shamim Adam, 'U.K. Can't Use Singapore as Post-Brexit Model, Premier Lee Says', *Bloomberg News* (online at November 6, 2018) <www.bloomberg.com/news/articles/2018-11-06/u-k-can-t-use-singapore-as-post-brexit-model-premier-lee-says>.

and invites international allies to use the issue to distinguish themselves from the West'.[40]

Ironically, the popularity of 'Asian values' made it the victim of its own success. The first problem of this 'Asian values' claim is the sheer size of Asia 'where about 60 percent of the total world population lives'.[41] With its geopolitical span from the Bering Sea to the Bosporus, and cultural difference from Shinto to Islam, 'any commentator might be unable even to identify the object referred to'.[42] Subsequently, the 'Asian values' narrative was rebranded as 'Chinese values', 'Sinic values' or 'Confucian values' and geographically limited to East Asia only.[43]

Even within East Asia, consensus is hard to find. The East-Asian diversity, particularly in liberal democratic states such as Japan, South Korea and Taiwan, renders Lee's thesis over-generalised.[44] Using the democratisation and industrialisation process in South Korea after the Gwangju Uprising, Kim Dae Jung, the 2000 Nobel Peace Prize recipient, argued that:

> Asia has a rich heritage of democracy-oriented philosophies and traditions. Asia has already made great strides toward democratization and possesses the necessary conditions to develop democracy even beyond the level of the West… There are no ideas more fundamental to democracy than the teachings of Confucianism, Buddhism, and the Tonghak … Although Asians developed these ideas long before the Europeans did, Europeans formalized comprehensive and effective electoral democracy first … The fact that this system was developed elsewhere does not mean that 'it will not work' in Asia.[45]

Kim unequivocally rejected the 'human rights exemption in Asia' thesis and counter-proposed that 'Asia's destiny is to improve Western concepts, not ignore them'.[46] Using statistics, he also demonstrated an often-overlooked fact that most Asian countries had been democratised by 1990 and exceeded a 45% democratisation rate worldwide. He

[40] Jonathan Symons and Dennis Altman, 'International norm polarization: sexuality as a subject of human rights protection' (2015) 7(1) *International Theory* 61, 86.
[41] Sen, 'Human Rights and Asian Values' (n 31) 13.
[42] Tomuschat (n 30) 218.
[43] Barr (n 35) 310, 313.
[44] Lukes (n 14) 100.
[45] Kim (n 32) 191-192.
[46] Holning Lau, 'Grounding Conversations on Sexuality and Asian Law' (2011) 44(3) *UC Davis Law Review* 773, 802, quoting Kim (n 32) 1.

predicted that Asia will enjoy both democratic development and economic prosperity soon and he attributed his optimism to the aspirations of the people. Kim emphasised that:

> Asia has no practical alternative to democracy; it is a matter of survival in an age of intensifying global economic competition. The world economy's changes have already meant a greater and easier flow of information, which has helped Asia's democratization process.[47]

Back in 1993, whilst the official Bangkok Declaration was released, several Asian Non-Governmental Organisations (NGOs) also corresponded with a shadow document — the Bangkok NGO Declaration.[48] Amartya Sen concludes that:

> The recognition of diversity within different cultures is extremely important in the contemporary world, since we are constantly bombarded by oversimple generalizations about "Western civilization," "Asian values," "African cultures," and so on. These unfounded readings of history and civilization are not only intellectually shallow, they also add to the divisiveness of the world in which we live.[49]

Michael Kirby comments that 'Sen acknowledges that the champions of 'Asian values' are often concerned with a need to resist Western hegemony. But he [Sen] insists that human rights and political liberties are important in every country, including in the countries in Asia.'[50] Kirby further asserts: 'The case for liberty and political rights turns ultimately on their basic importance and on their instrumental role. This case is as strong in Asia as it is elsewhere.'[51]

When global tensions are being fuelled by protectionist, nationalist or regionalist 'Asian values' discourse, or similar discourses such as 'British values' or 'Make America Great Again', the merit of revisiting and deconstructing such debates becomes ever more important. It reminds us that perhaps idealism is not so idealistic after all. It is merely

[47] Kim (n 32) 193.
[48] Coalition for Peace and Development, 'The Bangkok NGO Declaration' (1993) 3(57) *Law and Society Fortnightly Review* 5.
[49] Sen, 'Human Rights and Asian Values' (n 31) 31.
[50] Michael Kirby, 'Health care and global justice' (2011) 7(3) *International Journal of Law in Context* 273, 282.
[51] Ibid quoting Sen, 'Human Rights and Asian Values' (n 31) 30.

another name for long term and peaceful solutions. The exploration of the 'Asian values' debate also helps explain the tension between the aforementioned 'universal traditional values' and the global LGBTQ+ legal movement as the paper will next discuss.

IV QUEER LEGAL THEORY: AUTHORITARIAN ASIA VS. DEMOCRATIC ASIA

On the 24th of May 2019, Taiwan legalised same-sex marriage and reportedly became the first country in Asia to do so.[52] This historical move has its significant meaning for many Taiwanese and its ruling party's human rights diplomacy.[53] Not only does it lift the veil of 'Asian values', it also proves that Kim, Sen and Kirby are correct — Asian values are not Asian, they are often evoked to justify authoritarianism.

Around the same time, the World Health Organisation delisted transgender health issues as mental and behavioural disorders.[54] A month later, the highest court in Hong Kong rendered a favourable decision to the LGBTQ+ community and ensured equal protection to same-sex couples in terms of socioeconomic rights such as spousal benefits and joint tax reporting;[55] strengthening the previous decision from the same court on the issue of same-sex spousal visas.[56] In the beginning of 2020, research indicates that there is increasing public support for LGBTQ+ rights in Hong Kong.[57] Following these developments, there are also movements in Vietnam, Thailand, South Korea and Japan.[58] Such a domino effect further suggests that homosexuality is not just a 'western issue'.[59] Equality, diversity and human dignity are part and parcel of universal values and UN member states have the legal duty to prioritise these universal values over any conflicting

[52] Hou, 'Universalism of Cultural Relativism' (n 25).
[53] Po-Han Lee, 'LGBT rights versus Asian values: de/re-constructing the universality of human rights' (2016) 20(7) *International Journal of Human Rights* 978.
[54] Sabrina Barr, 'Transgender no longer classified as "mental disorder" by World Health Organisation', *Independent* (online at 28 May 2019) <www.independent.co.uk/life-style/transgender-world-health-organisation-mental-disorder-who-gender-icd11-update-a8932786.html>.
[55] Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue [2019] HKCFA 19.
[56] QT v Director of Immigration [2018] HKCFA 28.
[57] Yiu Tung Suen, Randolph Chun Ho Chan and Eliz Miu Yin Wong, *Public Attitudes towards LGBT+ Legal Rights in Hong Kong 2019/20* (Sexualities Research Programme, The Chinese University of Hong Kong, January 2020).
[58] Erich Hou, 'How a Hong Kong tax assessment decision could influence attitudes toward LGBT+ rights across Asia', *The Conversation* (Web Page, July 11 2019) <www.theconversation.com/how-a-hong-kong-tax-assessment-decision-could-influence-attitudes-towards-lgbt-rights-across-asia-118470>.
[59] Symons and Altman (n 40) 62.

regional values after local adjustment.[60] Academically, this universalising process and local adjustment has also been discussed under the concepts of 'vernacularisation' or 'constitutional indigenization'.[61]

While Western homosexuality may have experienced a different developmental path through religious condemnation, legal criminalisation and medical pathologisation, the existence of homosexuality in different cultures is nonetheless the same.[62] Since the 1969 Stonewall Riots,[63] global LGBTQ+ issues such as decriminalisation or same-sex marriage have become politicised and legalised with the support of universal human rights instruments such as the ICCPR.[64] This paradigm shift is evident not only in Western countries in North America, Europe and Australia, 'but also in Latin American countries and South Africa as well'.[65] With colonial legacy such as Section 377,[66] the 'wind of change' has now arrived in Asia-Pacific region and even the UN.[67]

With such a recent and rapid development, observing society and law from a sexual minority perspective, or Queer perspective, is up and coming.[68] Back in 1995, QLT was still in its embryonic form.[69] Being part of the Critical Legal Theory (CLT) family, QLT takes stock from Critical Race Theory, Feminist Legal Theory and Gay Legal Theory. Its name suggests its relationship with Queer Theory — a perspective from the subordination of

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[60] *Universal Declaration on Cultural Diversity,* UN Doc, 31st sess (entered into force 2 November 2001) art 4: 'No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.' See also Hou, 'Universalism of Cultural Relativism' (n 25).
[61] Sally Engle Merry, Getting Justice and Getting Even: Legal Consciousness Among Working-Class Americans (University of Chicago Press, 1990); Sally Engle Merry, Human Rights and Gender Violence: Translating International Law into Local Justice (University of Chicago Press, 2006). For 'constitutional indigenization' see Davis, 'Constitutionalism and Political Culture' (n 14) 138.
[62] Jing Wu Ma, 'From "Long Yang" and "Dui Shi" to Tongzhi: Homosexuality in China' (2003) 7 *Journal of Gay and Lesbian Psychotherapy* 132; Raja Halwani, 'Essentialism, Social constructionism, and the History of Homosexuality' (2008) 35(1) *Journal of Homosexuality* 25.
[63] Valdes, 'Afterword & Prologue' (n 6).
[64] *Toonen v Australia,* Communication No.488/1992; UN Doc CCPR/C/50/D/488/1992 (1994); *Joslin et al v New Zealand,* Communication No.902/1999; UN Doc CCPR/75/D/902/1999 (2002); *Young v Australia* Communication No.941/2000; UN Doc CCPR/C/78/D/941/2000 (2003).
[65] Jessica Brown, 'Human Rights, Gay Rights, Or Both? International Human Rights Law and Same-Sex Marriage' (2016) 28(2) *Florida Journal of International Law* 217, 239.
[66] Douglas Sanders, '377 and the Unnatural Afterlife of British Colonialism in Asia' (2009) 4 *Asian Journal of Comparative Law* [ii].
[67] Michael Kirby, 'A close and curious vote upholds the new UN mandate on sexual orientation and gender identity' (2017) 1 *European Human Rights Law Review* 37.
[68] Francisco Valdes, 'From Law Reform to Lived Justice: Marriage Equality, Personal Praxis, and Queer Normativity in the United States' (2017) 26 *Tulane Journal of Law and Sexuality* 1 ('From Law Reform').
[69] Valdes, 'Afterword & Prologue' (n 6) 352.

non-heterosexual individuals in a mainly heteronormative world. Valdes defines QLT as:

> A self-conscious, self-defined, and self-sustaining body of liberational legal scholarship that voices and pursues the interests of sexual minorities as its particular contribution toward the end of sex/gender subordination.[70]

50 years after Stonewall, the landscape has changed in the US with *Romer*,[71] *Lawrence*,[72] *Windsor*,[73] and *Obergefell*.[74] In Europe, there are also comparative cases such as *Dudgeon*,[75] *Karner*,[76] *X & Others*,[77] and *Orlandi & Others*.[78] In Baisley's words: 'international human rights norms pertaining to SOGI [sexual orientation and gender identity] are emerging'.[79] On the foundation laid down by *Toonen* and similar cases,[80] the latest Asian development in Confucian or Sinic Taiwan and Hong Kong has made QLT a truly international and transnational discourse. No longer merely a theory from the West, QLT is now an established jurisprudence with substantive legal principles and case law.

Originally a concern of human rights law, QLT is now observed in other legal disciplines such as public international law. For example, Otto builds on the Foucauldian concept of the 'biopolitical' nature of heteronormative law and suggests that:

> Queering international law means 'taking a break' from the ordinary way of doing things in international law, in order to open new ways of seeing international legal problems and expose some of the limitations of international law's 'norm' response to them, even when that normal response might be a feminist response.[81]

In terms of its function:

> A queer perspective can bring an array of presently marginalized knowledge to

[70] Ibid 349.
[71] *Romer v Evans* 517 U.S. 620 (1996).
[72] *Lawrence v Texas* 539 U.S. 558 (2003).
[73] *United States v Windsor* 133 S. Ct. 2675 (2013).
[74] *Obergefell v Hodges* 135 S. Ct. 2584 (2013).
[75] *Dudgeon v UK* (1982) 4 EHRR 149.
[76] *Karner v Austria* (2004) 37 EHRR 24.
[77] X & Others v Austria (2013) 57 EHRR 14.
[78] Orlandi & Others v Italy [2017] ECHR 26431/12.
[79] Elizabeth Baisley, 'Reaching the Tipping Point: Emerging International Human Rights Norms Pertaining to Sexual Orientation and Gender Identity' (2016) 38 *Human Rights Quarterly* 134, 136.
[80] Communication No.488/1992; Communication No.902/1999; Communication No.941/2000.
[81] Dianne Otto, 'Taking a Break from Normal: Thinking Queer in the Context of international Law' (2007) 101 *American Society of International Law Proceedings* 119, 122.

> bear on the taken-for-granted assumptions that underpin international legal doctrine and practice, asking different questions that may lead to solutions that will ensure – rather than threaten – the proliferation of diverse practices of freedom and pleasure.[82]

As a non-traditional theory, QLT naturally attracts critiques.[83] One of the strongest shared by many CLT critiques is that CLT only criticises and deconstructs with no real construction.[84] From an Eastern point-of-view, deconstruction, construction and the process from one to another jointly form a life cycle. Artificial dichotomies such as light/darkness, good/evil, East/West, male/female, heterosexual/homosexual and us/them may be convenient dialectic tools, but such over generalisation is far from reality. Between black and white, there are spectrums of colours. Construction, deconstruction and their interaction coexist simultaneously. From a macro-perspective, they are all part and parcel of reality.

A theory without practice is purely an academic exercise. In regard to QLT's praxis, Valdes suggests after the success of *Obergefell* that:

> We can now get busy constructing the freer normative future Queers say we need and want… Now that so many of us can marry legally, let's make sure that if we do, we then really do live increasingly happily ever after, and as a multiply-diverse and queered nation of equality lived justice for all.[85]

In short, the lessons learned from QLT and its corresponding traditional disciplines empower sexual minorities everywhere, may it be East or West, to 'take a break' from the norm and appreciate legalisation and equality without necessarily falling into heteronormalisation.[86]

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[82] Ibid 122.
[83] For example, Levit reports that 'A recent New Republic article by Lee Siegel criticized queer theory for "the sexualisation of everything"' [citation omitted]: Nancy Levit, 'A Different Kind of Sameness: Beyond Formal Equality and Anti-subordination Strategies in Gay Legal Theory' (2000) 61 *Ohio State Law Journal* 867.
[84] Ben Golder and Peter Fitzpatrick, *Foucault's Law* (Routledge, 2009); David Jabbari, 'From Criticism to Construction in Modern Critical Legal Theory' (1992) 12(4) *Oxford Journal of Legal Studies* 507.
[85] Valdes, 'From Law Reform' (n 68) 51.
[86] Otto (n 81). Regarding the concern that sexual minorities might fall into heteronormalisation through simulating heterosexual marriage via same-sex marriage, see Rosemary Auchmuty, 'Same-Sex Marriage Revived: Feminist Critique and Legal Strategy' (2004) 14(1) *Feminism & Psychology* 101.

V THE CULTURAL 'CLASH/WAR' V UNIVERSAL HUMAN VALUES IN QLT

When it comes to the discussion of civilisation clash or cultural war, Huntington and Allison consider the universality of humanity as naïve and politically correct.[87] Their view is understandable if the conflicts are viewed exclusively from the cultural and religious differences and the prioritisation of Western interests. The problem of their approach is: human dignity cannot and should not be overlooked.[88]

Using examples such as slavery, burning of widows and female genital mutilation, Tomuschat states that:

> The notion of human rights cannot be made [to?] disappear. The only-and-eternal question is how to find an adequate balance between individual rights and freedoms and the requirements of the common interest… it is debarred from invoking the Bangkok Declaration to support treatment to that effect.[89]

If ancient history could really mirror modern politics, then it should be remembered that there is a 'high degree of shared history' among the three successors of the Roman Empire: the Byzantine, the Papacy and Islam.[90] Focusing disproportionately on historical Greco-Roman, Judeo-Christian and West-centric views can lead to incomprehensive understanding. Extreme cultural relativist views are as damaging as any bias which can 'contribute the social construction of false binaries, either pitting the West against the East or pitting the West against the rest of the world in an exaggerated fashion'.[91] With the rise of protectionism, nationalism and regionalism, there is a hard lesson to learn from the crimes against humanity during the Nuremberg Trials.

From an international and transnational human rights perspective, it is also poignant to identify the omission of contribution from Asian, African and other non-Western

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[87] Allison (n 23) 147.
[88] 'Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world': *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) preamble.
[89] Tomuschat (n 30) 230.
[90] Rowan Williams, 'Civil and religious law in England: a religious perspective' (2008) 10(3) *Ecclesiastical Law Journal* 262.
[91] Holning Lau, 'The Language of Westernization in Legal Commentary' (2013) 61 *American Journal of Comparative Law* 507, 511 [citations omitted].

civilisations in the post-WWII international peace-building project of the United Nations.[92] While recognising the civil, political, social, economic and cultural differences in the world, the drafters of the 1948 *Universal Declaration of Human Rights* (UDHR) also emphasised the common interests shared by all people and enshrined these fundamental values in this international Magna Carta.

It is true that today's UN is far more complicated than the original plan drawn up by representatives from different cultures.[93] Nevertheless, it is still the *de jure* forum for reconciling international and transnational interests through political and legal mechanisms such as treaties, conventions, resolutions and communications. The bottom line is that most of the 193 UN member states are voluntarily bound by the International Covenant on Civil Political Rights (ICCPR) and International Covenant on Social Economic and Cultural Rights (ICESCR).[94] Some issues can only be effectively resolved through international and transnational cooperation such as non-state actors, environment, disease, trade, technology, human traffic, gender violence, sexuality and their intersection.[95] The traditional nationalistic view based exclusively on sovereignty is no longer sufficient to provide effective solutions. Under public international law and international human rights law, member states are under a duty to settle interstate disputes in a peaceful manner.[96]

With an alternative lens such as QLT, perhaps it is acceptable here to 'take a break' from the traditional international relations, pubic international law and human rights

[92] Lydia H Liu, 'Shadows of Universalism: The Untold Story of Human Rights around 1948' (2014) 40(4) *Critical Inquiry* 385.
[93] Guoyu Hua, 'From A Human Rights controversy to Consensus on Human Rights: Zhang Pengchun's Contribution to The Universality of Universal Declaration of Human Rights' (2016) 4 *China Legal Science* 30.
[94] The US has signed and ratified the ICCPR (1992) and signed the ICESCR but not ratified it. China has signed and ratified the ICESCR (2001) and signed the ICCPR but not ratified it. Singapore is neither a member of the ICCPR nor the ICESCR.
[95] Emily B Rodio and Hans Peter Schmitz, 'Beyond norms and interests: Understanding the evolution of transnational human rights activism' (2010) 14(3) *International Journal of Human Rights* 442.
[96] *Charter of the United Nations* art 2, para 3: 'All Members shall settle their international dispute by peaceful means in such a manner that international peace and security, and justice, are not endangered.' See also art 33: '1. The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice. 2. The Security Council shall, when it deems necessary, call upon the parties to settle their dispute by such means.'

discourses and refocus on the underlying concept of humanity.[97]

In terms of legalising same-sex marriage in Singapore, LKY once promised: 'We will follow the world. A few respectable steps behind'.[98] The 'Crazy Rich Asian' style wedding of LKY's grandson and his male partner in South Africa made international headlines.[99] One could take this blessing as a gesture to gradually close the generation gap and to heal a divided society. Meanwhile in Thailand, reports suggest that the Land of Smiles may become the first country in South East Asia to recognise same sex union.[100] On the 4th of March 2020, the Hong Kong Court of First Instance once again reaffirms that the government's refusal to provide eligible same-sex couples the access to public housing, another socioeconomic right, is unconstitutional.[101] Even in China, the issue of legalising same-sex marriage has been officially acknowledged by the government during the revision of China's Civil Code.[102] Hopefully soon, community leaders and people with traditional heteronormative views will embark on the journey to appreciate new interpretations of existing cultural or religious values, such as Queer Islam.[103] With optimism, culture does and can change for the better in small steps.[104]

VI CONCLUSION

History suggests that the clash of values, cultures and civilisations has always existed. Old

[97] Otto (n 81).
[98] Simon Obendorf, 'A few respectable steps behind the world? Gay and lesbian rights in contemporary Singapore' in Corinne Lennox (eds), *Sexual orientation, gender identity and human rights in the Commonwealth: struggles for decriminalisation and change* (School of Advanced Study Press, University of London, 2013) 231.
[99] Anna Maria, 'Wedding of Lee Kuan Yew's grandson and his boyfriend maybe a watershed moment for LGBT rights in Singapore', *The Independent* (online at 29 May 2019) <www.theindependent.sg/wedding-of-lee-kuan-yews-grandson-and-his-boyfriend-maybe-a-watershed-moment-for-lgbt-rights-in-singapore/>.
[100] Randy Thanthong-Knight, 'Thailand May Be First in Southeast Asia to Allow Same-Sex Unions', *Bloomberg News* (online at 27 August 2019) <www.bloomberg.com/news/articles/2019-08-27/thailand-may-be-first-in-southeast-asia-to-allow-same-sex-unions>.
[101] Nick Infinger v The Hong Kong Housing Authority [2020] HKCFI 329.
[102] Global Times, 'Lawmakers urged to include gay marriage in civil code', *Global Times* (online at 20 December 2019) <www.globaltimes.cn/content/1174233.shtml>.
[103] Lily Jamaludin, 'LGBT rights in "new" Malaysia still have a long way to go after activists' portraits are removed from photo exhibition', *South China Morning Post* (online at 9 September 2018). See also Scott Siraj al-Haqq Kugle, *Homosexuality in Islam – Critical Reflection on Gay, Lesbian, and Transgender Muslims* (One World, 2010).
[104] Kees Waaldijk, 'Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands' in Robert Wintemute and Mads Andenas (eds), *Legal Recognition of Same-Sex Partnership – A Study of National, European and International Law* (Hart, 2001).

traditions such as slavery, racism, misogyny, discrimination against minority groups are constantly challenged by modern social-engineering projects such as human rights. Such conflicts between traditional values and modernity do not only appear at personal and communal levels — they also appear at national, international and transnational levels.

As illustrated by the contrast between LKY and Kim, the crux of the 'Asian values' debate is intrinsically postcolonial as well as Maslowian: once the fundamental needs of people are satisfied, citizens, may they be Eastern or Western, equally aspire to participate in the decision-making process regardless of their differences. The basic instinct of self-autonomy generates the concept of freedom, universal suffrage, democracy and individual rights. However, as Oscar Wilde put it in *The Soul of Man*: 'High hopes were once formed of democracy; but democracy means simply the bludgeoning of the people by the people for the people.'[105]

Majoritarian rule is a double-edged sword. It is the foundation of democracy but it can also lead to majoritarian vice on the expenses of the minorities. The objective of the universal human values in QLT is exactly to compensate this heteronormative majoritarian vice. Without the balance and check of human rights focusing on the protection of individual equality, diversity and dignity, the narrowest form of democracy is just a number's game.

Fortunately, culture is not stagnant, and it can and must adapt. In order to ensure the progress of society, reconciliation of previous conflicts and pacific disputes resolution should be the way going forward. These are not dogmatic teachings or legalese but hard-learned lessons from past human atrocities. When facing the fourth industrialisation, population growth, public health, pollution and climate change, the need to address the common interest shared by all humankind is increasingly pressing, despite our differences. These ever more complicated issues require international and transnational cooperation alongside traditional concepts of sovereignty and nation states. For both East and West, traditional and modern, queer and straight, female and male, as well as all the spectrum in between, there is still a lot to learn from each other as long as we cohabitate on the same planet.

[105] Oscar Wilde, The Soul of Man under Socialism (1891).

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DIGNITY AND CULTURE IN DISPUTE RESOLUTION

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This paper adopts a definition of human dignity that highlights the importance of recognition and respect. These two concepts are important in dispute resolution processes, particularly where cultural differences exist between parties, or between a party and the third-party decision-maker or dispute resolution practitioner. Although cultural differences are not in themselves causes of conflict and should indeed be celebrated, culture and identity are intricately linked, meaning cultural differences negatively influence disputes and lead to intractability. Cultural differences may also affect a dispute resolution process and its outcome, particularly in relation to parties' engagement in, and perception of, the process. To prevent negative implications of cultural differences, dignity in the form of respect and recognition is important. These two concepts may also form the basis of procedural justice which, when present, enhances satisfaction in a decision-making process by giving effect to voice. This paper explores how cultural differences may diminish voice quality and how respect and recognition may lead to empowerment, thus improving the quality of voice and, in turn, both process and outcome. It discusses the elements of respect and recognition that may accord dignity to parties.

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CONTENTS

I INTRODUCTION

Dispute resolution (DR) is an important activity that forms part of the basic structure of society, for the very reason that disputes are socially constructed and inevitable. It takes many forms, from adversarial to non-adversarial processes and from peaceful to violent forms. DR processes differ, and different societies may prefer particular DR methods.[1] Traditional and indigenous methods of DR are part of every society,[2] although modern processes have emerged and been established. Some processes involve third parties who make final decisions, while others require disputants to make their own decisions in their own best interests. The non-adjudicatory processes of DR may involve third parties who facilitate the process or make recommendations. Contemporary DR processes have been categorised as determinative (arbitration and adjudication), facilitative (mediation, negotiation), advisory (conciliation, expert appraisal) and hybrid (med-arb, arb-med, med-arb-med) processes.[3]

Regardless of the process of DR, one thing is important: the opportunity for a party to contribute to the decision-making process or, simply put, voice. Procedural justice

[1] William I Zartman, 'Introduction: African Traditional Conflict "Medicine"' in William I Zartman (ed), *Traditional Cures for Modern Conflicts: African Conflict "Medicine"* (SAIS African Studies Library, 1999) 1-11.
[2] Ibid.
[3] National Alternative Dispute Resolution Advisory Council, *Dispute Resolution Terms: The Use of Terms in (Alternative) Dispute Resolution* (Report, September 2003) 4-7.

literature shows the importance of voice in a decision-making process.[4] Arguably, voice is about recognition of parties' dignity. However, the quality of voice, and therefore the extent to which parties' dignity is recognised, may be limited in some decision-making processes. Using various conceptions of dignity, this paper explores how human dignity is, or ought to be, given effect in DR processes. This is an important consideration as questions have been raised about the capacity of certain alternative dispute resolution (ADR) processes to deliver justice in contexts, including cross-cultural contexts, infested with power disparity. Questions include:

> Does a move away from formal legal processes threaten the impartiality of outcomes? Do the dynamics of ADR disadvantage those with less economic or social power? How are concepts of justice and approaches to dispute resolution inflected by culture, and how can approaches to ADR take seriously the challenges of intercultural justice, understanding, and negotiation?[5]

Some issues that have been raised in relation to mainstream, Western alternative DR processes in intercultural contexts include: translation of communication skills relevant to effective participation in DR processes across cultural boundaries; neutrality; a one-size-fits-all approach; institutionalisation and failure to train dispute resolution practitioners (DRPs) to 'assess their own cultural frames of reference [and how those] may limit access, understanding progress, or engagement in conflict processes'.[6] Kahane points to the manner in which legal processes that require third party neutrality favour dominant groups.[7] He argues that the approach to dispute resolution which involves:

> A set of principles and procedures that can neutrally adjudicate between parties' rights and interests … [represents] a culturally specific understanding of human identity and relationships, one held, as it happens, by powerful social groups. Principles and procedures that pretend to stand above culture may in fact operate to the advantage of some social groups and the disadvantage of

[4] Allan Lind and Tom R Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988) 63.
[5] Catherine Bell and David Kahane, 'Introduction' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 1.
[6] Michelle LeBaron, 'Learning New Dances: Finding Effective Ways to Address Intercultural Disputes' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 11, 13.
[7] David Kahane, 'What is Culture? Generalizing about Aboriginal and Newcomer Perspectives' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 28–56.

others.[8]

The interaction between power and culture, and how this interaction shapes perception of what is right or wrong, makes dignity a useful concept for DR. This paper examines conceptions of dignity within DR processes, particularly those processes that are considered alternative to judicial processes and do not require determination by a third party. It argues that dignity is critical in these processes but also recognises that, in instances, the conception of dignity adopted and which subsequently grounds fundamental principles of a DR process, may maintain the status quo of inequality: voice may not result in the best outcome possible in the circumstances. In addition, the conception of dignity adopted may lead to coercion and imposition of cultural values different to those held by a party. Dignity as respect and recognition, however, may improve the quality of voice in a DR process involving cultural issues. The paper first details conceptions of dignity, followed by a discussion on culture and cultural differences in DR. It then considers three conceptions of dignity in the context of DR. It concludes by emphasising the need for dignity as respect and recognition in DR processes involving cultural differences due to the negative public discourse about culture and cultural differences that may be prevalent.

To summarise, the paper argues that DR processes involving cultural issues require application of the dignity principle. Conceptions of human dignity include autonomy, respect, recognition and substantive dignity but given the way cultural issues may arise in DR, dignity as respect and recognition are more important in enhancing parties' voice quality. In addition, DRPs ought to pay attention, not only to procedural justice elements, but also to the quality of outcomes.

II CONCEPTIONS OF DIGNITY

Human dignity is a generally accepted concept present in state constitutions, applied as an interpretive tool in judicial decision-making, and forming the basis of various international covenants. It is referred to as a value, a principle, and a right, and the many

[8] Ibid 29.

conceptions of human dignity are applied in different, and sometimes, conflicting ways.[9] The concept is old, dating to Roman times when dignity was about status, hierarchy and invariably power.[10] In theology, the belief that man is made in the image of God supports the inviolability of human life, which grounds the principle of the inherent dignity of mankind enshrined in the United Nations Declaration of Human Rights (UNDHR).[11] The UNDHR is viewed as bringing to life the moralised concept of dignity as opposed to dignity based on merit.[12] Dignity itself has an unsettled meaning in contemporary times. It has been labelled 'useless' on one hand, perhaps, due to its many uses, and on the other hand, an important concept due to its breadth.[13] Two types of claims can be made about dignity: substantive claims, which answer the question of 'what makes humans possess dignity' or 'in virtue of what do humans have dignity?'; and formal claims, which relate to the 'general conceptual features or conditions that we think apply to any suitable substantive claim'.[14] For this paper, no condition attaches to the dignity of human beings and dignity is accorded on the very basis that a person is human.

The moralised and unmerited conception of dignity is seen in Rao's conceptions of dignity, particularly the first conception which refers to the intrinsic worth of the human being regardless of social status or hierarchy.[15] For Rao, the 'inherent dignity focuses on human potential - not the exercise of such potential. It does not judge whether a person's reasoning, choices or criteria for self-worth are "dignified"'.[16] Rao goes on: 'inherent dignity is pluralistic and remains neutral about different conceptions of the good life'.[17] Dignity as full inherent dignity refers to the 'quality of value or worth belonging to every being with full moral status' which is 'indivisible' and 'inviolable';[18] not conferred or acquired, not determined by gender, race or ethnicity, socio-economic status, education or health. Human dignity conceived this way touches on the question of difference,

[9] Neomi Rao, 'Three Conceptions of Dignity in Constitutional Law' (2011) 86(1) *Notre Dame Law Review* 183; Rory O'Connell, 'The Role of Dignity in Equality Law: Lessons from Canada and South Africa' (2008) 6(2) *International Journal of Constitutional Law* 267; Lucy Michael, 'Defining Dignity and Its Place in Human Rights' (2014) 20(1) *The New Bioethics* 12.
[10] Remy Debes, 'Introduction' in Remy Debes (ed), *Dignity: A History* (Oxford University Press, 2017) 2.
[11] Rao (n 9) 185.
[12] Debes (n 10) 3.
[13] Ibid 8-9.
[14] Ibid 4.
[15] Rao (n 9) 196.
[16] Ibid 187.
[17] Ibid 187.
[18] Michael (n 9) 15.

whether considerations of difference should shape human interaction and conceptions of human dignity, and if yes, how. Does difference have anything to do with human dignity? This dignity stands even when difference/inequality is present; it stands regardless of difference, culture, capacity or capability, including disability, poverty, membership of a minority group, citizenship, being a migrant or alien, status or personality. In this conception, human dignity is not about status or rank, and it is not attributed based on merit or morality — it is the dignity that is held by being human.[19]

Rao's second conception of dignity is substantive dignity which refers to socially constructed standards of dignity. This dignity, Rao argues, 'depends on specific ideals of appropriateness and deems a person worthy or dignified to the extent that he conforms to such ideals'.[20] It is dignity that is imposed, and may sometimes be coercive because it may conflict with individual autonomy. In fact, it may be a form of dignity imposed via cultural hegemony. Dignity in this substantive form 'may require observance of certain social norms';[21] 'the community may define dignity based on its particular values and the government may justify policies on the grounds that they promote the public good and improve the lives of individuals by requiring them to meet these standards.'[22] It could also refer to the access of social and economic goods to maintain a minimum standard of living.[23] Conceiving dignity as substantive dignity is problematic for the very fact that it is inextricably linked with culture; it could, in fact, refer to cultural values and practices that are prevalent and viewed as exemplars of the 'good life' expected of everyone within the community. In multi-ethnic, diverse societies, this may give room to cultural imperialism, and the denigration of some cultural practices. It could also be grounds for discriminatory attitudes. Whether or not human dignity should be conceived as substantive dignity presents problems. On one hand, it is desirable that human beings abide by some values and principles in their interactions; these values may form the basis of morality, or what is right or wrong. However, could it be said that anyone who falls short of those standards and values loses their dignity? Perhaps they may be said to behave in an undignified

[19] Michael (n 9) at 21-22 articulates different conceptions of dignity.
[20] Rao (n 9) 188.
[21] Ibid 222.
[22] Ibid.
[23] Ibid.

manner, but their inherent dignity will, arguably, remain intact.[24]

Standards or social norms are desirable in any society, but they should be those that aid human dignity when conceived as the inherent worth of the human being; thus, promoting good treatment, self-esteem, self-worth and granting access to resources to achieve the minimum standard of living.

Another issue to be addressed in relation to substantive dignity is that a conflict may arise between acceptable social standards and dignity, in the form of autonomy or individual choice.[25] But as inherent dignity, as has been discussed, is that which belongs to all members of the human race and has nothing to do with particular community standards or individual choices,[26] respect and recognition should be key considerations in setting and applying standards.

Rao's third conception of dignity is dignity as recognition.[27] This third conception is what Jacobson articulates as social dignity: dignity-of-self and dignity-in-relation.[28] Dignity-of-self is the dignity an individual attaches to self, also referred to as dignity of identity. Dignity-in-relation is the dignity that is created by interaction with others, 'reflecting worth and value' to an individual: dignity in social context.[29] Similarly, for Schachter, respect for human dignity could be considered in two ways: how one thinks about others (subjective) and how one treats others (objective), with a preference for the latter.[30] This requires that 'high priority should be accorded in political, social and legal arrangements to individual choices in such matters as beliefs, way of life, attitudes and the conduct of public affairs' but this is not absolute.[31] This conception may be further explored in two ways: political and psychological. In political contexts, it is about 'the will and consent of the governed'. From a psychological perspective, it is about treatment that is accorded to others — not to demean or humiliate others. It is also about treating others in a manner

[24] Debes (n 10) presents various origins of and claims to the foundation of 'dignity'.
[25] See, for examples of how this could occur, Rao (n 9) 226-234 where Rao discusses cases in which individual choice such as abortion, dwarf throwing, and self-representation by a person with a disability is trumped by other conceptions (community standards) of dignity.
[26] Rao (n 9) 242.
[27] Ibid 243
[28] Nora Jacobson, 'Dignity and Health: A Review' (2007) 64(2) *Social Science and Medicine* 292, 294.
[29] Ibid 294-295.
[30] Oscar Schachter, 'Editorial Comment: Human Dignity as a Normative Concept' (1983) 77(4) *The American Journal of International Law* 848, 849.
[31] Ibid 849-850.

that promotes their self-respect and self-esteem.[32]

For Rao, '[d]ignity as recognition focuses on … community values and validates the unique personality and choices of individuals and groups within society'.[33] It 'is a dignity of difference, or recognition for individual and group difference … and emphasizes the importance of *subjective* feelings about dignity, whether a person feels respected.'[34] It is dignity which considers everyone a respectable and reputable member of the community and, as such, is closely linked to the inherent worth of every human being.

As noted above, many authors point to the difficulty in applying dignity in practical terms. If it is accepted as an important norm, or considered, as Neal suggests, a substantive basic norm,[35] how should it be applied in practical terms? What are the principles or specific rights that dignity protects? Rao's work highlights the irreconcilableness of conceptions of dignity and difficulties that may arise, and that have arisen, in judicial application of the concept. Regardless, Rao urges the concept as indispensable and an approach might be to choose one conception. Neal argues that dignity cannot be conceived as 'a single concept, but rather a plurality of concepts grouped under 'an organising idea'',[36] and asserts that dignity is a criterion for measuring the validity of law. She further argues, relying on Waldron, that law's procedure is committed to respect for dignity in that it gives opportunity for both sides of a dispute to be heard; it promotes equal access, fair hearing and opportunity to be heard.[37] While there may be no agreement on the specific substance of dignity, it is no doubt commonly accepted as a fundamental good: it matters.[38]

Some authors have attempted to clarify how the concept should be applied. For example, Shultziner has outlined four principles that should guide judicial application of dignity:

1. That the application of human dignity in judicial decisions should be based on a

[32] Ibid.
[33] Rao (n 9) 244.
[34] Ibid 248.
[35] Mary Neal, 'Respect for Human Dignity as 'Substantive Basic Norm'' (2014) 10(1) *International Journal of Law in Context* 26, 37.
[36] Ibid 38.
[37] Ibid 38-40.
[38] Adopting terminology used by Rao (n 9) in relation to courts adopting the concept: 'Constitutional Courts around the world … regularly use the term dignity or human dignity *as if it matters*' (emphasis in original) at 186.

written law;

2. Judges should try to define what human dignity is and be explicit about its meaning;

3. Judges should attempt to use human dignity consistently in the same rulings and in future decisions; and

4. Human dignity should advance human rights rather than limit them.[39]

The application of the principle of human dignity as conceived by Shultziner raises a critical question of the role of the judge in formulating the substance of dignity, and the infiltration of personal beliefs and values, which are not addressed by the four principles. But at least no one would disagree with the assertion that 'the right for protection against humiliation and degradation' should be at the core of human dignity.[40] Humiliation and degradation, which are rife in many encounters, must be avoided. The next section considers these dignity concepts in relation to cultural difference. Why is cultural difference so problematic? It further considers the relationship with disputing and why dignity matters.

III CULTURE, CULTURAL DIFFERENCE AND DIGNITY

Culture is an extremely complex concept with several approaches to its definition:[41]

- The historical approach emphasises tradition, custom and social heritage;[42]
- The psychological approach views culture as methods of adapting to natural, economic and political conditions and ways of learning or acquiring traditions, habits and attitudes; [43]
- The descriptive approach identifies a number of features including etiquette, art, marriage, language, morals, laws, beliefs and traditions;[44]

[39] Doron Shultziner, 'Human Dignity in Judicial Decisions: Principles of Application and the Rule of Law' (2017) 25 *Cardozo Journal of International and Comparative Law* 435, 448.
[40] Ibid 452.
[41] Alfred L Kroeber and Clyde Kluckhohn, *Culture: A Critical Review of Concepts and Definitions* (Vintage Books, Random House, 1952) 13.
[42] Ibid 89.
[43] Ibid 107, 112.
[44] Ibid 81.

- The structural approach relates to the socio-political system defined as a 'derived system of explicit and implicit designs for living, which tends to be shared by all, or specially designated members of a group';[45] and
- The normative approach views culture as the 'distinctive way of life of a group of people — their complete 'design for living'.[46]

Culture influences practices, and practices develop into culture.[47] The list of things that make up culture indicate that culture is not homogenous. Traditions and customs differ from place to place; natural, economic and political conditions that require adaptation differ and, as such, methods of adaptation also differ. Languages, laws, political structures and art also differ from location to location. Culture is not homogenous, and it is not static; culture moves, it evolves.

Cultural difference abounds. Think Confucianism, Western, Arab, African and Asian as well as individualist/collectivist, low-context/high-context cultures. And even within each of these cultures, variations in social norms exist in relation to communication, time and space, and respect for elders. Laws, practices, norms, beliefs, ethical standards and principles are all culture, and this has consequences for conceptions of dignity. For instance, substantive dignity — that is, the conception of the good life — is based on acceptable social norms which, as already noted, differ considerably across cultures. As such, the substantive content of dignity may differ across cultures and speaking about culture is invariably speaking about difference. This has a lot to do with disputes.

In the social-constructionist paradigm, disputes are products of social interaction. Disputes may arise because social norms may not have been adhered to and rules, or laws, generally accepted, may have been breached or based on perception of non-adherence to social norms. Thus, a connection exists between conflict and culture, but 'culture is rarely by itself *the* cause of conflict'.[48] Culture impacts conflict because 'it is embedded in individuals' communication styles, history, ways of dealing with emotions, values and

[45] Ibid 119.
[46] Ibid 98.
[47] Clifford Geertz, The Interpretation of Cultures: Selected Essays by Clifford Geertz (Basic Books, 1973) 89; Kevin Avruch, Context and Pretext in Conflict Resolution: Culture, Identity, Power and Practice (Paradigm Publishers, 2013) 11 ('Context and Pretext in Conflict Resolution').
[48] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 11.

structures'.[49] According to Avruch, 'The mere existence of cultural differences is usually not the primary cause of conflict between groups. However, culture is always the lens through which differences are refracted and conflict pursued'.[50]

A dispute about the supply of goods or services may become infused with cultural issues rather than being strictly about the goods/services. Disputes turn on cultural differences, most times, because of existing public discourses about cultural groups including negative stereotypes, prejudices and assumptions. Ethnocentrism is another factor that leads to negative perceptions about other cultures. Passing negative judgement on other cultures' social norms, food, or traditions, based on one's own beliefs, is a cause of conflict.

Public negative discourse about cultural difference is rife. Nader asserts 'difference is a major preoccupation of our time' and rather than celebrate difference, '[d]o-gooders have deeply invested in difference as a "problem"'.[51] She states: '[w]ith all this talk about difference, similarities between locals and migrants are not noticed'.[52] In other words, we ought to celebrate difference rather than see it as a problem. But the horse has long bolted. Indeed, negative discourse about cultural (and racial) difference is the basis of many discriminatory policies and laws, and many conflicts in many parts of the world. This makes it important to consider how the difference discourse is proceeding and affecting disputes, disputing and dispute resolution. We need to pay attention to cultural difference in dispute resolution not because it is, in itself, a problem, but because cultural difference may hold the key to unlocking underlying issues in any dispute. The dispute may not be about the fence, or the noise, or whatever substantive issues the parties may be disputing over; the dispute may be easy to resolve on the facts, but parties may remain adamant or fail to problem-solve because of cultural difference. In addition, the dispute resolution process may not resolve the dispute because of transplantation issues, and resolution may not address the real issues in the dispute, paving way for future disputes. Cultural differences make conflicts intractable because the discourse is most often negative and laden with prejudice, stereotypes and ethnocentrism in relation to cultural identity.

[49] Bernard Mayer, The Dynamics of Conflict resolution: A Practitioner's Guide (Jossey-Bass Inc, 2000) 16.
[50] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 11.
[51] Laura Nader, Culture and Dignity: Dialogues between the Middle East and the West (John Wiley and Sons Incorporated, 2013) 24.
[52] Ibid 14.

Literature shows that disputes involving identity issues are more difficult to resolve because identity is 'who we are'.[53] Identity is closely related to culture because culture, as noted above, is about values, beliefs, traditions and practices. In addition, culture has a lot to do with creation of identity and the right to retain it. Taylor suggests an individual's concept of who they are is closely linked to their self-worth, self-esteem and self-confidence but defining identity is not based solely on the individual. As Taylor argues: 'we define our identity always in dialogue with, sometimes in struggle against, the things our significant others want to see in us', and 'the making and sustaining of our identity… remains dialogical throughout our lives'.[54] This articulation of identity is closely related to social dignity, or dignity in social context, as discussed above. For Taylor, the very reason that identity is derived from society makes dignity as recognition important. Taylor argues that each individual is seeking validation of their identity from the society in which they belong; a form of recognition. However, this attempt at validation can fail,[55] and does fail, because of negative stereotypes, prejudices and ethnocentrism, leaving the culturally different with feelings of low self-esteem, self-confidence and self-worth.

Arguably, negative public discourse on cultural difference is the result of failed attempts at validation or a failure of recognition maintained by 'the dynamics of power, authority, and hierarchy' within society.[56] Understanding power dynamics is critical as '[p]ower is always a factor that shapes whose cultural values are seen as legitimate, whose values are accommodated and how'.[57] DR processes are not immune to this failure to validate, as will be discussed in detail below. DRPs must pay attention to cultural differences in a DR process, considering how cultural differences relate to questions of identity, and how power may be influencing disputing and attempts to resolve them. Mediating these types of disputes with a restraint on ethnocentrism, cultural supremacy or imperialism may be an issue for DRPs. Thus, to quote Nader, 'a tolerance for difference, or the importance of cultural context'[58] is necessary in decision-making processes and in DR. Further,

[53] Charles Taylor, 'The Politics of Recognition' in Amy Gutman (ed), *Multiculturalism: Examining the Politics of Recognition* (Princeton University Press, 1994) pt 1, 32-3; Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 68.
[54] Ibid 32-3.
[55] Ibid.
[56] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 4.
[57] LeBaron (n 6) 14.
[58] Nader (n 51) 7.

reconciling cultural differences must 'be grounded in a philosophy of mutual respect, a knowledge of power distribution and of actions resulting from power inequities … [and must be] based on culture and dignity'.[59]

Recognising the importance of addressing cultural differences in DR processes, Avruch identified two errors that DR practitioners may make: Type I and Type II errors.[60] These errors are based, to an extent, on universalist and relativist approaches to culture. Relativists question 'the existence of any absolute moral standards that are separate from their cultural … context'.[61] On the other hand, universalists argue that due to the universality of human nature, certain generalisations can be made across all cultures.[62] Type I errors involve a complete disregard for cultural differences or culture in conflict analysis, in other words, lack of cultural sensitivity. Type II errors relate to overestimating the impact of cultural differences on culture or conflict resolution.[63] According to Avruch, Type II errors are most likely to occur in societies in which multi-culturalism is a valued ideal.[64] He further argued that this approach may 'be deleterious for the weaker, disempowered, or subordinate parties in the conflict or dispute. It can affect the equity of the intervention's outcome, its justice'.[65] DR practitioners must strike a balance between Type I and Type II errors. The pathway is somewhere in between: cultural sensitivity with the willingness to address cultural practices that disempower parties or violate rights guaranteed to them by law. Dignifying DR — that is, DR that honours human dignity — is important.

Cultural differences may become an issue in disputes in many respects. There may be

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[59] Ibid 194.
[60] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 14.
[61] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 39; Peter W Black and Kevin Avruch, 'Cultural Relativism, Conflict Resolution and Social Justice', *George Mason University* (Online Paper) <http://www.gmu.edu/programs/icar/pcs/BlackAvruch61PCS.html>.
[62] Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 72-77.
[63] Kevin Avruch, 'Type I and Type II Errors in Culturally Sensitive Conflict Resolution Practice' (2003) 20(3) *Conflict Resolution Quarterly* 351 ('Type I and Type II Errors'); Avruch, 'Context and Pretext in Conflict Resolution' (n 47) 39.
[64] Avruch, 'Type I and Type II Errors' (n 63) 362. Cf Morgan Brigg and Kate Muller, 'Conceptualising Culture in Conflict Resolution' (2009) 30(2) *Journal of Intercultural Studies* 121: The authors disagree with Avruch, arguing that Avruch's categorisation prioritises (Western) social science. They instead argue for an approach which conceptualises culture as an 'empty signifier' that needs to be filled: at 132.
[65] Avruch, 'Type I and Type II Errors' (n 63) 366. Avruch argues that the price of overvaluing culture is paid by 'marginalized and disempowered immigrant/refugee communities … particularly women and children': at 365.

cultural differences between the parties and the DRP, referred to here as party(ies)/DRP cultural differences; cultural differences between the parties, that is, party/party (or inter-party) cultural differences; cultural differences which lead to inner conflicts for one party, that is, intra-party cultural differences; and as between a party(ies) and the DR process, that is, cultural appropriateness of the process. Isabelle R. Gunning has discussed how negative cultural myths held by parties and the mediator impact on the mediation process.[66] She counselled that DRPs should intervene where necessary by injecting equality into the mediation, ensuring that the choice of DRPs represent parties' cultural groups. In the same vein, I have previously argued that a values-approach may be adopted in conflict resolution to address underlying issues and to promote social justice in relation to process and outcome. The values will assist the mediator and parties to address aspects of the dispute related to cultural differences and power imbalances.[67]

IV DIGNITY AND DISPUTE RESOLUTION

Application of the principle or value of human dignity in decision-making/DR processes can be explored based on three different conceptions of dignity. The first is the conception of human dignity as the capacity of humans to reason and make free moral decisions — humans are autonomous beings. In this sense, human dignity is said to be synonymous with individual autonomy or the capacity for self-determination, which is procedural. The second conception is substantive dignity — 'the enforcement of substantive values … *living in a certain way*',[68] particularly the aspect that promotes 'access to social and economic goods, enabling one to maintain a certain minimum standard of living'.[69] Arguably, the whole idea of promoting access to justice is based on this conception of human dignity. Access to justice is referred to as the right of individuals to access processes for the efficient and effective resolution of their disputes. The principles of access to justice are accessibility, appropriateness, equity, efficiency, and effectiveness.[70] The third conception is dignity as recognition of individual or group

[66] Isabelle R Gunning, 'Diversity Issues in Mediation: Controlling the Impact of Negative Cultural Myths' (1995) 1995(1) *Journal of Dispute Resolution* 55.
[67] Lola Akin Ojelabi, 'Values and the Resolution of Cross-Cultural Conflicts' (2010) 22(1) *Global Change, Peace and Security* 53 ('Cross-Cultural Conflicts').
[68] Rao (n 9) 187.
[69] Michael (n 9) 22.
[70] Access to Justice Taskforce, Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (Report, September 2009) 8.

particularities/identity. In decision-making processes, human dignity could be applied to arrive at conclusions that accord human worth, give recognition to the individual's basic need to be recognised as a valued member of the community or to feel valued as a member of the community. This strand of human dignity is arguably both substantive — that is, whether outcomes satisfy community conceptions of dignity — and procedural, in the form of respect accorded to the individual in a dispute resolution process.

This section discusses each of these conceptions of dignity and how they are reflected in mediation and negotiation processes, paying attention to principles/underlying values. In doing this, it explores to what extent the principles and underlying values could be said to emanate from or support human dignity.

A *Human Dignity as Autonomy and Dispute Resolution*

This dignity refers to the capacity of humans to reason and make free moral decisions. As noted above, it is sometimes considered synonymous with individual autonomy, that is, 'the ability of each person to determine for himself or herself a view of the good life'.[71] It differs from collective autonomy, which is the ability of a group to determine what the good life is. There is a point to be made of this in DR, and it is about parties' freedom of choice in relation to process and outcome — the extent to which parties choose the process, select the procedure to be followed, and determine the outcome of the DR process. Not many DR processes exemplify this full autonomy.

Autonomy is a concept with many conceptions. As noted by Gerald Dworkin, the 'concept is an abstract notion that specifies in very general terms the role the concept plays' and the 'filling out of an abstract concept with different content is what is meant by different conceptions of the same concept'.[72] The very general terms of autonomy — that is, what the various conceptions have in common — 'is a certain idea of persons as self-determining'.[73] In this paper, Immanuel Kant's conception of individual is adopted as it considers the position of the human being as self-determining in relation to others.

For Kant, '*rational nature exists as an end in itself*' and 'rational beings stand under the law

[71] Taylor (n 53) 57.
[72] Gerald Dworkin, 'The nature of autonomy' (2015) 2015(2) *Nordic Journal of Studies in Educational Policy* 7, 9-10.
[73] Ibid 10.

that each of them should treat himself and all others never merely as a means but always also as an end in himself.'[74] This is the basis of Kant's principle of autonomy, which, in turn, forms the basis of human dignity as freedom of choice.[75] Kant articulates the principle of autonomy as requiring one to '[a]lways choose in such a way that the maxims of [one's] choice are incorporated as universal law in the same volition'.[76] This articulation arguably means that autonomy requires a consideration of others; however, not directly as to make it appear as if one is acting based on others' instructions or preferences, but indirectly in the sense of considering whether the *maxims of the choice* are universal, that is, applicable in similar situations.[77] This universality attribute is why autonomy forms the basis of human dignity. Human dignity is universal, and in Kant's terms, a categorical imperative. Human beings are not to be treated as means to ends, but ends in themselves; they should have full autonomy or agency in making decisions and freedom to make decisions in their own best interests.

DR processes that give effect to this autonomy are, arguably, dignifying processes. These processes promote party decision-making and require parties to consider other parties' interests while aiming at a win-win solution where all parties' interests can be met.[78] These processes are referred to as collaborative problem-solving or cooperative processes, of which negotiation and mediation are part when conducted in their pure forms. Principled negotiation, which also forms the basis of pure facilitative mediation, has four elements: separate the people from the problem, focus on interests and not positions, invent multiple options prior to deciding, and apply objective criteria.[79] These elements support human dignity as autonomy.

In negotiation and mediation, parties are the ultimate decision-makers. By focusing on the problem and not the people, they refrain from an attack on the person. Negotiators must recognise they 'are dealing not with abstract representatives … but with human beings

[74] Immanuel Kant, *Groundwork for the Metaphysics of Morals*, tr Jonathan Bennett (Early Modern Texts, 2017) 32.
[75] Ibid 34.
[76] Ibid 37.
[77] Ibid 36–37.
[78] William Ury, Roger Fisher and Bruce Patton, *Getting to Yes: Negotiating an Agreement Without Giving In* (Random House Business Books, 2012) 11.
[79] Ibid 11.

[with] emotions, deeply held values, and different backgrounds and viewpoints'.[80] The relationship between the parties in this process should be based on 'trust, understanding, respect' but, of course, this is not always the case. As noted by William Ury, Roger Fisher and Bruce Patton, people 'are prone to cognitive biases, partisan perceptions, blind spots, and leaps of illogic', they 'get angry, depressed, fearful, hostile, frustrated, and offended. They have egos that are easily threatened' and 'see the world from their own personal vantage point'[81] without consideration for others. They teach that the way to separate the people from the problem is to avoid these human pitfalls through a focus on relationship, *giving value* to the other party, empathy, refraining from blaming, and face-saving, among other things. This is the responsibility of parties in negotiation because they control the process and outcome of negotiation. Both parties have a 'voice' in the decision-making.[82]

To further elaborate on autonomy and DR, a fundamental value of mediation is self-determination, which is also sometimes referred to as party autonomy.[83] Mediation, particularly facilitative mediation, is defined as a process 'that promotes the self-determination of participants.'[84] Self-determination is the parties' freedom to make decisions in their own best interests without interference from others, including other parties and DRPs. It is promoted through the third party's role of providing support to the parties.

Questions have been raised about the extent to which parties in mediation exercise self-determination. Concerns about self-determination relate to the level of impartiality of DRPs, including whether they give advice to parties or pressure parties to reach a settlement. Other concerns include the extent to which a party may participate in the process, including whether they have a voice and the effectiveness of their voice in the process. The latter concern can be further explored though a consideration of factors that

[80] Ibid 20-21.
[81] Ibid.
[82] John Thibaut and Laurens Walker, *Procedural Justice: A Psychological Analysis* (Lawrence Erlbaum Associates, 1975) 1-2.
[83] Ellen Waldman, *Mediation Ethics: Cases and Commentaries* (Jossey-Bass, 2011) 371.
[84] National Mediator Accreditation System, *Practice Standards* (at July 2015) cl 2.2 ('NMAS Practice Standards'): Mediation is defined as a process 'that promotes the self-determination of participants and in which participants, with the support of a mediator: (a) communicate with each other, exchange information and seek understanding (b) identify, clarify and explore interests, issues and underlying needs (c) consider their alternatives (d) generate and evaluate options (e) negotiate with each other; and (f) reach and make their own decisions.'

may limit the effectiveness of a party's voice.[85] These factors are multiple and include: lack of familiarity with process; not understanding responsibility in the process; power imbalance, including informational asymmetry; access to resources; lack of understanding of legal issues; lack of access to legal representation or other professional support; and the involvement of repeat players. Full exercise of individual autonomy may be inhibited by these factors. Other salient factors include cultural bias, stereotypes, and prejudices and incorrect assumptions about a party in relation to their cultural identity, including race and ethnicity.[86] Delgado et al have found 'ADR increases the risk of prejudice toward vulnerable disputants' and 'ADR is most apt to incorporate prejudice when a person of low status and power confronts a person or institution of high status and power.'[87] These concerns are about how culture and power play out in DR processes.[88]

In mediation, ethical standards impose certain obligations on third parties to ensure effective participation in the process. Under the Australian National Mediator Accreditation System Practice Standards, the mediator is responsible for ensuring procedural fairness.[89] This responsibility includes ensuring free and voluntary decision-making,[90] identifying undue influence and promoting informed consent,[91] giving opportunity to speak and be heard,[92] and enabling balanced negotiation between parties.[93] Also based on the value of self-determination, the mediator must refrain from pressuring parties to reach an agreement or to agree to particular terms.[94] To ensure that parties are in a position to make informed decisions, the mediator must allow sufficient time for parties to obtain independent professional advice or information.[95] In the event that power imbalance will jeopardise self-determination and informed decision-making,

[85] Lola Akin Ojelabi, 'Exploring Voice as a Justice Factor in Mediation' (2019) 38(4) *Civil Justice Quarterly* 459 ('Exploring Voice').
[86] Kahane (n 7) 28-56.
[87] Richard Delgado, Chris Dunn, Pamela Brown, Helena Lee and David Hubert, 'Fairness and Formality: Minimizing the Risk of prejudice in ADR' (1985) *Wisconsin Law Review* 1359, 1400, 1402.
[88] Kahane (n 7).
[89] NMAS Practice Standards (n 84) pt III, cl 7.1 provides that a 'mediator must conduct the mediation in a fair, equitable and impartial way without favouritism or bias in act or omission'.
[90] Ibid cl 7.4.
[91] Ibid.
[92] Ibid cl 7.5.
[93] Ibid cl 7.4, 7.7.
[94] Ibid cl 7.4 and cl 10(1)(c) which provides that the mediator must have understandings of the ethical principle of self-determination.
[95] Ibid cl 7.6.

the mediator should terminate or suspend the process.[96] In addition, the mediator must 'be alert to changing balances of power in mediation and manage mediation accordingly',[97] and have understandings of ethical principles including self-determination, confidentiality, procedural fairness and equity, and withdrawal from and termination of process.[98] All these are procedural safeguards for self-determination or party autonomy, but when stereotypes and prejudices based on culture and its practices are entrenched and held by the DRP, these procedural safeguards become ineffective in countering indignities.

In fact, one criticism about the processes of principled negotiation and mediation is that elements are not translatable across cultures, and where translated, or where those with different cultural practices, values and beliefs are required to use them, the processes themselves may be inhibiting. One reason for this is that the modern processes of principled negotiation or mediation are based on the individualist rather than the collectivist paradigm. The individualist makes decisions from the perspective of the individual self, while collectivists make decisions from the perspective of the collective self, that is, self in relation to the in-group or cultural group. The underlying values of the processes are Western, individualist values which those from collectivist cultures may find difficult to participate in.[99] This again, may diminish autonomy, and therefore, the dignity of parties. Also, rules around neutrality of the third party may not work well in cultures where elders provide advice and give direction on how the matter in dispute ought to be settled.[100]

To accord dignity to every party in a DR process, the five core interests of any human being must be satisfied. The interests are autonomy, appreciation, affiliation, role and status. Failure of the DRP to pay attention to these interests may 'generate strong negative emotions' but '[a]ttending to them can build rapport and a positive climate for problem-

[96] Ibid cl 6, 11.
[97] Ibid cl 6.
[98] Ibid cl 10(c).
[99] Larissa Behrendt, 'Cultural Conflict in Colonial Legal Systems: An Australian Perspective' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 116, 124-5.
[100] See, eg, Chief Justice Robert Yazzie, 'Navajo Peacemaking and Intercultural Dispute Resolution' in Catherine Bell and David Kahane (eds), *Intercultural Dispute Resolution in Aboriginal Contexts* (UBC Press, 2004) 107.

solving'.[101] The reason is not far-fetched: human dignity is a universal need. Each of the five core needs can be traced to the concept of human dignity.[102] The concept of autonomy has been addressed in this section. Paying attention to the voice of a party is an important core need. This approach would go a long way to safeguard the dignity of parties in DR.

B *Human Dignity as Respect and Recognition in Dispute Resolution*

Another concept of dignity is respect and recognition. As noted above, respect is necessary in realising party autonomy or self-determination. DRPs and DR theorists emphasise the importance of respect in DR processes. The word 'respect' is defined as 'esteem or deferential regard felt or shown', 'to treat with consideration; refrain from interfering with', 'the condition of being esteemed or honoured', and 'consideration or regard, as to something that might influence a choice'.[103] Self-respect is the 'proper esteem or regard for the dignity of one's character'.[104] Respect as directed toward self and others is important in consideration of dignity in DR. Appreciation — the 'desire to be recognized and to valued'[105] — is a human need, and the 'pursuit of positive self-worth (self-esteem) is a universal human characteristic'.[106]

Self-respect will influence the extent to which a person might be free to participate in the DR process, and respect for others is about how a party might treat other parties in the DR process. To realise self-respect, it is important to consider an aspect of dignity — dignity-of-self and dignity-in-relation — discussed above. Dignity-of-self relates to individual identity, which may also be shaped by the identity of the cultural group to which an individual belongs. In 'The Politics of Recognition', Charles Taylor discusses the connection between recognition and identity, identity being 'a person's understanding of who they are, of their fundamental defining characteristics as a human being'.[107] Taylor further asserts this identity

> … is partly shaped by recognition or its absence, often by *mis*recognition of others, as so a person or group can suffer real damage, real distortion, if the people or

[101] Ury, Fisher and Patton (n 78) 32.
[102] Ibid. Autonomy is referred to as 'the desire to make your own choices and control your own fate'.
[103] *The Macquarie Concise Dictionary* (Revised Third Edition, 2004) 'Respect'.
[104] Ibid.
[105] Ury, Fisher and Patton (n 78) 32.
[106] Shultziner (n 39).
[107] Taylor (n 53) 25.

> society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.[108]

No doubt, nonrecognition or misrecognition of minority cultures abound in the form of stereotypes, prejudices, ethnocentric attitudes, policies and approaches, mistreatment, imposition of legal systems and denial of cultural rights, deprivation of access to basic needs and so on. These forms of misrecognition or nonrecognition have significant consequences in DR spaces. They can sometimes be replicated, either consciously or unconsciously, by the DRPs, the institution, or the process of DR. In addition, nonrecognition or misrecognition affects the self-esteem and self-confidence of individual members of misrecognised or nonrecognised cultural groups. They could have adopted 'a depreciatory image of themselves … internalized a picture of their own inferiority. So that even when some of the objective obstacles to their advancement fall away, they may be incapable of taking advantage of new opportunities … and suffer the pain of low self-esteem.'[109] Misrecognition, Taylor asserts, is not just about 'a lack of due respect. It can inflict a grievous wound …'[110] Individuals from minority groups coming into DR processes may carry some of these wounds with them, and DR processes and practices, including the attitudes and behaviours of DRPs, should not perpetuate these forms of misrecognition or nonrecognition. In fact, it is argued that to the extent possible, DR processes and practices should not allow maintenance of the status quo, or follow the individualist paradigm to the extent that the outcomes of processes reflect these forms of misrecognition or nonrecognition.

As noted above, cultural differences may sometimes be a source of imbalance of power in a DR process. This is particularly true where a party from a minority cultural group is unfamiliar with the process; is not equipped to fully participate in the process, in terms of language and role in the process; and lacks relevant information for effective participation due to disadvantage in ability to access relevant information. The DRP should pay attention to all of these forms of disadvantage in facilitating the process. A strict

[108] Ibid.
[109] Ibid 25-26.
[110] Ibid 26.

adherence to self-determination, with restrictions on the DRP not to intervene in any way, may further disadvantage a party. While self-determination is a useful value, particularities of parties in the process must be taken into consideration.

DRPs must also be self-aware. They must be conscious of how their beliefs, attitudes and approaches may perpetuate misrecognition. Carol Izumi, in her paper titled 'Implicit Bias and the Illusion of Mediator Neutrality', considers the requirement of neutrality in mediation processes.[111] Neutrality (sometimes referred to or confused with impartiality) — referred to as a lack of input or interest in the outcome of the process — is a core value of mediation. It 'legitimizes the mediation process because the parties, rather than the mediator, are in control of decision-making' and 'parties' expectation of mediator neutrality is the basis upon which a relationship of trust is built'.[112] The essence and implications of neutrality in mediation has been the subject of much debate, but there are divergences in the definitions and requirement of neutrality. Arguably, there is a spectrum of practice but, as Izumi suggested, neutrality has four key elements: 'no conflict of interest; process equality; outcome-neutrality; and lack of bias, prejudice, or favouritism toward any party'.[113] The issue is how, and the extent to which, these elements may perpetuate disadvantage in a DR process.

In most jurisdictions, a mediator is referred to as an impartial third party required to act fairly, equitably and free from bias or favouritism.[114] Some Codes of Conduct specifically mention how bias may arise, including from mediators' perceptions of parties' personal characteristics, background, beliefs and values. These provisions are significant because they specifically address bias based on parties' personal attributes including, for example, race, ethnicity or religion. They also raise awareness of the mediator to unconscious bias by highlighting discriminatory tendencies on the part of the mediator.[115]

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[111] Carol Izumi, 'Implicit Bias and the Illusion of Mediator Neutrality' (2010) 34 *Washington University Journal of Law & Policy* 71.
[112] Ibid 76.
[113] Ibid 79.
[114] NMAS Practice Standards (n 84); Mediation Institute, *Code of Ethics and Conduct for Members* (at 2018) cl 13; European Commission, *European Code of Conduct for Mediators* (at 2018) cl 2.2; American Bar Association, *Model Standards of Conduct for Mediators* (at September 2005) standard II; Singapore Mediation Centre, *Singapore Mediation Centre Neutral Evaluation Service Code Of Conduct* (at January 2007) cl 2.
[115] This bias on the part of mediators has been identified as occurring. See Delgado et al (n 87); Izumi (n 111) 71.

To conclude this section, DRPs need to do more to ensure that recognition and respect form the bedrock of DR in every case, are accorded to each party, and each DRP is aware of their own biases and prejudices and can put those aside in the matter before them. This recognition and respect is that of human dignity — the dignity that is accorded to every human being, including equal rights and immunities devoid of prejudices and biases. But it is also a recognition of the 'unique identity' of each individual because of the history of discrimination against the cultural group with which they identify. It is the recognition of the possibility of individuals having internalised such prejudices and biases to the extent they are not expectant of dignified treatment, so that whatever they receive, short of the discriminatory treatment they were expecting, becomes acceptable.

Procedural justice literature sheds some light on why minority groups may be satisfied with outcomes that may be considered of lower quality than outcomes received by individuals from mainstream groups. Procedural justice literature shows that people will be satisfied with outcomes of DR processes that are imbued with elements of procedural justice, including voice — the opportunity to speak and to be heard in the process. Voice provides a 'cushion of support'[116] which may make unfair outcomes acceptable. This is referred to as the fair process effect. The fair process effect is captured as follows: 'the more … voice is available, the more an otherwise intolerable outcome … becomes relatively acceptable'.[117]

Research conducted by Folger et al found that 'when subjects were not certain that they had been treated inequitably, the voice procedure was rated fairer' and 'when people learn that someone else agrees that they have been denied their just desserts … the positive impact of voice seems to be negated'.[118] Two things are worthy of note here: uncertainty about the quality of treatment (or lack of knowledge about what a fair treatment should look like) and alignment of views on the fairness of outcome with those of third parties lead to the frustration effect. Where an individual has internalised

[116] Lind and Tyler (n 4) 67.
[117] Robert Folger, David Rosenfield, Janet Grove and Louise Corkran, 'Effects of "Voice" and Peer Opinions on Responses to Inequity' (1979) 37(12) *Journal of Personality and Social Psychology* 2253, 2254.
[118] Ibid 2259-2260. See also Robert J Bies and Debra L Shapiro, 'Voice and Justification: Their Influence on Procedural Fairness Judgments' (1988) 31(3) *The Academy of Management Journal* 676 where the authors concluded that 'a voice procedure that creates feelings of procedural fairness may serve as a decision-makers strategy to maintain people's support for an unfavourable decision': at 683 .

prejudices and biases against their identity, they may have low expectations which then make unfair outcomes, as measured by society standards, acceptable to them.[119]

The foregoing argument is strengthened by a US study on the effect of race and gender on small claims adjudication and mediation in the US. The research found that the level of satisfaction with mediation among minority women was higher regardless of the fact they received less when they were claimants and paid more as respondents.[120] This could be due to having low expectations, lacking information to make a comparison between outcomes of their cases and similar cases, and satisfaction with the outcome, due to being treated fairly by the DRP, thus obscuring substantive unfairness.[121] Recognition based on human dignity as a fundamental value should also extend to recognition of the unique identity of the individual and the impact historical memory and years of misrecognition or nonrecognition has had on them, and invariably on the quality of their voice in DR processes. Human dignity should also be considered in the form of a dignified outcome.

C *Substantive Dignity and Dispute Resolution*

Substantive dignity is about one's conception of the good life, but even this conception of the good life may be distorted by misrecognition and nonrecognition. However, this section focuses on that aspect of dignity that guarantees dignity in the form of 'access to social and economic goods, enabling one to maintain a certain minimum standard of living'.[122] As noted above, access to justice forms part of the conception of the good life based on the universal principle of human dignity. Access to justice for the disadvantaged is a concern for the international community as reflected in Sustainable Development Goal

[119] See detailed discussion in Akin Ojelabi, 'Exploring Voice' (n 85) 464-67.
[120] Michele G Herman et al, The MetroCourt Project Final Report, A Study of the Effects of Ethnicity and Gender in Mediated and Adjudicated Small Claim Cases at the Metropolitan Court Mediation Center, Bernalillo County, Albuquerqe, New Mexico: Cases Mediated or Adjudicated September 1990 – October 1991 (Final Report, January 1993). Other studies point to disadvantages that result from adopting a procedural justice framework for evaluating justice in mediation. See, eg, Gunning (n 67) who argued 'The classic and apparently neutral language that mediators are admonished to use - "How would you like to see this resolved" or "What did the other party say"- can unintentionally contribute to the repetition of whatever is the primary narrative and its interpretive framework': at 79-80 and 'For a primary narrative, the one which nests most comfortably within the larger cultural myths, to be transformed, the context and moral codes must be changed': at 25. See also Rebecca L Sandefur, 'Access to Civil Justice and Race, Class and Gender Inequality' (2008) 34(1) Annual Review of Sociology 339, 345-47.
[121] Jill Howieson, 'Perceptions of Procedural Justice and Legitimacy in Local Court Mediation' (2002) 9(2) *Murdoch University Electronic Journal of Law*.
[122] Michael (n 9) 22.

(SDG) 16.3, which is to 'promote the rule of law at the national and international levels, and to ensure equal access to justice for all'.[123] SDG 16.3 is not only relevant for developing countries, but also for developed nations where access to justice may not be guaranteed equally for all citizens. This SDG focuses on ensuring equal access to justice for all and there is currently a push to have access to civil justice recognised as an important aspect of achieving SDG 16.[124]

The access to justice movement was most influential in the uptake of ADR processes and their institutionalisation.[125] Access to justice is about ensuring 'that the interests of the poor, minorities, and diffuse public interests can be taken into account'.[126] It is not, however, just about gaining access to a DR forum/process but also about just outcomes both individually and socially.[127] This requires making DR processes visible to parties, so they can use them, but also a guarantee for both procedural and substantive justice. In conceptualising what an access to justice approach to mediation should look like, five principles have been identified:

1. Mediation outcomes should not reflect the power, wealth, status and privilege of parties.
2. The quality of outcomes should not be measured based predominantly on acceptability to parties.
3. Practitioners should engage in holistic dispute analysis including an assessment of the nature of the dispute, parties' characteristics and relevant societal standards, including social and legal constructions of justice.
4. Law (legal principles) is useful to society and relevant in the resolution of disputes.

[123] See 'Goal 16: Promote just, peaceful and inclusive societies', *Sustainable Development Goals* (Web Page) <https://www.un.org/sustainabledevelopment/peace-justice/>.
[124] See Peter Chapman and Sumaiya Islam, 'Equal Access to Civil Justice for All: How Will We Know When We Get There?', *SDG Knowledge Hub* (Web Page, 9 April 2018) <http://sdg.iisd.org/commentary/guest-articles/equal-access-to-civil-justice-for-all-how-will-we-know-when-we-get-there/>. See also 'Peace, Justice, and Strong Institutions: Why They Matter', *United Nations* (Web Page) <https://www.un.org/sustainabledevelopment/wp-content/uploads/2017/01/16-00055p_Why_it_Matters_Goal16_Peace_new_text_Oct26.pdf>.
[125] Mary Anne Noone and Lola Akin Ojelabi, 'Ensuring Access to Justice' (2014) 40(2) *Monash University Law Review* 529, 561- 62.
[126] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 31.
[127] Mauro Cappelletti and Bryant Garth, 'Access to Justice: The World-Wide Movement to make Rights Effective' in Mauro Cappelletti and Bryant Garth (eds), *Access to Justice: A World Survey* (Sitjhoff and Noordhoff, 1978) 6.

5. Mediators have some responsibility in ensuring procedural justice (that is, a fair process) and promoting substantive justice (that is, a fair outcome).[128]

This approach counters the ambivalence of mediators in focusing on substantive aspects of a dispute based on neutrality-cum-party self-determination. The principles 'support the mediator in addressing inequality and its effects on the mediation process and outcomes'.[129] These principles were developed to apply in all settings where inequality may be present but could also apply where inequality is due to identity or cultural differences.

The principles of access to justice: accessibility, appropriateness, equity, efficiency, and effectiveness are relevant in measuring access to justice,[130] and are all relevant in measuring the quality of access to justice that are available to minority groups. They address questions such as whether parties understood and were supported to exercise their rights, or whether the choice not to exercise rights were free and informed; whether attention was paid to the real causes of the problems; whether access was fair and equal; whether fair outcomes were delivered efficiently; and whether best outcomes have been delivered.

V CONCLUSION – DIGNIFYING CULTURE IN DISPUTE RESOLUTION

This paper has canvassed the importance of dignity in DR processes involving cultural differences. Culture and dignity are both complex concepts, each with multiple meanings and approaches to defining them. Nonetheless their complexities do not diminish their relevance in human interaction and DR processes. The paper has considered various conceptions of dignity, identifying three conceptions that are relevant in DR: dignity as individual autonomy, dignity as recognition and respect, and substantive dignity. There are aspects of these conceptions of dignity in DR in the form of self-determination, procedural justice, effective participation in a DR process, respect in the form of treatment by the DRP and other parties in the process, and ensuring access to justice. Dignity as

[128] Lola Akin Ojelabi, 'An Access to Justice Approach to Mediation and the Construction of Positive Legal Professional Identity' (2016) 23(3) *International Journal of the Legal Profession* 321, 323–24 ('An access to justice approach').
[129] Ibid.
[130] Noone and Akin Ojelabi (n 125).

autonomy is important as it recognises the importance of the individual making decisions in their own best interests. However, in circumstances where prejudice, stereotypes, and biases based on cultural identity have been internalised by a party, the outcomes might be short of what societal standards dictate in similar circumstances. This consideration is important in disputes involving cultural issues not because culture is problematic and a cause of disputes, but because identity is formulated in relation to others. Forms of nonrecognition or misrecognition based on cultural identity are prevalent in many societies and DR processes and practitioners should not turn a blind eye. DR processes must accord human dignity to all parties in a dispute and identify when cultural identity begins to impede the course of justice.

But it is also possible for cultural identification to obstruct the course of justice in another sense. This is the sense in which a claim to culture is used to support undignified treatment of another — the demonisation of culture.[131] In these instances, also, a DRP must not turn a blind eye, but must be willing to address indignities that are consequences of such demonisation. This requires cultural competency and awareness, but it also points to the need for generally acceptable values that are necessary to give effect to culture and identity in form of respect and recognition and resist cultural practices that support the undignified treatment of another.[132] Individual autonomy is not absolute; mutual respect and recognition is relevant even when both parties have the same cultural identity.

Giving effect to culture in a DR process will require the DRP to pay attention to the following:

[131] This has been discussed in detail in Lola Akin Ojelabi, 'Dispute Resolution and the Demonisation of Culture' (2014) 25(1) *Australasian Dispute Resolution Journal* 30, 30 where it was stated that demonisation 'describes situations in which culture has been or is being labelled an obstacle, one way or another, to the resolution of disputes; where culture is used by perpetrators of abuse as an excuse for human rights violations or atrocious acts, and the deprivation of basic needs in dispute situations; and where culture is used by victims of abuse to excuse perpetrators' actions. Culture influences the path of dispute, making it intractable and prolonged, most of the time with little or no respect for human dignity and worth.'

[132] Lola Akin Ojelabi, 'Adopting culture-specific dispute resolution processes in Australia: Which way forward for access to justice?' (2015) 29 *Australian Journal of Family Law* 235. See also Ayelet Shachar, 'Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law' (2008) 9(2) *Theoretical Inquiries in Law* 573-607.

1. Identify cultural norms that may be important to parties and embed cultural norms, where possible, in the process. They may also form criteria for evaluating outcomes.
2. Recognise how public discourse on cultural identities may be impacting on the DR process and address them.
3. Recognise demonisation of culture and address based on values that are considered universal.[133]

To achieve the above, a DRP must possess cultural sensitivity and be culturally aware, both of themselves and others. They must identify their own biases and take steps to conduct the process in a culturally dignifying manner.

[133] Ibid. See, eg, 'Criteria for QAP Intercultural Certification', *International Mediation Institute* (Web Page) <https://www.imimediation.org/orgs/cag-icc/>.

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ENHANCING FORENSIC AUDIO:
WHAT WORKS, WHAT DOESN'T, AND WHY

HELEN FRASER *

'Enhancing' has become a routine part of preparing indistinct covert recordings for admission as evidence in criminal trials. Typically, evaluation of its effectiveness is seen as a simple matter of listening to determine whether the enhancement sounds 'clearer' than the original. This seems like a straightforward approach, but it brushes over many important issues which can adversely affect the fairness of the trial. This article outlines findings from experiments, case studies and scientific literature to show how enhancing can affect perception in surprising and unpredictable ways, without listeners' conscious awareness. Discussion demonstrates that enhancing exacerbates, rather than mitigates, known risks of the jury being misled by an unreliable transcript. The conclusion indicates the direction in which to seek better procedures.

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I INTRODUCTION

The right to a fair trial is a cornerstone of a functioning democracy. Realistically, we must accept that it is not possible, in practice, to guarantee that every trial will be perfectly fair: there are simply too many contingencies that can influence any particular outcome. However, it is important to maintain confidence that, in principle, legal procedures, followed diligently, do promote fairness.

The present paper canvasses a threat to fairness that, rather than arising from contingencies, is baked into established legal procedures — specifically, procedures for the handling of indistinct covert recordings used as evidence in criminal trials. As they currently stand, even if followed perfectly, these procedures cannot guarantee a fair outcome.[1] This situation was the subject of a 2017 'call to action', in which a consortium

[1] Helen Fraser, 'Forensic Transcription: How Confident False Beliefs About Language and Speech Threaten the Right to a Fair Trial in Australia' (2018) 38(4) *Australian Journal of Linguistics* 586 ('How Confident False Beliefs').

of Australian linguistics organisations[2] called on the judiciary to review and reform legal procedures for the handling of indistinct covert recordings in four interconnected areas: transcription, translation, speaker attribution and enhancing.[3]

In a recent consultation, a working party of judges acknowledged the validity of the linguists' concerns in all four areas. The present paper focuses only on one: enhancing, i.e. processing applied by audio engineers to indistinct covert recordings with the intention of making their content clearer and thus easier for the court to understand.

The paper starts with a brief, informal review of current procedures for admission and use of enhanced audio. It then outlines a number of problems with those procedures, as seen from the perspective of linguistic science (including a brief consideration of how an enhancement interacts with a transcript). Finally, it indicates a direction for reform.

II CURRENT PROCEDURES: LEGAL PERSPECTIVE AND LINGUISTICS PERSPECTIVE

Under Section 48 of the *Evidence Act 1995* (Cth), a forensic audio recording is considered to be a 'document' for the purposes of a trial, and an enhanced version of the audio may be admitted as a 'copy' of the 'document'. Of course, it is understood that an enhancement is not an identical copy: enhancing, by definition, alters the original, albeit with the intention of improving its clarity. Since any alteration carries the risk, however minimal, that it might mislead, it is expected that the defence[4] will check carefully to ensure the copy is faithful to the original. Should this checking raise any doubt about the effect of the enhancing, they can call for a report detailing the processes that were applied, or hire an expert to review the enhancement. Any dispute not resolvable between the parties can be considered at a voir dire, where the judge, as well as hearing opposing arguments, may listen personally in order to compare the enhancement(s) against the original. If a serious anomaly is noted, the judge can exclude the enhancement. However, the normal

[2] The Australian Linguistics Society (ALS), The Applied Linguistics Association of Australia (ALAA), The Australian Speech Science and Technology Association (ASSTA) and The Australian Institute of Interpreters and Translators (AusIT).

[3] Helen Fraser, 'Thirty Years Is Long Enough: It's Time to Create a Process That Ensures Covert Recordings Used as Evidence in Court Are Interpreted Reliably and Fairly' (2018) 27(3) *Journal of Judicial Administration* 95 ('Thirty Years').

[4] Since enhanced audio is presented by the prosecution in the vast majority of cases, that is assumed as the default for present discussion. Naturally, similar considerations apply in cases where the audio is presented by the defence.

expectation is that evaluation of forensic audio should be left as a matter for the jury, with appropriate judicial instruction.

These concepts have been well established in law at least since *Eastman v R*,[5] and tested in Court of Appeal rulings.[6] For this reason, the effectiveness of enhancing is rarely disputed, and police and prosecution practice is built around the expectation, usually justified, that admission will be minimally challenged.

However, while the procedures outlined above were developed in good faith, and have become uncontroversial in law, they are problematic from a linguistics perspective.[7] They embody several false beliefs about the nature of speech; as well as the factors that influence the perception of speech in general, and of indistinct recorded speech in particular,[8] in ways that can be expected to affect the fairness of trials.[9]

The next section briefly reviews some of these false beliefs. Since they involve concepts that, though thoroughly refuted in relevant branches of the language sciences, remain widely accepted outside those specific domains, some of the points are likely to appear counterintuitive to readers more familiar with legal practice than with phonetic science.

III SOME FALSE BELIEFS ABOUT ENHANCING FORENSIC AUDIO

A *Enhancing is Not a Science But an Art*

Audio engineering is the profession tasked with producing high quality sound for live and recorded events, as well as for the broadcast and creative industries, and other applications. Its techniques are grounded in the science of acoustics, which individual practitioners master to varying levels of expertise.

Enhancing is a branch of audio engineering used in postproduction — processing previously recorded audio in order to create specific effects required for the purpose

[5] (1997) 76 FCR 9.
[6] See, eg, *R v Giovannone* (2002) 140 A Crim R 1.
[7] Helen Fraser, '"Enhancing" Forensic Audio: False Beliefs and their Effect in Criminal Trials' (2020) 52 *Australian Journal of Forensic Sciences* 165-177 ('False Beliefs').
[8] Helen Fraser, '"Enhancing" Forensic Audio: What if All That Really Gets Enhanced Is the Credibility of a Misleading Transcript?' (2020) 52 *Australian Journal of Forensic Sciences* 465-476 ('What if All That Really Gets Enhanced').
[9] Helen Fraser, 'Enhancing and Priming at a Voir Dire: Can We Be Sure the Judge Reached the Right Conclusion?' (2019) *Australian Journal of Forensic Sciences* ('Enhancing and Priming').

(typically movie soundtracks, advertisements or music recordings). As with enhancement of visual images, audio enhancing is acknowledged to be more of an art than a science, involving subjective judgement at all stages.[10]

Most commonly, enhancing is applied to input that is already of high quality ('enhance' means to take something good and make it better). However, related techniques can be used to restore degraded audio (e.g. old vinyl records or radio broadcasts) in order to make it easier or more pleasant to listen to.

As with restoration of old photographs, there are limits on what can be achieved (sometimes summarised with the aphorism 'garbage in, garbage out'). However, impressive results can be produced. These impressive results suggested the possibility of using enhancing techniques to improve the quality of indistinct forensic recordings, and forensic enhancement has now become a branch of audio engineering in its own right.[11]

However, while forensic applications may seem similar to general audio restoration, there are significant differences. Most obviously, the quality of the input to forensic enhancing processes is typically far worse than the most degraded audio an engineer would normally attempt to restore.

A more important, though less obvious, difference is that, in the forensic context, 'ground truth' (definitive, indisputable knowledge) regarding the content of the audio is not available. This means the engineer does not have a clear criterion against which to evaluate the effectiveness of the processes being applied.

From a legal perspective, this may not seem to be a problem, since it is not the engineer who is ultimately responsible for evaluating the content of audio admitted in a trial, but the jury. However, from a linguistics perspective, the lack of a scientific basis for determining the efficacy of enhancing techniques is crucial, as explained in the following sections.[12]

[10] Simon Langford, *Digital Audio Editing: Correcting and Enhancing Audio in Pro Tools, Logic Pro, Cubase, and Studio One* (Focal Press, 2013).
[11] Robert C Maher, *Principles of Forensic Audio Analysis* (Springer, 2018).
[12] Note that these sections summarise material presented in greater detail in Fraser, 'False Beliefs' (n 7); Fraser, 'What if All That Gets Enhanced' (n 8); Fraser, 'Enhancing and Priming' (n 9).

B *Enhancing Does Not 'Reveal' Words 'Masked' by Noise*

The experience of listening to indistinct audio is often one of being 'nearly' able to hear what is said, hindered only by what seems to be a veil of noise masking the words. The concept that audio engineers have the ability to remove this 'veil' and reveal the words behind is promoted by movies and cop shows — even by some forensic audio practitioners. However, the examples they provide are usually constructed for the effect. The capabilities with real forensic audio are far more limited.[13]

Certainly, engineers can reduce noise. Modern enhancing software offers settings designed to filter out many different kinds of noise. However, applying these settings requires not just skill but subjective judgement — and even then they only work well when the noise is easily separable from the speech signal.[14] The problem is that recordings in which the noise is easily separable from the speech signal, while they may sound unpleasant, are usually not particularly difficult to understand.

What makes speech recordings 'indistinct' is when the signal and the noise are convolved by the recording process in ways that listeners' ears cannot resolve. The real problem with this type of audio is not too much 'noise', but too little 'signal' (useful perceptual information). Unfortunately, while this is the situation in which the legal process relies most heavily on enhancing techniques, it is also the one where the objective effectiveness of the techniques is typically lower than expected.

In fact, readers may be surprised to learn there is no research-based evidence supporting the capability of any general engineering techniques to make an objective improvement to the intelligibility of indistinct audio.[15] The surprise may be reduced, however, by reflecting that the demand for such techniques is so high that, had they been developed, they would be used profitably for a wide range of everyday purposes. For one small example, elderly television viewers have long wished broadcasters of gritty urban dramas would provide the option of an enhanced soundtrack that makes the dialogue easier to

[13] While individual practitioners may assert their enhancing makes audio clearer, at official levels the difficulty of validating the effectiveness of forensic enhancement techniques is well understood — see also Anna Bartle et al, 'An Approach to Audio Enhancement Validation' (Conference Paper, The International Association of Forensic Phonetics and Acoustics Conference, 2018); Forensic Science Regulator, *Draft Guidance: Digital Forensics Method Validation August* (UK Forensic Science Regulator, 2014).
[14] Maher (n 11).
[15] Philipos C Loizou, *Speech Enhancement Theory and Practice* (Taylor & Francis Group, 2007).

follow. Unfortunately, a BBC study,[16] commissioned to find techniques that could achieve this, concluded it was impossible: the best recommendation was for viewers to use subtitles.

Indeed, responsible audio engineers acknowledge freely that they cannot improve the objective intelligibility of indistinct forensic audio. While they may agree to do what they can to improve 'listenability', they are often at pains to caution clients against inflated expectations. The problem is that clients readily misunderstand this advice. Specifically, they may think of 'listenability' as a step on the path to intelligibility, where in fact listenability and intelligibility are quite different dimensions.

This was demonstrated by a recent experiment[17] using audio from a real trial, enhanced by a well-credentialed audio engineer. The enhancement was admitted by the judge on the grounds that he found, after reviewing it personally, that it had made the covert recording easier to listen to, and thus could potentially assist the jury in discerning its contents. The experiment enabled participants to play a short section of the audio as often as they wished, then write down what they heard. Results showed that the enhancement was actually no more intelligible than the original, which was so poor that participants were able to transcribe at most a few random words, and, importantly, no two participants heard the same words.

From a legal perspective, the limited capabilities of enhancing may not seem to be a problem: even if the processes do not actively help, the procedures outlined in Section II are intended to ensure that the jury is no worse off with the enhancement than with the original. However, from a linguistics perspective, this view is problematic. It assumes that enhancing either assists or has no effect, which is incorrect. As explained next, enhancing may appear to assist when it is actually misleading.

C *Enhancing Can Make Indistinct Audio Sound More Clearly Like Something it is Not*

Not all indistinct audio is actually uninterpretable. In many cases, repeated listening allows words to be discerned, albeit 'through a veil of noise', with greater or lesser

[16] Mike Armstrong, 'Audio Processing and Speech Intelligibility: A Literature Review' (White Paper WHP190, British Broadcasting Corporation Research & Development, 2011) 1.
[17] Fraser, 'False Beliefs' (n 7).

confidence. The problem is the difficulty of determining whether the words are discerned accurately.

The issues are easier to explain in relation to the more familiar domain of visual evidence, where it is gradually coming to be more seriously recognised by the criminal justice system.[18] The UK Forensic Science Regulator[19] offers the instructive example of a car number plate depicted in a blurry photograph. Characters on the number plate, though far from clear, can be discerned with a certain degree of confidence. Surprisingly, however, a high quality photograph of the same number plate shows the confidently-discerned characters are nothing like the real thing. In retrospect, after the real characters have been seen, the relationship between the reality and the confident but erroneous perception can be worked out. However, no one could possibly discern the real characters spontaneously.[20]

The problem highlighted by the Forensic Science Regulator's number plate example is that the inaccuracy of the discerned characters can only be discovered because, in this particular example, ground truth regarding the real number plate happens to be known. In a trial, of course, ground truth is typically not available. This means that, if the number plate image had been admitted as evidence in a trial, the jury could never have got to the correct interpretation. More importantly, they could never have realised how wrong their perception of the blurry characters was, and would have had no reason to doubt their confident but inaccurate perception.

It is known that indistinct audio can create problems similar to those just discussed in relation to indistinct visual evidence.[21] For present purposes, the question of interest is the effect of enhancing in this situation.

To address this question, it is useful to start by returning to the number plate example. It

[18] Gary Edmond et al, 'Law's Looking Glass: Expert Identification Evidence Derived from Photographic and Video Images' (2009) 20(3) *Current Issues in Criminal Justice* 337.
[19] Forensic Science Regulator, *Forensic Image Comparison and Interpretation Evidence: Guidance for Prosecutors and Investigators* (UK Forensic Science Regulator, 2016).
[20] Useful multimedia demonstrations of these and following points are offered by Helen Fraser, 'Don't Believe Your Ears: 'Enhancing' Forensic Audio can Mislead Juries in Criminal Trials' *The Conversation* (Web Page, 2019) <https://theconversation.com/dont-believe-your-ears-enhancing-forensic-audio-can-mislead-juries-in-criminal-trials-113844> ('Don't Believe Your Ears').
[21] Clifford S Fishman, 'Recordings, Transcripts, and Translations as Evidence' (2006) 81(3) *Washington Law Review* 473.

is clear that no image enhancement technique (applied without knowledge of ground truth) could possibly reveal the characters of the real number plate. But that does not mean enhancing would have no effect at all. By making the (erroneously perceived) characters seem 'clearer', enhancing would give viewers even more confidence in their inaccurate perception than they had with the original.

This is exactly what can happen with indistinct audio, as shown by another recent experiment.[22] The 'fish experiment' used a section of indistinct audio for which (as for the number plates) ground truth happens to be known. Participants were randomly assigned to listen to either the original or the enhanced version.

Those listening to the enhanced version were more likely to hear words. That initially suggests that the enhancing had improved the audio quality. However, participants listening to the enhanced version all reported hearing different words, and none came close to the true content. This indicates that the enhancing actually produced a worse result than the original (the original, by evoking more 'unintelligible' responses, gave listeners a more realistic impression of actual audio quality than the enhancement, which helped listeners to hear words that weren't there).

These results highlight that the word 'clearer', in the context of indistinct audio, has two meanings. Enhancing the 'fish' audio made it 'clearer' in the subjective or aesthetic sense that it sounded less noisy and more 'listenable'. However, it did not thereby make it 'clearer' in the objective sense of giving listeners a more veridical impression of its real content. To the contrary, it increased listeners' confidence in unreliable perception.

Importantly, as with the visual example of the number plate, this mismatch could never have been discovered except that the experiment used audio for which ground truth was known. And again, in trials, by definition, ground truth is rarely, if ever, known with certainty.

This is why the lack of methods for scientific validation of the objective effect of an enhancement (see Section III A) is a major problem: there is no way to evaluate whether words apparently 'revealed' by the enhancing are really there. It is up to the jury to reach

[22] Fraser, 'False Beliefs' (n 7).

their own conclusion, with their only criterion being their own listening confidence. We have already seen that listener confidence can be thoroughly unreliable and misleading, but the situation is actually far worse than discussed so far.

D *Enhancing Exacerbates, Rather Than Mitigates, the Risk of Listeners Being Misled by an Unreliable Transcript*

The discussion until now has concentrated on the effect of enhancement on the perception of those listening to indistinct forensic audio 'cold' (with no contextual knowledge and no transcript). This gives a useful baseline for understanding the subjective and objective effects of enhancing — but it is not how forensic audio is presented in court.

In court, listeners almost always have a transcript to assist their perception. We digress briefly, then, to consider the use of transcripts in court, and their effect on perception,[23] before returning to the effect of enhancement when used in conjunction with a transcript.

The law recognises there is always a risk that a transcript might be inaccurate to some extent (especially when, as is often the case, it is produced by detectives investigating the crime). To mitigate this risk, the jury is instructed not simply to accept the transcript on face value, but to listen to the audio carefully and reach their own opinion as to its contents, using the transcript only as an aid (the 'aide memoire' instruction[24] — see *R v Cassar*).[25]

Unfortunately, the aide memoire instruction is unrealistic. To understand the reason, it is necessary to appreciate the extraordinarily powerful influence of a transcript on perception.[26]

Legal procedures are based on the concept that a transcript can assist perception. In fact, with very indistinct audio a transcript can create perception, without listeners' conscious awareness of its effect.[27] Most importantly, the influence of an inaccurate transcript can

[23] For background, detailed explanation and references see Fraser, 'False Beliefs' (n 7).
[24] I A Wilson and K N Garner, 'Evidence of Tape Recordings' (1988) 4 *QUT Law Journal* 113.
[25] [1999] NSWSC 436, 7e.
[26] Peter French and Helen Fraser, 'Why "Ad Hoc Experts" Should Not Provide Transcripts of Indistinct Forensic Audio, and a Proposal for a Better Approach' (2018) 42(5) *Criminal Law Journal* 298.
[27] Readers who doubt this are urged to view the very short video on the front page of forensictranscription.com.au.

be just as strong as that of an accurate transcript, sometimes stronger.[28]

The power of a transcript, accurate or otherwise, to influence or 'prime' perception of forensic audio in these ways is well established, and extensively covered elsewhere.[29] The question to consider here is the effect of enhancing in situations where listeners have a transcript (as they typically do in court).

The answer is an extension of the effect discussed earlier, whereby techniques that make audio 'clearer', in the subjective sense that it seems less noisy and more 'listenable', can misleadingly give listeners the sense that the audio is 'clearer' in the sense of being more objectively intelligible. However, with a transcript, this effect is far greater than when the audio is heard 'cold' (as it was in the experiments described earlier).

It is fair to say that, while enhancing rarely, if ever, makes indistinct audio objectively clearer (as discussed above), it readily makes words portrayed in a transcript seem clearer. This can be useful if the transcript is reliably known, by reference to ground truth, to be accurate. However, as noted, that is rarely if ever the case in a trial. In a trial, making the audio subjectively 'clearer' can improve listeners' confidence in the transcript — whether or not the transcript is objectively reliable. In other words, what really gets enhanced is not the audio but the credibility of a potentially misleading transcript. This has been demonstrated by yet another experiment,[30] in which a manifestly inaccurate transcript was more likely to be accepted by participants listening to the enhancement than by those listening to the original.

The upshot is that, rather than 'garbage in, garbage out', the effect of enhancing indistinct audio heard under courtroom conditions can be 'garbage in, gospel out'.

E *Even Neutral, Responsible Listeners Cannot Reliably Evaluate the Effect of Enhancing by Observing Whether it Makes Words 'Sound Clearer'*

As we have seen, the law recognises that offering a transcript presents a risk of

[28] A quick and entertaining introduction with many references is given by Kate Burridge, 'The Dark Side of Mondegreens: How a Simple Mishearing Can Lead to Wrongful Conviction' *The Conversation* (Web Page, 2017) <http://theconversation.com/the-dark-side-of-mondegreens-how-a-simple-mishearing-can-lead-to-wrongful-conviction-78466>.
[29] Helen Fraser, '"Assisting" Listeners to Hear Words that aren't there: Dangers in Using Police Transcripts of Indistinct Covert Recordings' (2018) 50(2) *Australian Journal of Forensic Sciences* 129.
[30] Fraser, 'Don't Believe Your Ears' (n 20).

'suggestibility' for careless or biased listeners, and legal procedures provide a strong system of safeguards to ensure the jury is not exposed to potentially prejudicial suggestions regarding the content of indistinct covert recordings. The problem (discussed in detail elsewhere)[31] is that these safeguards rely heavily on careful listening by lawyers and judges acting as gatekeepers to protect juries from potential prejudicial 'assistance'. However, while these listeners are surely more careful and responsible than some others,[32] they are far from immune to being unwittingly misled by an inaccurate transcript.[33]

Again, the issue of present concern is how enhancing plays into this situation. Unfortunately, while providing an enhancement is intended to help, it actually hinders: evaluating an enhancement and a transcript together creates a dangerous circularity from which it is impossible to escape, even for a judge. A further experiment demonstrated this powerfully, using audio from a recent trial in which a judge listened personally in order to rule on a dispute over the effect of enhancing on an extremely indistinct covert recording.[34] The experiment showed that the judge's evaluation of the enhanced audio must have been far more influenced by the prosecution transcript than he was aware of — and posed the question: If a listener as neutral and responsible as a judge can be influenced in this way, is it fair to expect a jury to hear more reliably?

F *What 'Enhancing' Can and Cannot Do*

It is important to be clear about exactly what is and is not being argued in this paper. There is no claim that enhancing techniques can never be effective. The point is that current procedures do not allow reliable differentiation between effective and ineffective enhancement, and take insufficient account of factors known to affect the evaluation and perception of enhanced audio.

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[31] Helen Fraser, 'Forensic Transcription: The Case for Transcription as a Dedicated Area of Linguistic Science' in Malcolm Coulthard, Alison Johnson and Rui Sousa-Silva (eds), *The Routledge Handbook of Forensic Linguistics* (Routledge, in press).
[32] Andrew J Wistrich, Chris Guthrie and Jeffrey J Rachlinski, 'Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding' (2005) 153 *University of Pennsylvania Law Review* 1251.
[33] Helen Fraser, 'How Interpretation of Indistinct Covert Recordings can Lead to Wrongful Conviction: A Case Study and Recommendations for Reform' in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 191.
[34] Fraser, 'Enhancing and Priming' (n 9).

Neither is it suggested that forensic audio should never be processed with engineering techniques. Reformed legal procedures designed to ensure the reliable handling of indistinct covert recordings should certainly have a key role for audio engineers — but it should not be the role they currently have. The need is to develop procedures on the basis of a realistic understanding of the capabilities of engineers to improve the quality of indistinct audio, and of listeners to evaluate the improvement objectively.

IV REASONS FOR FALSE BELIEFS

In order to develop such a realistic understanding, it is helpful to consider why current procedures, designed in good faith, have come to embody an unrealistic understanding of the capabilities of enhancing techniques. One suggestion is that the reason stems from the view, embodied in Section 48(c) of the *Evidence Act*,[35] that a recording should be treated like a document (see Section II above). It is easy to see how, from a legal perspective, 'an article or thing by which words are recorded in such a way as to be capable of being reproduced as sound' might be thought of as being similar to a printed document. However, for a variety of reasons,[36] it is a false analogy.

From a linguistics perspective, a recording is not at all like a document.[37] A transcript is a document, composed of discrete letters and words, but a recording is something quite different. That is because, contrary to popular belief, even clear speech is not a sequence of discrete words, but a continuous stream of sound.[38] The process of getting from a recording to a transcript is far more complex than usually recognised.[39]

Technically, then, what is 'recorded in such a way as to be capable of being reproduced as sound' is not 'words' but a representation (analogue or digital) capable of being reproduced as a continuous stream of sound, which, in turn, is potentially capable, under appropriate conditions, of being understood by competent listeners as a sequence of words, and, as a further step, of being transcribed into a written document.

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[35] Evidence Act 1995 (Cth).
[36] Fraser, 'How Confident False Beliefs' (n 1).
[37] David R Olson, *The World on Paper: The Conceptual and Cognitive Implications of Writing and Reading* (CUP, 1994).
[38] Peter Ladefoged and Sandra F Disner, *Vowels and Consonants: An Introduction to the Sounds of Language* (Wiley-Blackwell, 3rd ed, 2012).
[39] Barry Heselwood, *Phonetic Transcription in Theory and Practice* (Edinburgh University Press, 2013).

This distinction may seem like nit picking but it has some significance. In particular, it affects expectations about the capabilities of enhancing. The (incorrect) assumption that an indistinct recording is like a printed document whose letters have become smudged or obscured creates the expectation that 'enhancing' might restore all or some of the 'sounds' — which might, albeit with some difficulty, then be rendered into words by listeners, much as letters on a printed page can be 'sounded out' by readers. In fact, however, nothing remotely like this is possible, as has been indicated in a small way in the preceding sections.

These limitations on the concept of a recording being a kind of document have had an effect on the development of legal procedures for admission of enhanced recordings.[40] They have also influenced legal decision-making in other ways. One example can be seen in the response to an application to review a conviction.[41] The application included expert opinion, supported by scientific analysis and experimental results, that a transcript, provided to the jury to assist them in understanding crucial words allegedly contained in an indistinct covert recording, was factually wrong. The judge reviewing the application rejected this opinion, but noted that he could have been persuaded if 'enhanced listening technology' had been used to show that the transcript given to the jury was incorrectly transcribed. Perhaps if he had understood that there is no technology capable of achieving this he might have interpreted the expert opinion differently, and reached a different decision about the application.

V CONCLUSION

Ensuring the right to a fair trial requires legal procedures that take account of established scientific findings to ensure that juries understand evidence accurately, fairly and in accordance with justice. The present article has reviewed one area where that is not currently the case, namely admission and use of enhanced versions of indistinct covert recordings.

This is one of several areas where current procedures, developed in good faith but with insufficient understanding of the nature of speech and speech perception, cannot

[40] Fraser, 'False Beliefs' (n 7).
[41] Fraser, 'How Confident False Beliefs' (n 1).

guarantee that indistinct forensic audio will not mislead a jury. Given the power of covert recordings, as evidence that juries appear to perceive directly, 'with their own ears', this has a serious potential to compromise justice.[42]

The recent call to action by Australian linguistics organisations has started the process of reform. Clearly, this will be a challenging task. One of the key planks of the call to action[43] is that success cannot be achieved by law, law enforcement or linguistics working alone, but requires a broad-based project fostering collaborative research and development. Following the favourable outcome from the recent judicial consultation (see Section I) such a project is now underway. The linguists involved are ready to welcome interest and support from law and law enforcement personnel.

[42] J B Gould et al, *Predicting Erroneous Convictions: a Social Science Approach to Miscarriages of Justice* (National Institute of Justice, 2012).
[43] Fraser, 'Thirty Years' (n 3).

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THE QUEST FOR JUSTICE IN A TIME OF GLOBAL UNCERTAINTY

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This paper draws upon two recent papers delivered by the author — 'David Solomon Lecture: Accountability in the Age of the Artificial August 2019', Brisbane; and the keynote presentation to the Australian Lawyers Alliance Conference 'A Quest for Justice, Evolution or Catastrophe October 2019', Port Douglas.

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CONTENTS

I INTRODUCTION

A student of the law soon comes to realise that the law is often detached from the quest for truth, justice, equality, integrity and accountability. These qualities are critical to the strength of our democracy but are often ignored in the design of laws and their application in practice. The common law is regarded as largely immutable, resisting changes in political mood, public opinion and the desire for just outcomes, and striving always to appear impartial and objective.[1]

But the application of the law is not always just. It does not serve the truth, it does not guarantee equality and it is seen to be inadequate in protecting against breaches of integrity and accountability.

A great fault line runs between law and justice. The division is heightened in the context of global challenges of extraordinary complexity we currently face involving the changing climate; the movement of populations; access to increasingly scarce food, water and mineral resources; environmental damage; corruption; and unequal wealth distribution.

It is timely to reflect upon a few examples of the failings of the law to deliver just outcomes.

[1] Whilst there is an occasionally acknowledged need "from time to time, to reformulate existing legal rules and principles to take account of changing social conditions", the Courts have a self -described 'modest and constrained role' in this regard, consistently with the common law tradition: *D'Arcy v Myriad Genetics Inc* (2015) 258 CLR 334, 350 [26] (French CJ, Kiefel, Bell and Keane JJ); [2015] HCA 35. When the judgment of the courts seek to reflect changing social opinion, common law principles and rules of interpretation are usually cited in support. See, eg, *R v L* (1991) 174 CLR 379 for rape in marriage; *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 for political party deregistration; *Mabo v Queensland* (1992) CLR 1 for recognition of native title rights.

II TRUTH

We should begin with our own nationhood and entrenched history of untruth. As a law student in the 1980's, I was taught legal history and constitutional law by eminent scholars. The traditions of the law were explained in a context of established historical fact. Whilst I sometimes wondered at the logic and morality of those lessons, I did not question the prevailing narrative of Australia's history as a sovereign state.

Today, however, it is widely recognised that the languages and traditions of our Aboriginal and Torres Strait Islander peoples represent the world's oldest continuous cultural heritage. Theirs is a history that remembers the changing of seasons and teaches the great stories and the cycle of life; when to harvest, when to hold back the harvest. It is a history of complex stewardship of the land and waters for current and future generations.[2] It is a history steeped in a sense of common good, of common heritage.

A parallel concept of common heritage was well understood in Roman and English law. Originally conceived as a concept of the global commons designed to protect the seabed and ocean floor,[3] later the moon and Antarctic region,[4] the notion can trace its origins to Roman law concepts of *res communis* and *res nullius*.[5]

Founded upon a notion of public trust, the law recognised that certain lands including rivers, seabeds, lakes, forests, tidal zones and submerged lands, could not be 'owned' by individuals and were held by the Crown as trustee for the benefit of all citizens to freely use and navigate. Misuse of the commonly held property by commercial exploitation or

[2] See, eg, Love v Commonwealth; Thoms v Commonwealth [2020] HCA 3, 11; Bruce Pascoe, The Little Red Yellow Black Book: An Introduction to Indigenous Australia (AIATSIS, 4th ed, 2018); Bruce Pascoe, Dark Emu Black Seeds: Agriculture or Accident? (Magabala Books, 2014).
[3] Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction, GA Res 2749(XXV), UN GAOR, A/RES/2749 (17 December 1970, adopted 15-17 September 1970) leading to the United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 397 (entered into force 16 November 1994) (UNCOLS).
[4] Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, opened for signature 27 January 1967, 610 UNTS 205 (entered into force 10 October 1967) (Moon Treaty); Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, opened for signature 18 December 1979, 1363 UNTS 3 (entered into force 11 July 1984) art 7.
[5] Translated as 'communal things' and 'no-one's thing' respectively.

adverse possession was, according to the doctrine, a misuse against the community and protections were enforceable by any member of that community.[6]

In Australia, the concept of *res nullius* — or ownership by none — was deliberately employed to create enormous injustice for our First Nations peoples. Their land management practices and cultural traditions were, in the eyes of the colonial new arrivals, unsophisticated and unrelated to notions of ownership. This was convenient, as the law mandated that new lands could only be obtained by conquest, by cession or by occupation of lands that were 'desert and uncultivated'.[7]

Although I did not learn the truth at the time of my own studies, Captain James Cook had in fact been given secret instructions from the British Admiralty to find the Great South Land and:

> … with the Consent of the Natives to take Possession of Convenient Situations in the Country in the Name of the King of Great Britain: Or: if you find the Country uninhabited take Possession for his Majesty by setting up Proper Marks and Inscriptions, as first discoverers and possessors.[8]

It is now abundantly clear that consent to possession was never sought and was not forthcoming. Governor Arthur Philips also failed in his instructions to treat the natives with 'amity and respect' in establishing the colony of New South Wales. There was no payment, or consideration, for the use of lands that were used and occupied. The evidence of existing stewardship, or custodianship, of the original inhabitants was expressly rejected and so the land, it was determined, was effectively uninhabited and available to

[6] See, eg, *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388 (Supreme Court of India).
[7] Sir William Blackstone, *Commentaries on the Laws of England* (Clarendon Press, 1765-1770) vol 1, 104-105; Aileen Moreton-Robinson, 'Whiteness, Epistemology and Indigenous Representation' in Aileen Moreton-Robinson, *Whitening Race: Essays in Social and Cultural Criticism* (Aboriginal Studies Press, 2004) 75, 76.
[8] James Cook and Great Britain Admiralty, 'Cook's Voyage 1768-71: Copies of Correspondence', *National Library of Australia* (Manuscript, 1768) <http://nla.gov.au/nla.obj-229111770>; Tony McAvoy, 'High Court's 'Alien' Decision is not Surprising', *The Guardian* (online at 12 February 2020) <https://www.theguardian.com/commentisfree/2020/feb/12/high-courts-alien-decision-is-not-surprising-but-it-wont-be-the-end-of-the-story>.

be acquired by possession. The law was thus used as a justification for dispossession despite the fact these acts now appear to be unlawful.

This meant, in Australia, the dispossession and state sanctioned or condoned murder of our First Peoples, occurred with a brutality with which we are still struggling to come to terms.

Until relatively recent times, it also meant that we pursued government policies that encouraged the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country, considering that it was better for those children to be raised away from their communities, in many cases, in homes where they were abused. In many cases, the pain of removal was so profound that the effects are seen across the generations.[9]

The exclusion of Indigenous Australians as citizens and as people of the Commonwealth, until 1967, has compounded the sense of isolation and powerlessness. The legal recognition of the strong bonds between our First Peoples and their traditional lands has also been a long time coming, with recognition of common or native title to lands and waters only upheld by the High Court of Australia in 1992, overturning our former notions of historical truth.[10] The strength of the connection to lands and waters was expressed powerfully in the Uluru Statement from the Heart[11] and was recognised again by the High Court in cases concerning the 'aliens' power of the Commonwealth under our Constitution.[12]

The reality is that the wrongs of our colonial predecessors can no longer be ignored. If we strive to be a lawful nation we must confront the truth of unlawful possession in order to do justice according to law.

Notions of common wealth or common good should be revisited, because these ancient concepts underpin notions of collective law and justice. And because the complex challenges that confront humanity require us to work, not for the benefit of a few enabled

[9] Australian Human Rights Commission, Bringing them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Report, April 1997).
[10] *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1.
[11] First Nations National Constitutional Convention, *Uluru Statement from the Heart*, 26 May 2017.
[12] Love v Commonwealth; Thoms v Commonwealth (n 2).

sovereign states or a handle of individuals wealthy beyond imagining, but for the common good of all.

III JUSTICE & EQUALITY

In Australia, it is widely accepted, in theory at least, that in order to guarantee the protection of our rights and freedoms including equality before the law, there must be universal access to justice, including the means to obtain and understand legal advice and representation to address legal issues as they arise.

However, chronic and institutionalised social and economic barriers within Australia provide enormous challenges to access to justice. 14% of our population lives below the poverty line, yet legal aid grants are available to only 8% of Australians. Community legal centres turn away an estimated 170,000 people each year. Our courts and tribunals face critical pressures to deliver fair, efficient and effective outcomes to parties including burgeoning caseloads. The number of unrepresented litigants continues to grow.

In 2017, more than 40 years after the delivery of the landmark *Commission of Inquiry into Poverty*, known as the Sackville Report[13], and after many years of advocating for adequate funding for legal aid and the community legal sector in Australia, the Law Council of Australia undertook an ambitious national review into the state of access to justice in Australia: The Justice Project.[14] The Justice Project considered the impact of laws, policies and practices compounding inequality and systemic discrimination in Australia. It focused on the lived experiences of our most vulnerable and demonstrated widespread injustice and the devastating impact of not being able to access legal services for many, including those experiencing homelessness, family breakdown, neglect and violence, declining health, exploitation, entrenched poverty, and incarceration.

In conceiving of this Project and undertaking consultations across Australia during my term as President of the Law Council, I saw first-hand that, despite our lofty commitment to equality before the law and the dignity and worth of each human being, for many tens of thousands of Australians, equality and justice are out of reach. In courts convened in

[13] Ronald Sackville, Parliament of Australia, *Law and Poverty in Australia*: *Commission of Inquiry into Poverty Second Main Report* (Parliamentary Paper No 294, October 1975).
[14] Law Council of Australia, *The Justice Project* (Final Report, August 2018).

the red dirt, in retirement villages, in refuges, church halls and cramped offices, in prison cells across the country, I met with people caught up in the system and living on the margins, and observed cases where early intervention could have made all the difference.

Hearing these stories was both shocking and moving. As distressing as they are, we have seen no greater commitment to structural reform and to resourcing of the sector. I conclude that unless these cases touch us personally or professionally, we embrace a kind of national anaesthesia to injustice. We accept the situation as inevitable when it is not. We do so perhaps because we have been told the cost of services for all is too high, or that some people are less deserving of our support. Or perhaps because we do not understand the devastating impact of injustice upon lives, because the voices of those on the margins are not heard until they are in our own loungerooms, within our own families. The Justice Project makes absolutely clear that a systemic lack of access to justice contributes enormously to cycles of intergenerational trauma and disadvantage within communities.

A rigid approach to the application of law that does not accommodate diversity and vulnerability, or permit exceptional circumstances such as mandatory sentencing, was observed and found to impact disproportionately upon certain groups. Thus, laws targeting unpaid fines, unlicensed driving, public drunkenness or family violence disproportionately result in the entrenched over-representation of certain groups amongst those interacting with police and the criminal justice system.

Our First Nations peoples are being imprisoned at a higher rate than any cultural group in the Western world.[15] The drivers of Indigenous imprisonment are complex and intertwined: high rates of cognitive impairment in the prison population and foetal alcohol syndrome is rife; hearing and other health challenges mean young people disengage from schooling early; socioeconomic disadvantage; low school completion; high rates of alcohol and drug abuse; family violence; homelessness; unemployment; and poor health all play roles. As undoubtedly does the dislocation and grief of dispossession and denigration over the centuries.

These factors are self-perpetuating — they form a cycle of disadvantage which is virtually

[15] Australian Law Reform Commission, Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples (Report No 133, December 2017); Royal Commission into Aboriginal Deaths in Custody (Final Report, April 1991).

impossible for many, who are caught within it, to escape. Perhaps the most toxic of these factors is family violence.

Our governments contribute to the imprisonment crisis through a negatively self-reinforcing and criminal justice response. State and territory governments in recent decades have introduced various populist 'tough-on-crime' policies that cause more Indigenous Australians to be caught up in the justice system. The federal government claims justification for withholding adequate funding for legal services, arguing responsibility should lie with the states who have effectively driven up demand. It has denigrated those dependent on welfare through social disadvantage, imposing welfare quarantining with no apparent regard for the voices of medical, legal and human rights proponents who warn of further harm.[16]

While the problems are complex, there are a number of immediate cost-effective measures which could yield significant results. Small changes to laws and practices would immediately yield outcomes and could reduce recidivism, save money, and prevent crime. Justice reinvestment trials and specialist courts in consultation with Indigenous leaders, for example, are having positive impacts on community empowerment and ownership of justice solutions.[17]

Adequate funding for legal aid and legal assistance support is critical. In Australia, Aboriginal and Torres Strait Islander Legal Services were established in every state and territory some 40 years ago to provide culturally competent legal assistance services to Indigenous peoples. Unfortunately, after decades of inadequate and declining funding from the Commonwealth Government, these services are increasingly unavailable or inaccessible to many who need them most.

Across the country, unmet legal needs for people seeking asylum, refugees and vulnerable migrants is endemic, unprecedented and escalating. Amongst them are people facing destitution after being stripped of their basic income support, housing and trauma counselling while seeking protection; women and their children seeking protection from

[16] See, eg, Senate Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into the Social Services Legislation Amendment (Cashless Debit Card) Bill 2017*, including evidence of the author Hansard, 2 November 2017.
[17] Law Council of Australia (n 14) part 1: Aboriginal and Torres Strait Islander People, part 2: Governments and Policy makers.

family violence; people being detained indefinitely; and people battling for family reunion after years of separation.

The problems are massive, but they are not insurmountable. It is a question of whether we prioritise our spending on the type of nation we want to be, or not. Laws and policies that are inherently unjust, or that entrench inequity, must be discarded in favour of principled, evidence-based laws created in collaboration with citizens.

IV INTEGRITY

The strength of our democracy also depends upon the integrity of those entrusted to exercise power and a complex framework of checks and balances that scrutinise such exercise of power.

We count our blessings, as dictators and populist oligarchs assert wide discretionary executive powers in other parts of the world, protected by laws and with powerful military and intelligence assets at their command.

However, the first twenty years of this century have not been marked by any improvement in Australia's global standing for integrity.[18] We have seen numerous examples of law enforcement struggling to keep pace with the ingenuity of criminal organisations, the vast profits of illegal conduct pouring through the accounts of subterranean operatives and obscure networks of influence. We have witnessed politicians influenced by those who have purchased access, and Ministers and public servants spending public funds without due process. We observe a captive or disorganised press, unable to protect whistleblowers effectively, incapable of piercing the propaganda of well-resourced government 'messaging'.[19]

[18] See, eg, 'Corruption Perception Index', *Transparency International: The Global Coalition against Corruption* (Web Page, 2019) <https://www.transparency.org/research/cpi/overview>.
[19] Stephen Charles AO QC, 'The Fitzgerald Oration 2019' (Accountability Round Table, 1 September 2019). See also Katharine Murphy, 'Sports Rorts Changes Everything. It's Time for a Federal ICAC', *The Guardian* (online at 7 March 2020) <https://www.theguardian.com/australia-news/2020/mar/07/sports-rorts-changes-everything-its-time-for-a-federal-icac>; Senate Committee on Administration of Sports Grants, Parliament of Australia, *Inquiry into the Administrations of Sports Grants, Parliament of Australia,* including evidence of the author Hansard, 12 March 2020.

We appear powerless to address growing economic and social inequality, witnessing gross violations of human rights and environmental catastrophes across the globe where few are held to account, and future generations bear the cost.[20]

Most people instinctively understand these facts, if they do not understand the causes. They also understand the fact they are powerless to effect change in their own lives. The erosion of trust turns to anger, boiling over into all areas of life from the protest at the ballot box to outbursts of violence.

In this context, our efforts to build robust integrity and accountability mechanisms in support of the observance of human rights and the rule of law throughout the world, are crucial, both in maintaining trust in the system and social cohesion, and in addressing the causes of inequality and instability.

Globally, the trend is towards populism driven by patriotism, the loss of trust in government and multiple examples of executive overreach. It is therefore vital that our institutions are continually strengthened and improved.

V ACCOUNTABILITY

'Accountability' in essence, encompasses the processes and the enablers that allow people to hold government and the institutions of state to account — to answer for their conduct and omissions, their decisions and indecisions. In the context of public sector integrity, we have observed the steady erosion of institutional protections and singular resistance to robust anti-corruption measures.[21]

Naturally, those with power would prefer to avoid scrutiny and criticism, to control the means by which we find things out and talk about them. While openness can be productive of discomfort, governments that embrace this scrutiny and the direct participation of citizens, ultimately make better, more informed decisions.

Greater accountability builds trust and respect, and supports a more equitable society.

[20] See, eg, 'Uyghurs Tell of China-led Intimidation Campaign Abroad', *Amnesty International* (Web Page, 25 February 2020) <https://www.amnesty.org.au/uyghurs-are-not-safe/>; William Thiesen, 'The 10th Anniversary of the Deepwater Horizon Spill', *The Maritime Executive* (Online at 24 April 2020) <https://www.maritime-executive.com/editorials/the-10th-anniversary-of-the-deepwater-horizon-spill>.

[21] See, eg, n 20.

Government legitimacy depends on decisions being open to scrutiny. Ultimately it is why we consent to being governed and the corresponding legitimacy of government.

And yet, in Australia, our parliamentarians are not bound by a code of conduct and have no ability to access independent ethics advice.[22] There are no consequences for a breach of the Statement of Ministerial Standards unless an inherently conflicted Prime Minister decides to act. Current laws and practices mire our freedom of information laws, campaign financing and the regulation of lobbyists. Our tendering processes are routinely subverted or ignored. Money is sprinkled around marginal seats like confetti, regardless of principles of probity and equity.

Commissioner the Honourable Ken Hayne AC QC recently lamented, in the wake of inaction over his Banking Royal Commission recommendations and Crown casino revelations, trust in government and institutions has been 'damaged or destroyed'.[23]

Our commitment to the global initiative Open Government Partnership has not, so far, been productive of any particularly stunning advances. Two National Action Plans have been produced with timid commitments to integrity safeguards, public participation in democratic processes and accountability. There were some early commitments to review the Freedom of Information law reform and a promise of transformation of the delivery of government services, but nothing explicit in terms of assurances of accountability beyond the use of information.[24]

Increasing dependence upon technology, with the rush to embrace big data harvesting,

[22] Fiona McLeod and Stephen Charles, Submission No 32 to Senate Committee on Administration of Sports Grants, *Inquiry into the Administration of Sports Grants* (28 February 2020).
[23] The Honourable Ken Hayne AC QC, 'On Royal Commissions' (Speech, Melbourne Law School, 26 July 2019) 6.
[24] In May 2017, PMC indicated a commitment to develop a new Privacy Code for government agencies. On 26 November 2017, the government announced it would create a Consumer Data Right as one of the reforms in its upcoming response to the Productivity Commission (PC)'s Data Availability and Use Inquiry Report. The Report proposes reforms to strengthen Australia's data system and give individuals more control over their digital data. Several of the recommendations relate to high value datasets, including the designation of National Interest Datasets and a public nomination process for access to high value datasets. In May 2018, the government committed to the establishment of a National Data Commissioner and new legislative and governance arrangements to improve use of data while ensuring appropriate safeguards are in place to protect sensitive information. It included the establishment of a new Consumer Data Right that will give citizens greater transparency and control over their own data. This announcement means the High Value Dataset Framework has been delayed, but suggests the scope of the work was probably underestimated. In March 2019, the membership of the National Data Advisory Council met for the first time.

use, sharing and retention, compounds this lack of transparency and accountability. Machine learning or artificial intelligence is seen as a panacea for all ills despite concerns with inaccuracy and optimisation, confirmation biases inherent in programming, intrusions upon privacy, security of data, and misuse for law enforcement or hostile purposes. The scale of data harvesting, learning and commercialisation by private actors and government departments is staggering, particularly as most users are ignorant about the extent of surveillance, design flaws and default terms and conditions. The potential use and misuse of data to influence human behaviour, including by private entities such as Facebook and Google is frankly, terrifying.

Private complaints resolution processes increasingly avoid the courts altogether, substituting contractual and algorithmic determinations for human led interventions. In this context, the preservation of the rule of law and informed human involvement in judicial and administrative decision-making, is more precious and critical than ever before. If citizens are unable to scrutinise, comprehend and challenge decision-making, we head towards totalitarianism.

The future beckons with the possibility of human 2.0 with life extension, genetic and robotic enhancement, implantables, injectables, biometrics, the downloadable consciousness and virtual relationships meeting our need for intimacy and love. We are merging our virtual lives with the non-virtual. Increasingly, advertising and gaming are using sophisticated immersion experiences indistinguishable from real life. Our human minds are not particularly adaptive, and the temptation of each shiny new promise is irresistible.

There is a growing awareness, articulated by Human Rights Commissioner Ed Santow, the Australian Competition and Consumer Commission and others, that technological developments pose unprecedented challenges to privacy, freedom of expression and equality.

In Victoria, the right to privacy is protected by human rights legislation without substantive enforcement rights.[25] The ACT and Queensland Acts are in almost identical

[25] *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) s 13. Identical provisions are found in the ACT and in Queensland Acts. Public authorities are required to act consistently with the Charter, and there is a scrutiny process that mirrors the Commonwealth statement of compatibility

terms. But at the Commonwealth level, in the absence of a Human Rights Act, the only direct protections available are found in the Privacy Act.[26] In 2001 and 2004, the High Court[27] and the Victorian Supreme Court[28] respectively held there was no cause of action in privacy.

It is more than a decade since the Australian Law Reform Commission review of Australian privacy laws and five years since the *Serious Invasions of Privacy in the Digital Era* Inquiry Report. Our protections are lagging well behind the technology and well behind other states. We need a wide-ranging review into data use, sharing and storage, and the laws and practices that will be required to protect us including privacy, informed consent, human rights implications and regular assurances and audits.[29] Law reform will need to occur in many areas of law, including administrative law, with increased reliance upon machine-assisted decision-making, discrimination laws, contracts and consumer protections, procurement and design standards.

Contracts and consumer protection laws will also need to be reviewed. Our concepts of privacy protection are anachronistic, possibly obsolete, based on an assumption we choose to share discrete pieces of information for a specific purpose, and that further use will be constrained by the terms of use. The cyber context is one that assumes disclosure is sufficient and people will accept an intrusion into their private lives for a benefit or social good. The effectiveness of a notice regime depends on identifying and locating/contacting the affected individual, providing a meaningful opportunity to respond, an explanation of decisions and access to proprietary software components and

process, but it creates no stand-alone right of action and the rights are effectively unenforceable unless they are raised as an adjunct to other forms of legal claim. Recently, in *Jurecek v Director, Transport Safety Victoria* [2016] VSC 285, Bell J considered the scope of the protection of personal privacy under the Charter and Victorian *Information Privacy Act 2000* (now *Privacy and Data Act 2014*).

[26] The *Privacy Act* was intended to implement the privacy obligations under the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1), discussed in Human Rights Committee, *General Comment No 16: Article 17 (Right to Privacy)*, 32nd sess, UN Doc (8 April 1988); Organisation for Economic Cooperation and Development, *OECD Guidelines on Other Protection of Privacy and Transborder Flows of Personal Data* (2013) guideline 17. See also Joseph A Cannataci, Human Rights Council, *Report of the Special Rapporteur on the Right to Privacy,* UN Doc A/HRC/31/64 (8 March 2016).

[27] ABC v Lenah Game Meats Pty Ltd (2001) 208 CLR 199.

[28] *Giller v Procopets* [2004] VSC 113 (Gillard J), concerning the distribution of a video of private sexual activity.

[29] See, eg, New Zealand Government, *Algorithm Assessment Report* (Report, October 2018).

course code.[30]

A consequence of entrenched inequality is that users do not have access to or understand their rights and have little capacity to challenge abusive behaviour. Existing inequalities are exaggerated by technical knowledge asymmetry and cost of legal and other expert services.

Access to justice and access to information are critically empowering to the success of our adaptation. Unless we address existing problems with an eye on the future, we risk marginalising a whole new class of the technologically unsophisticated who will be denied access to justice.

It is only by operating openly and with transparency, mindful of the challenges to equality, that we will be best placed to navigate these pressures. Processes that enable accountability, on the other hand, create the mechanism for governments to answer for their conduct and omissions, and their decisions and indecision.

VI CONCLUSION

Our laws serve us best when they fairly reflect our aspirations of truth, justice, equality, integrity and accountability. They strengthen our democracy when they allow the governed to raise voices of dissent and heretical ideas, to express with potency the lived experiences of those who are otherwise invisible, oppressed, marginalised and unseen by those wielding power.

When laws serve opposite interests and aspirations, when they entrench inequality and vulnerability, we should not be afraid to revisit them and start afresh.

We are facing imminent social and economic upheaval on a number of fronts in a context of political inertia and compromise in our nation and across the world. But the possibility of stopping the worst of the predicted outcomes lies within our grasp. New legal frameworks founded upon the notions of the commons have been used before to protect precious natural heritage and ensure the viability of the environment that sustains all

[30] The Canadian Directive on Automated Decision-Making requires Algorithmic Impact Assessments and the provision of notice to affected individuals. In New Zealand, the Chief Data Steward developed the Principles for the Safe and Effective Use of Data and Analytics and published a direction in 2017.

living things.[31] This paper has touched upon some of the measures we might adopt to better align law with justice, equality, integrity and accountability, to adapt our notions of existing rights and responsibilities to ensure equality and justice for all.

[31] Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, beyond the Limits of National Jurisdiction (n 3).

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