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RESTORING HUMAN DIGNITY: SOME REFLECTIONS ON THE RIGHT TO REPAIR & MEDICAL DEVICES AND ASSISTIVE TECHNOLOGIES

LEANNE WISEMAN* AND KANCHANA KARIYAWASAM**

The Right to Repair movement, defined broadly as the ability to have products repaired at a competitive price using repairers of choice, gained even more support from the community during the COVID-19 pandemic as hospitals worldwide reported issues with the ongoing maintenance of crucial medical equipment. The ability to keep lifesaving medical equipment operational is not only relevant in hospital settings but is fundamentally important for those individuals in our community, particularly those in remote regions of Australia, who need to rely upon medical devices in their day-to-day lives. This article examines these complex issues in light of the findings of the Australian Productivity Commission's Right to Repair inquiry that barriers currently do exist to medical device repair and that a review be conducted of the medical device market and current regulations.

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I INTRODUCTION

We are used to being in control of not only ourselves but of the things we possess and own. Since the beginning of the industrial age, when machines were being built, the makers and users of those machines were always able to keep those machines in operation. Users and owners could tinker, modify, or fix the machines and devices they owned without seeking permission from anyone. In fact, during the depression, ‘make do and mend was the mantra, keeping our goods, clothes and possessions in use for longer was not only a matter of choice but a matter of necessity’.¹ Historically, the act of repairing goods or machines we owned was uncomplicated. It was simply a matter of using everyday tools to unscrew the base of your toaster or your household appliance or pop the hood on your motor vehicle or tinker with your tractor. Schematics and repair information were often supplied with the products and equipment sold, and spare parts were readily available at a reasonable cost. Many general household appliances, such as refrigerators and washing machines, were able to be routinely repaired and passed down from one generation to another, without even the consideration that they might need permission from the manufacturers to do so. Fast forward to today, and software is embedded in almost all the products, devices, and machines we rely upon and use. Many people feel hampered by manufacturers’ restrictions on their ability to repair their goods and machines and are rising up against original equipment manufacturers by demanding a Right to Repair. This movement has grown with strong business and community support over the past decade into an international Right to Repair movement.²

The Right to Repair (‘R2R’) has been defined as the ability of consumers to have their products repaired at a competitive price using a repairer of their choice.³ It gives owners

¹ In 1943, *Make Do and Mend* was a pamphlet that was issued by the British Ministry of Information which was ‘intended to provide housewives with useful tips on how to be both frugal and stylish in times of harsh rations. Along with its thrifty design ideas and advice on reusing old clothing, the pamphlet was an indispensable guide for households’. See ‘Make Do and Mend’, *British Library* (Web Page) <<https://www.bl.uk/learning/timeline/item106365.html>>. An updated version of the book was recently released to coincide with the economic recession, offering similar frugal advice for 21st-century families. Jill Norman, *Make Do and Mend: Keeping Family and Home Afloat on War Rations* (Michael O’Mara Books, 2nd ed, 2014).

² Aaron Perzanowski, *The Right to Repair: Reclaiming the Things We Own*, (Cambridge University Press, 2022).

³ Productivity Commission, Right to Repair (Final Report, No 97, 29 October 2021) 2 (‘Right to Repair inquiry’).

of products, machinery, vehicles, and medical devices three options to exercise their R2R: (1) obtaining a repair from the original manufacturer or obtaining the services of an authorised service provider, (2) using an independent third-party service provider for the repair, or (3) attempting a do-it-yourself repair.⁴ This movement is pushing back against the repair barriers created by manufacturers of digitally enabled goods who use not only the intellectual property ('IP') in the embedded computer software to "lock-up" the goods — in effect, tying us to the manufacturers for our products' repair and service — but also physical, design, and technical barriers to inhibit repair.⁵ The R2R movement has gained even more support and attention from the general community during the COVID-19 pandemic as hospitals worldwide were reporting issues with the ongoing maintenance and service of crucial medical equipment.⁶ The ability to keep crucial medical equipment and technologies operational is not only limited to equipment and devices in a hospital setting but is also fundamentally important to those individuals in our community who rely upon medical devices and assistive technologies ('ATs')⁷ in their day to day lives. The ability to keep crucial medical equipment and technologies operational becomes an even more urgent issue for those Australians living in rural and remote regions of Australia.

The *Australian Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* was recently told of the difficulty of being a wheelchair user or needing a mobility device in a remote community.⁸

⁴ Marissa MacAneney, 'If It Is Broken, You Should Not Fix It: The Threat Fair Repair Legislation Poses to the Manufacturer and the Consumer' (2018) 92 (2) *St John's Law Review* 331, 333.

⁵ Kyle Montello, 'The Right to Repair and the Corporate Stranglehold over the Consumer: Profits over People' (2020) 22(1) *The Tulane Journal of Technology and Intellectual Property* 165. This is best explained by Montello who states, 'Manufacturers maintain that consumers own the hardware, but the manufacturers really own the software': at 166.

⁶ Shuhan He, Debbie Lai and Jarone Lee, 'The Medical Right to Repair: The Right to Save Lives' (2021) 3 (9) *The Lancet* 1260. See also, Laura Bliss, 'Broken Ventilators Add Momentum to 'Right to Repair' Movement', *Bloomberg* (online, 6 May 2021) <<https://www.bloomberg.com/news/articles/2021-05-06/right-to-repair-movement-gains-momentum-as-states-consider-bills#xj4y7vzkg>>; An-Li Herring, "'Right-To-Repair' Advocates Worry That Hospitals Can't Fix Broken Ventilators', *WESA* (online, 20 April 2020) <<https://www.wesa.fm/economy-business/2020-04-20/right-to-repair-advocates-worry-that-hospitals-cant-fix-broken-ventilators>>.

⁷ Assistive Technology ('AT') is any item, piece of equipment, software program, or product system that is used to increase, maintain, or improve the functional capabilities of persons with disability. David Sinclair, 'Right to Repair – Assistive Technology Perspective' (Speech, Australian Repair Summit, 5 August 2022).

⁸ Celina Edmonds, "'Desperate situations' of First Nations people with disability living in remote communities laid bare at royal commission", *ABC News* (online, 16 July 2022) <<https://www.abc.net.au/news/2022-07-16/royal-commission-ndis-first-nations/101239698>>.

A wheelchair suitable for the suburbs of Sydney, Melbourne or Brisbane does not do well on gravel of the outback of Australia, senior counsel assisting Patrick Griffin told the inquiry. Witness Ronita Jackamarra, a Yawuru woman from Fitzroy Crossing, gave evidence that she'd been waiting years for a new wheelchair and three years for a hoist to assist her to get into vehicles. Her mother, Topsy, said there was always "trouble" with her daughter's wheelchair and once when it broke down, she drove around the community looking for a discarded wheelchair to use for parts.⁹

These statements provide shocking insights into the lived experiences of First Nations Australians living in remote communities and highlights the need for greater rights to repair medical devices, particularly for Australians with disabilities. It is the challenges and opportunities that the repair of medical devices and assistive technologies pose for Australian hospitals, biomedical technicians, caregivers, and individuals that we wish to focus on in this article.

II REPAIRING MEDICAL DEVICES AND ASSISTIVE TECHNOLOGIES

There is no denying that Australian hospitals and their biomedical technical staff experience significant barriers to accessing reasonably priced repair services for their medical devices and assistive technologies.¹⁰ However, when thinking about the Right to Repair medical devices, it is important not only to focus on the medical equipment and devices in hospital settings but also on those medical devices and assistive technologies that individuals rely upon to participate fully in society.¹¹ Some individuals are faced with insurmountable problems when the medical equipment and assistive devices that give them mobility, accessibility, and increase their quality and participation in life break down or stop working. The consequence of a broken wheelchair or medical device is that the owner and user of that device becomes more

⁹ Ibid.

¹⁰ Department of Medical Technology and Physics – Sir Charles Gairdner Hospital, Submission No DR233 to Productivity Commission, *Right to Repair* (July 2021).

¹¹ The restricted ability to repair essential items such as wheelchairs and medical devices can render individuals unable to fully participate in society. For example, the *Human Rights Act 2019* (Qld) states that it is the right of every person to access health services, of every child to access education appropriate to their needs, and of every person to access further education 'that is equally accessible to all' based on their abilities: at ss 36-7. Queensland and the Australian Capital Territory are the only two Australian jurisdictions to have enacted human rights acts. The Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) and the *Anti-Discrimination Act 1977 No 48* (NSW) do not provide for the above rights. The *Human Rights Act 2004* (ACT) similarly states that it is the right of all children to access education appropriate to their needs, and of individuals to 'have access to further education': at s 27A.

vulnerable, rendering some individuals immobile and helpless. Put simply, people who depend on medical devices and assistive technologies to participate fully in society are disproportionately affected by the barriers imposed by manufacturers on repairing their devices.

While it is important to analyse the repair of medical devices from the perspective of the use and users involved, it is also advantageous to categorise medical devices in two ways. Firstly, medical devices that are effectively managed and facilitated by health professionals in their practice, including expensive medical devices used in hospitals.¹² Secondly, medical devices that are used by patients as consumers with minimal intervention by health professionals, such as assistive technologies and mobility equipment.¹³

A Repair of Medical Devices in Hospital Settings

Debate regarding the importance of the right to repair medical devices became headline news during the COVID-19 pandemic as the potentially life-threatening consequences of broken medical equipment were highlighted by frustrated hospital biomedical technicians who were struggling to keep ventilators operating.¹⁴ While hospitals and their staff being unable to repair their medical equipment is not a newfound challenge, it was highlighted and exacerbated by the tragic spread of COVID-19. The importance of being able to keep medical equipment functioning in times of crisis was reinforced by one commentator who put it very succinctly as *The Medical Right to Repair: The Right to Save Lives*.¹⁵ Inability to repair medical equipment can take many forms, including contractual limitations for purchasers and lessees; technological protection measures on software

¹² The department uses two categories: those directly used by health professionals such as MRI scanners and those where professionals facilitate the selection, such as pacemakers, or hip or knee replacements. See Department of Health, Submission No 121 to Productivity Commission, *Right to Repair* (February 2021) 6 ('Submission No 121').

¹³ These in some ways can further be distinguished from the second category above.

¹⁴ Isaac Scher, 'Hospitals need ventilators to keep severe COVID-19 patients alive. They might not be able to fix them without paying the manufacturer \$7,000 per technician', *Insider* (online, 4 June 2020) <<https://www.businessinsider.com/ventilator-manufacturers-dont-let-hospitals-fix-coronavirus-right-to-repair-2020-5>>.

¹⁵ He, Lai and Lee (n 6). See also, Industry Commission, *Medical and Scientific Equipment Industries* (Report No 56, 20 December 1996) <<https://www.pc.gov.au/inquiries/completed/medical-scientific-equipment/56medsci.pdf>>.

embedded in medical devices and equipment; restricted training, repair, parts, tools, manuals and information for bio-medical staff; and various intellectual property claims.¹⁶

The issue of repair of medical devices was brought to the attention of the Productivity Commission in its 2021 *Right to Repair inquiry* (Right to Repair inquiry').¹⁷ The Commission's brief was 'to examine the potential benefits and costs associated with the "right to repair" in the Australian context, including (current and potential) legislative, regulatory and non-regulatory frameworks and their impact on consumers' ability to repair products that develop faults or require maintenance.'¹⁸

The inability to repair medical devices was touched on in a number of submissions to the Productivity Commission ('Commission').¹⁹ It was highlighted in those submissions that the current Australian medical device regulatory regime may not necessarily discourage the right to repair but it may allow manufacturers to 'limit, restrict or prohibit the repair of the medical device'.²⁰ The *Therapeutic Goods Act 1989* (Cth) ('TGA') requires manufacturers, especially of medical devices, to show that they have taken all measures to 'eliminate or reduce risks as far as possible'.²¹ The TGA regulates the supply, import, export, manufacturing, and advertising of therapeutic goods to ensure that those available in Australia are safe and fit for their intended purpose. The Commission recognises that this requirement could effectively limit any incentive to allow independent repairs.²²

The range of submissions on the repair of medical devices made to the Commission highlighted an interesting dichotomy regarding the right to repair. The submissions made by medical manufacturers argued that medical devices must be excluded from any

¹⁶ Ofer Tur-Sinai and Leah Chan Grinvald, 'Repairing Medical Equipment in Times of Pandemic' (2021) 52(1) *Seton Hall Law Review* 459, 459.

¹⁷ On 29th October 2020, the Productivity Commission was commissioned to undertake a 12-month inquiry into the Right to Repair in Australia. *Right to Repair* (n 3).

¹⁸ The terms of reference were very broad. See 'Right to Repair: Terms of Reference', *Australian Government Productivity Commission* (Web Page, 29 October 2020)

<<https://www.pc.gov.au/inquiries/completed/repair/terms-of-reference>>. See also, Productivity Commission, *Right to Repair* (Draft Report, June 2021) iv. These broad terms encompassed many of the key issues that the US and EU approach to the right to repair were similarly grappling with.

¹⁹ 'Right to Repair: View Submissions and Brief Comments', *Australian Government Productivity Commission* (Web Page) <<https://www.pc.gov.au/inquiries/completed/repair/submissions>>.

²⁰ Submission No 121 (n 12).

²¹ 'Therapeutic Goods: A Quick Guide', *Parliament of Australia* (Web Page)

<https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/TherapeuticGoods>.

²² *Right to Repair inquiry* (n 3) 16.

‘right to repair’ considerations to ensure their ‘continued safety and effectiveness’.²³ Among other justifications, the argument rested on patient safety and preventing ‘unintended consequences’ arising out of third-party repairs.²⁴ However, it was accepted that medical device manufacturers most often block the owners or users of these devices from undertaking repairs, either independently or through third parties, due to the alleged risks posed to assistive devices because non-authorised repairers might not have all the relevant information and expertise to affect the repairs.²⁵

Although the concern of manufacturers is understandable, these concerns were not accepted as genuine concerns by the Commission, as they were unable to find any such significant risk.²⁶ The Commission considered this to be a detrimental trade-off, especially when it comes to the right to repair medical devices as each hospital would have well-trained bio-medical staff who could affect the repairs. They acknowledged that in the medical field such repairs would be incredibly time-sensitive and recommended that regulations should account for the low risk of repair. It was found that the current legal regime

fails to account for the potential harm from reduced access to repair services (such as delays in medical treatment and additional costs), particularly for time-sensitive procedures, or users that are highly dependent on their devices. In addition, risks are likely to be low for some devices, or for repairs by highly qualified independent repairers (including those employed by hospitals).²⁷

²³ Ibid; Medtronic Australasia Pty Ltd, Submission No DR186 to Productivity Commission, *Right to Repair* (23 July 2021) (‘Submission No DR186’).

²⁴ Submission No DR186 (n 24).

²⁵ The planned obsolescence is another strategy in medical devices, in which manufacturers may manufacture machines to have a shortened life span that would need replacing sooner than is necessary. This was also raised as a matter of concern. The issue of medical device obsolescence could be particularly harmful to Australians who are in vulnerable communities. This has resulted in increased health care expenditure on vulnerable people. The community of Australians with disabilities squarely falls within this category.

²⁶ *Right to Repair* (n 3) 128.

²⁷ Ibid 16. It was also found that the current legal regime under the *Therapeutic Goods Act and the Therapeutic Goods (Medical Devices) Regulations 2002* (Cth) does not address the right to repair medical devices; rather it is focused on the device’s marketability and safety. See also John McEwen, *A History of Therapeutic Goods Regulation in Australia* (Therapeutic Goods Administration, 2007) <<https://www.tga.gov.au/sites/default/files/history-tg-regulation.pdf>>.

In addition to the issues raised within the *Right to Repair* inquiry, the Commission's *Report on Government Services 2022* investigated how the right to repair medical devices would be relevant in the context of public hospitals, which focuses on public hospitals, also indicated where the right to repair medical devices may be relevant in the context of public hospitals.²⁸ The report rightly highlights that public hospitals' focus on equitable access, efficiency, timely delivery of high-quality and safe services, and reducing mortality and waiting times for patients, depends on the working conditions of high-quality medical equipment. This highlights the critical importance of their maintenance and repair. Delays or unreasonable expenditures on such repairs, therefore, become a public health issue.²⁹

B Assistive Technologies and Mobility Equipment

The challenges and opportunities for the medical right to repair are also illustrated through an examination of assistive mobility devices such as motorised wheelchairs and hoists (or devices that do not necessarily require health professional intervention). Unfortunately, the TGA's requirements are not particularly helpful when it comes to assistive technologies, as 'household and personal aids, or furniture and utensils for people with disabilities' are excluded goods for the purposes of the Act.³⁰

The cost of purchasing complex rehabilitation technology ('CRT'), such as wheelchairs, as well as AT's has become exorbitant.³¹ The increased expenditure is due to Medicare's unconsidered decision to abandon having fixed prices for competitive bidding, which has resulted in smaller wheelchair manufacturers and repairers going out of business. Larger

²⁸ 'Report on Government Services: 12 Public Hospitals', Australian Government Productivity Commission (Web Page, 1 February 2022) <<https://www.pc.gov.au/ongoing/report-on-government-services/2022/health/public-hospitals>>.

²⁹ Ibid. The report does not address this aspect, therefore, there is a need to gather data on challenges in hospitals due to being unable to repair on time and the expenditure of time and money.

³⁰ See *Therapeutic Goods (Excluded Goods) Determination 2018* (Cth) sch 1 item 9. Although the schedule uses broad terminology, assistive technology such as wheelchairs and 'scooters, walkers, crutches, prosthetic and orthotic devices, hearing aids, cognitive aids, voice recognition software, and hardware, screen readers, mobility devices that enable people with disability to play sports and be physically active, etc' may be broadly recognised as falling within this category. Department of Health, *Therapeutic Goods Administration, Consultation: Products used for and by people with disabilities: Options for amendment to the Therapeutic Goods (Excluded Goods) Determination 2018* (Report, September 2019).

³¹ 'My current hearing aid is really ugly and always have a loud noise that annoys me all the time, I know there is a [brand of] hearing aid that is much lighter and better designed than my current one, but it is too expensive, and my insurance does not cover the cost for that brand'. See Franklin Mingzhe Li et al, "I Choose Assistive Devices That Save My Face": A Study on Perceptions of Accessibility and Assistive Technology Use Conducted in China' (Speech, Conference on Human Factors in Computing Systems, 22 January 2021) <<https://arxiv.org/abs/2101.09348>>.

companies have bought up smaller sellers, leading to two United States firms dominating the CRT industry.³² Ultimately, the owners and users of these devices pay the price of this monopoly. Increased prices, less tailored services and excessively long waits for repairs and replacements are direct effects of this monopoly.³³ Whereas devices in the first category (those used by health professionals) are directly relevant to the provision of medical services, the second category (devices used by patients) highlights a host of other issues. For instance, a delay in repairing a wheelchair means that the wheelchair user is unable to fully participate in many facets of their daily life.

There are several obligations that are potentially violated when the repair of wheelchairs is inaccessible or delayed, as was highlighted by the Australian Human Rights Commission.³⁴ The National Disability Insurance Scheme ('NDIS')³⁵ provides a ray of hope. The NDIS has included the cost of repairs and maintenance of AT or medical devices used by people accessing NDIS plans, which is a welcome step.³⁶ However, the potential for delays or whether third parties or consumers themselves have the right to repair is yet to be further clarified. An issue with the NDIS scheme is that it only provides guidance with respect to ATs relevant for the consumer, such as when a situation calls for replacement rather than repair.³⁷ Given the breadth of evidence being provided to the current Disability Royal Commission about challenges experienced in accessibility and mobility support, particularly for rural and remote Australians with disabilities, it is beyond the scope of this article to provide a detailed analysis of all of the repair challenges facing individuals who rely on assistive devices and mobility equipment.

³² Paul Roberts, 'Two behemoths dominate the motorized wheelchair industry. Disabled customers pay the price', (May-June 2022) Mother Jones <<https://www.motherjones.com/politics/2022/05/motorized-wheelchairs-numotion-national-seating-mobility/>>.

³³ Ibid.

³⁴ *Access for all: Improving Accessibility for Consumer with Disability* (Australian Human Rights Commission, 2016) 4 <<https://humanrights.gov.au/our-work/employers/access-all-improving-accessibility-consumers-disability>> citing *Disability Discrimination Act 1992* (Cth).

³⁵ Functioning under the *National Disability Insurance Scheme Act 2013* (Cth).

³⁶ 'Assistive Technology Repairs, Maintenance and Replacement', *NDIS* (Web Page, 8 September 2022) <<https://www.ndis.gov.au/participants/assistive-technology-explained/assistive-technology-repairs-maintenance-and-replacement>>.

³⁷ Two further steps with respect to the right to repair medical devices are important: (1) gathering data on the effect of delayed or expensive repairs of medical devices used in hospitals, and the subsequent effect on health service provision; and (2) providing the right to repair specifically for assistive technologies such as wheelchairs, focusing on prompt repair facilities and considering the detrimental impacts of delays on daily life.

III THE NEED FOR REGULATORY REFORM FOR MEDICAL DEVICE REPAIR

To address the challenges posed by an inability to maintain and repair medical devices and ATs in Australia, it is essential that regulators pay heed to regulatory initiatives in other jurisdictions, particularly those that have occurred recently in the US. Interestingly, it was during the COVID-19 Pandemic in 2020, that the United States government attempted to regulate medical device repair by the introduction of *The Critical Medical Infrastructure Right-to-Repair Act of 2020*.³⁸ Although the Act was not successfully passed, the attempt might constitute the foundation upon which future legislators can build. It contained many positive provisions that Australian regulators should consider. The main features of the Act were three-fold. First, the Act had a limited timeline as it was only meant to cover the ongoing COVID-19 emergency. This shows commendable awareness and willingness to compromise on the fact that the right to repair is a complex issue that has multiple strongly contested viewpoints. Second, it restricted manufacturers' ability to rely on intellectual property rights or contracts when it came to repairing 'critical medical infrastructure'.³⁹ It also protected medical repairers from contractual limitations regarding repair.⁴⁰ Third, the Act required manufacturers to provide access to service materials, tools, and equipment necessary for the diagnosis, service, maintenance, and repair of critical medical infrastructure on 'fair and reasonable' terms.⁴¹ Despite the failure of this proposed regulatory regime, there has been more (though limited) success with the regulation of wheelchair repair in Colorado US.

On the 3rd of June 2022, State Representatives introduced a Bill that would provide some relief to wheelchair users in Colorado.⁴² The Bill will 'require manufacturers to provide

³⁸ Ron Wyden and Yvette Clarke, 'Wyden and Clarke Introduce Bill to Eliminate Barriers to Fixing Critical Medical Equipment During the Pandemic: Restrictions Can Prevent Medical Providers from Repairing Ventilators and Other Essential Equipment, Worsening Shortages; The Critical Medical Infrastructure Right-to-Repair Act will Allow Emergency Repairs During COVID-19 Crisis' (Press Release, Ron Wyden United States Senator for Oregon, 6 August 2020), cited in Tur-Sinai and Grinvald (n 16) 482. See also He, Lai and Lee (n 6).

³⁹ See Critical Medical Infrastructure Right-to-Repair Act of 2020, HR 7956, 116th Congress (2020) ss 3-5. These state that a 'covered service provider' could make copies of 'service materials' incidental to the repair or maintenance of critical medical infrastructure in response to the COVID-19 emergency. It also allowed for technological protection measures to be circumvented. Exemptions from patent law were also allowed regarding non-commercial use of critical medical infrastructure: at s 4473 § 4.

⁴⁰ Ibid § 5.

⁴¹ Ibid § 6.

⁴² This was passed with a landslide approval of 30-5 votes by the Colorado General Assembly. See Andrew Kenney, 'Wheelchair users could get the "right to repair" in Colorado as bill heads to governor's desk', *CPR*

parts, embedded software, firmware, diagnostic documentation, and more to consumers'.⁴³ The legislation allows wheelchair users to repair their wheelchairs through their own means or through independent repairers. The Bill mandates that the requisite parts, software, tools, manuals, and other documentation should be provided at a reasonable price.⁴⁴ For people living in rural areas, there is to be a separate wheelchair-related Bill to address alternative rates for repairs.⁴⁵ The Bill was signed into law on 2 June 2022⁴⁶ and while there was much excitement, there are a number of limitations that have been highlighted.⁴⁷ However, of relevance here is the fact that regulators have chosen to intervene in this field. While not the panacea for medical repair, this is a huge development for medical device repair both in the United States and in the rest of the world.

IV CONCLUSION

This article has highlighted the complex issues posed by the inability to repair medical devices and it concludes by proposing that, without recognising the right to repair, the inability to repair life-saving equipment and other medical infrastructure will continue to cause patients and individuals to suffer or, in some cases, lose their lives. The health of Australians should not have to wait for Australian regulators to recognise the important

News (online, 25 March 2022) <<https://www.cpr.org/2022/03/25/wheelchair-users-could-get-the-right-to-repair-in-colorado/>>.

⁴³ Angela Ufheil, 'How a Right to Repair Bill Could Speed Up Wheelchair Fixes' (8 April 2022) 5280 <<https://www.5280.com/2022/04/how-a-right-to-repair-bill-could-speed-up-wheelchair-fixes/>>. See also, Federal Trade Commission, *Nixing the Fix: An FTC Report to Congress on Repair Restrictions* (Report, May 2021).

⁴⁴ Kenney (n 43).

⁴⁵ *Ibid.* This bill requires a manufacturer to provide parts, embedded software, firmware, tools, or documentation, such as diagnostic, maintenance, or repair manuals, diagrams, or similar information, to independent repair providers and owners of the manufacturer's powered wheelchairs to allow an independent repair provider or owner to conduct diagnostic, maintenance, or repair services on the owner's powered wheelchair. A manufacturer's failure to comply with the requirement is a deceptive trade practice. In complying with the requirement to provide these resources, a manufacturer need not divulge any trade secrets to independent repair providers and owners. Any new contractual provision or other arrangements that a manufacturer enters into that would remove or limit the manufacturer's obligation to provide these resources to independent repair providers and owners is void and unenforceable.

⁴⁶ COPIRG, Colorado Governor signs Wheelchair Right to Repair Law into Law, 2 June 2022. See Alina Lee, 'Colorado governor signs nation's first Right to Repair wheelchair bill into law', *FOX 21 Local News* (online, 4 June 2022) <<https://www.fox21news.com/news/colorado-governor-signs-nations-first-right-to-repair-wheelchair-bill-into-law/>>.

⁴⁷ Markian Hawryluk, 'Despite a First-Ever "Right-to-Repair" Law, There's No Easy Fix for Wheelchair Users', *KHN* (online, 2 June 2022) <<https://khn.org/news/article/power-wheelchair-users-right-to-repair-law-no-easy-fix/>>.

role that the right to repair can play in their future. If Australians are not allowed the right to access reasonable repair for their medical devices and assistive technologies, this will continue to interfere not only with their sense of autonomy but with their human rights to access services and participate fully in society.⁴⁸ There is much for Australia to learn from jurisdictions such as the US that have attempted to come up with a meaningful and efficient solution to the current problem they are grappling with. A very good place for Australian regulators to start is to reflect upon the finding of the Productivity Commission that:

current regulations of medical devices ... *in the Therapeutic Goods (Medical Devices) Regulations 2002* [which] aim to minimise safety risks to patients and device users ... has the effect of encouraging manufacturers to restrict access to repair. The regulations do not appear to account for the potential harm from reduced access to repair services (such as medical delays and additional costs), or that risks are likely to be low for some devices or for repairs completed by highly-qualified independent repairers.⁴⁹

We believe that improving repair access for low-risk medical devices, or for highly-qualified independent repair technicians, is of the utmost importance to ensuring equity and access to quality healthcare for all Australians.⁵⁰ We conclude by urging the adoption of the Productivity Commission's recommendation, based on this finding, that there is an urgent need for Australia to 'conduct an independent public review of existing medical device regulations to assess whether they strike a balance between repair access and device safety that maximises community wellbeing.'⁵¹

⁴⁸ Tur-Sinai and Grinvald (n 16) 468.

⁴⁹ *Right to Repair* (n 3) 32.

⁵⁰ *Right to Repair* (n 3) 146.

⁵¹ *Right to Repair* (n 3) 32. The review should consider whether current regulations create incentives for manufacturers to restrict repair and examine potential ways to improve repair access for low-risk medical devices or for highly qualified independent repair technicians.

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REFORMIST TINKERING, THE QUEENSLAND LAW OF MURDER AND OTHER DISASTERS

SANTO DE PASQUALE* AND ADRIAN HOWE#

Two Victorians, long-term advocates of abolishing the provocation defence, discuss the ramifications of reformist tinkering with the law of murder that stops short of abolition. They register their despair at legislatures that hold fast to the so-called 'heat of passion' defence with reference to law reform and cases in Queensland and New South Wales. What, they ask, will it take for these two jurisdictions to enter the twenty-first century and follow all the other Australian states in abolishing a defence well past its use-by date?

Santo

Hi Adrian.

I know your work over the last decade or so has been almost exclusively on English intimate partner femicide cases, but I thought you might be interested in a recent Queensland case. Coming as we both do from Victoria where the provocation defence was abolished in 2004 — the second Australian jurisdiction to do so — it is devastating to have these conversations again, all these years later, about how courts should handle wife-killing cases. Sadly, I think it's essential that we repeat what we have been saying for the last 30 years - namely, that the provocation defence needs to be abolished.

Adrian

I'm guessing I already know why, but tell me anyway.

Santo

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Because it is an outrage that two decades after the abolition of provocation in most Australian jurisdictions, commencing in Tasmania in 2003 through to South Australia in 2020, Queensland, like New South Wales, is still refusing to follow suit, both preferring instead to make minor legislative changes. I recall you terming this ‘reformist tinkering’.

Adrian

Yes, I did back in 2004 when I was assessing the English Law Commission’s recommendations for reforming partial defences to murder.¹ Thankfully they were not implemented, the government opting to take the vastly preferable path of abolishing the provocation defence. It did so on the explicit ground that the defence was ‘letting men get away’ with murdering their women partners and former partners. No longer. Now that provocation is not available as a defence, most femicidal men are pleading guilty to, or are being found guilty of, murder.²

But I am getting ahead of your story. Tell me about your Queensland case. It’s been a while since I checked in on Australian provocation cases.³

Santo

The offender in *Peniamina* — I will limit my references to case names as I know you would much rather drum wife-killers out of the human race than ‘glorify’ them — and his wife, Sandra, were married with young children. After returning from a holiday overseas, he suspected her of having had an affair.⁴

On 29 March 2016, the two had an argument. Sandra demanded that he return her phone, which he claimed had messages from another man. Two days later, he killed Sandra.

¹ Adrian Howe ‘Provocation in Crisis — Law’s Passion at the Crossroads? New Directions for Feminist Strategists’ (2004) 21(1) *Australian Feminist Law Journal* 55.

² For a discussion of the English reforms of partial defences to murder which were implemented in 2009 over protests by the upper echelons of the judiciary see Adrian Howe, “‘Red Mist’ Homicide — Sexual Infidelity and the English Law of Murder (Glossing *Titus Andronicus*)” (2013) 33(3) *Legal Studies* 407.

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⁴ *Peniamina v R* (2020) 385 ALR 367, 378 [36] (Keane and Edelman JJ).

Adrian

I can hardly bear to hear it, but can you give me a brief run-down of what happened?

Santo

Of course, we only have his account. He claimed it all started when he found Sandra's second mobile phone, where he discovered more text messages and that the last conversation was with the same man.⁵

In a subsequent argument with her, he hit her. She proceeded to the kitchen where she grabbed a knife. He tried to take the knife from her but in doing so cut his hand. This made him 'more angry and more angry'. He then grabbed the knife from Sandra who tried once again to get away from him. At this point he resolved to kill her and commenced stabbing her.⁶

When Sandra fell to the floor, he continued stabbing her. One of the knife wounds to Sandra's face measured twelve centimetres and caused her nasal septum to be exposed. She lost a tooth.⁷ Somehow Sandra was able to get up off the floor and run to the driveway. But he found her and continued stabbing her in the head. In fact, he stabbed her over twenty times, kicking her as well. He then removed a concrete bollard from a garden bed and hit Sandra twice on the back of her head with it, fracturing her skull and killing her.⁸

At the crime scene, he claimed in a call to his mother and to attending police that Sandra had cheated on him 'too many times'.⁹

Adrian

How many times have we heard that same old exculpatory script?

Santo

⁵ Ibid 379, [40]-[41].

⁶ Ibid [43]-[44]. See also *R v Peniamina* (2019) 2 QR 658, 686 [97] (Applegarth J).

⁷ *Peniamina v R* (2020) 385 ALR 367, 379 [45] ((Keane and Edelman JJ)); *R v Peniamina* (2019) 2 QR 658, 658 (112) (Applegarth J).

⁸ *Peniamina v R* (2020) 385 ALR 367, 379 [43]-[44] ((Keane and Edelman JJ)). In the sentencing remarks following the offender's second trial, the sentencing judge, Davis J stated that the offender 'inflicted 29 sharp-force injuries': *R v Peniamina (No 2)* [2021] QSC 282, [11].

⁹ *R v Peniamina* (2019) 2 QR 658, 690 [114] (Applegarth J).

Too many.

Adrian

And how many times is 'too many times'?

Othello said his wife Desdemona 'hath the act of shame a thousand times committed' with her lover Cassio.¹⁰ He miscalculated by a factor of 1000, Desdemona being entirely 'innocent'. Nor have femicidal men let the facts get in the way of a compelling provocation by 'infidelity' narrative.

Anyway, tell me about the trial.

Santo

At his first trial...

Adrian

His first? How many were there?

Santo

Two. And two appeals. One for his conviction for murder in the first trial and a subsequent, successful appeal to the High Court. The whole process, from the fatal attack on Sandra to the second trial ordered by the High Court, took five years.

Adrian

Five years?

Santo

At his second trial the jury found him not guilty of murder. He then pleaded guilty to manslaughter.

¹⁰ William Shakespeare, *Othello, the Moor of Venice* in E A J Honigmann (ed), *Othello* (Arden Third series Cengage Learning, 1997) [5.2.209-210].

Adrian

Five years to work out whether stabbing someone 29 times and slamming a concrete bollard into their head was murder or manslaughter?

Santo

Getting back to his first trial. He invoked the partial defence of provocation in s304 of the *Criminal Code* (Qld). The section states:

When a person who unlawfully kills another under circumstance which, but for the provision of this section, would constitute murder, does the act which causes the death in the heat of passion caused by sudden provocation, and before there is time for person's passion to cool, the person is guilty of manslaughter only.

He claimed he lost self-control solely as a result of the cut occasioned to his hand when attempting to grab the knife from Sandra.¹¹

Adrian

'Heat of passion'. Who talks like that today? Which century are we in?

The 16th century? When the notion of 'heated blood' had become the 'key conceptual tool' for distinguishing cold-blooded murder from less serious spur of the moment killing prompted 'by the heating of the blood'?¹²

The 18th century? When Chief Justice Holt famously discussed whether killing without any provocation was murder even if committed 'of a sudden, and in the heat of passion'? Unlike many late modern commentators, he had no illusions about who was killing whom in so-called 'heated passion':

...when a man is taken in adultery with another man's wife, if the husband shall stab the adulterer, or knock out his brains, this is bare manslaughter: for jealousy is the rage of a man, and adultery is the highest invasion of property.¹³

¹¹ *R v Peniamina* (2019) 2 QR 658, 686 [95] (Applegarth J).

¹² See Jeremy Horder, *Provocation and Responsibility* (Clarendon Press, 1992) 7-12.

¹³ *R v Mawgridge* (1706) Kel 119, 137; (1707) 84 ER 1107. Enraged men have killed their allegedly adulterous wives far more frequently than their lovers over the centuries. But men have killed men, claiming 'heat of passion'. For example, in 1727 John Oneby killed a man in a sword fight occasioned by

‘Heat of passion’ is so Shakespearean: ‘I see, sir, you are eaten up with passion’.¹⁴ So Iago observed to Othello, suggesting he would have a classic ‘heat of passion’ defence had he stood trial for wife-murder. Never mind that most critical readings of *Othello* see the play as problematising the entire conceit of impassioned femicide.¹⁵ And, never mind decades of criticism of the operation of so-called ‘heat of passion’ defences in the context of intimate partner femicide, critiques which culminated in major shake-ups of the law of murder in many anglophone jurisdictions.

Santo

There’s more to s304. The ‘heat of passion’ or provocation defence is excluded under ss304(2) and (3) if the sudden provocation is based on words alone or, to use short-hand, if it is based on the deceased having changed or ended the relationship, other than in ‘circumstances of a most extreme and exceptional character’.¹⁶

Adrian

What a great step forward. Let me get it straight. The provocation defence is ‘excluded’ if a domestic partner leaves a relationship.

Santo

But not if the circumstances are ‘extreme and exceptional’.

Adrian

heated words. Deciding the case, Lord Chief Justice Lord Raymond elaborated on the early eighteenth-century judicial understanding of an excusatory ‘heat of passion’. He rejected the defence argument that killing taking place in ‘a sudden fighting in heat of passion’ was merely manslaughter. If there was ‘sufficient time for this passion to cool, and for reason to get the better of the transport of passion’, it was murder: *R v Oneby* (1727) 2 Ld Raym 1485, 1488-1489; 92 ER 465.

¹⁴ Shakespeare in Honigmann (ed) (n 12) [3.3.394].

¹⁵ For the deployment of *Othello* in a Theatre of Education project contesting excuses for femicide see Adrian Howe, ‘Dramatising Intimate Femicide — Petitions, Plays, Public Engagement (with a Shakespearean Gloss)’ (2014) 26(2) *Canadian Journal of Women and the Law* 276.

¹⁶ Section 304(3) of the *Criminal Code* (Qld) provided that the defence did not apply other than in circumstances of a most extreme and exceptional character if a domestic relationship existed between the two, one of them killed the other and the sudden provocation was based on anything done by the deceased or anything the person believed the deceased had done: to end the relationship; or change the nature of the relationship; or to indicate that the relationship may, should or would end, or that there may, should or would be a change to the nature of the relationship. As a result of the *Criminal Law Amendment Act 2017* (Qld), an offender invoking the provocation defence in the context of, inter alia, a domestic relationship, would need to establish that the circumstances were of an ‘exceptional character’ rather than the circumstances being of a ‘most extreme and exceptional character’.

So, there's an exception to an exclusion to the defence to murder. Heaven help the poor juries.

And by the way, this is exactly what wife-killers effectively say in 'departure' cases – that he found her leaving him 'extreme and exceptional'. After all, she was leaving him, possibly for another man, and that was unbearable.

Anyone who reads the case law will see that so-called 'domestic' homicides are overwhelmingly committed by men and that the vast majority of these cases involve femicidal men slaughtering women who have left them or are trying to leave them. Attempting to exclude exiting a relationship as an excuse for murder by fiddling with the law to restrict provocation will not work.

Santo

It is so easy to get around. Just change the defence narrative – very useful for astute defence lawyers. But we're getting ahead of ourselves.

In the case at hand, the prosecution argued that the events leading to Sandra's death were a continuation of the earlier confrontation when he hit her: he was angry that she wanted to leave and the exclusion in s304(3) applied.¹⁷ That is, it was a departure case, precisely the kind of case that the legislation was designed to ensure could not give rise to a provocation defence. Furthermore, Sandra was 'defending herself and she had every right to be concerned. She no longer wanted this in her life. She needed to get out'. Sandra's actions with the knife, alone, signified the end of their relationship.¹⁸

Adrian

Actually, it was a concrete bollard that ultimately ended their relationship. As we plunge into the minutiae of the reformed Queensland law, it is imperative that we to keep in mind what this man did to his wife.

Santo

Defence counsel maintained that the exclusion did not apply because loss of self-control was based solely on the brandishing of the knife. Although it was acknowledged that the

¹⁷ *R v Peniamina* (2019) 2 QR 658, 677 [57] (McMurdo JA), 691 [119] (Applegarth J).

¹⁸ *Ibid*, 678 [59] (McMurdo JA).

offender had been in a rage before entering the kitchen, it was this that 'tipped him over into a rage'.¹⁹ The defence also argued that the exclusion was negated because the circumstances of the provocation were of an 'exceptional character'.

Adrian

An exceptional character? There is nothing 'exceptional' about a woman wanting to leave a man and employing an object to defend herself against an assault. How much ink has been spilt about jealous and possessive men who kill their partners because of cases like these, because of alleged infidelity?²⁰

Anyway, go on.

Santo

The judge directed the jury that provocation was not available if the provocative act was based on anything that Sandra did, or that the offender believed she had done, to change the nature of their relationship. It was for the defence to satisfy them that the provocation was not based on something Sandra did to change the nature of the relationship.²¹ Nor would the defence apply unless the jury found that the circumstances were of a most extreme and exceptional character.

The judge reminded the jury of the defence position: the relevant provocative conduct was the raising of the knife and the cutting of the hand, these not being acts that Sandra did to change the relationship. Accordingly, if the jury concluded that the provocation was 'based on' this conduct, the verdict would be one of manslaughter.²² Ultimately, he was convicted of murder.²³

Adrian

Amen to that.

¹⁹ Ibid 691 [118] (Applegarth J).

²⁰ See, for example, Victorian Law Reform Commission, *Defences to Homicide* (Final Report, October 2004) 29-30.

²¹ *R v Peniamina* (2019) 2 QR 658, 692 [123] (Applegarth J).

²² Ibid 692 [124].

²³ Ibid 686 [93] (McMurdo JA).

Santo

Yes, but remember he did appeal.

He argued that the exclusion 'did not arise on the evidence' and complained of the jury directions.²⁴ It is worth setting out the reasoning of the judges, briefly. Essentially, it all turned on the meaning of 'based on' in s304(3).

Adrian

Please no.

Santo

The majority dismissed the appeal. Applegarth J considered that it was Parliament's intention that s304(3) would apply in a case such as this, as the deceased's attempt to leave the relationship formed the basis for the killing. Were it otherwise, an accused could avoid the operation of s304(3) by nominating the most immediate act of the deceased devoid of the earlier context.²⁵ Even if an accused might nominate an immediate act of the deceased for the sudden provocation, the evidence might be such that the sudden provocation was based on something else done by the deceased to change the relationship.²⁶

Adrian

This must all be so hard for a jury to follow. I have a law degree but am still struggling to decipher the legalese. But please continue.

Santo

Morrison JA considered that the matters contained in s304(3) could constitute a 'foundation' or 'basis' for an accused's loss of self-control even if a deceased had not done anything specifically to change the nature of the relationship or end it.²⁷ An example in this case was the offender's belief that Sandra was having an affair.²⁸ In any event,

²⁴ Ibid 687 [99] (Applegarth J).

²⁵ Ibid 699-701 [160]-[169] (Applegarth J).

²⁶ Ibid 703 [182].

²⁷ Ibid 667-668 [16]-[19] (Morrison JA).

²⁸ Ibid 668-669 [25].

Morrison JA was of the view that while an accused person might nominate a particular act as *causing* the sudden provocation, regard could nonetheless be had to the changing nature of the relationship.²⁹ Put differently, notwithstanding defence arguments about what caused the sudden provocation, the jury could still have regard to the matters set out in s304(3) to find that the sudden provocation was based on them such that the exclusion would apply.

McMurdo JA, in dissent, disagreed that s304(3) was engaged merely because the deceased's conduct occurred in the context of an end or a change to the relationship. Here, it was the defence case that there was a loss of self-control as a result of Sandra's conduct with the knife. On the defence case, this is what caused the sudden provocation and the jury ought not have been directed to consider the exclusion in s304(3). Sandra's conduct with the knife was not in itself an act to end or change the relationship.³⁰

Adrian

This really does beggar belief. You said there was another appeal?

Santo

Yes, the sole ground of appeal before the High Court was whether the operation of s304(3) was limited to the provocative conduct identified by the appellant as the cause of his loss of self-control.³¹

The majority allowed the appeal, substantially echoing the dissenting judgment in the lower court. They disagreed that the words 'based on' represented a wider connection than the words 'caused by'. Further, they saw no evidentiary foundation for Sandra's conduct with the knife being itself a thing done to change the relationship. Nor was it for the defence to prove that his loss of self-control was not based on anything done by Sandra to change the relationship.³²

²⁹ Ibid 668-669 [20]-[25].

³⁰ Ibid 684 [81]-[83] (McMurdo JA).

³¹ *Peniamina v R* (2020) 385 ALR 367, 393 [107] (Keane and Edelman JJ).

³² Ibid 376 [28] (Bell, Gageler and Gordon JJ).

Adrian

What about the dissent?

Santo

Interestingly, the dissenting judges thought it surprising that the issue of provocation was allowed to go to the jury at all:³³

It is, to say the least, distinctly arguable that no reasonable jury could have been satisfied on the balance of probabilities that an ordinary person who had assaulted his wife could so far lose his self-control by her attempt to defend herself that he could form and act upon an intention to kill her.

But the prosecution neither made that submission nor one that ‘no reasonable jury could have been satisfied on the balance of probabilities that the appellant had killed the deceased when he lost his self-control because she took up the knife rather than because of her perceived infidelity’.³⁴

Adrian

Sanity at last.

Santo

They also disagreed that the phrase ‘based on’ means ‘caused by’.

Adrian

Please, not again.

Santo

OK. Suffice to say they found it telling that the legislature had not used ‘caused by’ and had made a clear policy choice that ‘a loss of self-control founded upon a change, or the prospect of a change,’ in a relationship could no longer be an excuse to intentionally kill a domestic partner.³⁵

³³ Ibid 381 [56] (Keane and Edelman JJ).

³⁴ Ibid.

³⁵ Ibid 390 [97].

Accordingly, they had no difficulty in finding that s304(3) was engaged by the offender's very own admissions of anger at Sandra's alleged infidelity and withdrawal from the relationship and that his loss of self-control was due to his 'smouldering resentment'.³⁶

After a second trial for murder, the offender was convicted of manslaughter and sentenced to 16 years, eligible for parole upon serving 80% of his sentence.³⁷

Adrian

Manslaughter? On what basis?

Santo

It might have been that he did not have the requisite intention to kill or do grievous bodily harm for murder. But the judge considered there was overwhelming evidence of murderous intent and sentenced the offender on the basis that he lost self-control.³⁸

Adrian

Thanks for that summary, Santo. If I could make a few comments.

Santo

Please do. I have a few of my own!

Adrian

Not being familiar with the case, I decided to read it backwards from the post-trial comments of the judge presiding in the second trial.³⁹

Santo

It's relatively uncommon for a judge to write a paper about a case. Why, do you think?

³⁶ Ibid 392 [104].

³⁷ *R v Peniamina (No 2)* [2021] QSC 282 [53].

³⁸ Ibid [3]-[4].

³⁹ Justice Peter Davis, 'Provocation – where to now? The implications of the Peniamina case' (Conference Paper, Queensland Bar Association Annual Conference, 27 March 2022).

Adrian

It's clear why. He felt the need to address the negative media coverage of the case. He helpfully provided a sample of the hostile social media posts. They include:

"Why oh why are we going backwards to entertain this provocation bullshit?"

"Anyone with an ounce of humanity must surely be angry ... over the fact that a bloke who repeatedly stabbed and then beat a woman until she died escaped a murder charge."

"Jealousy as an excuse to bludgeon to death and get away with it in Queensland. So, to get away with murder, just say you were convinced they cheated."

"This 'provocation' law needs to change. 'You made me angry' is not a defence for taking someone's life. Civilised people know this."

"Disgusting. Unforgiveable. When will it end!? ... (P)erpetrators will often irrationally, obsessively, inaccurately accuse their wives or girlfriends of cheating. Hold him accountable."

"Provocation as a defence should be abolished!"

"Why the f... is the defence of 'provocation' still allowed???"

"His sentence was reduced because she defended herself and this enraged him? Is this what it is saying?"

"Australia in the Dark Ages still ...".

"Strengthen the Murder Law. It is now only manslaughter because she attempted to defend herself? Outrageous."⁴⁰

Santo

And what did the judge make of all of that?

⁴⁰ Ibid 12-13.

Adrian

He rejected the abolition option favoured by these commentators, citing the standard refrain that because Queensland has a mandatory life sentence for murder, that this would disadvantage a person in a domestic relationship 'legitimately provoked' into killing a partner because that person would face the same punishment as someone who had intentionally plotted and murdered a third party, perhaps even for money. Such a 'serious injustice', he said, would be 'intolerable'.⁴¹

What I find intolerable is that this line of argument is so frequently trotted out every time a femicidal man charged with murder is convicted of manslaughter. I call it 'the move'. However earnest and well-meaning it usually is, the move takes the form of a disavowal of the reality of intimate partner homicide. Diverting attention away from the most common cases of 'provoked' killings, namely intimate partner femicide, the move fixates on the case of the rare woman killer. No matter that, as the Queensland judge acknowledges, so-called 'domestic' homicides are overwhelmingly committed by men, the gender-neutral 'person in a domestic relationship' is code for a woman who kills a male partner in the course of a violent or abusive relationship. No matter that these are not provocation cases but rather, in most cases, departure cases in which a woman leaves or expressed a desire to leave a relationship as the victim in this case allegedly did. The 'movers' cite the statistics but then move straight to a rare or even simply hypothetical case of a battered woman killer who is 'legitimately' provoked.⁴² It would, they say, be unjust to her if provocation was abolished.

⁴¹ Ibid 34. He cites the Queensland Law Reform Commission to this effect: Ibid 32. See generally Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008). While it is beyond the scope of this article to canvass the merits of retention or abolition of mandatory life for murder, the Commission examined the competing arguments, including those in favour of retaining mandatory life for murder and abolishing the partial defence of provision: Report No 64, 421.

⁴² The move is by no means confined to non-feminist commentators. It occurs frequently in feminist critiques concerned about ensuring women killers have access to partial defences. For a recent example see the move from the *Clinton case*, appeals by three wife-killers convicted of murder, immediately to that of a woman who killed her husband in Heather Douglas and Alan Reed, 'The Role of Self-Control in Defences to Homicide: A Critical Analysis of Anglo-Australian Developments' (2021) 72 (2) *Northern Ireland Legal Quarterly* 271. I have long argued that the partial defence of provocation is an inappropriate vehicle for protecting women who kill violent male partners in self-defence. See Howe, 'Reforming Provocation (More or Less)' (1999) 12(1) *Australian Feminist Law Journal* 127, 134.

Santo

Indeed. I note that the introduction of s304 in 2011 had its genesis in a Queensland Law Reform Commission recommendation. While troubled by men's disproportionate use of provocation in departure cases, it did not recommend abolishing provocation partly out of a similar concern held for battered women.⁴³

Adrian

The intention is laudatory, at least in the feminist critiques, but the effect disastrous. As occurs over and over again, retaining partial defences, indicatively provocation for the very rare, battered woman killer, entails making it available for the far larger number of femicidal men. And, what needs to be emphasised is that women who kill male partners rarely, if ever, do so because they were 'provoked' by a man's 'nagging and shagging'. In intimate partner homicide cases, the provocation defence operates in a profoundly sex-specific way. It is the woman who provokes because that is what women do, so the historically mandated cultural and legal script goes.

Santo

That's exactly what happened in Victoria where a new defence of defensive homicide was abolished within a few years of its introduction in 2005. It was found there was 'clear evidence' that the defence was primarily relied upon by men and that they killed in circumstances that were 'very similar to those where provocation previously applied'.⁴⁴

Adrian

There are many other examples of this kind of reformist tinkering with the law of murder, the Queensland case being the most recent instance of a well-intentioned reform going wrong.

⁴³ Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, September 2008) above note 41, 473-4, 480. Section 304(3) was introduced by the *Criminal Code and Other Legislation Amendment Act 2011 No 7* (Qld).

⁴⁴ Department of Justice Victoria, *Defensive Homicide: Proposals for Legislative Reform: Consultation Paper-Criminal Law Review* (2013) viii. See also Danielle Tyson and Bronwyn Naylor (2019) 'Reforming Defences, An Australian Case Study' in Adrian Howe and Daniela Alaattinoğlu (eds) *Contesting Femicide – Feminism and the Power of Law Revisited* (Routledge, 2019).

Santo

I recall the Victorian Law Reform Commission toying with the idea of retaining provocation by excluding its availability in certain circumstances, for example, if the context for the killing was sexual intimacy or spousal homicide. The Commission, drawing upon the academic literature, determined that the provocative conduct would simply be recast by defence lawyers to sidestep the exclusion. Apropos the complexity of the Queensland provision, the Commission shrewdly observed that this approach ‘may also further complicate what is an already extremely complex test’.⁴⁵

Adrian

The situation in New South Wales — the only other Australian jurisdiction to retain the provocation defence — is hardly any better. It’s a toss-up which State has the most reactionary criminal law jurisdiction. I recall a case in New South Wales late last year where the killer was able to successfully invoke the so-called ‘homosexual advance defence’ (HAD) as part of his defence that he was provoked.

Santo

That case — *R v Cust* — bore such an uncanny resemblance to all those HAD cases we wrote about years ago.⁴⁶ In that case, Jesus Bebita was found dead in his unit, having suffered 47 knife inflicted injuries.⁴⁷ The killer, a former work mate who had arranged to stay with him, claimed that after imbibing a few drinks he awoke to find Jesus trying to ‘rape’ him. He admitted stabbing Jesus several times and attempting to conceal the crime by setting a doona alight.⁴⁸ The jury returned a guilty verdict to alternative charge of manslaughter by reason of the partial defence of ‘extreme provocation’ in s23 of the *Crimes Act 1900*

⁴⁵ Victorian Law Reform Commission, *Defences to Homicide* (n 22) 43-47 citing Jenny Morgan, ‘Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them’ (1997) 21(1) *Melbourne University Law Review* 237; Santo De Pasquale, ‘Provocation and the Homosexual Advance Defence: The Deployment of Culture as a Defence Strategy’ (2002) 26(1) *Melbourne University Law Review* 110, 139.

⁴⁶ See Adrian Howe, ‘More Folk Provoke Their Own Demise (Revisiting the Provocation Law Debate, Courtesy of the Homosexual Advance Defence)’ (1997) 19(3) *Sydney Law Review* 336; De Pasquale (n 47) 139.

⁴⁷ *R v Cust* [2021] NSWSC 1515, [24], [27].

⁴⁸ *Ibid* [12], [14]-[16], [18].

(NSW).⁴⁹ He was sentenced to six years' imprisonment with a non-parole period of four years and six months.⁵⁰

Adrian

I had thought that serious consideration had been given to abolishing provocation in New South Wales?

Santo

While abolition was in the Terms of Reference of the Select Committee's inquiry into the Partial Defence of Provocation, it ultimately recommended retaining the partial defence out of concern for women suffering from long-term domestic abuse who would have difficulty establishing self-defence.⁵¹

Adrian

There's 'the move' again.

Santo

The law was reformed in 2014 to exclude certain conduct from constituting extreme provocation, namely, if the deceased's 'conduct was only a non-violent sexual advance' or the 'accused incited the conduct in order to provoke an excuse to use violence against the deceased.' Another precondition for extreme provocation is that the deceased's conduct is a serious indictable offence.⁵² These threshold requirements appear to have been met in the New South Wales HAD case as the offender's account — that Jesus sexually assaulted him — was accepted.⁵³

⁴⁹ Ibid [1].

⁵⁰ Ibid [89].

⁵¹ See Select Committee on the Partial Defence to Provocation, *Partial Defence of Provocation* (Final Report, April 2013) pt IV, 2 and 87-88. See further, pt X, 5 and, in particular, the discussion at 74-77.

⁵² See *Crimes Act 1900* (NSW) ss 23(2)-(3) as inserted by the *Crimes Amendment (Provocation) Act 2014* (NSW).

⁵³ *R v Cust* [2021] NSWSC 1515, [41]. Specifically, the offender claimed that he awoke to find that his pants were down, and Jesus was rubbing his penis against him: [16].

Adrian

I presume there was good evidence of a violent attack? If so it would surely be a matter of self-defence rather than ‘provocation’?

Santo

It does not seem that there was any ‘violent’ attack to ground self-defence. Anyway, stabbing Jesus multiple times, also while in pursuit of him, might not be seen as a ‘reasonable response’.⁵⁴ Theoretically, ‘excessive self-defence’, which is available as a partial defence to murder in New South Wales, could have applied but the offender would have needed to show that his homicidal conduct (when Jesus was attempting to flee) was ‘necessary’ to defend himself.⁵⁵

Adrian

Yes, it is clear why provocation serves as the far superior excuse for these men. All in all, it would appear that New South Wales represents yet another failure of reformist tinkering with the law, in this case ensuring that a sexual advance cannot ground a provocation defence.

Santo

Interestingly, the Select Committee had recommended excluding provocation in ‘wife-killing’ cases,⁵⁶ using the same language in s304(3) and, which we have seen, failed in *Peniamina*.

Ironically, the Select Committee’s recommendation was expressly rejected by the New South Wales Government as it considered the proposal ineffectual. It cited the United Kingdom example of *R v Clinton* to demonstrate that excluding conduct such as infidelity or ending a relationship is problematic. There, provocation arose based on the impugned conduct combined with other ‘provocative’ acts, this constituting the ‘whole context’ of the killing.⁵⁷

⁵⁴ Ibid [41]. See *Crimes Act 1900* (NSW) s 418 for the pre-requisites for self-defence.

⁵⁵ *Crimes Act 1900* (NSW) s 421.

⁵⁶ Select Committee on the Partial Defence to Provocation, *Partial Defence of Provocation* (n 53) 203.

⁵⁷ *R v Clinton* [2013] QB 1 cited in New South Wales Government, *Government Response* to the report of the Legislative Council Select Committee on the *Partial Defence of Provocation* (2013).

Adrian

The judgment in *Clinton*, appeals by three more wife-killers, was certainly problematic, - a last gasp attempt to bring back 'sexual infidelity' as relevant to the new loss of control defence despite its express legislative exclusion as a trigger for loss of control.

All that it achieved was a new trial in which the offender pleaded guilty to murder and had his sentence cut from 26 to 20 years. It has not assisted other femicidal men in their bids for manslaughter convictions on the basis of loss of control.⁵⁸ Instead, post-reform cases have exposed 'infidelity' cases to be overwhelmingly exit cases, with juries convicting femicidal men of murder in most cases. And astonishingly, some judges are using their sentencing remarks to confirm a woman's right to leave a relationship without paying for it with her life. The evidence of the post-reform case law is that the English law reform abolishing provocation and expressly excluding sexual infidelity as a trigger for loss of control is having its intended effect. Most men are no longer getting away with murdering their wives and women partners.⁵⁹

In short, abolishing provocation as a defence to murder is, for the most part, working as the reformers intended in England and Wales – namely, stopping men getting away with murder.⁶⁰

Santo

Certainly there are cases that provide catalyst for change. South Australia only abolished provocation in 2020 on the back of a law reform report responding to the High Court's decision in another HAD case, *Lindsay v The Queen*.⁶¹ In that case, two men were jointly charged and tried with the murder of Andrew Negre and the offender was so convicted.⁶²

⁵⁸ Lord Chief Justice Lord Judge, who presided in *Clinton*, had been a virulent opponent of the reforms banning sexual infidelity as an excuse for murder. For a critique of *Clinton* see Adrian Howe 'Enduring Fictions of Possession – Sexual Infidelity and Homicidal Rage in Shakespeare and Late Modernity (glossing *Othello*)' (2012) 21 *Griffith Law Review* 772.

⁵⁹ See the analysis of the post-*Clinton* cases in my chapters in Howe and Alaattinoğlu, (n 46).

⁶⁰ My analysis of post-reform cases reveals that the reforms are working as intended inasmuch as few femicidal men are getting away with murder in England and Wales today: *Ibid*.

⁶¹ (2015) 255 CLR 272. See *Statutes Amendment (Abolition of Provocation and Related Matters) Act 2020* (SA) and South Australian Law Reform Institute, *The Provoking Operation of Provocation: Stage 1* (Final Report, April 2017) viii.

⁶² The other was acquitted but convicted of assisting him: see *R v Lindsay* (2014) 119 SASR 320, 324[5] (Gray J).

Adrian

What happened this time?

Santo

After meeting at a tavern, the two men returned to the offender's family home where others, including the offender's co-accused, were gathered. Negre allegedly approached the offender, straddling his legs and making a thrusting motion with his hips. The offender threatened to hit Negre. Negre replied he was joking.⁶³

Adrian

That was the homosexual advance?

Santo

Not quite — there was more.

Negre stayed the night at the offender's house where he fatally stabbed Negre after he allegedly said to the offender that he would pay to have sex with him.⁶⁴

Adrian

That was the homosexual advance?

Santo

Yes, unbelievably. I mean, to start with, a witness saw the offender wearing gloves. Then there was evidence of the offender asking his co-accused to hold Negre down while he rifled through Negre's pockets. Further, when the same witness told the offender to let Negre go, the offender said that he couldn't as Negre would 'call the cops.'⁶⁵

Bizarrely, it was the trial judge who left provocation to the jury. The actual defence at trial was that the offender did not attack or stab Negre.⁶⁶

Adrian

⁶³ Ibid 324 [8]-[10] (Gray J), 349-350 [100]-[107] (Peek J).

⁶⁴ Ibid 325 [12] (Gray J), 350 [109]-[110] (Peek J).

⁶⁵ Ibid 325 [13] (Gray J).

⁶⁶ Ibid 329 [21]-[22].

How can you be provoked to do something you said you didn't do?

Santo

Precisely! The trial judge directed the jury that the offender would be guilty of manslaughter if they were satisfied that the offender, as a result of the victim's conduct, suffered a sudden and temporary loss of self-control. He drew on defence arguments that the offender may have lost self-control as he was, inter alia, 'Aboriginal', 'not homosexual', and had been met with an 'unwanted sexual advance.'⁶⁷

Adrian

Ah, the 'cultural defence', racialising the offender as more volatile, less self-controlled than benchmark white men.⁶⁸

I find it significant that the jury returned a verdict of murder. Tell me about the appeal.

Santo

The appeal complained, in general, of the jury directions in relation to provocation.⁶⁹

Although the South Australian Court of Criminal Appeal unanimously dismissed the appeal, Peek J made specific reference to the authorities and the 'extensive academic literature' — none of which was cited — in concluding that no reasonable jury in 21st century Australia could 'find that an ordinary man would have lost self-control' so as to 'attack the deceased in the manner' he did.⁷⁰

Undeterred, the offender appealed to the High Court. Unfortunately, that judgment provides yet another example, if one more was needed, of all that is wrong with retaining a homophobic laden provocation defence. Interestingly, one of the grounds of appeal to

⁶⁷ Ibid 331-2 [29]. Defence counsel contended that the evidence of the co-accused gave rise to provocation: Ibid 325 [19]. The facts that formed part of the provocation to prove that the offender had an intention to kill would have also enlivened the defence.

⁶⁸ See the account of how law figures offenders as 'always already white' and how this played out in *Lindsay* in Kent Blore, 'Lindsay v The Queen: Homicide and the Ordinary Person at the Juncture of Race and Sexuality' (2018) 39(1) *Adelaide Law Review* 159, 171-172.

⁶⁹ *R v Lindsay* (2014) 119 SASR 320, 346-7 [88] (Peek J).

⁷⁰ Ibid 380[236].

succeed in the High Court was that the court had wrongly taken into account the 'unidentified academic literature'.⁷¹

Adrian

They weren't referring to us, were they?

Santo

Not just us as it turns out.

The majority judgment, citing our work and the work of others, misstated our critiques of the provocation defence as revealing a distrust of the jury and their 'gendered' and 'heterosexist' verdicts.⁷²

Adrian

Really? I thought we made it clear we were problematising the law and judicial attitudes to provocation, not jury verdicts?

Santo

We were.

Adrian

But it seems we need to do so again. So here it is once again. The problem we have addressed and highlighted in our analyses of provocation cases rests with the law, not with juries. Occasionally juries will return what we regard as a perverse verdict in a case where a woman has been killed by a male partner. Almost always this occurs in cases where provocation is available.⁷³

⁷¹ *R v Lindsay* (2015) 255 CLR 272, 275 [3] (French CJ, Kiefel, Bell and Keane JJ).

⁷² Ibid 281-2 [22] (French CJ, Kiefel, Bell and Keane JJ). See further note 65 of the judgment and the references to the following works: Adrian Howe, 'Green v The Queen – The Provocation Defence: Finally Provoking its Own Demise?' (1998) 22 *Melbourne University Law Review* 466; Sarah Oliver, 'Provocation and Non-violent Homosexual Advances' (1999) 63 *Journal of Criminal Law* 586; Rebecca Bradfield, 'Provocation and Non-violent Homosexual Advances: Lessons from Australia' (2001) 65 *Journal of Criminal Law* 76; De Pasquale (n 47); Stephen Gray, 'Provocation and the Homosexual Advance Defence in Australia and the United States: Law Out of Step with Community Values' (2010) 3(1) *The Crit: A Critical Legal Studies Journal* 53; Kate Fitz-Gibbon, *Homicide Law Reform, Gender and the Provocation Defence: A Comparative Perspective* (Palgrave, 2014).

⁷³ My analysis of the post-reform English intimate partner femicide cases reveals that juries rarely returned manslaughter verdicts in intimate partner femicide cases where self-defence was raised. But these were

Santo

Perverse verdicts aside, the jury in the *Lindsay* case saw through the defence: they convicted him of murder. But getting back to the High Court judgment, the court did think that a jury could be satisfied that an ordinary person in contemporary Australia would have responded as the offender did.⁷⁴ In expressing this view, the majority referred to the court's earlier decision in that other lamentable HAD case, *Green v The Queen*.⁷⁵

For the majority, what was most relevant was that an offer of money for sex made:

by a Caucasian man to an Aboriginal man in the Aboriginal man's home and in the presence of his wife and family may have had a pungency that an uninvited invitation to have sex for money made by one man to another in other circumstances might not possess.⁷⁶

Adrian

Pungency — racialising an Aboriginal offender as more easily provoked, less self-controlled, is a risible othering practice that itself has a pungent smell about it.⁷⁷

Santo

Equally problematic is the insinuation that the defence in this case was not redolent of homophobia due to the accused's attributes or circumstances. We had already observed this phenomenon years ago when discussing *Green*. There the so-called 'sexual abuse factor', an accused's memory of (hetero) sexual abuse, was seen as highly relevant to the provocation.⁷⁸

outliers, the exceptions proving the rule that when provocation is abolished, murder convictions usually follow in these cases. There is no evidence to support speculation that removing provocation would simply lead to the same problems occurring in self-defence. See my chapters in Howe and Alaattinoğlu, [n 46].

⁷⁴ *Lindsay v The Queen* (2015) 255 CLR 272, 286 [35] (French CJ, Kiefel, Bell and Keane JJ).

⁷⁵ (1997) 191 CLR 334.

⁷⁶ *Lindsay v The Queen* (2015) 255 CLR 272, 287 [37] (French CJ, Kiefel, Bell and Keane JJ). Nettle J, in a separate concurring judgment put it more bluntly, observing that a jury might have inferred that because 'the appellant is Aboriginal, he perceived the deceased's conduct towards him to be racially-based and for that reason especially insulting': at 300 [81].

⁷⁷ For a critique of the use of a so-called 'cultural defence' for an Aboriginal offender see Adrian Howe, 'R v *Wunungmurra*: "Culture" as Usual in the Courts' (2009) 30(1) *Australian Feminist Law Journal* 163 referencing Volpp's scathing account of the deployment of cultural defences for minority ethnic men in the United States: Leti Volpp '(Mis)identifying Culture; Asian Women and the "Culture Defence"' (1994) 17 *Harvard Women's Law Journal* 57.

⁷⁸ Howe above note 72, 476; De Pasquale (n 47) 139.

Adrian

Ah *Green*. Who can forget Gummow J's brilliant dissenting judgment calling for a 'credible narrative' to be told before provocation be left to the jury.⁷⁹

Getting back to the case at hand: what did that jury decide?

Santo

He was found guilty of murder at his second trial too.⁸⁰

Adrian

Juries usually do return murder verdicts, especially in jurisdictions that have abolished provocation. One did so even in your Queensland case where they had to wade through complex legislation to determine if knifing a woman 29 times and smashing her head in with a bollard was murder.

The suggestion in the majority judgment in *Lindsay* that our work critiquing the provocation defence reveals a distrust of the jury is nowhere supported by a reading of what we have argued. Indeed, none of the work cited in their misleading footnote 65 sheeted the problem to juries. Nor, for that matter, do the social media commentators in the Queensland case. The issue to be addressed, as we *all* make clear, is the law of provocation itself.

And there is yet another misreading of the critiques of the provocation defence, namely Justice Davis' response to the social media commentators. He claims it was the fact that this killer's attack on his wife 'seemingly went on forever' was what 'probably most caused public concern'.⁸¹ This misreads the comments he cites. They target the law of provocation itself – this 'bullshit' law should be abolished. Strengthen the law of murder. Why is provocation still allowed? There's not a word about the jury.

⁷⁹ *Green v The Queen* (1997) 191 CLR 334, 377 (Gummow J), quoting *Lee Chun-Chuen v The Queen* [1963] AC 220, 231-2 (Lord Devlin).

⁸⁰ Incidentally, he did appeal once more and again with a complaint about the trial judge's directions to the jury in relation to provocation. That appeal was also dismissed: see *R v Lindsay* (2016) SASR 362.

⁸¹ Davis (n 41) 31.

With such wilful misreading of critiques of the defence passing as reasoned argument, it is Groundhog Day when it comes to dealing with provocation's ardent defenders.

I also have a comment about the minority judgment's criticism in *Peniamina* of the prosecution's 'unnecessarily complicated' case. It is the prosecutor's job to anticipate, prepare for and rebut defence arguments that victims provoke their own demise.

Accordingly, given all the trenchant criticism over the last three decades of the very idea that a woman knifed or bludgeoned to death by her husband bears some blame for her own death and given all that we now know about the usual circumstances of their deaths, surely questions need to be asked about a prosecution case that fails to secure a murder verdict.

Furthermore, I read the minority judgment as, in effect, a critique of legislative tinkering of the provocation defence. All that was needed in the case was a submission to the judge that no reasonable person would have lost control in the circumstances alleged, namely, that the victim was trying to defend herself from a vicious attack.

But a vastly preferential option is to catch up with the other States and abolish provocation and not simply as a defence. It is not enough to merely abolish the partial defence, as defence lawyers can argue lack of intent, as has occurred in Victoria.⁸² Even when murder convictions are secured, the victim's 'provocation' can still be relied upon at sentence as a mitigating factor. Victim-blaming lives on there.

The wider issue needs to be addressed: the entire conceit of a 'provoked' killing must be contested, especially in the context of intimate partner femicide. If historically, 'heat of passion' was seen as a laudable concession to 'human frailty', the merest glance at centuries of case law exposes that frailty to be, specifically, men's frailty, when confronted with women who want to leave them. Your Queensland case leaves us stuck in the Dark Ages.

Santo

I wonder if Sandra's unspeakable death at the hands of her partner will be the catalyst for Queensland to become the next State to abolish provocation? Certainly, the unpalatable,

⁸² See generally Tyson and Naylor (n 46).

almost incomprehensible legalese of the appellate court judgments illustrates all that is wrong with meticulously crafted exceptions to the antiquated 'heat of passion' defence. They inevitably fail in all their complexity.

Adrian

Agreed. Of course, this is not to say that complexity inevitably makes for bad law. But it does in murder cases. Simply put, it makes for a situation such as this where knifing a woman multiple times and hitting her over the head with a concrete bollard can be regarded as less than murder. It cannot be emphasised enough that it is the availability of provocation and the reformist tinkering aimed at restricting it that leads to such an appalling outcome, one attracting so much critical attention in the media, possible.

Santo

Yes. Factually, the case is a simple and oft-repeated one: a possessive and jealous man killed his partner. Yet because of some very technical drafting, coupled with a misguided aim of retaining provocation for the betterment of others, a five-year legal squabble ensued, all for the purpose of determining if a husband's rage over a cut to his hand was, as the defence argued, manslaughter. Or that a wife wanting to leave her husband, as the prosecution contended, meant that he ought properly be convicted of murder.

What better example is there than *Peniamina* of the failure of reformist tinkering with the law of homicide to achieve its stated goal of tightening the provocation defence?

Santo & Adrian

Lest we forget what that man did to his wife.

Lest we forget the ferocious knife attack.

Lest we forget the concrete bollard.

We conclude by recalling Judge Coleridge's apt words in the famous 1837 provocation case of *Kirkham*: '(T)hough the law condescends to human frailty, it will not indulge

human ferocity. It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions'.⁸³

We submit that it's past time that Queensland legislators took these words on board. It is incumbent on them to take a close look at what passes for justice in femicides committed in the 'heat of passion' today.⁸⁴ As Victorian abolitionists, we implore Queensland to consign the provocation defence to history. Avert the gaze from the rare battered woman killer. Focus instead on the lethal violence meted out to women on a weekly basis in Australia by femicidal men claiming 'provocation'. Abolish it as a defence to murder forthwith.

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⁸³ *R v Kirkham* (1839) 8 Car & P 115, 119; 173 ER 422. For some women the glass ceiling is 'like a concrete block': Rachel Noble quoted in Tory Shepherd, "May the best spy win': Australia's intelligence chiefs open up on cyber threats – and feminism", *The Guardian* (online, 2 September 2022) <<http://www.theguardian.com/technology/2022/sep/02/may-the-best-spy-win-australias-intelligence-chiefs-open-up-on-cyber-threats-and-feminism.html>>. For Sandra Peniamina a concrete bollard was a death sentence. For an assessment of how successful English courts have been in holding impassioned femicidal men to account over the centuries see Adrian Howe, *Crimes of Passion Since Shakespeare – Red Mist Rage Unmasked* (Routledge, forthcoming).

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PRESERVING HUMAN DIGNITY IN THE AGE OF AUTONOMOUS WEAPON SYSTEMS

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The regulation of autonomous weapon systems has long been a nebulous topic for lawmakers. It has attracted contentious and prolonged debate within the international community, with no sign of a resolution in sight. Among the many dilemmas, is the ethics of autonomous weapons and whether autonomous weapons can ever be developed and regulated in a manner which preserves human dignity. This is rooted in the key tenets of international humanitarian law, particularly the principle of 'humanity' which prohibits the infliction of superfluous suffering, injury, and destruction when it is not necessary for military purposes. The issues concerning human dignity are central to discussions on the legality of autonomous weapons which take humans out of the loop because such weapon systems alter the means and methods of warfare in ways that are not encompassed by the traditional laws of war. This article considers these issues and explores the notion of human dignity in the autonomous weapons debate, the concept of 'meaningful human control' which has dominated discussions on the use and deployment of autonomous weapons and whether the international community can progress towards a guiding framework for regulating autonomous weapons which incorporates considerations of human dignity and meaningful human control.

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I INTRODUCTION

The development and use of autonomous weapon systems (‘AWS’) has been subjected to prolonged and contentious debate. It presents one of the most legally elusive challenges to international humanitarian law (‘IHL’) and our existing assumptions and traditional interpretations of the law. An Autonomous Weapons System is a weapon system that exercises autonomy in the critical functions of selecting, attacking, acquiring, and tracking targets. An example of an AWS could be armed drones that are currently remote-controlled by human operators. The prospect of taking humans ‘out of the loop’ of decisions in combat ignited the modern discourse on the applicability of AWS to the tenets of the laws of armed conflict (‘LOAC’). These tenets including distinction, military necessity, proportionality, and unnecessary suffering have been used as a practical guiding tool to examine the legality of AWS.¹ Under Article 36 of Additional Protocol I to the Geneva Convention, States are obliged to review their new weapons to ensure they comply with IHL regulations, however, the unprecedented nature of AWS complicates

¹ Marco Sassòli ‘Autonomous Weapons and International Humanitarian Law: Advantages, Open Technical Questions and Legal Issues to be Clarified’ (2014) 90 *International Law Studies* 308, 310.

this form of assessment.² One of the key dilemmas in the regulation and legalisation of AWS is the value of human dignity and whether such an attribute can be maintained in the age of AWS. Human dignity is a classical concept of public international law, but as will be elucidated later in this article, is a nebulous concept among lawmakers in international humanitarian law. This article will explore the right to human dignity in the legal debate surrounding the regulation of AWS, with an examination of the *Martens Clause*, a customary principle of international humanitarian law. As a principle of customary international humanitarian law, the Martens Clause is sometimes interpreted as a baseline of protection for civilians and combatants in warfare when no specific treaty law exists.

This article will explore this first by providing a brief overview of what an autonomous weapon system is for the purpose of this article. It will then delve into the concept of human dignity under the law and particularly through the concept of the *Martens Clause*.³ The *Martens Clause* is inextricably linked to discussions about morality and human dignity because the first limb of the *Martens Clause* encapsulates the ‘principles of humanity’. The phrase ‘principles of humanity’ has a specific meaning in the context of IHL, where it refers to the idea that the methods and means of warfare available to the warring parties are not unlimited.⁴ Third, this article will elucidate how the concept of human dignity has been conceptualised in the AWS legal debate through the notion of ‘meaningful human control’. Finally, this essay assesses how meaningful human control, which incorporates the concept of human dignity, can be reconciled with the development and use of AWS in warfare.

II AUTONOMOUS WEAPON SYSTEMS

² Group of Governmental Experts of the High Contracting Parties, International Committee of the Red Cross, *Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, GGE.1/2018/3, 6th item, 9-13th April, 5; Thompson Chengeta, ‘Are Autonomous Weapon Systems the Subject of Article 36 of Additional Protocol I to the Geneva Conventions?’ (2017) 23(1) *UC Davis Journal of International Law and Policy* 65, 66.

³ Hague Convention No. II – Laws and Customs of War on Land, adopted 29 July 1899, (entered into force 4 September 1900) article 23(e).

⁴ Dr Hans-Peter Gasser, ‘International Humanitarian Law and the Protection of War Victims’ in *International Humanitarian Law: An Introduction* (Paul Haupt Publishers, 1998) 56.

While there is no international consensus on the meaning of AWS, the International Committee of the Red Cross ('ICRC') has provided a comprehensive definition that has assisted States in assessing the legality of their weapons. Accordingly, AWS includes 'weapons that can independently select and attack targets ... the critical functions of acquiring, tracking, selecting and attacking targets' make it autonomous.⁵ AWS is distinct from remotely operated weapon systems ('ROWS'). The latter still requires 'meaningful human control' because humans still exercise the decision to use lethal force.⁶ AWS is also distinguishable from automated weapon systems and automatic weapons defence systems as these weapons are solely defensive rather than offensive.⁷ For example, these weapons must first sense an incoming hazard before responding automatically whereas AWS can attack a target which is chosen independently.⁸ Defining what 'autonomy' encompasses for AWS is challenging because it is difficult to define the extent of human agency required to control a weapon. Around the world, there are different interpretations and understandings of what autonomy means. Some may understand autonomy to mean implicitly positioning the autonomous weapon as a stand-in for a human operator in the legal sense, whereas others may consider autonomy to mean still placing obligations on personnel who plan and decide upon attacks and who use autonomous weapons to carry out those attacks. In some cases, definitions of autonomy appear to be selected to support a preferred regulatory outcome.

The International Committee for Robot Arms Control ('ICRAC') report has outlined the main characteristics and limitations of current autonomous robotic systems.⁹ This includes that they are capable of complex reasoning or judgement when carried out by humans. For example, that they can only carry out single rather than multiple tasks; they have little capability to perceive their environment and, consequently, are mostly capable in simple, predictable environments. Moreover, they have limited adaptability to unexpected changes in their environment; they can be slow at performing the assigned task; they are unreliable in performing their assigned task and generally cannot devise

⁵ International Committee of the Red Cross, *Report of the ICRC Expert Meeting on 'Autonomous weapon systems: technical, military, legal and humanitarian aspects'* (26-28 March 2014), 5.

⁶ Ibid.

⁷ Ibid 2.

⁸ Ibid.

⁹ Frank Sauer, 'ICRAC Statement on Technical Issues to the 2014 UN CCW Expert Meeting' (Discussion Paper No 1, May 2014).

an alternative strategy to recover from a failure.¹⁰ However, autonomous robotic systems will gradually become more sophisticated with advances in computation techniques and sensor quality. At least 381 partly autonomous weapon and military robotics systems have been deployed or are under development in 12 states, including France, Israel, Russia, the United Kingdom, and the United States.¹¹

III HUMAN DIGNITY UNDER INTERNATIONAL HUMANITARIAN LAW

The concept of human dignity is considered a classical concept in public international law and has played a central role in international legal discourse since the turn of the 19th century. It has drawn recognition in both constitutional and international documents and has become the foundation for various legal frameworks.¹² However, human dignity does not have a uniform application in law and therefore has become a nebulous concept in both its meaning and ultimate purpose. Essentially, it has failed insofar to provide a universalistic basis in judicial decision-making under both human rights and international humanitarian law. Part of the obstacle is that human dignity is a moral value, but it also appears in various legal instruments and attracts widely shared ethical principles under the portmanteau of one description.¹³ The principle of human dignity first became notable in legal discussions with the First Hague Peace Conference of 1899 which gave birth to the *Martens Clause*. The Russian delegate, jurist and diplomat FF Martens, formulated a declaration that became the preambular clause to the *Hague Conventions (IV) on the Laws and Customs of War on Land*.¹⁴ It reads:

The High Contracting Parties deem it expedient to declare that, in cases not covered by the rules adopted by them, the inhabitants and belligerents remain under the protection and governance of the principles of the law of nations, derived from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience.¹⁵

¹⁰ Ibid 2.

¹¹ Ibid.

¹² Michael Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause' (2012) 17(3) *Journal of Conflict and Security Law* 403, 404.

¹³ Ibid.

¹⁴ Hague Convention No. IV – Laws and Customs of War on Land, Date opened for Signature or Signed 18 October 1907, (entered into force 26 January 1910) Preamble.

¹⁵ Ibid.

Since then, other major international law texts have continued to refer to human dignity in their preambles, confirming its foundational role in understanding human dignity under the law. For instance, the Preambles of both the *International Covenant on Civil and Political Rights* ('ICCPR') and the *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') state that the equal and inalienable rights of all members of the human family 'derive from the inherent dignity of the human person'. The protection of these rights are then 'essential for the dignity and liberty of Man'.¹⁶ Under the *Martens Clause*, the 'laws of humanity' can be dissected into two key components: first, the requirement to treat others humanely and second, to show respect for human life and dignity.¹⁷ Article 3 of the ICCPR provides some clarity on the first limb, which mandates the humane treatment of others. The Article outlines that humans must be treated humanely in the absence of specific laws.¹⁸ The ICRC has built upon this definition to provide guidance on the discourse assessing the legality of AWS. In particular, they have stressed that emotions including compassion and empathy are central to humane treatment.¹⁹ Furthermore, the ICRC maintains that to align with the principles of IHL, the capacity to feel emotion is necessary because it serves to minimise or avoid harm being inflicted upon others.²⁰ Respect for human life and dignity compels ethical questions about whether a machine without meaningful human control should make life and death decisions as well as the manner of killing.²¹ It has also raised the significance of not arbitrarily depriving someone of their life, appreciating the value of human life and the profundity of loss.²² An expansive interpretation of the *Martens Clause* that has been

¹⁶ Ibid 110.

¹⁷ Group of Governmental Experts of the High Contracting Parties, International Committee of the Red Cross, *Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, GGE.1/2018/3, 6th item, 9-13th April, 5, 6.

¹⁸ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 3.

¹⁹ Group of Governmental Experts of the High Contracting Parties, International Committee of the Red Cross, *Group of Governmental Experts of the High Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects*, GGE.1/2018/3, 6th item, 9-13th April, 5, 7-8; Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (Report, 19 November 2012) 6.

²⁰ Kevin Neslage, 'Does "Meaningful Human Control" Have Potential for the Regulation of Autonomous Weapon Systems?' (2016) 6 *University of Miami National Law Security and Armed Conflict Law Review* 151, 158.

²¹ Human Rights Watch, *Losing Humanity: The Case Against Killer Robots* (Report, 19 November 2012) 7; Amanda Sharkey, 'Autonomous Weapons Systems, Killer Robots and Human Dignity' (2019) 21(2) *Ethics and Information Technology* 75.

²² Ibid.

exhorted by the Human Rights Watch argues that AWS degrades human dignity because it cannot exercise ethical judgement and simply treats humans as both objects and indiscriminate targets and therefore disrespects the worth of human life in the process.²³ It removes the potentially restraining influences of humanity.²⁴ The case has been made that to preserve human morality, justice and law, autonomous lethal systems must not be accepted, and concludes, '[as] a matter of the preservation of human morality, dignity, justice, and law we cannot accept an automated system making the decision to take a human life.'²⁵ As well as the dignity of those killed or attacked by autonomous weapons, it is argued that the dignity of those in whose name such attacks are carried out is compromised, because the opportunity to be a moral person and to make moral decisions is lost when machines are used to make lethal decisions.²⁶ Thus, in such arguments, it is maintained that AWS violates the principle of protecting human dignity, in that the latter dictates that decisions affecting the life and physical integrity of human beings involved in armed conflicts should be reserved for human operators.²⁷ Weapons that lack meaningful human control over the critical functions would be unable to comply with the principles of the *Martens Clause*. These arguments have been used as a justification for banning AWS while still in its infancy.²⁸ From this point of view, autonomous targeting is unacceptable because it 'objectifies' human beings, reducing them to algorithmically processed 'data points', thereby systematically denying their inherent value as human beings.²⁹ Suppressing human life is ethically and legally justifiable only if it is based on human judgement, for only human decision-making offers a guarantee that the values at stake (human life, physical integrity and so on) can be fully appreciated.³⁰ However, there have been some criticisms of this perspective. Some concerns have been raised about the merits of placing a strong emphasis on human dignity in arguments against autonomous weapons. Scholar, Adam Saxton argues that the problem with the human dignity

²³ John Lewis, 'The Case for Regulating Fully Autonomous Weapons' (2015) 124 *Yale Law Review* 1309.

²⁴ Amanda Sharkey (n 21) 77.

²⁵ Peter Asaro, 'On banning autonomous lethal systems: Human rights, automation and the dehumanizing of lethal decision-making, special issue on new technologies and warfare' (2012) 94(886) *International Review of the Red Cross* 687.

²⁶ Amanda Sharkey (n 21) 77-8.

²⁷ *Ibid.*

²⁸ Christopher Toscano, 'Friend of Humans: An Argument for Developing Autonomous Weapon Systems' (2015) 8 *Journal of National Security Law and Policy* 189, 196.

²⁹ Richard Moyes, 'Key Elements of Meaningful Human Control' (Background Paper, Article 36, April 2016) 1.

³⁰ *Ibid.*

argument about autonomous weapons is that the use of autonomous weapons should not be viewed as a violation of human dignity 'due solely to the weapon's autonomy'.³¹ He asserts that this is not the only way that human dignity can be compromised: it is generally undermined in war when humans are sacrificed to achieve military objectives. His argument is that autonomous weapons threaten human dignity by 'potentially changing the dynamic between weapons and their operators'.³² He is concerned about losing the potential advantages that automation could bring to warfare and argues against the need for a ban. Instead, he suggests that further thought and investigation are needed to ensure that enough human control of weapons is maintained to ensure that humans can remain responsible and accountable for their use.³³ Tyler D Evans also is critical of human dignity being afforded too much weight when assessing the legality of autonomous weapons.³⁴ According to Evans, when the Martens Clause is given more weight in considering the compatibility of AWS under IHL, the view formed is that AWS violates the principles of humanity. This broad approach regards the principles of humanity as independently enforceable sources of international law and therefore if violated, could theoretically prohibit an autonomous weapon.³⁵ According to Evans, AWS is not the only form of weaponry which compromises human dignity as a wide range of weapons and technologies already do so on the battlefield. He argues that AWS can overcome 'fog of war' issues regularly encountered by human soldiers and take greater precautionary steps to assess a legitimate target.³⁶ This is because it has the capacity to directly approach potential enemies and be subjected to the first shots without risking a human soldiers' life.³⁷ Unlike AWS, humans are more likely to succumb to stress or emotions in a conflictual environment which can make it more difficult to make immediate and precise decisions, without margin of error, as to when to pull the trigger.³⁸ This indicates that AWS could diminish much of the unpredictability of human behaviour.

³¹ Adam Saxon, '(Un)dignified Killer Robots? The Human Dignity Argument' *Lawfare Blog* (Blog post, 20 March 2016) <<https://www.lawfareblog.com/undignified-killer-robots-problem-human-dignity-argument>>.

³² *Ibid.*

³³ *Ibid.*

³⁴ Tyler Evans, 'At War With the Robots: Autonomous Weapon Systems and the Martens Clause' (2013) 41(3) *Hofstra Law Review* 697, 711.

³⁵ *Ibid* 724-25.

³⁶ *Ibid.*

³⁷ *Ibid.*

³⁸ Christopher Toscano (n 28) 211.

In turn, this could allow for a reduced risk to civilians and other combatants because AWS would be better positioned to target more precisely and make firing decisions in a more controlled manner than a human soldier.

IV MEANINGFUL HUMAN CONTROL – A CONCEPTUALISATION OF HUMAN DIGNITY IN THE REGULATION OF AUTONOMOUS WEAPONS SYSTEMS

Central to the discussion around how human dignity is conceptualised in the AWS debate is the notion that taking human judgement away from life and death decisions violates the moral principle of human dignity. This propelled the notion of ‘meaningful human control’ (‘MHC’) into the discourse on the regulation of AWS and whether MHC should become a requirement in the regulation of autonomous weapons. MHC is inextricably linked to the concept of human dignity.

Scholars have defined MHC according to a number of elements and characteristics that extend beyond the moral element of human dignity. This includes predictability and reliability, situational awareness, context-control, the capacity for human intervention, and an understanding of machine capabilities so that humans can take control where necessary. John Boyd’s OODA Loop Model can provide a basic framework to facilitate a legal analysis of MHC by identifying levels of meaningful control and where a human is involved in the decision-making process.³⁹ The acronym stands for (1) Observe, (2) Orient, (3) Decide, and (4) Act.⁴⁰ It details a procedure for how humans gather information, scrutinise it for decision-making purposes and act accordingly.⁴¹ A ‘human-in-the-loop’ system obliges a human to manage the system to choose a target and attack it. A ‘human-on-the-loop’ manifests where the system chooses targets and strikes them, with some human supervision.⁴² A system capable of attacking without any human involvement is a ‘human-out-of-the-loop’ and would not accord with the elements of MHC discussed above.⁴³ However, a ‘human-on-the-loop’ weapon could still accord with the

³⁹ William C Marra and Sonia K McNeil, ‘Understanding “The Loop”: Regulating the Next Generation of War Machines’ (2013) 36 *Harvard Journal of Law and Public Policy* 1139, 1145.

⁴⁰ Rebecca Crootof, ‘The Killer Robots Are Here: Legal and Policy Implications’ (2015) 35(5) *Cardozo Law Review* 1837, 1861.

⁴¹ Ibid; Markus Wagner, ‘The Dehumanisation of International Humanitarian Law: Legal, Ethical and Political Implications of Autonomous Weapon Systems’ (2014) 47(5) *Vanderbilt Journal of Transnational Law* 1371, 1382.

⁴² Ibid.

⁴³ Ibid.

key components of MHC raised above. Under the 'Orient' stage, AWS can independently study the environment, calculate the strategic impacts, gather, and assess information and then make approximations. As AWS develops, it could perform the 'Orient' stage with greater predictability and reliability than a human.⁴⁴ Currently, only a human commander exercises this level of subjectivity. However, to strengthen the predictability and reliability components of MHC, the weapon would need to be designed to facilitate the prioritisation of human control in a given situation which can be used to intervene where necessary.⁴⁵ Furthermore, with advancements in machine learning, AWS could potentially fulfil the 'Decide' stage of the OODA Model.⁴⁶ The 'Decide' phase constitutes the last conscious step in the decision-making stage before it culminates with the delivery of force through the 'Act' stage.⁴⁷ In this scenario, a machine would require human input to consider how to proceed, once it had discerned and positioned itself with its surroundings. Ultimately, a human operator having the capacity to override any action of the machine would help preserve the human judgement of making decisions on the battlefield, thus preserving human dignity to some degree.

Furthermore, a broad deontological theoretical framework focused on Kantian ethics can facilitate the examination of the moral characteristics of the MHC concept. Philosopher, Immanuel Kant's moral theory advances value-based ethics founded on the normative stance that rational beings should behave in ways that regard humanity as an end goal.⁴⁸ Kant's human-centric approach endorses moral responsibility and the value and status of human dignity as important elements for MHC.⁴⁹ Kant argued that dignity is a social value. It motivates humans to respect each other in the interests of peaceful co-

⁴⁴ Timothy McFarland, 'The Status of Autonomous Weapon Systems Under International Humanitarian Law' (Doctor of Philosophy, The University of Melbourne, 2017) 1, 55-6; Shin-Shin Hua, 'Machine Learning Weapons and International Humanitarian Law: Rethinking Meaningful Human Control' (2019) 51(1) *Georgetown Journal of International Law* 117, 123.

⁴⁵ Ibid; Thompson Chengeta, 'Defining the Emerging Notion of Meaningful Human Control in Weapon Systems' (2017) 49(3) *New York University Journal of International Law and Politics* 833, 852.

⁴⁶ Shin-Shin Hua (n 44) 126; Kevin Neslage (n 20) 164-5.

⁴⁷ Kevin Neslage (n 20) 165.

⁴⁸ Ozlem Ulgen, 'Kantian Ethics in the Age of Artificial Intelligence and Robotics' (2017) 43 *Questions of International Law* 59, 60-1.

⁴⁹ Ibid, 61-2.

existence.⁵⁰ Unlike animals, humans can treat others with dignity and recognise their worth.⁵¹

This approach informs the ‘meaningful’ aspect of MHC in the need for humans to be morally responsible for their actions. Moral responsibility entails willingly engaging in intentional action, being free to intervene or abstain from acting, acknowledging the effect of force on others, and appreciating the moral reasons underpinning actions.⁵² Key to the element of ‘moral responsibility’ in MHC is that the duty-bearer must execute actions in warfare with moral maturity. This includes curbing their impulses, making appropriate judgements in restraining their self-driven interests, appreciating their own and others’ rights and interests and considering how the exercise of their rights can affect others.⁵³ Ultimately, a machine is not functionally tantamount to a morally responsible human agent and therefore combatants cannot relinquish their rights to a machine.

A doctrinal analysis of the current legal literature distils three key arguments about how the principle of humanity interlinks with the regulation of AWS and the MHC elements of ‘human dignity’ and ‘moral responsibility’.⁵⁴ Firstly, the use of AWS depersonalises the exercise of force to the extent of inhumanity. This effectively uproots ‘human dignity’ and ‘moral responsibility’ which are key to MHC. It physically and psychologically detaches combatants from the effects of their actions.⁵⁵ The moral buffer posed by AWS makes it easier to commit atrocities in conflict. It also contradicts the legal weapons review which prohibits weapons from causing unnecessary suffering and superfluous harm and the need to balance it against military necessity.⁵⁶ Any suffering without a legitimate military purpose is unnecessary.⁵⁷ Article 36 of *Additional Protocol I* to the *Geneva Conventions*

⁵⁰ Ibid, 70-1; Thompson Chengeta, ‘The challenges of increased autonomy in weapon systems: In search of an appropriate legal solution’ (LLD Thesis, University of Pretoria, 2015) 160.

⁵¹ Ozlem Ulgen (n 48).

⁵² Michael Skerker, Duncan Purves, and Ryan Jenkins, ‘Autonomous Weapons Systems and the Moral Equality of Combatants’ (2020) 1 *Ethics and Information Technology* 1, 7.

⁵³ Ibid.

⁵⁴ Thompson Chengeta, ‘The challenges of increased autonomy in weapon systems: In search of an appropriate legal solution’ (LLD Thesis, University of Pretoria, 2015) 143-5.

⁵⁵ Ibid.

⁵⁶ Ibid 87.

⁵⁷ Ibid 134.

1977 reflects an implicit need to maintain an appropriate level of human judgement or MHC over the decision-making actions of the targeting process.⁵⁸

The use of weapons that are impossible to surrender to is deemed inhumane according to literature discussing the principle of humanity in the AWS legal debate.⁵⁹ This aligns with the MHC element of 'moral responsibility' and the importance of recognising when to cede or restrain one's interests because of its impacts on others. In a warfare scenario without AWS, if a combatant surrenders fighting due to wounds or sickness, the humane approach is to spare their life.⁶⁰ However, AWS without MHC cannot discern when a fighter is about to surrender or is too injured or sick to continue fighting.⁶¹ This echoes the difficulties of the distinction principle because AWS lacks the sophistication of human emotional judgement to recognise the abrupt alterations to a target's status from legitimate to illegitimate on the battlefield.⁶² It also returns back to the notion of moral responsibility and the significance of humans to make moral decisions. Compassion is part of human nature whereas a robot is incapable of sufficient empathy to treat others humanely.

A Towards a 'Meaningful Human Control' Doctrine in International Humanitarian Law?

Based on the above discussion, it is shown that preserving human dignity goes hand in hand with other principles of IHL. It informs all the other principles be it the principle of distinction, proportionality, and the prevention of superfluous suffering in warfare. The *Martens Clause* has become an opening to incorporate ethical considerations as well as the prioritisation of the value of human dignity and human element (both in presence and behaviour) in decision-making procedures related to the regulation of autonomous weapons. Indeed, the *Martens Clause* has featured in discussions by the Convention on Certain Conventional Weapons ('CCW') panel. The CCW panel reviews and negotiates the

⁵⁸ Ibid 77, 80.

⁵⁹ Ibid 141-3.

⁶⁰ Ibid 142.

⁶¹ Ibid 142-3.

⁶² Ibid.

development of specific rules on conventional weapons to address humanitarian concerns. The aim is to minimise the suffering in armed conflict.

B Uniform Standard

Amongst the existing legal scholarship and material arising from the CCW panel and expert meetings, clear support is conveyed for a global standard of MHC applicable to all weapon systems including AWS.⁶³ Some assert that a uniform standard of MHC should be embedded throughout the entire weaponization process. This spans from pre-development, testing and evaluation to the certification and deployment of the weapon, command, and control testing and even an aftermath assessment.⁶⁴ Others suggest MHC only needs to be exerted at specific moments such as the 'wider loop approach' proposed by the Dutch government where MHC occurs at the planning stage of the targeting process.⁶⁵ However the latter approach has limited applicability and relevance for the deliberate targeting of military objectives. A global, uniform standard of MHC provides certain advantages in regulating AWS. Adopting the concept as language in a treaty reflects a greater overall acceptance by the international community for a standard to evaluate new weapon technology.⁶⁶ MHC offers a common language for discussing the concept in relation to the regulation of AWS because it centres on a shared goal of preserving some quantum of control over all weapon systems.⁶⁷ It can facilitate a legal standard within a regulatory treaty or additional protocol centred on AWS.⁶⁸ It could obligate manufacturers to design and develop AWS according to the established elements of MHC. A narrowed definition can also pinpoint accountability to a specific actor such as

⁶³ Adam Cook, 'Taming Killer Robots: Giving Meaning to the 'Meaningful Human Control' Standard for Lethal Autonomous Weapons' (2017) *The Judge Advocate General School Research Series* 1, 16.

⁶⁴ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, *Possible outcome of 2019 Group of Governmental Experts and future actions of international community on Lethal Autonomous Weapons Systems*, /GGE.1/2019/3, 5th item, 25-29th March 4.

⁶⁵ Daniele Amoroso and Guglielmo Tamburrini, 'What makes "meaningful" the human control over weapons systems?' (ICRAC Working Paper Series No 4, Report to the CCW GGE, International Committee for Robot Arms Control, August 2019) 1, 8.

⁶⁶ Kevin Neslage (n 20) 171.

⁶⁷ Tae Takahashi and Elena Finckh, 'The Weaponization of Increasingly Autonomous Technologies: Considering how Meaningful Human Control might move the discussion forward' (Research paper No 2/2014, UNIDIR, 13 November 2014) 3.

⁶⁸ Rebecca Crootof (n 40) 1900.

the end user who exercises control over the weapon's decision-making.⁶⁹ Furthermore, it ensures that all new weapon systems remain predictable, that their actions reflect the human operator's intentions, and that human dignity is preserved to some degree.

A uniform application of MHC would need to define terms like 'predictability' and 'understanding of a weapon's capabilities and limitations' which lack definitive meanings and would require further interpretation for individual applications of AWS.⁷⁰ The definition for an agreed standard of MHC should be reasonably flexible to encompass potentially sophisticated forms of AWS, the present weapons review standards and the vast array of situations that employ AWS.⁷¹

Unfortunately, a uniform, global standard of MHC is far too elusive and difficult to implement across all weapon systems. There is no one-size-fits-all situation and MHC is highly context dependent. A less cluttered, smaller environment may enable less need for MHC compared to a complex, unpredictable scenario.⁷² Furthermore, an additional tenet of MHC in IHL may only serve to blur the current principles of IHL and its overall effectiveness for regulating the means and methods of warfare.⁷³ A uniform MHC standard stemming from IHL may undermine fundamental tenets like military necessity, distinction, proportionality, and humanity. Instigating a new international legal instrument or additional principle of IHL that imposes MHC in individual attacks may weaken pre-existing principles of IHL.⁷⁴

C Meaningful Human Control as a Guiding Framework

Alternatively, MHC can be used as a guiding framework for discussing the weaponization of AWS. The discussion above reflects the importance of ensuring MHC is retained across the process of developing and using AWS. Human dignity is an important consideration

⁶⁹ Thompson Chengeta (n 45) 868.

⁷⁰ Adam Cook (n 63) 17.

⁷¹ Ibid 18.

⁷² Christopher Toscano (n 28) 212, 233.

⁷³ Thompson Chengeta (n 45) 842.

⁷⁴ Ibid.

in human-machine interaction and ethical principles which are often shunned in approaches that parochially evaluate current AWS technology.⁷⁵

The above analysis has demonstrated an assumption that more autonomy in a weapon is tantamount to lower control or that a machine is being entrusted with the decision-making process. However, AWS is increasingly improving the degree of control humans can exercise over force. Thus, AWS does not necessarily constitute a lack of human control in itself.⁷⁶ Unlike the more technical elements of the MHC guiding framework, human dignity and moral responsibility are among the most difficult elements for AWS to adopt because machines lack moral agency. The humanity principle presumes that combatants should be humans and not machines because of humans' capacity for moral decision-making. However, some extent of human dignity can be retained by how AWS is designed and operated by humans.

For example, AWS is becoming increasingly more sophisticated. Advanced machine learning could substitute human control and therefore, the current *a priori* prioritisation for humans over machines could subsequently be rejected.⁷⁷ AWS is already reflecting signs of exercising greater predictability, reliability, and situational awareness particularly in targeting and selecting objects which can lead to actions that preserve moral responsibility and prevent superfluous and unnecessary suffering.

More sophisticated forms of AWS do not succumb to the same mistakes that can happen in particularly high-pressure, dangerous environments.⁷⁸ These effects of warfare can increase the prospect of soldiers committing war atrocities, violating standards of LOAC and suffering fear, anger and panic which can cloud judgement.⁷⁹ By targeting with greater precision, the risks for both combatants and civilians are minimised.⁸⁰ Therefore, a concept of MHC could transition to appropriate levels of human control or a greater

⁷⁵ Tae Takahashi and Elena Finckh (n 67) 8.

⁷⁶ Eric Jensen 'The (Erroneous) Requirement for Human Judgment (and Error) in the Law of Armed Conflict' (2020) 26(96) *International Law Studies* 26, 47.

⁷⁷ Ibid 56; Shin-Shin Hua (n 44) 131-2.

⁷⁸ Tyler D Evans (n 34) 730.

⁷⁹ Ibid.

⁸⁰ Ibid 730.

focus on ensuring the means and methods of warfare protect humanity and human dignity and are within the lawful limits of LOAC.

V CONCLUSION

The consideration of human dignity in the regulation of AWS under IHL is a laborious task. This article has, however, demonstrated that internationally, lawmakers recognise the importance of human dignity in considering moral responsibility, proportionality, distinction, and the need to restrain unnecessary and superfluous suffering in warfare. Legislative instruments and documents which delineate the *Martens Clause* also continue to guide lawmakers and allow them to balance those considerations with other principles of IHL. The article has argued human dignity does not have a uniform application in the law and therefore has become a nebulous concept in both its meaning and ultimate purpose. This has meant it has failed insofar to provide a universalistic basis in judicial decision-making under both human rights law and IHL, particularly in the context of autonomous weapons. Moreover, the article raises salient considerations regarding human dignity being afforded too much weight when assessing the legality of autonomous weapons because it could unduly curtail the development of weapons that may in fact prevent soldiers from risking their own lives on the battlefield. This article has then shown that it is possible to reconcile human dignity to some degree with other elements through the concept of MHC which has a strong human dignity element to it. It has explored John Boyd's OODA Loop Model to highlight that MHC most likely corresponds with the human-on-the-loop approach. The notion of MHC closely intertwines with moral responsibility and Kantian moral ethics on human dignity. The article then examines whether the international legal community can move towards a 'MHC' doctrine that could be implemented as a uniform standard during weapons review. As argued above, a one-size-fits-all approach is too difficult to implement given the varied characteristics of weapons. Instead, the article concludes that a guiding framework on MHC could be useful for future discussions on the development and regulation of AWS.

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ANNIVERSARY ISSUE EDITORIAL – 2012 TO 2022

DR ALLAN ARDILL *

Founded in 2012, the Griffith Journal of Law & Human Dignity celebrates a decade of publishing. To mark the achievement, the Editorial Board invited our esteemed inaugural authors to write for the Journal again, together with scholars having an enduring connection to Griffith University. This editorial provides the context for the Anniversary Issue with a brief history of the Journal.

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I ORIGINS

Our *Journal* began as an initiative of the 2011 Executive of Griffith Law School ('GLS') to explore ways to create a stronger law school community following a difficult corporate restructure of the University in 2010. My brief was to explore options to build community between staff and students. After convening meetings over several months with Gold Coast students, there was consensus around the idea of creating a student edited law journal. A proposal was prepared and the GLS Executive agreed to support the creation of this *Journal*.

* Lecturer, Griffith Law School, Founder and Consulting Executive Editor. I thank Kirsten Gunhold for contributing to this editorial.



Inaugural masthead - 2011

Together with a team of 15 students I established the *Griffith Journal of Law & Human Dignity* in 2011. The *Journal* Board began as a democratic student entity and over time it has shifted to become a merit-based supervisory structure led by an Editor-in-Chief.

Over the years I have changed my involvement away from leadership and training to consulting and risk management so that today the *Journal* is wholly student administered and edited. As a consultant to the student Editorial Board, I provide some training, help with recruitment, advise the Editor-in-Chief and the Board about policy and the management of risk, and I also act as the link between the Board and GLS. Occasionally I might help with editing, however the Editorial Board makes the decisions democratically, with the Editor-in-Chief having the final say.

Since we began, we have had three publishers. We started by publishing ourselves using our own website after registering a domain name. When Griffith ePress learned of our existence in 2013 we were invited to publish with them. This lasted for several years until the savage federal budget cuts made to university funding prompted an end to Griffith ePress. Since 2018, we have been publishing with the Public Knowledge Project through Simon Fraser University¹ at an annual cost to GLS of approximately \$900 (\$850 for the publishing platform and \$50 for our domain name) plus my time. Clearly an efficient and effective publishing model.

¹ See <https://pkp.sfu.ca/hosting-services/>

II A DECADE OF PUBLISHING

The *Griffith Journal of Law & Human Dignity* provides immediate open access to its content on the principle that making research freely available to the public supports a greater global exchange of knowledge. We published our first Issue over Easter 2013 as Volume 1 Issue 1 (2012). Since the publication of our inaugural Issue in 2012, the *Journal* Board has been served by 99 GLS students and we have now published 163 articles.

The *Griffith Journal of Law & Human Dignity* is a double-blind peer-reviewed interdisciplinary and critical law journal. It publishes two Issues per year plus occasional Special Issues.² The *Journal* also publishes narratives as blind refereed articles.³ We have also published a conversation with world renowned critical pedagogy scholar Peter McLaren.⁴

IV ANNIVERSARY AUTHORS

To mark the achievement of a decade of academic publishing, the Editorial Board invited some of our esteemed inaugural authors to write for the *Journal* again, together with two scholars who have an enduring connection with Griffith University. Among the authors who graced our inaugural Issue were Julian Burnside AO KC and the Honourable Michael Kirby AC CMG, and both generously agreed to write for the *Journal* again.

Julian Burnside continues to promote justice and human dignity in his article 'A bit of history'. In 2012⁵ he wrote about the plight of asylum seekers and this time he shares his experience in the struggle of workers, asylum seekers, and First Nation Australians for justice. In his fifth article for the *Journal*,⁶ Michael Kirby reminds us of the continuing

² Four special Issues have been published: (1) 2014 Volume 2(1) Women and Violence Special Issue, (2) 2015 Special Art Issue, (3) 2017 Gender, Culture, and Narrative Special Issue, and (4) 2019 Law & Human Dignity in the Technological Age Special Issue.

³ Please refer to the Journal's [Narrative Policy](#) for details.

⁴ 'Teaching Against the Grain: A conversation between Editors of the Griffith Journal of Law & Human Dignity and Peter McLaren on the importance of critical pedagogy in law school' (2019) 7(1) *Griffith Journal of Law & Human Dignity* 173-202.

⁵ Julian Burnside, 'Borderline Justice: Dignity and Decency Outside the Margins' (2012) 1(1) *Griffith Journal of Law & Human Dignity* 36-54.

⁶ Michael Kirby, 'Privacy Protection and Media in Australia: Unfinished Business' (2012) 1(1) *Griffith Journal of Law & Human Dignity* 117-141; 'Kinsey, Empiricism, and Homo/Transphobia' (2016) 4(2) *Griffith Journal of Law & Human Dignity* 121-142; John Marsden's Impatience and LGBTIQ Rights: The Ongoing Challenge for Equality (2017) 5(2) *Griffith Journal of Law & Human Dignity* 165-182; 'Beyond Marriage Equality and Skin Curling' (2018) 6(2) *Griffith Journal of Law & Human Dignity* 1-24.

struggle to end the death penalty. He starts by recognising in 1922 Queensland was the first common law jurisdiction to abolish the death penalty, only to see judicial opposition to reform plaguing Australia before the tide eventually turned. Still, success in Australia has not necessarily set the standard in other jurisdictions where 'hold-outs' remain requiring the continued advocacy for justice.

Both Professor John Braithwaite and Professor Therese Wilson have enduring connections with Griffith University. Professor Braithwaite began his academic career teaching criminology at the School of Humanities, Griffith University in 1975. Professor Braithwaite is internationally renowned for his research involving responsive regulation and restorative justice in the field of criminology, is currently involved in the 25-year comparative project, '*Peacebuilding Compared*', and has had a long involvement in social movement politics in these areas in Australia and Internationally for 50 years.⁷ In honour of the *Journal's* commitment to freedom and dignity, Professor Braithwaite cautions against 'social movement weakness and social democratic sloth in rich countries' in his article 'Regime Change Geopolitics: Obstacles to Freedom and Dignity'.

Professor Wilson has previously published in the *Journal*,⁸ is Dean and Head of Griffith Law School, and a Director of Asbestos Awareness Australia. Professor Wilson and Professor Gill North, Adjunct Professor at both Deakin University Law School and Griffith Law School have collaborated to argue for proper regulation to prevent unnecessary deaths from asbestos exposure in Australia. The danger from exposure to asbestos is not well understood in the community and the regulatory response is inadequate. Indeed, tragically, Professor North passed away after a three-year battle with the asbestos-related cancer, mesothelioma, on 23 December 2021. Despite the significant risk to Australian lives posed by *in situ* asbestos, governments have failed to ensure that Australians are accurately informed about that risk, and responsible corporations have not been fully held to account.

⁷ <https://researchprofiles.anu.edu.au/en/persons/john-braithwaite>

⁸ Therese Wilson, 'The Private Provision of Essential Financial Services and the Corporate Social Responsibilities of Banks and Insurance Companies' (2018) 6(1) *Griffith Journal of Law & Human Dignity* 1-22.

V THANK-YOU

On behalf of the Editorial Board, I thank all of our authors and the referees for their respective roles in the production of knowledge. I also thank Professor Therese Wilson for her belief in the importance of a student run law *Journal*. Had it not been for Professor Wilson's patronage, our *Journal* may have collapsed for want of funding following the University decision to end Griffith ePress. I also want to thank Catherine Turner for her administrative assistance over many years. Lastly, I thank all of the students who have volunteered their time and creativity to provide the opportunity for our authors to flourish.

Dr Allan Ardill

Founding and Consulting Executive Editor *Griffith Journal of Law & Human Dignity*

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REGIME CHANGE GEOPOLITICS: OBSTACLES TO FREEDOM AND DIGNITY

JOHN BRAITHWAITE *

This essay seeks to honour the anniversary of The Griffith Journal of Law & Human Dignity and its narrative commitment to freedom and dignity. The Journal is a light on law's hill. I draw attention to a concern where that light should shine more brightly. The argument is that social movement weakness and social democratic sloth in rich countries has allowed regime change machinations (sometimes motivated by a desire to protect democracy) to devastate Indigenous peoples, women through high rates of femicide, and crush democracy. That inattention has fostered cascades of war and crime, and criminalization of markets and of states. The narrative sees the present as a time of some hope for struggles to reverse these tyrannies.

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* University of Maryland and Emeritus, Australian National University. This essay is based on a Nigel Walker Lecture at Cambridge University, May 2022. My thanks for helpful audience feedback there and from reviewers.

I JOURNEY FROM GRIFFITH

My first teaching job was in the School of Humanities at Griffith from 1975; I was first to teach a criminology course. I worked on the relationship between freedom and crime and learnt much from interdisciplinary teachers of the first intake of students to the university. It was hardly a strong law/criminology university then, but definitely became that after I departed! This research continued until publication of *Macrocriminology and Freedom*.¹ That book is about the idea that a great variety of legal and normative checks and balances are needed if citizens are to enjoy freedom and dignity. For Philip Pettit and I, a thin liberal version of freedom that expands choices and limits interference in individual choices is less fundamental to human dignity than freedom as non-domination, freedom from being under the arbitrary power of others.² This contribution is no rehash of those arguments. It seeks to add value by explaining one specific obstacle to freedom and dignity neglected in my earlier work.

This obstacle is geopolitical competition that motivates interference and regime change of foreign states. The starting point for the analysis is a view that patriarchal interests cannot hold down uprisings of suffragists and feminists forever; tyrannical monarchists could not pin down uprisings of chartists, republicans, and people power movements for democracy forever; business power cannot contain assertion of environmental rights forever; homophobic hegemony could not suppress gender diverse rights forever; slave trading capital could not suppress the anti-slavery movement. It is a natural part of the human condition to want to resist domination. Crushing that resistance is common, but so are victories against tyranny.

II COSETTE'S JOURNEY FROM PARIS TO BARCOLDINE

One psychological theory that continues to be plausible to many children, parents and grandparents is Alfred Adler's.³ He argues that that to be a child is to be a human who struggles for release from domination by, and dependence on, parents. Struggle against

¹ John Braithwaite, *Macrocriminology and Freedom* (ANU Press, 2022).

² John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford University Press, 1990); Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford University Press, 1997).

³ Alfred Adler, *Individual Psychology of Alfred Adler* (Harper Perennial, 1964).

domination motivates much of what humans do and value. This struggle as infants helps us become capable of surviving independently; it infuses our value framing of our world. The struggle in turn can motivate humans who are economically comfortable white churchgoers to become self-sacrificing activists who build a global movement against slavery. An economically comfortable Victor Hugo, can write a novel that ordinary Parisians flock to read, revive as theatre, and re-revive as cinema. They devour Hugo because he reveals how the oppression of industrialization, the tyranny and indignity of its justice system, and how the capitalism of human trafficking weighs on the lives of Fantine and her daughter Cosette. Not only is Fantine trafficked; so is her hair, her front teeth, her daughter. Hugo drags our spirits down from the false dawn of the 1831 uprising in Paris, where French citizens are too dominated by these institutions, especially by the secret police embodied by Inspector Javert. The people are too dominated to surge onto the streets in support of Cosette's friends. They are cut down in 1831. Yet the finale of the 49th film version of *Les Misérables* (2012) is uplifting cinematography of a return to the barricades for the Paris Commune of 1848 when the people of Paris do surge to support revolutionary republicans, socialists and feminists.

If you have engaged with Hugo's text, you have imbibed the core message of *Macrocriminology and Freedom* through an infinitely more engaging writer. It can be enjoyed through the 2012 film that encapsulates the political message even better than *Les Mis* the musical. There was no profound renewal of republican political institutions immediately after 1848 in France, nor across Europe – certainly no socialist or feminist revolution. But uprisings did quickly, and widely cascade from the Paris Commune right across Europe and more slowly infected republican, socialist and feminist social movement politics on the racist and patriarchal Australian frontier at Eureka – the uprising and enduring movement in support of Ned Kelly. Australian writing memorializing the oppression of Ned's mum by the police, the oppression by the troopers of a swagman who sings *Waltzing Matilda*, and under a Tree of Knowledge in Barcaldine,⁴ sees a distinctively rural labour movement inspired by shearer unionization. The shearers usher onstage the world's first 'labourist' government in Queensland.⁵ The Jean

⁴ Robert Mason and Rebecca Damjanovic, 'The Start of It All? Heritage, Labour and Environment in Regional Queensland' (2018) 25(2) *Queensland Review* 208-221.

⁵ Teaching Griffith students, I loved to use Dennis Murphy's biography of the young Queensland Premier, TJ Ryan, to grasp the labour movement journey from Barcaldine to Brisbane, to Canberra. Ryan surely would have become prime minister had he not so young passed streets of Brisbane lined by massive crowds

Valjeans of the 1891 Shearer's Strike are sentenced to hard labour on Saint Helena Island, but build the labour movement along the democratic path taken from the Tree of Knowledge. Revolutionary war was the path not taken from Barcaldine, though there were many advocates of that at Barcaldine, Eureka and in Northern Victoria after Ned was captured.

Tom Griffith's inspiring recent contribution to the *Griffith Review* shows that amidst the structurally racist conditions of the frontier wars not far from Barcaldine, there was even a treaty that sought to lift the oppression of violence from the backs of Aboriginal and settler Australians.⁶ Like Hugo, Griffiths does something important in revealing a suppressed narrative of our continent's history of domination, and struggle against domination. Ours has been a society devoid of narratives of treaty to cascade dignity for all First Nations Australians. Now finally, we have the beauty and the promise of the Uluru Statement from the Heart. The narrative conditions for that cascade of peace, and against domination, finally, hopefully, are arriving by the hands of the original Australians.

We can experience moments when we might take our heart to the Tree of Knowledge. I once explained to an American Indigenous leader how spiritually impoverished, I was, and consequently so ineffective in peace processes compared to spiritually deep Indigenous elders who have what Maori call *Mana*. He did not say, as I feared, 'you have no hope of that white man.' He said, 'that is easy, take your heart to trees that connect to your heart.' So, one day in Belfast soon after the Belfast Good Friday Agreement, hearts were taken to the Tree of Knowledge. A restorative peace encounter about a new justice system for Northern Ireland and a new Royal Ulster Constabulary was going badly. There had been an incident when a senior RUC man walked across the room to shake the hand of an IRA man he had tortured. As he approached, his close personal protection guy scuttled to his side. The IRA combatant took offence at this. I jettisoned my prepared talk at the set-piece part of proceedings. Instead, I spoke of the path not taken by Irish shearers from the Tree of Knowledge. Before that, I spoke of how the troopers oppressed Ned's mum; some in the audience knew more about Ned than me. During their time in prison, the IRA and Loyalist hard men had grown stronger bonds with each other as

of mourners to arrive at Toowong Cemetery: Dennis Murphy, *TJ Ryan: A Political Biography* (University of Queensland Press, 1990).

⁶ Tom Griffiths, 'But We Already Had a Treaty! Returning to the Debney Peace' (2022) 76 *Griffith Review* 154-169.

working-class victims of the violence. Both actually had bitter grievances with the RUC. For these men, some of whom, like Ned, had killed more than one police officer, the Kelly narrative resonated – so it did with the RUC participants. I told them the story of sitting by a policeman friend during a play on Ned Kelly at our childrens' school. When it came to Ned killing the police, I asked if he was OK with this. He was. I discussed with the RUC men why it was important to healing some of the oppression of the Australian frontier for children to understand the suffering of Ned's mum – a theme of the play. Perhaps surprisingly, it turned out that RUC torturers understood Ned's perspective too.

III SOCIETIES WITH DECLINING LEVELS OF DOMINATION AND VIOLENCE

The uprisings that spread across Europe in 1848 also affected the countries that defeated Napoleon militarily – Britain, Prussia, Russia, and the Habsburg Empire. After Napoleon's armies dismantled feudalism across much of the rest of Europe, the monarchies that defeated Napoleon grew bourgeois revolutions that saw peasants benefit from land reforms in varied and complex ways to enjoy freedom to choose whether their noble landlord or the factory owner offered them better opportunities once they became organized to clamour for labour rights.

The 18th century revolutions in France and America were important in Hugo's thinking because they started dynamics that would lead to peasants, factory workers, slaves, and women organizing to get property rights, the right to vote and more genuine access to the justice of the police and courts than was available from the likes of Hugo's Javier. Beyond the states that had republican revolutions, liberty, equality, and feminist fraternity grew across the North Atlantic and spread to far-flung European settler societies on other continents.

Modern European societies mostly became low-crime societies in comparative terms and in the historical terms documented in *Macrocriminology and Freedom*.⁷ The Russian Czar did not reform enough after learning lessons from 1848: he got a communist revolution and a firing squad instead. *Macrocriminology and Freedom* argues that Russia's path was an inferior one to liberation from street crime, corporate crime, state crime, and from war. The Russian Revolution followed an inferior path to non-domination. Likewise with

⁷ Braithwaite (n 1) Ch 3.

a China that had been humiliated by colonial militaries in the 19th century. After the promise of Sun Yat-sen's 1911 republican revolution, the West refused to support Sun, because banks and other western corporations in Hong Kong and Shanghai persuaded Western leaders that Sun was a dangerous socialist. In fact, Sun was a social democrat who wanted to build strong private Chinese businesses. He had a deeper commitment to democracy than Western states.⁸ Sun's republican values were sold out to tyrants like Chiang Kai-shek who were more acceptable to Western banks. An unfree China with more criminalized business corporations and a more criminalized state was the outcome.⁹ Redemptively, however, authoritarian Taiwan ultimately reformed toward a more Sun version of liberty, equality, and feminist fraternity. Taiwan's land reforms helped its peasants greatly. They laid foundations for a society in the top quartile of economic equality. Fear of communism motivated this Sun style of ultimate social democratic shift. In fact, all of democratic East Asia achieved a comparable level of equality to Western European welfare states, and in every case built on a foundation of egalitarian land reform for the peasants motivated by fear of communism.¹⁰ The other cases I am thinking about here are Japan, South Korea, and Mongolia alongside Taiwan. Like western Europe, these states all do reasonably well on Gini inequality, corruption as measured by Transparency International, homicide, poverty-reduction, and freedom. Mongolia has a uniquely strong history of feminist empowerment that goes back to the time of Genghis Khan's empire,¹¹ continued under Mongolian communism and in democratic Mongolia. As a post-communist society, Mongolia struggled to remain in the bottom quartile of the Transparency International corruption index, but the other three remained there and this part of the world enjoyed low levels of crime even compared to North-Western Europe. Fear of communism motivated conservative regimes in Japan, South Korea, and Taiwan to implement comparatively redistributive land reforms to benefit peasants.

Across Western Europe and East Asia, conservative political leaders delivered much to redistributive reform. We see this in Germany, for example, from Bismarck's leadership

⁸ Audrey Wells, *The Political Thought of Sun Yat-sen: Development and Impact* (Palgrave, 2001).

⁹ This Chinese aspect of my narrative is developed in Braithwaite (n 1) 14-21, 99-181.

¹⁰ Jong-sung You, 'Land Reform, Inequality, and Corruption: A Comparative Historical Study of Korea, Taiwan, and the Philippines' (2014) 12(1) *The Korean Journal of International Studies* 191-224.

¹¹ Jack M Weatherford, *The Secret History of the Mongol Queens: How the Daughters of Genghis Khan Rescued His Empire* (Crown, 2010).

in building a welfare state to fend off communism. Bismarck's successors in the aftermath of World War I supported a German Labour movement that wanted an International Labour Organization. It achieved a great deal during the twentieth century in globalizing labour standards and modest improvements in the dignity of work. Finally, a leader from the conservative side of politics – Angela Merkel – was stalwart in her defence of the welfare state, a women's rights and refugee rights reformer, and a prudent peacemaker of the long European peace who favoured dialogue that respected the dignity of adversaries at times when other leaders traded on disrespect and provocation.

These European and East Asian democracies have made mostly impressive progress toward sustained growth of freedom and low crime in comparative cross-national terms and in terms of more violent, more despotic pasts of their own histories. Yet, great domination remains and this especially fuels high levels of corporate crime according to *Macrocriminology and Freedom*. There is no such thing as social democracy that achieves excessive equality between the lowest paid workers and owners of capital, feminism that achieves too much domination reduction for women, a social movement against slavery that approaches abolition of modern slavery, and a land rights movement that justly redistributes a Continent's stolen lands. Endless struggle for less domination continues with no fear of achieving too much equality. This is because the forces of domination are ever diligent at retrieving the ground they lose.

The core message of *Macrocriminology and Freedom* can be summarized in one sentence: strengthen freedom to prevent crime; prevent crime to strengthen freedom. Because that is so abstract, it is fleshed out into 150 more specific explanatory and normative propositions and into a proposed program of research to revise and test them. This essay simply adds a 151st proposition to the research program.

The theory claims to explain the big picture patterns of crime. Where freedom as non-domination enjoys a sustained upwards trajectory, crime falls. I read this as the history of democratic Europe and East Asia for the most part since 1945, and in earlier eras such as that of the Hugo lens. There was progress of social movement politics for freedom and dignity through nonviolent struggle against the odds after 1848, but not through the violent revolution that some on the Paris barricades wanted.

IV VIOLENCE AND DOMINATION IN LATIN AMERICA

The republican revolutions of Latin America two centuries ago seemed inspiring at the time but did not have the effects just described for Europe and East Asia. When a tiny Communist regional power arose in Latin America (Cuba), it was not feared in the way the spectres of Russian and Chinese Communism were feared in Europe and East Asia. Landed elites of Latin America remained effectively in total control politically. Landlords captured militaries to their projects. Militaries with CIA training, weapons, and intel executed coups against social democratic regimes at the behest of the landlord class. The US was recurrently proactive in supporting death squads and coups against social democratic leaders like Salvatore Allende in Chile and Jacobo Arbenz in Guatemala, and in educating Latin American militaries in how to do this through the School of the Americas.¹² The CIA supported coups that covered the overwhelming majority of the population of Latin America, mostly during the Cold War.

Nicaragua was an early intervention from 1909 that encouraged a conservative overthrow of the elected government after Nicaragua invited Japan to assist with building a canal to link Pacific and Atlantic trade. The intervention included landing of US Marines in Nicaragua.¹³ Earlier still, in the Indian wars of the 18th and 19th century, the United States boosted pliant Indigenous leaders and assassinated leaders who stood in the way of 'manifest destiny' for North American conquest. Intervention in Mexico was more dramatic than simply interfering in which government would rule; it was an invasion of Mexico that started in 1846 after geopolitical intent to annex Texas, California, Arizona, New Mexico, and parts of other states such as Oregon from Mexico became part of US manifest destiny. Interventions aimed at regime change moved on to other large Latin American countries: Brazil in the 1960s and Argentina in the 1970s, ultimately getting around to most of the smaller countries as well.

¹² Lesley Gill, *The School of the Americas: Military Training and Political Violence in the Americas* (Duke University Press, 2004).

¹³ Britannica (eds), *Nicaragua: Foreign Intervention* (Encyclopaedia Britannica, 2022); US Department of State Archive, 'US Intervention in Nicaragua, 1911-1912', (Web Page, Released 2009) <<https://2001-2009.state.gov/r/pa/ho/time/ip/108629.htm>>.

Marc Becker lists 56 different US military interventions in Latin America, mostly small incursions, since 1890.¹⁴ My hypothesis is that collaboration between the landlord class and the CIA, between militarization of the state and criminalization of the state, helps explain why Latin America became a high crime, high inequality region of the world where El Salvador vies with other Latin American countries to hold the title for the highest rate of femicide in the world.

Regime change meddling engendered shadow governments of business cronies entangled with military elites who ensured that elections were fixed so their puppets won. The endless, bloody civil wars and the cleaning out of clean candidates morphed into drug cartel wars and a US war on drugs. United States regime change operations after 1970 and interventions in civil wars facilitated the emergence of criminal gangs through the creation of large pools of people with military training while concurrently causing economic devastation that left few employment opportunities to offer former combatants across Central America.¹⁵ Excellent quantitative criminology consistently shows that the war on drugs sponsored by the US made the violence worse rather than better. That is, where the War on Drugs had most success in decapitating cartel warlords, violence subsequently increased most steeply.¹⁶

A normally less visible part of this problem was when CEOs of companies like ITT persuaded a US President that Salvador Allende was a communist when he was a social democrat; and a CEO of United Fruit who persuaded another US President that Jacobo Arbenz was a communist when his actual sin was increasing taxes on United Fruit, applying minimum wage laws to United Fruit workers, and promoting land reforms that saw some United Fruit land transferred to use by peasant farmers.¹⁷ Similarly, many western companies wanted business relationships with South African traders in

¹⁴ Marc Becker's Homepage 2011, 'History of US Interventions in Latin America', *Yachana Teaching Resources* (Web Page, 20 June 2022)

<<https://www.yachana.org/teaching/resources/interventions.html>>. An updated and easier starting place for beginning to chase down literatures on these cases is the Wikipedia lists and sources for 'United States Involvement in Regime Change', <https://en.wikipedia.org/wiki/United_States_involvement_in_regime_change>. However, an anonymous referee correctly pointed out that 'Wikipedia has multiple issues with how it defines the phenomenon of regime change'.

¹⁵ I am grateful to an anonymous referee for suggesting this addition.

¹⁶ Braithwaite (n 1) 95.

¹⁷ Stephen Schlesinger and Stephen Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala, Revised and Expanded* (Harvard University Press, 2020); Peter Chapman, *How the United Fruit Company Shaped the World* (Canongate, 2007).

diamonds, gold and other products; they persuaded Western governments that Nelson Mandela was another communist and terrorist who should be in prison.

The global human rights movement, the social movement for social democracy, and the social movements against slavery and racism, neglected this business dimension in their advocacy for far too many decades, leaving business elites in charge as they bought Western politicians with campaign contributions. Dwight D Eisenhower was one conservative President who reflected on his own errors when he warned successors to be wary of a military-industrial complex that in his time as President wanted to fight a war with China over Taiwan in 1958, and earlier advocated complete military defeat of China (and nuclear attack if needed) as the Korean War escalated. Regionally, Eisenhower worried about defence contractors benefiting from endless war in Latin America. The contractors outlasted Eisenhower and the Cold War.

The problem of violence and inequality is connected to the politics of race in the sense of being a legacy of slavery and colonialism. That way of seeing reveals more than the problem conceived as a culturally Latin legacy. *Macrocriminology and Freedom*¹⁸ includes a diagnosis of Jamaica as a country with an extreme homicide rate, extreme criminalization of state and markets as a survivor of British colonialism, slavery, and landlord power that during the Cold War saw the CIA arm one political party and Cuba another. Violence of organized crime groups linked to these political parties continues to devastate the country more than any war could have. Societies that had more nineteenth century slavery have more crime today. Poverty is worse today in those African societies that supplied more slaves in past centuries.¹⁹ *Macrocriminology and Freedom* argues that racist legacies of slavery explain why the highest crime societies are the most unequal societies of the Americas and Africa, more so than unequal societies on other continents. Colonial republicans including William Penn and Benjamin Franklin believed in learning from the deliberative democratic institutions of American First Nations and in finding a Constitutional architecture of peace and union with these nations.²⁰ Their reasoning was

¹⁸ Braithwaite (n 1) 105, 142, 257-9.

¹⁹ Nathan Nunn, 'The Long-Term Effects of Africa's Slave Trades' (2008) 123(1) *The Quarterly Journal of Economics* 139-176.

²⁰ Donald A Grinde and Bruce E Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (UCLA American Indian Studies Center, 1991); David Graeber and David Wengrow, *The Dawn of Everything: A New History of Humanity* (Signal Books, 2021).

crushed by the rifle butts of those who believed in genocidal spread of Christian civilization.

V VIOLENCE OF FOREIGN INTERVENTIONS WORLDWIDE

In all corners of the world, from Indonesia to Iran to many African states, political leaders did not need to be in alliance with Moscow to be targets for regime change. Being a social democratic leader of the non-aligned movement could be enough to trigger US support for coups or other regime change machinations, especially when social democrats required American corporations to pay higher taxes and wages or threatened nationalization. In fact, US regime change interventions were concentrated in non-aligned states during the Cold War and were not more likely to help democratic than non-democratic states stay on top (with 44 of 64 covert interventions supporting authoritarian forces).²¹ Data on US covert operations (which include both regime change and regime maintenance interference), reveal US covert intervention decreased the likelihood that a targeted state would become a democracy by approximately 30 percent over the next 20 years.²² Mesquita and Downs concluded that interveners best secure their goals by installing autocracies or 'a rigged-election democracy' in the target state. Crushed democratic impulses and institutions best deliver the concessions foreign interveners seek because their puppets 'need not cater to the preferences of the median voter to remain in power'.²³

The conclusion that great power regime change interventions shackle longer-run hopes for democracy, especially social democracy, is supported by qualitative and quantitative research. That literature sustains the conclusion that if what the United States was attempting in the late twentieth century was intervention for democracy promotion, it was not good at it.²⁴ Incompetence continued this century with botched US interventions

²¹ Lindsey A O'Rourke, 'The Strategic Logic of Covert Regime Change: US-Backed Regime Change Campaigns During the Cold War' (2020) 29(1) *Security Studies* 92-127, 101.

²² Daniel Berger, Alejandro Corvalan, William Easterly and Shanker Satyanath, 'Do Superpower Interventions Have Short and Long Term Consequences for Democracy?' (2013) 41(1) *Journal of Comparative Economics* 22-34.

²³ Bruce Bueno de Mesquita and George W Downs, 'Intervention and Democracy' (2006) 60(3) *International Organization* 627-649, 632; see also Alexander B Downes, *Catastrophic Success: Why Foreign-Imposed Regime Change Goes Wrong* (Cornell University Press, 2021) Ch 2.

²⁴ James Meernik, 'United States Military Intervention and the Promotion of Democracy' (1996) 33(4) *Journal of Peace Research* 391-402; Margaret G Hermann and Charles W Kegley, 'The US Use of Military Intervention to Promote Democracy: Evaluating the Record' (1998) 24(2) *International Interactions* 91-114; Mark Peceny, 'Forcing Them to Be Free' (1999) 52(3) *Political Research Quarterly* 549-582; Bruce

to influence Afghanistan elections failing to achieve whatever outcomes NATO powers were attempting to achieve there, and certainly failing to sustain democracy.²⁵

Large numbers of new democracies were created in the twentieth century. Great power intervention can take little credit. Latin America has become a region of social democratic, Indigenous, and feminist hope, renewed with the first election of a left President in Colombia in June 2022; pledged to the land reform program of the Colombian Peace agreement of 2016 that was suppressed by the previous government and the death squads. The tide of far-right governments rose and rose across the Americas during the Cold War and beyond. These regimes were supportive of an armed right with a right to bear arms in civil society that delivered extraordinary levels of gun violence across the Americas. Latin America is the region with the highest levels of police killings. In North America, the United States has by far the highest rate of police killings among all developed economies, Canada the second highest.²⁶

Today journalists talk not of a new Red Tide but of a Pink Tide of redistribution, non-violence, and commitment to deepened democracy after President Bolsonaro was defeated in Brazil. The Pink Tide is an Americas where far-right governments have been pushed from power across more than 90 per cent of the Western hemisphere. While this supports a politics of hope that anti-domination social movements cannot be suppressed forever, reversals can be foreseen. Post-Right governments reach for simplistic fixes like the President in the country with the highest homicide rate in the world, El Salvador, seeking to lift his people out of poverty by becoming the only government to officially commit to a cryptocurrency, a Ponzi policy of hope for poverty alleviation. On the positive side, civil war has hit an all-time low in Latin America. It will be instructive to observe whether homicide declines in Latin America in the 2020s and 30s compared to the 2010s. When Levin added Soviet cases of meddling in democratic elections to the US cases, he built supplementary evidence of impetus for democratic breakdown as a consequence of

Bueno de Mesquita and George W Downs, 'Intervention and Democracy' (2006) 60(3) *International Organization* 627-649; Scott Walker and Frederic S Pearson, 'Should We Really "Force Them to Be Free?" An Empirical Examination of Peceny's Liberalizing Intervention Thesis' (2007) 24(1) *Conflict Management and Peace Science* 37-53; Lindsey A O'Rourke, *Covert Regime Change* (Cornell University Press, 2018).

²⁵ Scott Shane, 'Russia Isn't the Only One Meddling in Elections. We Do It, Too' *New York Times* (17 February 2018).

²⁶ Braithwaite (n 1) 67.

Soviet meddling.²⁷ The Soviets were like the United States in supporting authoritarian, anti-democratic regime change that they believed served their interests. That is one reason I hypothesize that Africa and the Middle East come in after Latin America and the Caribbean as high violence regions of the planet – because Great Power support for coups and insurgencies caused such a large number of proxy wars across these regions of the planet. US military and regime change operations were hugely counterproductive across Latin America, likewise in Congo, Iran, Vietnam, right up to the recent militarized meddling in Afghanistan, Iraq and Libya. Likewise, Moscow's biggest investments in Afghanistan,²⁸ and today in Ukraine, involve equally catastrophic loss of blood and treasure, setting back its great power status economically and geopolitically. Western media commentators like to say in the aftermath of Russia and the West both sharing disasters in Afghanistan and Ukraine that regime change and nation building rarely runs according to plan. What particularly does not work in contemporary conditions is invasions, coerced regime change, and militarized nation building. Ask Indonesian elites how much their 270 million citizens with a huge army benefitted from invading a society of one million in East Timor in 1975?

Alexander Downes studied all instances (120) of foreign-imposed regime changes over the past two centuries (to 2008). Foreign-imposed regime change doubled the likelihood

²⁷ Dov H Levin, 'A vote for freedom? The Effects of Partisan Electoral Interventions on Regime Type' (2019) 63(4) *Journal of Conflict Resolution* 839-868.

²⁸ Afghanistan was always geostrategically important as a gateway between Europe and South Asia. At least the US and Russia did not manifest the depth of folly of the foreign power striving to conquer and hold Afghanistan that the British Empire manifested in its heyday: 'Having seemingly learned nothing from their first Afghan debacle [the British invasion and occupation of Afghanistan between 1839 and 1842], Britain invaded again in 1878 for the same reason (supposed Russian encroachment on Kabul), for the same purpose (to install a leader who would protect British interests), and with the same outcome (massive revolt after initial victory).' Downes' book is entitled *Catastrophic Success: Why Foreign-Imposed Regime Change Goes Wrong*: at Alexander B Downes (Cornell University Press, 2021) Ch 2, because militarized initial regime change is not difficult for powers as great as the British Empire, Russia, and the United States. But it is only a matter of time before regime change sours. Even cases like Iran and Democratic Republic of Congo that Downes considered intervention 'successes' because puppets installed by Western regime-change interventions during the Cold War survived for little more than two decades, by 1979 in Iran and 1997 in DRC, these Western puppets would be deposed and followed by decades of war making and geopolitical disaster for the West. The most enduring and persuasive cases of foreign-enforced regime change that Downes considered the most 'shining successes' were Germany and Japan in 1945 (and one might add Italy). These all became sustained, successful, peaceloving, pro-US democracies. Their transformations are distinctive in that they were preceded by the most massive and deadly military defeat in human history that seemingly quashed all militarist ambition of the losers for eight decades. Defeat was followed by the most generous hand of recovery ever extended by victor to vanquished, the Marshall Plan. Thirdly, these states had histories of institutional strength that could be appealed to, renewed. These three conditions are missing from other regime change interventions. Downes might have done better to focus on these three drivers of the 1945 exceptionalism he identified.

of civil war over the next ten years in leadership change cases and tripled it in cases where leadership change was combined with institutional change. It can also produce interstate war. As Mearsheimer puts it, in the age of nationalism, 'occupation almost always breeds insurgency'.²⁹ Leadership change also increases the likelihood of subsequent violent removal of the leader who benefited from the regime change.³⁰ Downes argues that the historical record is clear that foreign interventions to topple disliked regimes are costly for the intervener and more likely to cause counterproductive blowback than the intended successful imposition of a hegemonic will. While one might expect the replacement client installed to state leadership after the foreign intervention to align with the preferences of the intervener, they do not become more aligned with intervener voting records at the United Nations, nor do they acquire similar alliance portfolios.³¹ Foreign-sponsored regime change is likely to cause the military to disintegrate and disperse to the countryside to help train and launch insurgencies. Imposed leaders tend to get into quandaries between supporting their foreign sponsors and domestic demands for political change.

Downes found that the United States has been the most consistently recidivist regime changer of the past two centuries, with the Soviet Union a distant second, followed closely by Britain, Germany and France, with Austria seventh on this list and Italy ninth. Guatemala and El Salvador fill out that list, being both common victims and perpetrators of foreign regime change. Honduras tops the list of countries that have been most recurrently targeted by successful foreign regime changes, followed by Afghanistan, then Nicaragua and Dominican Republic third and fourth, and Guatemala and El Salvador both being among the eight most targeted countries. The data shows that regime change has been overwhelmingly a game played by the NATO states and Russia.³² Of the 153 regime change interveners, not one was China, though we should contest the data-set by pointing

²⁹ John Mearsheimer, *The Great Delusion: Liberal Dreams and International Realities* (Yale University Press, 2018) 142, 169.

³⁰ Alexander B Downes, *Catastrophic Success: Why Foreign-Imposed Regime Change Goes Wrong* (Cornell University Press, 2021).

³¹ Ibid Conclusion.

³² The US and Russia were followed closely by Britain, Germany and France, with Austria seventh on this list of repeat regime changers, and Italy ninth. Guatemala and El Salvador fill out that list, being both common victims and perpetrators of foreign regime change. Honduras tops the list of countries that have been most recurrently targeted by successful foreign regime changes, followed by Afghanistan, then Nicaragua and Dominican Republic third and fourth, and Guatemala and El Salvador both being among the eight most targeted countries.

out that the 1951 agreement of the Dalai Lama to join Tibet to China, followed by flight of the Dalai Lama from Tibet under military pressure in 1959, was effectively, if not technically, a foreign regime change. There are no Asian, African, nor Middle Eastern states (perhaps surprisingly) on the list of the most recurrent foreign regime changers.

Foreign electoral interference may likewise be a ‘catastrophic success’ within the power of states as powerful as the US and Russia because meddling ‘increases support for the assisted side by around 3%’.³³ Levin shows that overt great power attempts to shape elections are as common as one in nine competitive elections in the world between 1946 and 2000. Their success was real but also catastrophic, as illustrated by what analysis of surveys reveals about US intervention in meddling, as well as Levin’s models. Such analyses indicated that US meddling turned a 1992 Israel election to install Yitzhak Rabin, only to have him assassinated in 1995 after advancing a Palestinian peace process that never advanced again. In aggregate across more than a hundred cases of US and Russian electoral interference, meddling increased terrorist group emergence between 1968 and 2000 by 11 percent and increased levels of domestic terrorism by an average of 152 percent in the next ten years for the targeted country (between 1970 and 2000).³⁴

Downes discusses belief in an ‘elite consensus’ about the US literature, particularly since defeat in Afghanistan, that if only COIN (counterinsurgency doctrine), or this or that aspect of intervention policy, had been done better, institutional and leadership regime change cases would have succeeded. If this were true, however, it would be possible to pick out more cases beyond the 1945 regime changes where leadership and institutional change produced the long-run successes of the Marshall Plan. In that US elite consensus literature, blame tends to be placed on the difficulty of ‘nation building’, when the more evidence-based inference is that foreign intervention to coerce regime change is the problem. ‘Nation building’ is certainly difficult in the hands of UN peacekeeping operations as well and has many failures. Studies of large numbers of peacekeeping cases, however, convincingly show a high statistical success rate overall. Multidimensional UN peacebuilding operations where war torn states commit to a peace agreement and UN peacekeeping are, in contrast to militarized regime change, highly cost-effective at

³³ See Dov H Levin, *Meddling in the Ballot Box: The Causes and Effects of Partisan Electoral Interventions* (Oxford University Press, 2020).

³⁴ Dov H Levin, ‘Voting for Trouble? Partisan Electoral Interventions and Domestic Terrorism’ (2020) 32(3) *Terrorism and Political Violence* 489-505.

building peace, economic recovery and prospects of democracy.³⁵ In fact, there are few public investments that are more effective for building a stronger world economy with less suffering.³⁶ Miserliness in support for societies struggling to reconcile and recover from conflict makes no sense. At the same time, there is an evidence-based case for cost savings by desisting from interfering militarily in other countries, desisting from interfering in their elections and in their regime choices in general.

The problem of covert or overt US interference to foster regime change, and its approach of tarring redistributive social democrats with the same brush as communists, was at its worst in Latin America because the 1823 Monroe Doctrine declared the Western Hemisphere to be a sphere of US influence. Two hundred years ago, US support for Latin American decolonization through republican revolutions raised hopes of liberation from imperial domination. These were dashed by the imperium of a new kid on the block.

The problems of violent US intervention were at their least with targets that were NATO democracies and close allies. Interference with allies risked undermining bipartisan solidarity with the US alliance. Covert electoral intervention is very common with US allies, however, with variegated effects. In Japan, the cash provided to the Liberal Democratic Party by the CIA during five election intervention events³⁷ may have been quite instrumental in guaranteeing it unchallenged domination of Japan for decades beyond the Cold War. This had the cost of creating an effective one-party democracy with untouchable leaders. After the scandal of \$12 million Lockheed bribes to Japanese Prime Minister Kakuei Tanaka, however, the clang of the jailhouse door echoed for the first time for leaders who mattered in Washington. Tanaka was sentenced to four years prison.

VI SYSTEMATIC EVIDENCE ON INTERFERENCE FREQUENCY AND EFFECTS

Lindsey O'Rourke's data set concludes that the US intervened covertly ten times as frequently as overtly, that it often takes a long time before declassification of cabinet records and other disclosures provide sufficient evidence to confirm formerly

³⁵ Barbara F Walter, Lise Morje Howard and V Page Fortna, 'The Extraordinary Relationship Between Peacekeeping and Peace' (2020) (2021) 51(4) *British Journal of Political Science* 1705-1722.

³⁶ Paul Collier, *Wars, Guns, and Votes: Democracy in Dangerous Places* (Harper, 2009) 96; Braithwaite (n 1) 300.

³⁷ Collier (n 36) 96.

unconfirmed covert cases.³⁸ O'Rourke documented 64 covert regime change campaigns during the Cold War, with overt ones like Cuba counting among a minority of 6 cases. Even the Bay of Pigs invasion, Operation Mongoose, and its multiple attempts to assassinate Fidel Castro were at one time covert matters. Other kinds of foreign interventions that fell short of regime-change were the proxy insurgencies studied by Melissa Lee that (as in 2014 Russian support for Eastern Ukraine separatists) deprived the target of full consolidation of its state by loss of control of one region of it. When Russia and other powers destabilize other states by supporting insurgencies this can weaken state consolidation of authority and development so that when the intervener gets the successor regime, they prefer that regime may also fail when it inherits a Leviathan that remains 'crippled' by the insurgency.³⁹

In the O'Rourke data set, cases were not counted unless US policymakers explicitly state in official records that their objective was regime change. Alleged destabilization of Australia's Whitlam government in 1975 falls way short of this coding threshold, for example. It is likely that there are many other cases where the US interfered merely to help one party it preferred, or to hobble somewhat a party it disliked, without being committed to anything as explicit as regime change intent that is so recorded on the public decision making record. It also ignores CIA dark operations that political leaders did not support or know about and that therefore were never discussed in a way that appeared on the public record. Another aspect of the under-count is that it ignores US regime change operations since 1990. Extending the count by another ten years to 2000, Levin counted only covert or overt partisan interventions in foreign elections; he counted 81 by the United States and 36 by the USSR or Russia.⁴⁰ The United Kingdom has also mounted many regime change interventions, sometimes in collaboration with the US, but often independently. Cormac argues that we learn less about British covert operations because they are better than the CIA at keeping them covert.⁴¹ Regime change operations by US allies such as Saudi Arabia and Rwanda that enjoy tacit US support are also not

³⁸ Lindsey A O'Rourke, 'The Strategic Logic of Covert Regime Change: US-Backed Regime Change Campaigns During the Cold War' (2020) 29(1) *Security Studies* 92-127.

³⁹ Melissa M Lee, *Crippling Leviathan: How Foreign Subversion Weakens the State* (Cornell University Press, 2020).

⁴⁰ Dov H Levin, 'Partisan Electoral Interventions by the Great Powers: Introducing the PEIG Dataset' (2019) 36(1) *Conflict Management and Peace Science* 88-106.

⁴¹ Rory Cormac, *Disrupt and Deny: Spies, Special Forces, and the Secret Pursuit of British Foreign Policy* (Oxford University Press, 2018).

counted. O'Rourke counts 70 target countries, when it is well documented that many target countries like Cuba, Guatemala and Chile had a number of regime change attempts across decades for one target case in the data set.

George W Bush wasted opportunities when old adversaries like Iran, Russia and China offered considerable support in Afghanistan and beyond against Al Qaeda. Bush castigated allies who were not 'all the way with USA', drawing the line 'You are either with us or against us'. What America needed in 2001 were allies who were so fond of America to be critical friends of policies of invasion of countries that had not attacked the United States (Afghanistan and Iraq); and critical friends of policies that encouraged others to be proxy invaders of Libya in 2011, including some dubious despots such as the Sudanese regime that rolled its tanks against Muammar Gaddafi;⁴² and critical of a dubiously motivated French President who wanted Gaddafi dead and who is now being prosecuted for accepting illegal campaign contributions from Gaddafi. Bush and Barack Obama would have been well served by friends robustly advancing alternatives to protracted war in Afghanistan, Iraq and Libya, including early peace negotiations that resolved grievances with their unattractive leaders, starting with peace deals offered by the Taliban leadership in 2001, 2002, up to 2005, and again around 2009.⁴³ Had NATO done that, Islamic State affiliates might not have spread to become a more deadly terrorism problem, even after their defeats in Iraq and Syria led on the ground by the Kurds. Islamic State affiliates are still twice as dangerous today in global terrorist killings, than Al Qaeda was from 2001.⁴⁴ Had the United States been less bull-at-a-gate in the way it approached Libya on the Security Council in 2011, had it listened to the point of view of Russia, China and African Union leaders who believed they had persuaded Gaddafi to go without a war that destroyed his state and society (and cascaded civil wars across Africa, fought with Gaddafi's armoury), the Security Council might still be in the post-1990 era where it got things done for peace. There might still be the trust of great power vetoes being extremely rare for more than a decade.

⁴² Alex de Waal, 'African Roles in the Libyan Conflict of 2011' (2013) 89(2) *International Affairs* 365-379.

⁴³ As discussed by John Braithwaite and Bina D'Costa, *Cascades of Violence: War, Crime and Peacebuilding Across South Asia* (ANU Press, 2018) 402-403 and David Kilcullen and Greg Mills, *The Ledger: Accounting for Failure in Afghanistan* (Hurst Publishers, 2021).

⁴⁴ Kilcullen and Mills (n 43).

Those of us who believe in dialogue with Russia, the United States and China, serve all of them well by saying to Russia in the aftermath of Vladimir Putin's criminal invasion of Ukraine, 'don't make the terrible situation you have got your country into worse by pushing back on the expanding Western Alliance against you by attempting an equally strong military alliance against NATO with China.'⁴⁵ At the same time, peace-loving countries could today be saying to China, don't allow yourselves to be drawn into future wars of comparable foolishness to the Russian invasion of Ukraine by joining a mutual defence pact with Russia.' 'Your interests are quite different from theirs and we say this to you as friends of China as well as friends of peace.' As ASEAN countries effectively do say to China as genuine friends of China, others should likewise say to China 'don't seize the opportunity of weakened US support for currently economically collapsing countries that surround India – Afghanistan, Sri Lanka, Pakistan, Nepal, Myanmar - by coming to their rescue economically on condition that they join a defence pact with China to balance NATO and the Quad.' Let us all speak up about the dangers of widening military alliance structures that might turn future little wars into wars that end us all. Post-Ukraine, who can blame many Eastern European countries for wanting to come under guarantees that NATO will send troops to fight if Russia attacks them? Equally, who can doubt that a 2020s alliance structure like that which evolved before World War I, and that locks many states in to escalate into a world war, puts the whole planet at risk.

In these terms, Australia's nearest geopolitically significant friends, Indonesia, and New Zealand, have become more constructive players for regional peace and prosperity than

⁴⁵ Pursuant to my non-interference theme, we might also say 'Let's both desist from interfering in each other's elections because the meddling of both of us has backfired on that front.' Would Biden have declared such a vigorous US proxy war against Russia in Ukraine had Putin not interfered successfully for Hillary Clinton's election defeat at the hands of Donald Trump? On its side, the US must bear in mind that it interfered to discredit other candidates and prop up fading support for Boris Yeltsin in his implausible 1996 re-election when inflation, poverty and crime were skyrocketing, sustainable development in freefall. As Yeltsin's health and popularity faded further, it was Yeltsin who plucked Vladimir Putin from obscurity as his successor. It was hard to foresee that this succession to Putin would be such a terrible outcome for US interests. But that is the point. Meddling sows uncertain seeds. Perhaps it was hard also to foresee that the election would be interpreted by the Russian people as one in which Yeltsin perpetrated widespread electoral fraud and benefited from a lot of US support in the form of campaign advisors and more. This was the beginning of the end of the post-Soviet love affair between the Russian and American people. Gorbachev probably reflected the general view in Russia when he said in his book, *The New Russia*, that 'There have been no fair and free elections in Russia since . . . the election of 1991 when Boris Yeltsin became the first president of Russia': Tom Gallagher, 'One Fait Accompli After Another: Mikhail Gorbachev' (8 July 2017) *Los Angeles Review of Books*; Michael Kramer, 'Rescuing Boris: The Secret Story of How Four U.S. Advisers Used Polls, Focus Groups, Negative Ads and All the Other Techniques of American Campaigning to Help Boris Yeltsin Win' (15 July 1996) *Time*. An anonymous reviewer and I think that 1996 was a sufficiently tragic turning point away from democracy to merit this footnote, indeed it was perhaps the most consequential setback to democratic values of recent decades.

Australia. True diplomatic friends of Asia might say that ASEAN or South Korea is on a better path than the Quad. We do not want Asia in the 2020s and 30s to pursue a bifurcation of military alliance structures in the way Europe did before World War I, and in the way NATO has risked during the era of conflict over Ukraine. It is quite possible for the Asian century to continue to be comparatively peaceful for Asia in a way the European and American centuries were not for Europe and the Americas.⁴⁶ This paper specifically contends as part of that more general argument about preventive diplomacy, that social democratic governments in recent decades have been unfaithful friends toward movements for democracy and freedom by failing to speak up against great power interference for regime change, whether by the United States, the UK, China, Russia, Turkey, Israel, or Rwanda. Social democracies have been weak in raising their voices against great power interference in elections and national congresses that nominate leaders, especially by failing to put sensible guardrails around the new cyberespionage. These covert regime change machinations endanger us all and endanger great power cooperation to save the planet from global warming, or from a nuclear winter that ends the life of most humans in a global famine. It is unconscionable for civil societies who love freedom and democracy to continue to be so mute on these dangers that intelligence agencies and the military-industrial complex promote so assiduously.

VII STEPS BACK AND FORWARD FROM DOMINATION

I hypothesize that freedom and social democratic institutions evolve organically *unless* they are suppressed by criminal violence of the kind we saw from the landlord class, the war on drugs, and elites buying politicians in Latin America. When freedom as non-domination has flourished in stateless societies, it only persists so long as militarized states refrain from colonizing them. Violence and elite corruption can set back social movements severely for a long time, as we saw with crushing of the world's most effective trade union movement inside the United States in the late nineteenth and early twentieth century by levels of anti-union violence not seen in any other democracy of that era.⁴⁷

⁴⁶ In that sense, Kevin Rudd is constructive on questions like Chinese and US guardrails against escalations triggered by cyberespionage, and other new technologies of risk: Kevin Rudd, *The Avoidable War: The Dangers of a Catastrophic Conflict between the US and Jio Jinping's China* (Public Affairs, 2022).

⁴⁷ Paul F Lipold and Larry W Isaac, 'Repressing Worker Dissent: Lethal Violence Against Strikers in the Early American Labor Movement' (2022) 63(1) *Labor History* 1-23.

One of the worst setbacks to freedom in the last century was a coup sponsored by the CIA and Britain against a social democratic Iranian regime in 1953. Details were declassified in 2013.⁴⁸ The coup returned the monarchist regime of the Shah to power. This was sufficiently oppressive to induce a revolution to overthrow the Shah led by liberals, social democrats, and a marginalized Kurdish minority, a revolution quickly captured by clerical oligarchs with a violent, exclusionary ideology. The Ayatollahs imprisoned the liberals and the social democrats because they enjoyed superior organizational bases in the society that had not been crushed by the Shah in the way that democratic organizational bases in the trade unions and tribal structures had been crushed.

The trajectory toward social democracy that Mikhail Gorbachev initiated with Glasnost and Perestroika, and its reversal by Putin and his cronies, was another devastating reversal for freedom. No direct covert operation was responsible for Russia's predicament even if Putin alleges this. That is not to deny that preventive US diplomacy could have been more sensitive. The failure of Western powers to support Sun a hundred years ago because of his drive to decolonize China, and opposition to his redistributive policies by Hong Kong and Shanghai bankers, was an earlier mistake of enduring consequence.⁴⁹ Ultimately Western support for authoritarian mass murderers like Chiang Kai-shek not only helped them to crush freedom, but also sustained Mao Zedong with his alternative model of 'liberation', which, as in the USSR, proved a prescription for even deeper domination, and larger numbers of state murders. Other competitors for the worst catastrophes of US regime change and duplicity in crushing freedom and

⁴⁸ Ervand Abrahamian, *The Coup: 1953, the CIA, and the Roots of Modern US-Iranian Relations* (New Press, 2013).

⁴⁹ Discussed in Braithwaite (n 1) Ch 1.

democracy are Congo,⁵⁰ Indonesia⁵¹ and South Africa.⁵² Particularly in their impact across Africa, these rate among the more destructive Western covert operations.

For all of the evidence of such desperately devastating impacts, I optimistically hypothesize that empowering families and education institutions also have a covert presence that grows civil society movements like the movement against Apartheid, the slave trade, the Chartists, the Suffragists. Violence, covert operations by deep states, and buying politicians cannot suppress these movements forever. Europe and democratic East Asia, which had been such violent parts of the world before 1950, did much better on crime and war than the rest of the world after 1950. This was because state crime against advocates for freedom was gradually humbled in Europe and then in democratic East Asia earlier and better than in high income countries like Argentina, Chile, and indeed the United States, and hugely better than in low-income countries like Congo and Afghanistan.

Macrocriminology and Freedom argues that democracy without checks and balances has dim prospects of survival. Once path dependency on checks and balances that temper power is entrenched, democracy becomes robust and valued by citizens who struggle to preserve it. Until that is achieved, however, elected governments have incentives to

⁵⁰ Search 'Congo' on open access of John Braithwaite and Bina D'Costa, *Cascades of Violence: War, Crime and Peacebuilding Across South Asia* (ANU Press, 2018). US (and Belgian) interference in Congo escalated with involvement in the assassination of President Lumumba in 1961. This admittedly converted Zaire to become one of the strongest US allies during the Cold War. Ruthless US covert support for an extravagantly corrupt and anti-freedom regime in turn contributed to the collapse of the Democratic Republic of Congo. It was once the second most industrialized country in Africa (after South Africa). By the twenty-first century, the DRC sunk to dead last in the world on GDP per capita and on the Human Development Index. It also became the most violent society on the planet, suffering more deaths and rape as a result of war than any country since World War II, with more than 100 armed groups still pillaging the DRC today.

⁵¹ Human Rights Watch, *Indonesia: US Documents Released on 1965-66 Massacres* (18 October 2017). The Indonesian military takeover of 1965 installed President Suharto. It became a less enduring tyranny than in Iran. A people power movement on the streets of Jakarta in 1998 led the most important transition to democracy of the past three decades; transition from a high violence to a low violence and low imprisonment Indonesia that managed the War on Terror with less violence than all the other 'Muslim' societies with lower Muslim populations than Indonesia (which has the largest): John Braithwaite, Valerie Braithwaite, Michael Cookson and Leah Dunn, *Anomie and Violence: Non-truth and Reconciliation in Indonesian Peacebuilding* (ANU Press, 2010). Only in recent years has release of CIA records revealed how central the CIA was in the Suharto coup, with CIA operatives even involved in preparation of hit lists entailed in the murder of 500,000 Indonesians, and perhaps as many as a million, active in trade unions or with allegedly communist sympathies.

⁵² Throughout the Cold War, NATO states supported the Apartheid regime in South Africa and the incarceration of Nelson Mandela and other opposition leaders until a vibrant social movement against Apartheid prevailed.

misgovern. Good government is not the most enriching way of benefiting from power. If you can get away with it, it is better to buy elections, corrupt an electoral commission, intimidate or kill opponents, scapegoat a minority to cultivate majoritarian support, jail strong opponents for corruption and run against weaker ones, or simply miscount votes. Once in government, you can reimburse these costs by pillaging the state. When leaders endeavour to win elections with good government, their capacity to benefit from power is much reduced. This is because good government means checks on abuse of power that place limits on political opportunities to pillage.⁵³

While there are reasons for optimism that natural human preferences against domination survive and prevail in the long run of histories of nations, incentives running the other way are also profound. *Macrocriminology and Freedom* argues that while markets can contribute valuable checks against domination by monopolies – public and private – they also tend to markets gamed by corporate power, re-monopolization, exploitation of workers and consumers, gamed tax systems, and greenwash for environmental crises. Hence, I argue that social democrats can and must commit to regulation that subdues the lure of business tyranny in specific ways. Second, activists must do better at calling out international business lobbying for regime change to remove social democratic parties in emerging democracies. Social democrats in government can choose to support fellow social democrats in oppressed societies. They can support them in preference to allegiance to their national corporate champions and campaign donors when they complain of developing countries that tax them heavily, impose costly environmental laws, or increase minimum wages. Most Australians think it a national disgrace that Australia bugged a Timor-Leste cabinet meeting for commercial intelligence to advantage an Australian carbon giant, which later hired the retiring Foreign Minister as a consultant. Then the deep state prevailed on prosecuting those who blew the whistle on Australian state crime (until the Albanese government came to power). That does not mean the Albanese government will prove to impoverished, war-ravaged Timor-Leste that we are a more trustworthy friend than China. It remains to be seen whether the Albanese government will be effective at preventing the US prosecution of Julian Assange for antagonizing the US deep state with whistleblowing on its war crimes.

⁵³ Collier (n 36).

VIII RESISTING DEEP STATE ADVOCACY OF INTERVENTION

In the long run of history, I hypothesise that we inherit a more secure, freer, less violent world when societies resist business and intelligence service lobbying to follow short-term preferences to interfere in emerging democracies. Later on, there will be fewer Putins, Ayatollahs, Saudi warmongers, Maoist Red Guards, and Islamic States to contend with if robust rejection of such machinations is the road taken. *Macrocriminology and Freedom* argues that there are many (150!) consequential choices for freedom, nonviolence and dignity. A 151st hypothesis discussed herein is neglected in that book:

Choosing defence of social democracy over defence of the military-industrial complex, choosing to oppose any form of foreign interference to fix elections, support military coups, or achieve regime change, contributes to a world with less domination, less violence.

Activists might ponder why this proposition has been so historically neglected in the domestic politics of wealthy countries with social democratic governments.

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THE CENTENARY OF THE FIRST ABOLITION OF CAPITAL PUNISHMENT IN QUEENSLAND: A STUDY IN LAW AND HUMAN DIGNITY*

Michael Kirby AC CMG**

On 1 August 1922 the Parliament of Queensland enacted a Bill to abolish capital punishment. This was the first jurisdiction in the common law world at that time to take that step. It afforded an example and a challenge to the global community. In this article, which derives from the author's speech to a centenary celebration of the Queensland innovation, the author explains the background of reforms and modernisation of the criminal law and procedure that stimulated the reform. He explains the opposition to reform of many judges and other lawyers and the disappointing record of the High Court of Australia in capital punishment decisions. He also explains recent reforms that have been adopted in Papua New Guinea, Kazakhstan, Malaysia and elsewhere. He recounts earlier instances of partial reform in the United States and other countries, and he lists the continuing opposition to reform in Iran, Singapore, and Myanmar/Burma. Whilst such 'hold outs' remain, Australians must continue to advocate abolition. They can take encouragement and inspiration from the innovative reform achieved in Queensland a century ago.

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* This article is based on an address by the author at the centennial celebratory conference held in the Premier's Hall, Parliament of Queensland on 1 August 2022.

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I WHAT IS PAST

English traditions, from which Australia derived the common law system of law and the Westminster Parliament, constitute a mixed bag of positive and negative gifts. This can also be said for the athletes of many popular sports: exhibiting a dedication to fierce contest, fought under rules of fair play but resulting in savage outcomes. The legal system of the common law includes peculiar features: the accusatorial trial and the adversarial system. These elements of English culture have also influenced parliamentary systems for resolving large political and like disagreements. A growing revulsion against aristocratic rule and unequal representation in the legislature led, in the first years of the 20th century, both in Britain and Australia, to universal franchise and forms of electoral democracy, organised through parliamentary representation of local constituencies. The gradual advance of this system ultimately resulted in rule by legislation approved in broadly representative parliaments. A reflection on the potential for chaos inherent in the American presidential system, copied from the norms of Hanoverian traditions, led eventually to a much fairer institution of governance by the Westminster legislature, preferable by far to the American Constitution – a system frozen in time by the governmental model of King George III.

The evolution of the English criminal trial system also witnessed many steps:

- The early systems of trial by ordeal and combat were replaced by a mode of contest, intellectual rather than physical;
- The accused was permitted to give an unsworn statement of their version of the facts that was not sworn on oath lest accused persons might imperil their immortal souls by a temptation to self-defensive perjury;
- The alteration of the earlier rules of trial, so as eventually to permit the accused person to give his or her evidence about contested issues previously forbidden;
- The creation of a trained police force and professional prosecutors succeeding the armed corps of citizens and subjecting the players to rules of

law and procedure devised and enforced by judges who were, in theory at least, independent and neutral as between the Crown and the accused;

- Enlarging the procedures by way of permitting reserved points of law to be reserved for scrutiny by a special court after the trial so as to examine the legal accuracy of judicial directions given by the presiding judge to the jury;
- Ultimately, the right of the accused to give sworn evidence if that was elected and the winding back of unsworn statements as the principal mode of putting forward the accused's version of events contested before the jury;
- Enlarging in 1909 the grounds of appeal to permit appellate reconsideration, not only of reserved points of law and the accuracy of judicial directions and rulings, but also provision for consideration of the risk that a miscarriage of justice had occurred, against which appellate protection was justified and provided;¹ and
- Ultimately replacing petitions to the Crown's prerogative of mercy by a recent change allowing a second appeal where the appellate court is convinced that "fresh and compelling evidence" exists to justify the provision of leave for a retrial or proceeding directly to a judicial order of acquittal.²

The foregoing list of reforms in criminal procedures by no means exhausts the attempts of the criminal justice system to avoid the previous risks of serious miscarriages of justice. However, one particular feature of the trial system of British criminal procedure actually multiplied the risk of uncorrectable error. This was occasioned by a long persisting fairly universal feature of cruel punishments. These included the availability of the sentence of death that applied to a very large and persisting number of criminal convictions in England. Capital punishment was quickly adopted in England's overseas colonies including Australia, notably in Queensland. The reform of this aspect of criminal punishment proved most resistant to change. This is why the abolition of the availability of the sentence of death in Queensland on 1 August 1922 – a century ago – is so worthy of remembrance in 2022. Not long after I first became a judge in 1975, I sat in the sunshine in a park in Shepparton, Victoria. I conversed about the older times with Justice (later Sir) Murray McInerney, Judge of the Supreme Court of Victoria. We conversed

¹ As in *Pell v The Queen* (2020) 268 CLR 123.

² Legislation to permit a second application for leave to appeal to a court of criminal appeal applies in South Australia, Tasmania, Victoria, and Western Australia.

during our respective lunch hours. He answered my questions about the particular burdens that he remembered from those days. This fine, sensitive, and experienced judge was heavy with honours for his long service to the law. Into his mind, came swimming a recollection of a capital case long ago. In it he had had picked up a “dock brief”, a rough form of legal aid by which the youngest barristers were assigned a brief for an accused person in a criminal trial. “Do your best” he was enjoined as the trial soon to open. The young lawyer, who had entered the legal profession believing in its nobility and dedication to justice, suddenly came face to face with the remembrance of things past. A day he had never forgotten. In the case according to his remembrance, he did not secure the miracle of an acquittal for his client. The prisoner had neither the merits nor the barrister with technical magic to ensure success in that trial. It was technically just; but unimaginably a horror story for client and lawyer alike. An old judge conversing in a country park with a young judge, listening in astonishment and dread to the story. I saw that the old judge was weeping at the memory of that far off ordeal. Imagining the tears of the accused, when told that his young and inevitably inexperienced counsel had done his best in the circumstances. The statute book and the old common law contained hundreds of offences for which the death penalty was prescribed. In fact, hanging was a comparatively benign form of capital punishment for the English. Offences recorded in the English State Trials involved many features worse than hanging.³ Burning, drowning, and drawing and quartering together with public exhibition of the end of a former human life and its display, on a pike, showed how ferocious the punishments prescribed by the English law for the King’s enemies amongst “the criminal classes”. It did not stop in England.

The spread of hanging as the common form of punishment on conviction of a felony anywhere in the British Empire was not considered in the early days of Empire particularly disproportionate or shocking to most. The advance of the reform movement owed little credit to Blackstone or other legal scholars. They accepted the death penalty for it had long been thus. For the cause of reform, much more was owed to Blackstone’s contemporary Bentham, and the latter’s successor and disciple J S Mill, writing from the standpoint of rational utilitarianism. Drawing ideas from scholars of the European enlightenment who did not share the English complacency about the widespread

³ See *Hayne’s Case* [1614] 13 Co Rep 133 (theft of a winding sheet from bodies of disinterred deceased).

punishment involving deliberate killing of convicted felons and antipathy towards reform.⁴ Bentham and Mill attributed most of the opposition to reform, to “Judge and Co”, ie the Bench and Bar whom they blamed for the overly complex, chaotic and punitive system of criminal liability and punishment.⁵ The invention of transportation to far distant colonies (in America and Australia) were an illustration of how slow the process of reform in criminal punishment took in English-speaking countries. This was the ‘civilised’ system that helped the ‘white’ newcomers to rule the new Great South Land. Ultimately, it was to prevail over the First Nations people protected by a criminal justice system they had convinced each other was proportionate, just, and equal in its application to people of every race. Little did they acknowledge that such system was specifically harsh in its impact on the lower class ‘whites’ and the dispossessed ‘blacks’ alike.⁶ After the establishment of the convict colonies in Australia and the passage of a little more than a century of colonial rule, the Commonwealth was created. The first century marked the creation of the establishment of the High Court of Australia. For a celebration of these notable achievements, the centenary of the High Court of Australia was marked. I wrote a critical description of the role of the High Court of Australia in a century of capital cases.⁷ There were occasional glimpses of enlightenment in some of the cases. On the whole, however, many of the cases revealed the same judicial hostility to reform that Bentham and Mill had complained of a century earlier and on the opposite side of the world. Sixteen reported appeals against convictions carrying the death penalty were reported. Some of them provided a reprieve for the convicted prisoner. These included *Tuckiar v The King*⁸ where the court overturned the sentence of death of the prisoner, described as a ‘completely uncivilised Aboriginal native’.⁹ However, in most other cases the trial judge’s conduct of the trial was accepted as having offered an accurate trial. The majority of the High Court repeatedly refused to intervene.¹⁰ Overwhelmingly, sentences of death were confirmed. No techniques of constitutional

⁴ HLA Hart, ‘Jeremy Bentham’ in AWB Simpson (ed), *Biographical Dictionary of the Common Law* (Butterworths, 1984) 44.

⁵ Ibid 45-6.

⁶ See Michael Kirby, ‘Black and White Lessons for the Australian Judiciary’ (2003) 23 *Adelaide Law Review* 195.

⁷ Michael Kirby, ‘The High Court and the Death Penalty: Looking back, looking forward, looking around’ (2003) 77(12) *Australian Law Journal* 811.

⁸ (1934) 52 CLR 335.

⁹ Ibid 339 (Gavin Duffy CJ, Dixon, Evatt and McTeirnan JJ).

¹⁰ See eg, *Sodeman v The King* (1936) 55 CLR 192.

reasoning were invoked to cast doubt on the punishment. Even in obiter dicta, the justices of the High Court never expressed doubts as to its legitimacy or about the part they were playing in the judicial orders followed soon after by the imposition of the sentence of death.¹¹

Specially shocking amongst the cases was the decision of the High Court in the case of an Aboriginal prisoner, Rupert Max Stuart.¹² He was ultimately saved from hanging, not by the judiciary or legal reasoning, but by political pressure exerted on the executive government in his newspaper by another Adelaide Rupert (Rupert Murdoch).¹³ It is a story that, arguably, displays the worst of the judicial heartlessness about which Bentham and Mill had repeatedly complained.

For most of the last century, the Judicial Committee of the Privy Council in London provided the last word in appeals against the imposition of the death penalty. Surprisingly perhaps, that imperial court in London came by 2000 to adopt an approach urged by a New Zealand member, Lord Cooke of Thorndon. Drawing on principles of international human rights law, Lord Cooke said that special ‘vigilance’ was required before upholding convictions and sentences including a death sentence.¹⁴ Eventually, Lord Cooke’s approach was adopted by the Privy Council.¹⁵ Possibly they were influenced by the fact their decisions were subject to a petition to the Inter-American Commission on Human Rights. Looking back, the notion that “special vigilance” was required where rejection of consideration of legal and factual arguments would result in the execution of the prisoner, it was not an especially surprising principle for the highest judges, the ultimate guardians of justice, to embrace. However, in the High Court of Australia decisions, over its first century, only Justice Isaacs (later Chief Justice); Justice Evatt; and sometimes Justice Dixon (also later Chief Justice) exhibited any inclination to such a vigilant approach of special scrutiny.¹⁶ It is not a famous chapter in the High Court’s legal history.

¹¹ Kirby, ‘The High Court and the Death Penalty’ (n 7).

¹² *Stuart v The Queen* (1939) 101 CLR 1.

¹³ M Kirby, ‘Black and White Lessons for the Australian Judiciary’ (2002) 23 *Adelaide Law Review* 195, 204.

¹⁴ *Higgs v Minister of National Security* [2000] 2 AC 228, 260 (Lord Cook in dissent).

¹⁵ *Lewis v Attorney General of Jamaica* [2001] 2 AC 50.

¹⁶ Kirby, ‘Black and White Lessons for the Australian Judiciary’ (n 6) 812, 816-7.

In a way, this was a particularly astonishing feature because of the attention given about the highly publicised wrongful conviction of Timothy Evans for the actions later found to have been performed by the mass murderer John Christie.¹⁷ That case showed what could happen when judges were insensitive to the risks of error later revealed. The emergence of DNA and other forensic exculpation of convicted prisoners, increased, at last, the approach of “special vigilance” in capital cases. Eventually, such shocking cases led to an approach calling for the abolition of the death penalty in England, Australia and elsewhere. In this, the repeal in Queensland was a forerunner.

By August 2003, the time of my review of the dismal record of decisions in the High Court involving capital crimes, a poll of Australians showed that about 56% were still in favour of the death penalty for those found guilty of committing ‘major acts of terrorism’.¹⁸ Gradually, the proportions changed. Political and public opinions in many jurisdictions shifted in favour of abolition. However, the fact that, in the present century, a majority were still in favour of executing some prisoners convicted of crimes of seriousness, shows that the shift towards abolition is far from deeply entrenched. Barbaric or uncivilised overreach of the law can still return. Enlightenment on this subject is a relatively recent achievement in most English-speaking jurisdictions. Restoration is far from impossible.¹⁹ In many of the 56 member countries of the Commonwealth of Nations,²⁰ the continued imposition of the death penalty has endured hand in hand with criminal punishment for homosexual offences. Of the 56 countries, 32 retain the death penalty either on the books or in practice,²¹ and 34 countries in the Commonwealth of Nations also favour the retention of the criminal offence of consensual, private sexual conduct

¹⁷ J Scott Henderson QC, *Report of an inquiry into certain matters arising out of the deaths of Mrs Beryl Evans and of Geraldine Evans and out of the murder of Geraldine Evans* (House of Commons, Command Paper No 8896, 29 July 1953); J Scott Henderson QC, *The case of Timothy John Evans* (House of Commons, Supplementary Report, Command Paper No 8946, 5 November 1953); Ludovic Kennedy, *Ten Rillington Place* (Victor Gollancz, 1961).

¹⁸ Steve Lewis, ‘Terrorists Should Die: poll - Majority in support of Amrozi execution’, *The Australian* (19 August 2003) 1.

¹⁹ Nigel Jones, ‘Is the death penalty making a comeback?’, *The Spectator* (online, 30 July 2022) <<https://www.spectator.co.uk/article/the-shadow-of-the-noose---is-the-death-penalty-making-a-comeback-/>>.

²⁰ See generally ‘Member countries’, *The Commonwealth* (Web Page) <<https://thecommonwealth.org/our-member-countries>>.

²¹ Amnesty International, *Death Sentences and Executions 2021* (Amnesty International Global Report No ACT 50/5418/2022, 2022) 63 <https://www.amnesty.org.au/wp-content/uploads/2022/05/REPORT_-Amnesty-Death-Sentences-and-Executions-2021-v2-web.pdf>.

involving adult participants of the same sex.²² Importantly, of these 34 countries, 26 countries still either retain the death penalty in theory or practice.²³ As Jeremy Bentham pointed out, acceptance of serious overreach of the criminal law often coincides with attitudes of indifference to arguments of disproportionality and excessive punishment for crimes generally. These attitudes often coincide with, and reveal, a common attitude to traditional crimes and punishment.

II WHAT IS PASSING

Reform of criminal laws against sexual minorities has seen progress steadily, but slowly. Progress on the death penalty might benefit from lessons deriving from the help of the United Nations in upholding civilised rules that restrain excess and disproportionality in criminal law and punishment more generally. Within the United Nations system, an Independent Expert on Sexual Orientation, Gender Identity and Expression ('SOGIE') was created by the United Nations Human Rights Council in 2016. The first person elected to that office was Professor Vitit Muntarbhorn (Thailand). On his resignation in 2018, he was replaced by Mr Victor Madrigal-Borloz (Cost Rica). Within the Human Rights Council, on each occasion that the mandate of the Independent Expert on SOGIE has come up for extension, there have been strong statements in opposition. These have mainly come from African countries, China and some Asian countries, the Russian Federation, and some Commonwealth of Independent States countries. Nevertheless, the office on SOGIE has survived. In a recent vote, 23 countries voted for continuance, 17 countries voted to terminate the mandate, seven countries abstained, and a number were absent from the vote.²⁴ A shift of a few countries to join the opposition to continuance would have terminated this office. That indicates the fragility of support for the mandate. However, it continues to exist as a flash point for international progress on LGBTIQ issues. The same hostility overlaps with the identity of opponents to national and international action on

²² Mai Sato and Christopher Alexander, 'State-sanctioned Killing of Sexual Minorities: Looking Beyond the Death Penalty' (Report, 4 March 2021), 79 (Appendix 1) <<https://doi.org/10.26180/14069318.v3>>.

²³ That is to say, 15 countries are retentionist (Antigua & Barbuda, Barbados, Bangladesh, Dominica, Guyana, Gambia, Jamaica, Malaysia, Nigeria, Pakistan, Saint Lucia, St Kitts and Nevis, St Vincent and The Grenadines, Singapore, and Uganda) and a further 11 countries retain the death penalty however are abolitionist in practice (Brunei, Cameroon, Grenada, Ghana, Kenya, Malawi, Mauritius, Sri Lanka, Sierra Leone, Tonga, and Zambia). See Amnesty International, *Death Sentences and Executions 2021* (n 21).

²⁴ Human Rights Council, *Mandate of Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, 50th sess, A/HRC/RES/50/10 (7 July 2022) <<https://undocs.org/A/hrc/res/50/10>>.

the death penalty. The same countries would probably be found in an open vote in the Human Rights Council ('HRC') concerning the strengthening of the opposition, on human rights grounds to the continuance of the death penalty. Nevertheless, the degree to which the mandate on the Independent Expert on SOGIE has survived shows the way in which the international community has increasingly come to accept that mandate as representing the future enlightenment of the international legal order. This affords both encouragement and an example to international endeavours to view capital punishment, like sexual orientation crimes, as a global project, not just an issue reflecting local culture and individual differences. There are only so many such projects that the international community can ordinarily tolerate at any given time. However, the lesson of the HRC response to sexuality crimes and other human rights abuses carries a message for the continuation and enlargement of the global community's response to resistance to the death penalty.

Strangely, perhaps more progress may be anticipated in respect of progress on abolition of the death penalty than in respect of sexuality. Three notable recent instances illustrate this proposition.

Firstly, Papua New Guinea. On 23 March 2022, Papua New Guinea ('PNG') presented a response to the HRC's recommendations that PNG had received as a result of its third cycle of Universal Periodic Review ('UPR').²⁵ UPR is the procedure, adopted by the UNHRC, to limit special human rights mandates and procedures to the most egregious cases. Consideration of themes and issues on the global human rights agenda, has produced a rotating procedure for scrutiny of countries' own reports. The objective of UPR is to engage in open dialogue, at the HRC, targeting improvements in the human rights records common to many countries. Country-specific mandates tend to be more controversial. In the case of PNG, an increased presence of civil society participants in the UN process of UPR (doubling since the last cycle) encouraged increasing attention to the call to end provisions in the PNG *Criminal Code* providing for imposition of the death penalty. On 4 November 2021, 22 countries in the HRC called on PNG to abolish its statutory provisions authorising the death penalty. This constituted adoption of a recommendation made in the submissions of Amnesty International, Human Rights

²⁵ Human Rights Council, 'About the UPR', *Universal Periodic Review*, (Webpage) <<https://www.ohchr.org/en/hr-bodies/upr/upr-main>>.

Watch and Joint Submission 7.²⁶ In 2016, only 12 countries had occasioned a like recommendation for the abolition of the death penalty. The increased number of countries voting to that end, and international diplomatic pressure led on 22 January 2022 to the PNG Parliament passing amendments to the *Criminal Code* to abolish the death penalty wherever appearing in PNG law.²⁷ This change in the law would make PNG the 21st country in the Asia and Pacific Region to have abolished the death penalty and the 110th country worldwide. Amnesty International, in a published statement of 13 April 2022, welcomed this move to enshrine PNG's commitment to abolition of the death penalty under international law by urging ratification by PNG of the *Second Optional Protocol to the International Covenant on Civil and Political Rights* (ICCPR). That Protocol aims at the eventual abolition of the death penalty worldwide.

PNG's *Criminal Code* continues to criminalise consensual adult same-sex activity.²⁸ That code was originally inherited from Queensland during the colonial and trusteeship eras. Reform for attaining other specific rights were referred to in the Amnesty International statement. It may be hoped that once the reform agenda gathers momentum a broad range of recommendations will be adopted.²⁹

Secondly, Kazakhstan has recently abolished the death penalty. It has ratified the *Second Optional Protocol* to the ICCPR. The International Bar Association's Human Rights Institute ('IBAHRI') has welcomed the abolition of the death penalty in Kazakhstan.³⁰ It also shows how the issues of capital punishment and same-sex criminality tend to go hand in hand. Those who seek to preserve and defend the criminal offences against

²⁶ See generally, 'Universal Periodic Review Third Cycle - Papua New Guinea - Reference Documents', *United Nations* (Web page) <<https://www.ohchr.org/en/hr-bodies/upr/uprpg-stakeholders-info-s39>>.

²⁷ Amnesty International, 'Papua New Guinea: Increased participation of civil society hailed a success in human rights review' (Public Statement ASA 34/5479/2022, 13 April 2022) 1 <<https://www.amnesty.org/en/wp-content/uploads/2022/04/ASA3454792022ENGLISH.pdf>>; see also Moses Sakai, 'The PNG Parliament abolishes the death penalty for the second time' (Monash University, Eleos Justice Blog Posts, 27 January 2022) <<https://www.monash.edu/law/research/eleos/blog/eleos-justice-blog-posts/the-png-parliament-abolishes-the-death-penalty-for-the-second-time>>.

²⁸ See *Criminal Code Act (PNG)* ss 210 and 212: 'unnatural offences' and 'indecent practices between males' respectively.

²⁹ Amnesty International, 'Papua New Guinea: Increased participation of civil society hailed a success in human rights review' (n 27) 1.

³⁰ International Bar Association, 'IBAHRI welcomes the abolition of the death penalty in Kazakhstan' (Media Release, 23 June 2022) <<https://www.ibanet.org/IBAHRI-welcomes-the-abolition-of-the-death-penalty-in-Kazakhstan>>.

LGBTIQ people also tend to favour retention of capital punishment.³¹ Some common components of cultural traditionalism and adherence to disproportionate overreach in criminal punishment is in play.

Thirdly, is the situation in Malaysia. On 10 June 2022, a statement by a Minister in the Prime Minister's office of the Government of Malaysia, reported that the government had agreed to abolish the mandatory sentence of death. It would substitute in cases of death penalty a limitation that would recognise a discretion of the court having regard to the circumstances of the case.³² Since that speech was delivered, however, in the draft Bills tabled in early October, in most instances a natural life-sentence was proposed as an alternative – ie with no prospect of parole. The legislation has not yet been debated, as the following day the Malaysian Parliament dissolved, and an election was called. It is therefore unclear whether the new government will proceed with the move to a discretionary death penalty at all, and if so, whether the legislative change will provide significant relief to those currently on death row.³³ This is not as welcome an outcome as outright abolition. Nevertheless, it is noteworthy because, in the past, persons (including Australian citizens) imprisoned in Malaysia, commonly on charges of possession of prohibited drugs, have had sentences of death confirmed by the Executive and carried out against global opposition, including protests from Australia.³⁴ A spokesman for the Malaysian Cabinet agreed that research should be carried out concerning further reform.³⁵ Proposals for change in Malaysia followed a 'presentation of the Substitute Punishment Review Report Against the Mandatory Death Penalty at a Cabinet Meeting on the 8 June 2022'.³⁶ That committee was chaired by the former Chief

³¹ Although same sex relations were legalised in 1997, same sex marriage is not recognised and there are no protections against discrimination. See eg, Equaldex, *LGBT Rights in Kazakhstan* (Webpage, 2023) <<https://www.equaldex.com/region/kazakhstan>>.

³² See generally, Vincent Tan, 'Malaysia government agrees to abolish mandatory death penalty' (Channel News Asia, Web Page, 10 June 2022) <<https://www.channelnewsasia.com/asia/malaysia-abolishes-death-penalty-wan-junaidi-2738916>>; and the statement of the Malaysian Bar in response to the Ministers announcement, Karen Cheah Yee Lynn, 'Abolition of Mandatory Death Penalty a Step Towards the Right Direction, But Abolish Capital Punishment Entirely' (Press Statement, 11 June 2022) <<https://www.malaysianbar.org.my/article/about-us/president-s-corner/pressstatements/press-release-abolition-of-mandatory-death-penalty-a-step-towards-the-right-direction-but-abolish-capital-punishment-entirely>>.

³³ See Jia Vern Tham, 'What comes after the mandatory death penalty in post-GE15 Malaysia?', Malay Mail (online, 28 October 2022) <<https://www.malaymail.com/news/what-you-think/2022/10/28/what-comes-after-the-mandatory-death-penalty-in-post-ge15-malaysia-jia-vern-tham/36043>>.

³⁴ *Dangerous Drugs Act 1952* (Malaysia) s 39B(2).

³⁵ Tan (n 32).

³⁶ Thaatchaayini Kananatu, 'Framing Death Penalty Politics in Malaysia' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 57, 63.

Justice of Malaysia, Tan Sri Richard Malanjum, and included further recommendations. The Government of Malaysia announced that it would establish a law reform commission for the reform of prison institutions and the imposition of punishment based on principles of 'restorative justice'. The influence of friendly neighbouring countries in these developments cannot be underestimated. Still, the criminalisation of same sex acts in Malaysia remains.³⁷

There are other instances where reform of imposition of the death penalty, or its complete abolition, have been reported. The importance of the foregoing instances illustrates the useful impact of international agencies, the United Nations Human Rights Council and civil society support, in persuading longstanding supporters of the death penalty to reconsider the proportionality and arguability of their previous provisions.

It must be hoped that, in the future, the human rights procedures of the United Nations HRC will continue to provide the gradual reform and repeal of the long-standing laws on capital punishment dated back to colonial times. A neighbouring advantage of this procedure may be that reform in one country in the region may offer encouragement to reform in other countries nearby. Propinquity and shared legal, religious, and historical tradition may more readily secure legal reforms. Clearly, this is what is needed in the case of capital punishment.

III WHAT IS TO COME?

The numbers of hangings in Australia diminished markedly after the end of colonial period. The reduction and reform of capital punishment gathered pace beginning with advent of the Commonwealth, and Australia's progress as an independent nation on the world stage. To some extent, such change in Australia may be attributed to a policy adopted by the Australian Labor Party (ALP). That party, throughout the 20th century had a uniform policy of commuting death sentences and substituting life imprisonment during times when the ALP formed the government.³⁸ Repeal of the criminal provisions requiring, or permitting, capital punishment became available as a priority policy where

³⁷ Equaldex, *LGBT Rights in Malaysia* (Webpage, 2023) <<https://www.equaldex.com/region/malaysia>>; 'Malaysian Authorities Raid LGBT Halloween Party', *VOA News* (online, 30 October 2022) <<https://www.voanews.com/a/malaysian-authorities-raid-lgbt-halloween-party/6811548.html>>.

³⁸ See eg, Carolyn Strange, 'Ambivalent Abolitionism in the 1920s: New South Wales, Australia' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 33.

the ALP enjoyed the necessary power in both Houses of Parliament. To some extent, the proof of serious miscarriages of justice and wrongful executions undermined the unquestioning faith in the neutrality and expertise of the judiciary and the unwavering correctness of jury verdicts. To some extent the change in the law and practice on capital punishment was simply the result of growing knowledge about, and developing repugnance towards, the unpleasant details of capital punishment.

Gradually, capital punishment came to be deleted from the criminal calendar in the United Kingdom, Canada, New Zealand, and Australia. The last hanging to occur in Australia was that of Ronald Ryan on 3 February 1967.³⁹

I remember that day. There was much discussion in society and in the media of the circumstances of the punishment, before and after it occurred. I was preparing for university examinations. At 8am, the appointed hour, in my family home in Sydney, I was alone with my books. I interrupted my reading to reflect on what was happening at that very moment in Melbourne. I did not then know that this would be the last hanging to be carried out as punishment for conviction of the crime of murder (in that case of a prison warden). After that event, Australia's politicians began to adopt a substantially bipartisan policy of repealing statutory provisions providing for capital punishment. Thereafter, some monitors of non-ALP governments occasionally engaged in debate over the restoration of capital punishment. However, restoration has never happened. With every passing year, operating under reformed abolitionist laws, the possibility of restoring capital punishment appears to have become increasingly remote.⁴⁰ An anxiety about capital punishment in the United States of America was allayed by the substitution for hanging (the favoured British means of capital punishment) of administration of poison gas or other lethal injection or by using electric shock. These were advocated as more 'modern and humane' forms of the death penalty. Much empirical research cast serious doubt on that proposition. Although the 14th Amendment to the US Constitution prohibited the infliction of "cruel and unusual punishments" no stable Supreme Court majority could be assembled to apply that provision to prohibit capital punishment in all circumstances.⁴¹ In 1972 the US Supreme Court quashed all sentences providing for

³⁹ Patrick Tennison, 'The Death of Ronald Ryan' in Barry Jones (ed), *The Penalty is Death: State Power, Law and Justice* (Scribe Publications, 2022) ch 26.

⁴⁰ The story is discussed and explained in Barry Jones (ed), *The Penalty is Death: State Power, Law and Justice* (Scribe Publications, 2022).

⁴¹ Capital punishment was effectively abolished between 1956 and 1972 in the United States of America.

capital punishment where they had been imposed under laws that failed to address the particular moral questions associated with particular offences or omitted to spell out statutory guidelines.⁴² However, because of the reported continuation of public support for the death penalty in the United States, the moratorium on the death penalty came under increasing attack.⁴³

Eventually, in 1976, in *Gregg v Georgia*,⁴⁴ the judicial moratorium was lifted. Instead, the 8th Amendment was reinterpreted to remove obligatory execution and requiring that consideration of aggravation or mitigation was obligatory. In the result, although capital punishment was restored, initially by ‘originalist’ interpretation, the overwhelming proportion of executions has been restricted to cases of discretion. In more recent decades, increasing conservative majorities in the Supreme Court retreated from a ‘rights’ based constitutional reasoning. In language with a contemporary familiarity,⁴⁵ Supreme Court majorities in the United States have preferred interpretations that ‘turn over the development of capital punishment policies and procedures to State legislatures and courts’.⁴⁶ In jurisdictions having constitutional protections for the right to life and to be free of “cruel and unusual punishments” arguments based on constitutional rights, the permissibility of capital punishment has been upheld. Given that capital punishment long preceded adoption of human rights law, this outcome was not especially surprising.⁴⁷ Driven back in this way to invocation of perceptions of the unacceptability of the death penalty, the achievement of reform to restrict, narrow or prohibit imposition of the death penalty, has depended upon the trends in popular opinion and on civic awareness and leadership embracing legislative reform. This notwithstanding, the majority of nations throughout the world have gradually been persuaded to embrace the termination of capital punishment. By 2022, starting from the abolition in Queensland a century ago, 109 countries have completely abolished the availability of capital punishment for any crime.⁴⁸ Some countries have abolished it, except of defined cases

⁴² Lief H Carter, ‘Capital Punishment’ in Kermit L Hall (ed), *The Oxford Companion to the Supreme Court of the United States* (Oxford, 1992) 125.

⁴³ *Furman v Georgia*, 408 US 238 (1972).

⁴⁴ 428 US 153 (1976).

⁴⁵ Following the decision in *Roe v Wade*, 410 US 113 (1973), it was overruled by a majority by *Dobbs v Jackson Women’s Health Organization* 597 US (2022).

⁴⁶ Carter (n 42) 126.

⁴⁷ A similar reasoning explains the adoption of the Second Optional Protocol to the ICCPR which assumes that the death penalty is not already outlawed by the traditional language of that Covenant prohibiting “cruel and unusual punishment” or “failure of due process”.

⁴⁸ *World Coalition Against the Death Penalty* (Web page, January 2023) <<https://worldcoalition.org/>>.

involving special or aggravated circumstances such as war crimes, deliberate murder or murder involving particular victims such as police or prison officers; children or spouses. In the case of 25 countries, although capital punishment has remained part of the law, in practice many countries may never actually carry out this form of punishment.⁴⁹ On the other hand, in 54 countries, capital punishment has been retained and is available in defined cases.⁵⁰ In countries that have ratified the *European Convention on Human Rights*, 46 member states have abolished capital punishment.⁵¹ During the past 15 years, the UN General Assembly has adopted 8 non-binding resolutions calling for a moratorium on the death penalty with a view to its eventual abolition.⁵² Although the current trend in the world appears to be moving strongly towards abolition of capital punishment, a number of states worldwide continue to insist on the need for such punishment in particular circumstances. Among the jurisdictions that have retained capital punishment are states including the United States of America, Japan, and India. Recent publicity given to particular executions show that the struggle is by no means over.

In a number of recent reports, it appears that instances of multiple executions have occurred in Iran.⁵³ On 29 June 2022, ten inmates at the Rajai Shahr facility in Iran were executed including Iman Sarfari-Rad. He was executed on conviction on a “sodomy” charge, alongside other named prisoners who had been charged with “rape”. According to reports, the execution of LGBTIQ prisoners in Iran for crimes related to their suggested SOGI status are commonly described in this way.⁵⁴ Iran has been reported as having

⁴⁹ ‘Death Penalty’, *Amnesty International*, (Web page, 9 May 2021) <<https://www.amnesty.org/en/what-we-do/death-penalty/>>.

⁵⁰ Amnesty International, *Death Sentences and Executions 2021* (n 21); cf World Coalition Against the Death Penalty (n 48) currently lists 55 countries as retentionist.

⁵¹ *Charter of Fundamental Rights of the European Union* (EU) Art 2.

⁵² ‘Helping the World Achieve a Moratorium on Executions’, *World Coalition Against the Death Penalty* (Webpage, 20 December 2022) <<https://worldcoalition.org/campagne/helping-the-world-achieve-a-moratorium-on-executions/>>.

⁵³ Amnesty International reported prior to the recent September 2022 uprisings concerning Mahsa Amini’s death in custody, at least 251 executions, between 1 January 2022 and 30 June 2022, in ‘Iran: Horrific wave of executions must be stopped’, News, *Amnesty International* (Web page, 27 July 2022) <<https://www.amnesty.org/en/latest/news/2022/07/iran-horrific-wave-of-executions-must-be-stopped/>>. See also ‘Iran: Urgent international action needed to ensure accountability for Mahsa Amini’s death in custody’, *Amnesty International* (Public Statement MDE 13/6060/2022, 27 September 2022) <<https://www.amnesty.org/en/documents/mde13/6060/2022/en/>>.

⁵⁴ Emily Maskell, ‘Gay Man in Iran Executed on “Sodomy” Charge’, *Jerusalem Post* (Web Page, 1 July 2022) <<https://www.jpost.com/middle-east/iran-news/article-710848>>; Sato and Alexander (n 22) 32, 42-3.

repeatedly executed enemies of the regime. The planned execution of Swedish-Iranian academic, Ahmad Reza Djalali, is a case in point.⁵⁵

For an instance of stubborn adherence to the death penalty (and also statutory provisions against LGBTIQ citizens), Singapore is hard to beat. It has been a long-standing and consistent proponent of capital punishment. Kalwant Singh, a young Malaysian citizen, was informed that his conviction of being a courier in a drug offence had been confirmed. Kalwant was believed to be mentally disabled.⁵⁶ He had earlier served a prison sentence awaiting challenges to the death penalty for 9 years. Such prison punishment was not regarded as sufficient expiation and he was executed on 7 July 2022. Particularly disappointing was the way that the Singapore Government appeared to insist on, and to defend, discredited laws inherited from colonial times.⁵⁷ Yet hope may be dawning. The Singapore courts have repeatedly interpreted constitutional provisions, so that they offered no apparent redress for challenges to anti-LGBTIQ offences or convicted drug offenders.⁵⁸ Still, in August 2022, the Singapore Prime Minister announced that the criminal law against sexual minorities would be repealed. At the same time, he proposed that the Constitution of Singapore would be amended so as to outlaw same-sex marriage in the City State hence the reform in Singapore continues to send mixed messages.

The most recent outrageous instances of capital punishment to attract international attention have been those of four opponents of the military junta who had overthrown the elected government of Myanmar/Burma. Despite an informal moratorium on capital punishment since 1986, the four prisoners were put to death. More than 11,000 people

⁵⁵ International Bar Association, 'IBAHRI calls for revocation of scheduled execution of Swedish-Iranian academic Ahmadreza Djalali' (Media Release, 12 May 2022).

⁵⁶ Although Kalwant Singh did not argue a mental impairment, see Kokila Annamali, 'I will fight till the noose is around my neck', Transformative Justice Collection (Web page, 4 July 2022) <<https://transformativejusticecollective.org/?s=Kalwant+Singh>>.

⁵⁷ Nagaenthran K Dharmalingam was executed on 27 April 2022, despite having an IQ of 69 and ADHD. The Singapore Ministry for Home Affairs took issue with Nagaenthran being referred to as 'intellectually disabled' see <<https://www.mha.gov.sg/mediaroom/press-releases/ministry-of-home-affairs-response-to-sir-richard-branson-blog-post-on-10-october-2022>>; In response, the Anti-Death Penalty Asia Network addressed Nagaenthran's disability in detail, see Dobby Chew, 'Singapore: It's time for meaningful engagement with civil society on the death penalty', Anti-Death Penalty Asia Network (Statement, 31 October 2022) <<https://adpan.org/wp-content/uploads/2022/10/Singapore-its-time-for-meaningful-engagement-with-CSO.pdf>>; International Bar Association, 'Singapore: IBAHRI calls for revocation of scheduled execution of Nagaenthran Dharmalingam', (Statement 8 November 2021) <<https://www.ibanet.org/Singapore-IBAHRI-calls-for-revocation-of-scheduled-execution-of-Nagaenthran-Dharmalingam>>.

⁵⁸ *Public Prosecutor v Mohamad Yazid Bin Md Yusof* [2016] SGHC 102; *Norasharee Bin Gous v Public Prosecutor* [2017] SGCA 17.

in Myanmar/Burma are currently subject to arbitrary detention.⁵⁹ The trials of the four executed men were described as a travesty and a ‘sham disregard for basic fair trial standards and due process’.⁶⁰ The four executed men were described by their supporters as “freedom fighters”. The call has been made for the new Australian Foreign Minister Senator Penny Wong to support a humanitarian intervention in Myanmar/Burma for death penalty cases.⁶¹ The work of all of them should be remembered, as should their courage. They include Phyo Zeya Thaw (former opposition lawmaker) and Kyaw Min Yu (a human rights activist). They were charged with treason and terrorism. They were sentenced to death following closed door military trials. They are heroes of liberty and brave examples of how the death penalty can be used in the attempt, ultimately futile, to suppress opposing voices.

IV CONCLUSION

The republished book edited by the Hon. Barry Jones AC, *The Penalty is Death*, was launched in Brisbane to coincide with the centenary of the abolition of capital punishment by the Queensland State Parliament in 1922. The book lays out the compelling case that exists against retention of this barbaric mode of responding to the crime. So long as such punishment remains on the statute books, there will be a temptation by tyrants and autocrats to carry out the executions. Australians should not be content with the situation that we have achieved. So long as countries close to our shores continue with the barbaric practice of capital punishment, it survives. Australians should lift their voices against the countries and regimes concerned. Australia’s governments should express, in clear terms, both the experience and resolution of the Australian people. Lawyers, who necessarily play a large part in the criminal justice system, have a special responsibility

⁵⁹ Cf Office of the High Commissioner for Human Rights, ‘Myanmar: Bachelet condemns executions, calls for release of all political prisoners’, *United Nations* (Press Release, 25 July 2022) <<https://www.ohchr.org/en/press-releases/2022/07/myanmar-bachelet-condemns-executions-calls-release-all-political-prisoners>>:11,500 according to this statement as at July 2022; According to the Assistance Association for Political Prisoners over 12,800 people detained and 2413, ‘Daily Briefing in Relation to the Military Coup’, Assistance Association for Political Prisoners (Web page, 4 November 2022) <<https://aappb.org/?p=23344>>.

⁶⁰ ‘Myanmar’s Junta’s Nod for Activists’ Death Sentences Draws Global Ire’, *The Irrawaddy* (Web Page, 6 June 2022) <<https://www.irrawaddy.com/news/burma/myanmar-juntas-nod-for-activists-death-sentences-draws-global-ire.html>>.

⁶¹ Ian Mannix, ‘Wong challenged to support a humanitarian intervention in Myanmar’, *Pearls and Irritations: John Menadue’s Public Policy Journal* (Web Page, 26 July 2022) <<https://johnmenadue.com/wong-challenged-to-support-a-humanitarian-intervention-in-myanmar/>>.

to speak up and to act. Whilst punishments include the death penalty survive, and are carried out, the project begun on 1 August 1922 remains incomplete. Humanity must not endure a further century of argument, attempted persuasion, and agitation to complete the challenge launched in the Queensland Parliament in 1922. Australians should honour and remember the political leaders, judges and advocates, politicians, and civil society leaders for standing up and speaking out on the death penalty. That is why it is still relevant and useful to celebrate the relaunch of Barry Jones's book of 1965. I honour those who gave early leadership for what has been achieved. I congratulate Barry Jones, Stephen Keim, Richard Bourke, Julian McMahon, and many others. The struggle is not over. In a world of violence and injustice, it has only begun.

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A BIT OF HISTORY

JULIAN BURNSIDE*

I was invited to write this article on the 10th anniversary of the Griffith Journal of Law & Human Dignity reflecting on key moments in my career.

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I EARLY DAYS

I did better than expected at the end of year 12. I surprised everyone, and I was offered a place in four faculties at Melbourne and Monash.¹ I had no idea what I wanted to do. I chose Law at Monash because my sister's former boyfriend was doing Law at Monash, and I thought I would be less lonely if I knew someone in the same faculty. That was my thinking, back in 1966.

University life was different back then. For a start, there was such a thing as 'university life'. It revolved around the Union building and the pub. Most students were full time – they came to the campus each day and stayed all day. There were many opportunities for mischief and diversions. It was a rare thing to see students who had day jobs and who came onto campus only for lectures and tutorials. Back then, most people did not have to pay fees, and we did not go into the world saddled with a HECS debt. Indulgent? Maybe,

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¹ The following introductory paragraphs are adapted from Julian Burnside, 'The Bludgeoning Of Chance' (Hal Wooten Lecture, University New South Wales, 31 March 2015) <<https://www.unsw.edu.au/content/dam/pdfs/unsw-adobe-websites/law-justice/news-events/2018-12-annual-hal-wootten-lecture/2018-12-hal-wootten-lecture-2015-julian-burnside.pdf>>.

but it also meant that you could explore areas of thought simply because they were interesting, not because they might win you a job.

The relative narrowness of tertiary education today is a serious deficiency. Some of the greatest advances in human history have been the product of well-stocked minds piecing together bits of information from diverse fields. Learning that is confined to functional categories may earn you a meal ticket, but it should not be confused with an education. The point was well made by George Bernard Shaw, who said that his education was interrupted only by his schooling.

Although I was studying law, I had no particular plan to be a lawyer. I wanted to be an artist. But I also wanted an income, so I enrolled in Economics, with a view to becoming a Management Consultant.

Back then, as I recall, mooting was optional (mooting is a kind of pretend appeal). It was the sport of nerds, and I gravitated to it. In my second-last year, I was chosen as part of the Monash mooting team to compete in intervarsity mooting in New Zealand. I had never even been to Tasmania, so a free trip to New Zealand was very exciting.

I won the Blackstone Cup as best individual speaker. The Chief Justice of New Zealand presided over the final moot. He was talking to me at the prize-giving/drinks function and asked what I planned to do. I said I thought I was going to be a Management Consultant. He said I should go to the Bar. He was the most important person I had ever met, so I agreed (it occurred to me later, that he may have meant "Go and get another glass of wine").

For Christmas that year, I was given a biography of the great American trial lawyer, Clarence Darrow. He was a great role model. Darrow believed passionately in his clients' cause, and win, lose or draw, his clients always knew Darrow had done his best. He fought passionately for causes, including Justice for Trade Unionists and the abolition of capital punishment.

Darrow once said, "Laws should be like clothes: they should fit the people they serve." It is that book which made me want to be a barrister.

My early years at the Bar were quiet and uneventful. I had no connections in the law. Appearances were infrequent and mostly unexciting. For the first few years, I imagined myself the victim of a defective phone, or perhaps of some dark conspiracy to

keep briefs away from me. Most of my friends were doing better than I was. While Clarence Darrow was the reason I wanted to be an advocate, most of the early work I got was from the Tax office – I had an Economics degree, and could understand accounts quite easily.

But spare time offers great opportunities. In the late 1970s I became interested in learning how computers work. Here's some ancient history for you: The transistor was devised in 1947, the integrated circuit was developed in 1962, the microprocessor was developed in 1971, the first 'microcomputer' was available on the market by about 1975, and the PC (personal computer) was launched by IBM in 1981. In 1982, IBM began selling PCs with a new operating system made by a Seattle company called Microsoft. It was MS-DOS, and rapidly became the standard operating system for personal computers. In 1985 Microsoft introduced version 1.0 of its Windows operating system.

By 1981, when the PC was introduced, I was on my third computer and was beginning to use computers for litigation support. That year the *Australian Law Journal* published an article I had written in which I ventured some thoughts about the legal implications of computers.²

I suggested the need for the law to deal with the possibility that computers might be used for novel kinds of criminal activity and might give rise to problems concerning intellectual property. In addition, I suggested that computers might be useful tools in legal practice. This idea was politely dismissed by most as a harmless eccentricity. It turned out to be more accurate than I could have imagined. When I visited him in the Ecuadorian Embassy in London, Julian Assange reminded me that I had acted for him, when he was a teenager charged with some computer-related offences. Not many legal practices operate without computers these days, and computers are ubiquitous in big litigation. Without any pretence at modesty, I am probably still ahead of the curve when it comes to techniques of using computers in litigation.

Back then, you qualified as a high-tech lawyer if your secretary had a golf-ball typewriter, and here I was writing about using computers in legal practice! My friends thought I was a harmless lunatic.

² J W K Burnside, 'The legal implications of computers' (1981) 55(2) *Australian Law Journal* 79.

The simple fact is that, if you keep your mind open and learn every possible thing that attracts your interest, you will be ready when the right opportunity comes along. It doesn't matter a scrap if you don't know in advance what that opportunity is going to be.

All the while, I was driven by what I had read about Clarence Darrow. It took a long while before I got the sort of case that would have interested him. But in early 1998 I was sitting in chambers when the phone rang. It was a solicitor asking if I could take a brief in the case between Patrick Stevedores and the Maritime Union of Australia (MUA). I asked when it would be, and he said March or April. Reluctantly, I said that I was not available because I was about to be married and I would be on my honeymoon. When I was first married, I did not take time for a honeymoon. This turned out to be a fatal mistake. I was not going to make the same mistake again. I said No, with the regret that only a barrister can fully understand. At home that night I told Kate what a good bloke I'd been, saying No to a brief so that we could have a honeymoon. She asked what the case was. I said that it was something about the Maritime Union of Australia and Patrick Stevedores. She said, "That's going to be a terrific case – you should have said Yes". She even suggested that I should ring the solicitor back and say that I was free after all, but that would have been quite improper.

II WORKER RIGHTS

I was feeling a bit crestfallen in chambers the next day when the phone rang again. It was another solicitor offering me a brief in the matter of the MUA against Patrick Stevedores. I said that I was available. The solicitor was Josh Bornstein of Maurice Blackburn, acting for the Union. The day before, it had been the solicitor for the Victorian Farmers' Federation. By such small things is our future decided.

When I took the brief for the MUA I had a vague distaste for unions generally and an impression that the MUA was among the most troublesome of them. After all, I had grown up in a household in which Unions were seen as a dangerous force, and governments were close to perfect. Perhaps that background made me ready to see the alternative view. Relations between the Union and Patricks had not been good for some time. Patrick Stevedores had been sprung seeking to train a group of mercenaries to stevedore ships. This operation had been carried out in Dubai, which raised eyebrows and suspicions.

Early in 1998, rumours began to circulate that Patricks were about to do something drastic.³ As the weeks went by, the rumour firmed into a suggestion that Patricks were about to dismiss the entire unionized workforce on the Australian waterfront. Rumours are not evidence and so there was not much to work with. Innocent of any knowledge about the *Workplace Relations Act*, I asked what would happen if Patricks acted as the rumour suggested. Those in the team who are cleverer and better informed than I am, told me that the workforce would be reinstated, because of the provisions of the *Workplace Relations Act*. I asked innocently if there were any exceptions to that. They said that the only exception was if Patricks were going out of the business of stevedoring. Well, if they were to go out of the business of stevedoring, Patricks would have to sell their assets, so I suggested that we should write to Mr Corrigan asking for an undertaking not to dispose of Patrick's assets and not to dismiss the workforce. If he did not give the undertaking sought, then his refusal would provide the evidence we needed.

He treated the request dismissively. He did not give the undertaking. We prepared a motion for injunctions, returnable on the Wednesday before Good Friday. The motion simply sought an order restraining Patricks from disposing of its assets or sacking its workforce.

On Wednesday morning, 8th April 1998, Australia woke to headlines saying that the entire workforce of Patrick Stevedores had been dismissed and had been replaced by an alternative, non-unionized workforce. When I arrived in court, Counsel for Patricks told me that administrators had been appointed to Patrick Stevedores. This was a surprising turn of events. My time practising as a commercial junior in the 1970s and 1980s made me think immediately of Bottom of the Harbour schemes. I thought that probably the court would be unimpressed by Patricks acting precipitately and doing the very thing which the court had been asked to restrain.

The Judge granted a holding injunction and directed that the matter should come back for further argument after Easter. Patricks were required to provide us with all relevant documents showing what had gone on. The picture revealed by those documents was truly astounding. In September 1997, the assets of the main stevedoring companies had

³ The following recollections about *Patrick Stevedores v Maritime Union of Australia* (1998) 195 CLR 1 were published previously as Julian Burnside, 'Are We There Yet?' (Web Page, 7 March 2020) <<http://www.julianburnside.com.au/?s=patrick+stevedore>>.

been sold to new companies and the resulting credit balances were sent upstream to the holding company. The companies which had always employed the workforce – apparently large and successful stevedoring companies – were left with two assets only: their workforce, and contracts to provide the workforce to the new owners of the assets. These labour hire contracts were, in effect, terminable at will by the company with the assets. The employees had no job security whatever and no means of knowing the fact.

The effective result of this arrangement was that the labour hire company could be jettisoned without harming the enterprise. This made it possible to dismiss the entire workforce in a single stroke. On the ground, nothing at all had changed: Patrick Stevedores still had the appearance of prosperity which it had enjoyed for many decades, but it was a mere shell. The workforce was hostage to a corporate shadow, and a CEO with secret plan.

The only party bound to gain from this strategy was the company which owned the assets. The only people bound to lose were the employees. As it happened, an obliging Federal Government had agreed in advance to provide the labour hire company with enough cash to pay the accrued entitlements of the employees when the workforce was sacked en masse. Thus, the risks associated with the stevedoring venture were transferred to the workers and underwritten by a government enthusiastic for waterfront reform at any price.

The case ran at an astonishing pace. We resumed argument before Justice North on the 15th of April. The argument ran for three days. On the 21st of April, Justice North delivered his judgment and granted injunctions pending trial. At 3 o'clock that afternoon the Full Federal Court convened by video-link (with Justice Wilcox in Sydney, Justice Von Doussa in Adelaide and Justice Finkelstein in Melbourne). They ordered a stay of Justice North's orders pending appeal.

The Full Court appeal began the next day, 22 April, and ran over to the 23 of April. At 7 o'clock that night the Full Court gave judgment, upholding the order of Justice North. At 10 pm Justice Hayne in the High Court granted a stay of the Full Court's orders, pending an application for special leave to the High Court.

On Monday, 27 April the seven judges of the High Court convened in Canberra and began hearing Patrick Stevedores' application for special leave to appeal from the Full Federal

Court's orders. The application ran until the afternoon of Thursday, 30th April. The following Tuesday, 4th May the High Court delivered judgments upholding the judgment of Justice North. The process of going from Judge at first instance to appeal to special leave to a final hearing by the High Court took three weeks. Ordinarily it would take between three and five years.

It was an exciting case which significantly shifted my previous, naïve belief that governments in Australia behaved honestly. It also left me with a significantly changed view of the importance of unions. On the day that the High Court upheld the Union's case, Josh and I were approached by a member of the cleaning staff of the court who said, "Thanks for that fellas, we all feel a bit safer now". Of course, Work Choices hadn't been heard of at that time. But his point was a good one: If an employer could crush the MUA, then no employee in Australia was safe. Union power, responsibly exercised, redresses the imbalance of power between employers and the individual employee.

The MUA case made me famous in a way I had never imagined possible. It opened the way for me to do a lot of other important cases – in effect, to follow the Clarence Darrow model. In 1998, I got the chance I had been waiting for.

III ASYLUM SEEKERS

In the middle of 2001, I was asked if I would act pro bono for the asylum seekers who had been rescued by the Tampa. On the 26 August 2001, the Palapa (a small, dilapidated boat carrying Afghan Hazara asylum seekers) was heading across the Indian Ocean from Indonesia towards Christmas Island. The boat began to disintegrate. A Norwegian cargo vessel, the Tampa, was asked by Australia to go to the aid of the Palapa. It did. Captain Arne Rinnan thought that the boat might be carrying 40 or 50 people. In fact, 434 people clambered up the rope ladder from the disintegrating Palapa onto the steel deck of the Tampa. I knew nothing about refugee law or refugee policy, but since childhood I have felt the heat badly, and here were these people who were stuck on the steel deck of a ship in the tropical sun, near the equator. It sounded hideous. I took the brief.

Luckily for me, there were lots of other counsel in the case who knew a lot about refugee law and policy, so I learned a lot.

It is not well-known that the trial judgment in the Tampa case was handed down at 2.15 pm, Melbourne time, on 11 September 2001. Eight or nine hours later the terrorist attack in America happened. So, we no longer had “boat-people”, we had “Muslim boat-people”. And suddenly, the Australian government began calling Muslim boat-people “illegals”, even though their entry into Australia is not a criminal offence. By doing the Tampa case, I learned a lot of uncomfortable truths about our law and policies regarding asylum seekers. Later, when the Immigration Minister was Scott Morrison, the entire exercise (punishing boat-people, sending them offshore, vilifying them) came to be called “border protection”.

The simple facts are that seeking asylum is not a crime, Australia does not need to be “protected” from people seeking asylum, and most of our federal Liberal politicians either do not know the facts, or they are liars.

After the Tampa case, I was asked to act for lots of asylum seekers. Finally, I was doing what Clarence Darrow would have done. One case, in particular, worried me – the case of Amin Mastipour. Amin arrived in Australia in March 2001 with his daughter Massoumeh. She was then five years old. They were held in Curtin for two years, then in Baxter. Baxter is surrounded by a 5,000-volt electric fence (although I was once publicly corrected by a senior official of the Immigration Department: it’s not an “electric fence”, it’s an “energised fence”).

On the 14 July 2003, three ACM guards entered Amin’s room in Baxter and ordered him to strip. Apparently, they thought he had a cigarette lighter.⁴ He refused, because, apart from it being deeply humiliating for a Muslim man to be naked in front of others, his (then) 7-year old daughter was in the room. When he refused to strip, the guards beat him up, handcuffed him, and took him to the “Management Unit”.

The Management Unit is a series of solitary confinement cells.

Officially, solitary confinement is not used in Australia’s detention system. Officially, recalcitrant detainees are placed in the Management Unit. The truth is that the Management Unit at Baxter is solitary confinement bordering on total sensory deprivation. I have viewed a video tape of one of the Management Unit cells. It shows a

⁴ The following paragraphs were originally published as part of Julian Burnside, ‘Justice or Law?’ (Web Page, 8 December 2021) <<https://www.julianburnside.com.au/justice-or-law/>>.

cell about 3 ½ metres square, with a mattress on the floor. There is no other furniture; the walls are bare. A doorway, with no door, leads into a tiny bathroom. The cell has no view outside; but it is never dark. The occupant has nothing to read, no writing materials, no TV or radio – no company and yet no privacy, because a video camera observes and records everything, 24 hours a day. The detainee is kept in the cell 23 ½ hours a day. For half an hour a day he is allowed into a small exercise area where he can see the sky.

No court has found Amin guilty of any offence; no court has ordered that he be held this way. The government insists that no court has power to interfere in the manner of detention.

There he stayed from 14 July until 23 July – each 24 hours relieved only by a half-hour visit from his daughter, Massoumeh. But on 23 July she did not come. It was explained to him that the manager of Baxter, Greg Wallace, had taken her shopping in Port Augusta.

But the next day, 24 July, she did not arrive for her visit – the manager came and explained that Massoumeh was back in Tehran. She had been removed from Australia under cover of a lie, without giving Amin the chance to say goodbye to her.

Amin remained in detention for another eight weeks. It took three applications in court to get him released. The government did not contradict the facts or try to explain why they had removed Massoumeh from the country; they argued simply that the court had no power to dictate how a person would be treated in detention. It sounds like the sort of argument the German government might have used in 1940 to justify Auschwitz.

The judge rejected the government's arguments and ordered that Amin be removed from solitary confinement and be moved to a different detention centre.⁵

The government appealed. It lost.⁶

This is our taxes at work: tormenting innocent people, in ways that offend every decent instinct – and for what? To deter people smugglers? The HREOC report into Children in Detention concluded that the treatment of children in Australia's detention centres was "cruel, inhumane and degrading", and that it constituted systematic child abuse. The

⁵ *Mastipour v Department of Immigration & Multicultural & Indigenous Affairs* [2003] FCA 952.

⁶ *Mastipour v Department of Immigration and Multicultural and Indigenous Affairs* (2004) 140 FCR 137; *Department of Immigration & Multicultural & Indigenous Affairs v Mastipour* (2004) 259 FCR 576.

Minister did not seek to deny the facts or the findings; instead, she said simply that it was “necessary”, that the alternative would “send a green light to people smugglers”.

Amin got a protection visa. He shows all the signs of serious damage from years in detention.

IV FIRST AUSTRALIANS

Probably because of my work for refugees, I was briefed to act in a case in the SA Supreme Court for a bloke called Bruce Trevorrow.⁷ In my opinion, it was probably the most important case I ever did. In the South Australian case, the Plaintiff was Bruce Trevorrow. Bruce was the illegitimate son of Joe Trevorrow and Thora Lampard. They lived at One Mile Camp, Meningie, on the Coorong in South Australia. It is the centre of the Ngarrandjeri people. Meningie’s population now is about 1,800.

One Mile Camp was a collection of tents and humpies, a mile away from Meningie.

Joe Trevorrow and Thora Lampard had two other sons, Tom and George Trevorrow.

They lived at One Mile Camp because, when Bruce was born in November 1956 it was not lawful for an aborigine to live closer than one mile to a place of white settlement, unless they had a permit. How extraordinary is that? Aboriginal people have lived here for about 65,000 years. White people turned up and took over the place about 250 years ago, and we made a law like that!

When Bruce was 13 months old, he got gastroenteritis. Joe didn’t have a car capable of taking Bruce to the hospital, so some neighbours from Meningie took him to the Adelaide Children’s Hospital (about an hour’s drive from Meningie) where he was admitted on Christmas Day 1957. Hospital records show that he was diagnosed with gastroenteritis, he was treated appropriately, and the gastro resolved within seven days. Seven days later he was given away to a white family who lived in suburban Adelaide.

They had a daughter who was aged about 16 at the time. She gave evidence at the trial as a woman in her late middle age. She remembered the day clearly. Her mother had always wanted a second daughter. They had seen an advertisement in the local newspaper offering Aboriginal babies for fostering. They went to the hospital and looked at a number

⁷ The following paragraphs are adapted from Julian Burnside, ‘The Stolen Generations’ (Web Page, 20 June 2019) <<https://www.julianburnside.com.au/the-stolen-generations/>>.

of eligible babies and saw a cute little girl with curly hair and chose her. They took her home and when they changed her nappy they discovered she was a boy. Such was the informality with which Aboriginal babies could be given away in early 1958 in South Australia.

A short time later, Bruce's mother wrote to the Department asking how he was doing and when he was coming home. The magnitude of her task should not be overlooked: Pen and paper, envelope and stamp were not items readily obtained in the tin and sackcloth humpies of One Mile Camp, Meningie. But Thora managed to write a letter which still exists in the State archives. The reply is still in existence. It notes that Bruce is doing quite well but that the doctors say he is not yet well enough to come home. Bruce had been given away weeks earlier.

The laws relating to fostering required that foster mothers be assessed for suitability and that the foster child and foster home should be inspected regularly. Although the laws did not distinguish between white children and Aboriginal children, the fact is that Bruce's foster family was never checked for suitability, and neither was he checked by the Department to assess his progress. He came to the attention of the Children's Hospital again when he was three years old – he was pulling his own hair out. When he was eight or nine years old, he was seen a number of times by the Child Guidance Clinic and was diagnosed as profoundly anxious and depressed, and as having no sense of his own identity.

Nothing had been done to prepare the foster family for the challenges associated with fostering a young Aboriginal child. When Bruce was 10 years old, he met his natural mother for the first time. Although the Department had previously prevented his mother from finding out where Bruce was, the law had changed in the meantime, and they could no longer prevent the mother from seeing him.

The initial meeting interested Bruce and he was later to be sent down to stay with his natural family for a short holiday. When the welfare worker put him on the bus to send him down to Victor Harbour, the foster mother said that she couldn't cope with him and did not want him back. His clothes and toys were posted on after him.

Nothing had been done to prepare Bruce or his natural family for the realities of meeting again after nine years. Things went badly and Bruce ended up spending the next six or

eight years of his life in State care. By the time he left State care at age 18, he was an alcoholic. The next 30 years of his life were characteristic of someone who is profoundly depressed and who uses alcohol as a way of shielding himself from life's realities. He has had regular bouts of unemployment and a number of convictions for low-level criminal offences. Every time he has been assessed by a psychiatrist, the diagnosis has been the same: anxiety, profound depression, no sense of identity and no sense of belonging anywhere.

The trial had many striking features. One was the astonishing difference between Bruce – profoundly damaged, depressed and broken – and his brothers, who had not been removed. They told of growing up with Joe Trevorrow, who taught them how to track and hunt, how to use plants for medicine, how to fish. He impressed on them the need for proper schooling. They spoke of growing up in physically wretched circumstances but loved and valued and supported. They presented as strong, resilient, resourceful people. Their arrival to give evidence at the trial was delayed because they had been overseas attending an international meeting concerning the repatriation of Indigenous remains.

The second striking feature was the fact that the Government of South Australia contested every point in the case. Nothing was too small to pass unchallenged. One of their big points was to assert that removing a child from his or her parents did no harm – they even ventured to suggest that removal had been beneficial for Bruce. This contest led to one of the most significant findings in the case. Justice Gray said in his judgment:

I find that it was reasonably foreseeable that the separation of a 13 month old Aboriginal child from his natural mother and family and the placement of that child in a non-indigenous family for long-term fostering created real risks to the child's health. The State through its emanations, departments and departmental officers either foresaw these risks or ought to have foreseen these risks.⁸

That finding also accords with common sense. We all have an instinct that it is harmful to children to remove them from their parents. It was based on extensive evidence concerning the work of John Bowlby in the early 1950s, which showed that it is

⁸ *Trevorrow v South Australia* (2007) 98 SASR 136, 319 [885].

intrinsically harmful to remove a child from his or her parents, in particular when this occurs after nine months of age.

The harm of which the Prime Minister spoke when he said 'sorry' was harm which Governments knew in advance would result from their conduct.

At the time Bruce was removed, the Aborigines Protection Board of South Australia had already been advised by the Crown Solicitor that it had no legal power to remove Aboriginal children from their parents. One of the documents tendered at the trial was a letter written by the secretary of the APB in 1958. It read in part:

... Again in confidence, for some years without legal authority, the Board have taken charge of many aboriginal children, some are placed in Aboriginal Institutions, which by the way I very much dislike, and others are placed with foster parents, all at the cost of the Board. At the present time I think there are approximately 300 children so placed. ...⁹

After a hard-fought trial, the Judge found in Bruce's favour, and awarded him a total of \$800,000 plus costs.

There are a few things to say about this. First, Bruce's circumstances are not unique. There are, inevitably, other Aboriginal men and women who were taken in equivalent circumstances while they were children, and suffered as a result. Although they may seek to vindicate their rights, the task becomes more difficult as each year passes. Evidence degrades, witnesses die, documents disappear.

Second, litigation against a government is not for the fainthearted. Governments fight hard. It took Bruce's case eight years to get to court, and the trial ran from November 2005 to April 2006. If he had lost the case, Bruce would have been ruined by an order to pay the government's legal costs.

The third thing to note about Bruce's case is that the same facts would not necessarily have produced the same result in other States. The legislation concerning Aborigines was not uniform in all the States and Territories.

The Prime Minister's apology makes no difference whatever to whether or not governments face legal liability for removing Aboriginal children. But it acknowledges

⁹ *Trevorrow v South Australia* (2007) 98 SASR 136, 167 [74].

for the first time that a great moral wrong was done, and it acknowledges the damage which that caused. The most elementary instinct for justice tells us that when harm is inflicted by acts which are morally wrong, then there is a moral, if not a legal, responsibility to answer for the damage caused. To acknowledge the wrong and the damage, and to deny compensation is simply unjust.

From this point, events can play out in a couple of different ways. One possibility is that members of the Stolen Generations will bring legal proceedings in various jurisdictions. Those proceedings will occupy lawyers and courts for years and will run according to the circumstances of the case and the accident of which State or Territory is involved. The worst outcome will be that some plaintiffs will end up the way Lorna Cubillo and Peter Gunner ended up eight years ago: crushed and humiliated. Or they might succeed, as Bruce Trevorrow did. Either way, it is a very expensive exercise for the State, and a gruelling experience for the plaintiff.

A second possibility is a national compensation scheme, run by the States, Territories and the Commonwealth in co-operation. The scheme I advocate would allow people to register their claim to be members of the Stolen Generations. If that claim was, on its face, correct, then they would be entitled to receive copies of all relevant Government records. A panel would then assess which of the following categories best describe the claimant:

- (a) removed for demonstrably good welfare reasons;
- (b) removed with the informed consent of the parents;
- (c) removed without welfare justification but survived and flourished;
- (d) removed without welfare justification but did not flourish.

The first and second categories might receive nominal or no compensation. The third category should receive modest compensation, say \$5,000-\$25,000, depending on circumstances. The fourth category should receive substantial compensation, between say \$25,000-\$75,000, depending on circumstances.

The process should be simple, co-operative, lawyer-free, and should run in a way consistent with its benevolent objectives.

If only the Governments of Australia could see their way clear to implement a scheme like this, the original owners of this land would receive real justice in compensation for one of the most wretched chapters in our history.

Until such a scheme is introduced, members of the Stolen Generations will have good reason to think that they have been denied justice.

We got judgment in Bruce's case in August 2007. Later that year, Kevin Rudd was voted in as the new PM of Australia. He announced that the first business of the new Parliament would be an apology to the Stolen Generations. He wanted plenty of people in the public gallery of the House of Representatives to hear the apology. By this time, Tom & George Trevorrow had become leaders of the Ngarrindjeri people.

Tom & George Trevorrow were invited to hear the apology. Bruce was not. We sent the Department a note, and Bruce was then invited. He got there and was very proud of the fact.

It was astonishing and uplifting to hear some of the noblest and most dignified sentiments ever uttered in that place on the hill. It is worth recalling some of the words:

... today we honour the indigenous peoples of this land, the oldest continuing cultures in human history.

We reflect on their past mistreatment.

We reflect in particular on the mistreatment of those who were Stolen Generations – this blemished chapter in our nation's history. ...

We apologise for the laws and policies of successive Parliaments and Governments that have inflicted profound grief, suffering and loss on these our fellow Australians.

...

For the pain, suffering and hurt of these stolen generations, their descendants and for their families left behind, we say sorry.

To the mothers and the fathers, the brothers, and the sisters, for the breaking up of families and communities, we say sorry.

And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry. ...

We today take this first step by acknowledging the past and laying claim to a future that embraces all Australians.

A future where this Parliament resolves that the injustices of the past must never, never happen again. ...¹⁰

The 13 February 2008 will be remembered as a day the nation shifted, perceptibly. The apology was significant not only for marking a significant step in the process of reconciling ourselves with our past: it cast a new light on the former government. It set a new tone. And I think it reminded us of something we had lost: a sense of decency.

Most of the worst aspects of the Howard years can be explained by the lack of decency which infected their approach to government. They could not acknowledge the wrong that was done to the Stolen Generations; they failed to help David Hicks when it was a moral imperative – they waited until his rescue became a political imperative; they never quite understood the wickedness of imprisoning children who were fleeing persecution; they abandoned ministerial responsibility; they attacked the courts scandalously but unblushing; they argued for the right to detain innocent people for life; they introduced laws which prevent fair trials; they bribed the impoverished Republic of Nauru to warehouse refugees for us. It seemed that they did not understand just how badly they were behaving, or perhaps they just did not care.

One of the most compelling things about the apology to the Stolen Generations was that it was so decent. Suddenly, a dreadful episode in our history was acknowledged for what it was.

Unfortunately, when announcing that the Government would apologize to the Stolen Generations, the PM also said that the Government would not offer compensation.

Bruce died on 20 June 2008, aged just 51.

V CONCLUDING REMARKS

I am glad I was able to do the case of *MUA v Patrick Stevedores*. I am glad I was able to do the Tampa case. I was glad of the opportunity to act for Amin Mastipour and many other asylum seekers.

¹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167 (Kevin Rudd, Prime Minister). See especially, Apology to Australia's Indigenous Peoples, 2008, Gemma Black (calligrapher), Gifts Collection, Parliament House Art Collection
<https://www.aph.gov.au/Visit_Parliament/Art/Exhibitions/Custom_Media/Apology_to_Australias_Indigenous_Peoples>.

But I am especially proud of having acted for Bruce Trevorrow. His case was the first (and arguably the only) case in which an Aboriginal was found to have been taken from his family illegally, and to recover damages as a consequence.

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A CALL FOR REFORM: THE NEED FOR AN EFFECTIVE RESPONSE TO ASBESTOS IN AUSTRALIAN WORKPLACES AND RESIDENTIAL SETTINGS

GILL NORTH * AND THERESE WILSON #

This article argues for greater regulatory efforts to prevent unnecessary deaths from asbestos exposure in Australia. Despite asbestos-related diseases being responsible for a large number of deaths in Australia every year, the danger from exposure to asbestos is not well understood in the community and the regulatory response has been inadequate. A survey of 43,000 Australians between April 2020 and May 2021 found that only 28 percent of respondents knew that asbestos is dangerous to health and only 5 percent were aware that once diagnosed, most cases of asbestos-related disease are fatal within relatively short timeframes. Despite the significant risk to Australian lives posed by in situ asbestos, governments have failed to ensure that Australians are accurately informed about that risk, and responsible corporations have not been fully held to account.

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I INTRODUCTION

Despite asbestos-related diseases being responsible for a large number of deaths in Australia every year,¹ the danger from exposure to asbestos is not well understood in the community and the regulatory response has been inadequate. A survey of 43,000 Australians between April 2020 and May 2021, found that only 28 percent of respondents knew that asbestos is dangerous to health and only 5 percent were aware that once diagnosed, most cases of asbestos-related disease are fatal within relatively short timeframes.²

Despite the significant risk to Australian lives posed by in situ asbestos, governments have failed to ensure that Australians are accurately informed about that risk, and responsible corporations have not been fully held to account.

We argue that at the very least clear, effective, and scientifically informed communications and public health campaigns about the risks of even short exposures to asbestos need to be implemented. Ideally there should also be a funded program for removal of in situ asbestos, to prevent further unnecessary deaths, although we acknowledge that removal itself brings with it potential risk if not carefully managed.

This article begins with an outline of the ongoing harms of in situ asbestos, before exploring the current regulatory frameworks applicable to asbestos in Australia in both the workplace and in residential settings. It then provides a critique of those regulatory frameworks before drawing upon the recommendations of the Asbestos Management Review and the observations and findings of the Full Court of the Supreme Court of South

*Professor Gill North passed away after a three-year battle with the asbestos-related cancer, mesothelioma, on 23 December 2021. At the time of her passing, Professor North was an Adjunct Professor at both Deakin University Law School and Griffith Law School.

#Professor Dr Therese Wilson is the Dean of Law and Head of School at Griffith Law School and a member of the Law Futures Centre at Griffith University. Professor Wilson is also a director of the registered charity Asbestos Awareness Australia. No funding was received from Asbestos Awareness Australia for this article.

¹ See Asbestos Safety and Eradication Agency, 'Asbestos Health Risks' (Web Page) <<https://www.asbestossafety.gov.au/asbestos-health-risks-and-exposure/asbestos-health-risks#how-can-asbestos-affect-your-health>> where the estimate given is 4000 deaths per year although this is based on 2015 mesothelioma deaths which might be linked to a time when asbestos was legal and used extensively.

² See Digital Finance Analytics and Asbestos Awareness Australia, 'Community Awareness & Knowledge of Asbestos Threats & Consequences' (Research Report, Asbestos Awareness Australia, May 2021) <<https://digitalfinanceanalytics.com/blog/wp-content/uploads/2021/05/Report-Version-27-May-final.pdf>>.

Australia in *Amaca Pty Ltd v Werfel*,³ to formulate a set of recommendations which will offer much needed protection to the Australian public moving forward.

II THE ONGOING HARMS OF IN SITU ASBESTOS

As noted in prior papers, the asbestos crisis in Australia is far from over,⁴ and the ongoing risks and harms are poorly documented and comprehended. Exposure to asbestos can lead to diagnoses of asbestosis, mesothelioma, and lung cancer.

Asbestosis is a chronic lung disease caused exclusively by inhalation of asbestos fibres.⁵ While this condition is not fatal, it can trigger respiratory or cardiac failure and exposure to asbestos can lead to subsequent diagnoses of other asbestos-related diseases such as mesothelioma or lung cancer.⁶ There is currently no cure for asbestosis.⁷

Mesothelioma (also called malignant mesothelioma) occurs when abnormal cells in the tissue that surrounds the lungs, known as the pleura, grow in an uncontrolled way. This disease is not the same as lung cancer, which starts inside the lungs.⁸ Unlike other forms of cancer, exposure to asbestos is the only known cause of mesothelioma in Australia.⁹ According to the Cancer Council it was estimated that 868 new cases of mesothelioma would be diagnosed in 2021, and the five-year survival rate for mesothelioma is 6.3 percent.¹⁰

³ *Amaca Pty Ltd v Werfel* (2020) 138 SASR 295 ('*Werfel Case*').

⁴ See, eg, Peter Franklin and Alison Reid, 'The Ongoing Problem of Asbestos In Situ' in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia* (Monash University Publishing, 2019); Matthew Soeberg, Deborah A Vallance, Victoria Keena, Ken Takahashi and James Leigh, 'Australia's Ongoing Legacy of Asbestos: Significant Challenges Remain Even After Complete Banning of Asbestos Almost Fifteen Years Ago' (2018) 15(2) *International Journal of Environmental Research & Public Health* 384. Soeberg et al at 12 of 14 conclude that the 'Australian community needs to remain vigilant to the public health risk of asbestos exposure from existing asbestos or asbestos-containing materials as well as exposure to asbestos-containing materials that are brought into Australia despite regulations being in place'.

⁵ Safe Work Australia, 'Asbestos-Related Disease Indicators', *Safe Work Australia* (Report, October 2012) v <<https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related-disease-indicators-2012.pdf>>.

⁶ *Ibid* 2. For example, Bernie Banton suffered initially from asbestosis but was subsequently diagnosed with mesothelioma.

⁷ St Vincent's Hospital Lung Health, 'Asbestosis' (Web Page) <<https://www.svhlunghealth.com.au/conditions/asbestosis>>.

⁸ Australian Government Cancer Australia, 'What is Mesothelioma?' (Web Page) <<https://www.canceraustralia.gov.au/cancer-types/mesothelioma-cancer/overview>>.

⁹ Safe Work Australia (n 5) 3.

¹⁰ Cancer Council, 'Mesothelioma' (Web Page) <<https://www.cancer.org.au/cancer-information/types-of-cancer/mesothelioma>>.

Lung cancer develops when cells grow out of control in a person's lungs on one side or on both.¹¹ Lung cancer can be curable in the early stages but is often not diagnosed until the disease is advanced.¹² While smoking is the single greatest risk factor for lung cancer, some people diagnosed with lung cancer have never smoked, and asbestos is an exacerbating and interacting risk factor.¹³ In 1964, a study by Selikoff, Hammond and Churg showed that asbestos workers who smoked had 92 times the risk of developing asbestos-related cancer than non-smokers with no exposure to asbestos.¹⁴ A lung cancer diagnosis is very serious, with a relatively low average five-year survival rate of 20 percent.¹⁵

Given the seriousness of the diagnoses that can follow asbestos exposure, the need to protect Australians through a robust, interventionist regulatory scheme seems obvious. This is particularly the case when considering the studies which have demonstrated that, contrary to common misconceptions, there are positive and strong associations between non-occupational exposure (including neighbourhood, domestic and household exposures) and the risk of mesothelioma.¹⁶ Marsh et al conclude that mesothelioma risks from non-occupational asbestos exposure are consistent with the fibre-type potency response observed in occupational settings.¹⁷ Other medical researchers highlight cases of mesothelioma arising from much lower dosages in non-occupational settings than observed from occupational sources.¹⁸

¹¹ St Vincent's Hospital Sydney, 'Early Screening for Lung Cancer' (Web Page) <<https://www.svhs.org.au/research-education/participating-in-research-trials/early-screening-for-lung-cancer>>.

¹² Ibid.

¹³ In *Burrows v WA Government Railways Commission* (1982) 1 WCR WA 177, the Court accepted evidence by Arthur Musk of the multiplicative interaction between smoking and asbestos. It found that asbestos had materially increased the risk of lung cancer to the plaintiff and on balance contributed to it.

¹⁴ Irving J Selikoff, E Cuyler Hammond and Jacob Churg, 'Asbestos Exposure, Smoking, and Neoplasia' (1968) 204(2) *Journal of the American Medical Association* 106, 110.

¹⁵ Australian Government Cancer Australia, 'Lung Cancer' (Web Page) <<https://www.canceraustralia.gov.au/cancer-types/lung-cancer/statistics>>.

¹⁶ See, eg, Gary M Marsh, Alexander S Riordan, Kara A Keeton and Stacy M Benson, 'Non-occupational Exposure to Asbestos and Risk of Pleural Mesothelioma: Review and Meta-analysis' (2017) 74(11) *Occupational Environmental Medicine* 838; Rengyi Xu, Frances K Barg, Edward A Emmett, Douglas J Wiebe and Wei-Ting Hwang, 'Association Between Mesothelioma and Non-Occupational Asbestos Exposure: Systematic Review and Meta-Analysis' (2018) 17:90 *Environmental Health* <<https://doi.org/10.1186/s12940-018-0431-9>>: 1-14.

¹⁷ Marsh et al (n 16) 845.

¹⁸ See, eg, Alison Reid, Jane Heyworth, Nicholas H. de Klerk and Bill Musk, 'Cancer Incidence among Women and Girls Environmentally and Occupationally Exposed to Blue Asbestos at Wittenoom, Western Australia' (2008) 122(10) *International Journal of Cancer* 2337; *Werfel Case* (n 3) 340[128] citing Jan

While the discussion concerning asbestos exposure has tended to focus on occupational exposure, since 2008, 52 percent of the mesothelioma claims made through the Asbestos Injuries Compensation Fund (established by James Hardie in 2006) have been categorised by KPMG (the auditor of this fund) as home renovation related. These percentages rose to 62 and 55 percent in 2018 and 2019 respectively, and the number of these types of claims reached a record number in 2019.¹⁹

Even occupational exposure has not been adequately addressed through regulation. Scientists acknowledged in the 1960s that the only safe level of exposure to asbestos was nil, with any exposure presenting certain and known risks.²⁰ These facts were subsequently confirmed by the World Health Organization and International Agency for Research on Cancer in 1977.²¹ Despite the clarity of the science in this arena, the asbestos industry continued to argue for minimum dust standards during the 20th century.²²

III THE CURRENT STATE OF WORKPLACE REGULATION

Existing law around the control and handling of asbestos in Australia is primarily designed to apply in workplaces. The *Work Health and Safety Act 2011* (Cth) was introduced nationally as model legislation for the management of health and safety issues in workplaces. This model legislation was then enacted by the states and territories as law and associated regulation.²³

Lieben and Harry Pistawka, 'Mesothelioma and Asbestos Exposure' (1967) 14(4) *Archives of Environmental Health: An International Journal* 559.

¹⁹ KPMG, 'Valuation of Asbestos-Related Disease Liabilities of former James Hardie entities ("the Liable Entities") to be met by the AICF Trust', *Asbestos Injuries Compensation Fund* (Report, 19 May 2020) 27-28 <https://www.aicf.org.au/docs/AICFL_KPMG%20Annual%20Actuarial%20Report_31%20March%2020.pdf>.

²⁰ *Werfel Case* (n 3) 338-9 [120] citing N W Hendry, 'The Geology, Occurrences, and Major Uses of Asbestos' (1965) 132 *Annals of New York Academy of Sciences* 21.

²¹ International Agency for Research on Cancer, 'Monographs on the Evaluation of Carcinogen Risks of Chemicals to Man: Asbestos', *IARC Publications* (Report, 1977) 14 <<file:///C:/Users/61493/Downloads/mono14.pdf>>. See also International Agency for Research on Cancer, 'IARC Monographs on the Evaluation of Carcinogenic Risk of Chemicals to Humans - Overall Evaluation of Carcinogenicity: An Updating of IARC Monographs Volumes 1 to 42 Supplement 7', *IARC Publications* (Report 1987) 106-116 <<file:///C:/Users/61493/Downloads/Suppl7.pdf>>; World Health Organization, 'Elimination of Asbestos-Related Disease' (Web Page) <https://apps.who.int/iris/bitstream/handle/10665/69479/WHO_SDE_OEH_06.03_eng.pdf;sequence=1>.

²² See, eg, Lenore Layman, 'Tackling the Dust Hazard: The Response of Public Health' in Lenore Layman and Gail Phillips (eds), *Asbestos in Australia: From Boom to Bust* (Monash University Publishing, 2019) 105; Jock McCulloch, *Asbestos: Its Human Cost* (Queensland University Press, 1986) 242.

²³ See, eg, *Work Health and Safety Act 2011* (NSW); *Work Health and Safety Regulation 2011* (NSW).

SafeWork Australia has issued a Code of Practice to provide guidance on how to respond to asbestos risks. The Code contains information on identifying asbestos materials, how to report asbestos properly, and how to manage the risk of exposure in a work setting.²⁴

Australian employers are not legally obliged to remove materials containing asbestos but are required to assess and manage any related threats.²⁵ When asbestos is identified during an assessment, a written management plan must be prepared that records its location, type and condition, and the date of review.²⁶ For this purpose, employers are required to maintain an asbestos register that can be viewed by employees and others.²⁷

A Compliance & Enforcement

The extent to which the present workplace obligations around asbestos threats are complied with, and are monitored and enforced by regulatory bodies, is unclear. A national audit conducted by the Heads of Workplace Safety Authorities found that the construction industry had the lowest rate of compliance with asbestos-related standards.²⁸ Another Safe Work Australia study found that although construction and maintenance workers indicated that they were well aware of the potential dangers of asbestos to their health, they lacked knowledge on how to recognise materials containing

²⁴ SafeWork Australia, *How to Manage and Control Asbestos in the Workplace - Code of Practice* (July 2020) <https://www.safeworkaustralia.gov.au/sites/default/files/2020-07/model_code_of_practice_how_to_manage_and_control_asbestos_in_the_workplace_1.pdf>.

²⁵ See Mark Kay, 'The "A" Word', *Company Director* (Web Page, 1 March 2014) <<https://www.aicd.com.au/leadership/types/thought/the-a-word.html>>. Kay states that it has never been more important for directors to keep up to date with their asbestos duties and obligations.

²⁶ See, eg, SafeWork NSW, *Asbestos Registers and Management Plans* (Web Page) <<https://www.safework.nsw.gov.au/resource-library/asbestos-publications/asbestos-registers-and-management-plans-fact-sheet>>.

²⁷ See Inca Consulting, 'A Strategic Review of the Practice and Use of Asbestos Registers in Australia', *Asbestos Safety and Eradication Agency* (Report, 2016) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_Reports_strategic_review_use_of_asbestos_registers_in_Australia_discussion_paper.pdf>.

²⁸ Corie Gray, Renee Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22(4) *International Journal of Occupational and Environmental Health* 292, 295. This audit was conducted in 2006. See also Safe Work Australia, 'Asbestos Exposure and Compliance Study of Construction and Maintenance Workers' (Research, February 2010) <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestosexposureandcompliancestudyofconstructionandmaintenanceworkers_2010_pdf.pdf>; Safe Work Australia, 'Asbestos-Related Disease Indicators' (Report, August 2010) 10 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related_disease_indicators.pdf>.

asbestos, they were not complying with safety procedures as well as they perceived, and there were instances of inappropriate disposal of asbestos contaminated materials.²⁹

The Asbestos Safety and Eradication Agency ('ASEA') admits that instances of workplace noncompliance remain a serious issue.³⁰ The *ASEA National Strategic Plan 2019-2023* includes targets for the public, commercial and residential sectors. The target for the commercial sector is an expectation that commercial buildings that are required by law to maintain asbestos registers will have up-to-date registers and management plans that are actively being implemented.³¹ The fact that compliance with existing law is set as a target suggests that either non-compliance remains a significant issue or that this target is tokenistic.

B Training

Compulsory training on asbestos risks and removal is not mandated for tradespersons across all states and territories of Australia. In a survey of tradespersons involved with home renovations in 2018, the proportion of tradespeople who had undertaken formal training in relation to the management, handling and removal of asbestos was only 37 percent.³²

The voluntary or recommended training frameworks seem insufficient given the risks and fatalities involved.

IV LACK OF PROTECTIONS AROUND ASBESTOS IN RESIDENTIAL SETTINGS

²⁹ Safe Work Australia, 'Asbestos Exposure and Compliance Study of Construction and Maintenance Workers' (Research, February 2010) <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestosexposureandcompliancestudyofconstructionandmaintenanceworkers_2010.pdf.pdf>.

³⁰ Asbestos Safety and Eradication Agency, 'National Asbestos Profile for Australia' (Report, November 2017) 11 <https://www.asbestossafety.gov.au/sites/default/files/documents/2017-12/ASEA_National_Asbestos_Profile_interactive_Nov17.pdf>.

³¹ Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Awareness and Management' (Strategic Plan, November 2019) <https://www.asbestossafety.gov.au/sites/default/files/documents/2019-11/ASEA_NSP2_ebrochure%28Nov19%29.pdf>.

³² Colmar Brunton, 'Asbestos Awareness Research' (Draft Report, June 2018) 60 <<https://www.asbestossafety.gov.au/sites/asea/files/documents/2018-08/Executive%20summary%20-%202018%20National%20asbestos%20awareness%20and%20attitudes%20survey.pdf>>.

Outside of workplaces, there are still no systematic policy or public health protections in Australia. The legal obligations in the residential sector and the ability for outsiders to review actions taken in homes are considerably more ambiguous than in the public and commercial sectors. When tradespersons are employed by a homeowner or occupant to do a project, the project occurs within a workplace, and the workplace health and safety obligations around the handling and control of asbestos theoretically apply. However, very few homeowners in Australia voluntarily seek professional asbestos assessments of their homes on either a one-off or periodic basis.³³

A Longstanding scientific evidence

Scientific evidence demonstrating that asbestos-related diseases arise in non-occupational or environmental settings is longstanding. Within the non-occupational exposure risk category, expert warnings on incidences of mesothelioma linked to home renovations have been documented since the 1960s.³⁴ These include people with very brief periods and dosages of asbestos exposure.

For example, Wagner et al highlighted mesothelioma cases caused by environmental exposure in South Africa in 1960,³⁵ Newhouse and Thompson identified mesothelioma cases linked to household exposure in London in 1965,³⁶ and Lieben and Pistawka discussed mesothelioma cases linked to non-occupational exposures in the United States in 1967.³⁷

Longstanding scientific evidence of the risks of limited exposure was accepted as evidence in the *Werkel Case*. For instance, an article in the *British Medical Journal* in 1967 observed that ‘there is a vast number of “do-it-yourself” enthusiasts who may be

³³ NSW Environment Protection Authority, ‘Asbestos Safety Part 1- Household Renovations and Maintenance’ (Social Research Report, 2021) 7, 17-46 <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/resources/asbestos/asbestos-safety-social-research-report-part-1-2021.pdf?la=en&hash=F6BBA34B3B0F9D41F50A1CB3F433BD2CAE8A6D0B>>.

³⁴ See, eg, *Werfel Case* (n 3) [125] citing ‘Asbestosis’ (1967) 5557 *British Medical Journal* 62.

³⁵ JC Wagner, CA Sleggs, and P Marchand, ‘Diffuse Pleural Mesothelioma and Asbestos Exposure in the North Western Cape Province’ (1960) 17(4) *British Journal of Industrial Medicine* 260, 269-70. Eleven of the 30 cases studied by Wagner had not worked with asbestos and arose from non-occupational sources of exposure, *ibid*.

³⁶ ML Newhouse and H Thompson, ‘Mesothelioma of Pleura and Peritoneum Following Exposure to Asbestos in the London Area’ (1965) 22(4) *British Journal of Industrial Medicine* 261, 264.

³⁷ J Lieben and H Pistawka, ‘Mesothelioma and Asbestos Exposure’ (1967) 14(4) *Archives of Environmental Health* 559, 561-62.

exposed intermittently to highly concentrated asbestos dust'.³⁸ The authors note that in some cases, extremely short exposures have been reported.³⁹ The following year in 1968, an article published in the *Medical Journal of Australia* warned of the development of mesothelioma after 'minor exposure to asbestos'.⁴⁰

B Excess risk studies in homes

Scientists often use excess risk studies that compare the incidences of asbestos-related diseases in a controlled group versus the incidences across the general population to assess statistically significant associations between individuals with specific sources of exposure to asbestos.

There are published studies within medical journals that find statistically significant excess risks of mesothelioma in homes.⁴¹ For example, in 2017, Marsh et al conducted meta-analysis and concluded that mesothelioma risks from non-occupational asbestos exposure are consistent with the fibre-type potency response observed in occupational settings.⁴²

In 2018, Xu et al also used meta-analysis and found non-occupational asbestos exposure is significantly associated with an elevated risk of mesothelioma.⁴³ The relative risk estimates varied by types of exposure (neighbourhood, domestic and household exposure), but for all these categorisations, there was an elevated risk of mesothelioma.

The handling of asbestos by non-workers, such as residential property owners or "do-it-yourselfers" remains largely unregulated across Australia.⁴⁴

In some circumstances, local council development controls in Australia may require owners or renovators to use a licensed asbestos removalist, but these rules generally only apply to residential areas containing asbestos of over 10m².⁴⁵ So, homeowners are legally

³⁸ *Werfel Case* (n 3) 339 [125] citing 'Asbestosis' (1967) 5557 *British Medical Journal* 62, 62-3

³⁹ *Ibid* 340 [125].

⁴⁰ *Ibid* 341 [131].

⁴¹ Marsh et al (n 16); Xu et al (n 16).

⁴² Marsh et al (n 16) 845.

⁴³ Xu et al (n 16).

⁴⁴ Asbestos Safety and Eradication Agency (n 30).

⁴⁵ In the ACT, all asbestos removal work must be carried out by a licensed asbestos removalist. In other states and territories, a non-licensed person can remove non-friable asbestos as long as the area is no bigger than 10m².

responsible for the control and cost of asbestos in their properties but are largely unaware of this fact and remain at risk of deadly exposure.

Under current State and local council settings (other than in the ACT),⁴⁶ even if homeowners do arrange for a professional asbestos assessment, and asbestos threats in their properties are identified as a result, the owner(s) can choose to sell or lease their premises rather than resolve these threats and are not obliged to disclose the identified risks to potential buyers or tenants.⁴⁷

In any event, these measures place responsibility on property owners, while recent qualitative research by the NSW Environment Protection Authority cautioned against this approach, noting that:

...interventions (such as those currently in place) that position property owners as solely responsible for the management of asbestos (and its costs) can be considered by the community as punitive and are likely to have unintended and perverse outcomes.⁴⁸

The emphasis on regulating asbestos in the workplace in Australia is consistent with the early stages of the asbestos crisis when most of the asbestos-related victims were employees in mines and factories where asbestos was present. However, published sources suggest that the share of sufferers from what is referred to as ‘the first wave’ is now low, while those who were possibly or probably exposed from non-occupational sources (such as home renovations) are increasing.⁴⁹

The most recent Australian Mesothelioma Registry report released November 2021 emphasises the historical nature of the current deaths from mesothelioma and suggests the working conditions that resulted in these deaths have changed.⁵⁰ Similar arguments and claims have been made by the industry worldwide since the 1970s,⁵¹ but they ignore

⁴⁶ When a residential owner in the ACT seeks a professional asbestos assessment, they must disclose any identified asbestos threats to prospective buyers or tenants. This policy approach was recommended in NSW by the Ombudsman in 2010 and again by the Acting Ombudsman in 2017.

⁴⁷ Asbestos Safety and Eradication Agency (n 30) 38.

⁴⁸ NSW Environment Protection Authority (n 33) 104.

⁴⁹ See, eg, Australian Government, Australian Institute of Health and Welfare, ‘Mesothelioma in Australia 2018’ (Report, 28 August 2019) <https://www.aihw.gov.au/getmedia/7df8ff10-d0b7-4d42-881b-76647a9263ef/aihw-can-130-infocus_1.pdf.aspx?inline=true>.

⁵⁰ Australian Mesothelioma Registry, ‘Mesothelioma in Australia 2020’ (Report, 10 November 2021) <<https://www.aihw.gov.au/reports/cancer/mesothelioma-in-australia-2020/summary>>

⁵¹ See, eg, Jock McCulloch and Geoffrey Tweedale, *Defending the Indefensible* (Oxford University Press, 2008) 111, 112, 196-202, 270.

the incomplete regulation governing the control and handling of asbestos in residential properties beyond workplaces.

The NSW government website on 'Asbestos and Health Risks' presently states that those 'who get health problems from inhaling asbestos have usually been exposed to high levels of asbestos for a long time'.⁵²

However, as noted in a report by Safe Work Australia released in 2010:

Mesothelioma ... can develop from *short or lengthy periods of low or high concentrations* of asbestos, although exposure to asbestos fibres does not make the development of the disease inevitable.⁵³

While the risk of disease from low level exposure may be low, it is nevertheless real for those who develop disease as a result.

V THE INADEQUACY OF THE CURRENT RESPONSE

The *Asbestos Safety and Eradication Act 2013* (Cth) makes the Asbestos Safety and Eradication Agency responsible for implementing the National Strategic Plan and for annual reporting on the progress made by the federal, state and territory governments in achieving its stated objectives.⁵⁴

The Asbestos Safety and Eradication Agency has published three progress reports.⁵⁵ The last was the 2017-2018 report which indicated that:

⁵² NSW Government Health, 'Asbestos and Health Risks' (Web Page) <<https://www.health.nsw.gov.au/environment/factsheets/Pages/asbestos-and-health-risks.aspx#:~:text=People%20who%20get%20health%20problems,the%20first%20exposure%20to%20asbestos>>.

⁵³ Safe Work Australia, 'Asbestos-Related Disease Indicators' (Report, August 2010) 2 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/asbestos-related_disease_indicators.pdf>.

⁵⁴ *Asbestos Safety and Eradication Act 2013* (Cth) ss 8, 29. See also Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness 2014-2018' (Report, April 2019) <<https://www.asbestossafety.gov.au/sites/default/files/documents/2019-05/National%20Strategic%20Plan%20for%20Asbestos%20Management%20and%20Awareness%202014%20-%202018%20Final%20Report.pdf#:~:text=The%20National%20Strategic%20Plan%20for%20Asbestos%20Management%20and,%20ARDS%29%20in%20Australia%2C%20over%20the%20last%20five%20years>>; Asbestos Safety and Eradication Agency (n 31).

⁵⁵ Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness: Progress Report 2015-16' (Report, Oct 2016) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-03/ASEA_NSP_2015-16_Progress_Report_final_web.pdf>; Asbestos Safety and Eradication Agency, 'National Strategic Plan for

- The NSW Government produced guides, templates, and fact sheets, held a media event at Orange, and ran a pilot scheme to improve asbestos awareness in Aboriginal communities.⁵⁶
- The Victorian Government invested \$200 million over four years to remove asbestos from its public schools,⁵⁷ with a further \$179 million allocated for this purpose in the 2019-2020 budget.⁵⁸
- The Queensland Government ran a program to assess compliance by seven of its licensed asbestos removalists, resulting in the cancellation of two licenses, the suspension of one license, and the sending of a warning letter to another.⁵⁹
- The South Australian Government identified and contacted 42 building owners to warn them about the potential existence of asbestos-containing millboard in their heater banks.⁶⁰
- The Tasmanian Government ran a state-based online and help line asbestos awareness campaign and concluded that it may be more effective for jurisdictions to collaborate on a national campaign.⁶¹

Asbestos Management and Awareness: Progress Report 2016-17' (Report, November 2017) <<https://www.asbestossafety.gov.au/what-we-do/national-strategic-plan/national-strategic-plan-progress-report-2016-17>>; Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness: Progress Report 2017-18' (Report, November 2018) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-12/ASEA_2017-18_Progress%20Report.pdf>. See also Asbestos Safety and Eradication Agency, 'Case Studies of Significant Asbestos Removal Projects' (Report, December 2017) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_Reports_case_studies_significant_asbestos_removal_jan18.pdf>.

⁵⁶ Asbestos Safety and Eradication Agency, 'National Strategic Plan for Asbestos Management and Awareness: Progress Report 2017-18' (Report, November 2018) 26-30 <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-12/ASEA_2017-18_Progress%20Report.pdf>. The pilot scheme resulted in the distribution of guidance material to 250 recipients and trained 95 people.

⁵⁷ Ibid.

⁵⁸ Victorian School Building Authority, 'Asbestos Safety Program' (Web Page) <<https://www.schoolbuildings.vic.gov.au/Pages/Asbestos-removal-from-schools.aspx>>.

⁵⁹ Asbestos Safety and Eradication Agency, (n 55) 34-35.

⁶⁰ Ibid 34, 36, 37.

⁶¹ Ibid 38-39.

- The ACT Government removed loose fill asbestos from the roof space of one property in Edgar Street and remediated three other properties in this street to ensure the safety of these premises.⁶²

The summary table at the rear of the ASEA 2018 progress report reflects the slow pace of government responses to fatalities caused by asbestos-related diseases since 2012. Most of the reported activity consists of plans, announcements, the establishment of agencies, and the holding of conferences.⁶³ Similarly, ASEA's annual report 2020-21 refers to data collection, the establishment of working groups, and providing reporting templates.⁶⁴

The reported actions by State and Territory governments to raise public awareness of asbestos dangers in homes and prevent future incidences of asbestos-related disease linked to the residential sector seem minimal, given the seriousness of the public health issues and the numbers of lives involved.

Our research found only one example of a body beyond the Victorian School Asbestos Eradication Program acting in accordance with the eradication goals of the Asbestos Management Review, which will be referred to below. The Victorian Asbestos Eradication Agency (VAEA) states on its home webpage that 'the only way to prevent asbestos-related diseases is to eliminate the risk of exposure by removing asbestos-containing materials'.⁶⁵ This objective is backed by specific plans and actions and the scope of its actions are clearly stated: 'to remove asbestos containing materials from buildings owned by the Victorian government, including offices, hospitals, train stations, community centres, prisons and TAFEs'.⁶⁶

To achieve its goal, the VAEA developed a consolidated register of identified asbestos-containing materials in government-owned buildings, a risk assessment model to assess asbestos hazards, and a schedule for the prioritised removal of asbestos from government-owned buildings. The VAEA highlights that this approach will ensure that

⁶² Ibid 40-41.

⁶³ Ibid.

⁶⁴ Asbestos Safety and Eradication Agency, 'Asbestos Safety - Annual Report 2020-21' (Report, 17 September 2021) 25 <<https://www.asbestossafety.gov.au/sites/default/files/documents/2021-10/ASEA%20Annual%20Report%202020-21%20-%20Final.pdf>>.

⁶⁵ Victorian Asbestos Eradication Agency, 'Providing Victoria with a long term plan for the removal of asbestos from government owned buildings' (Web Page) <<https://www.vaea.vic.gov.au/>>.

⁶⁶ Victorian Asbestos Eradication Agency, 'Scope of the VAEA's Work' (Web Page) <<https://www.vaea.vic.gov.au/scope>>.

‘the long-term plan for the prioritised removal of asbestos from Victorian government buildings is informed, measured, systematic and safe’.⁶⁷

The program by the Victorian School Building Authority in Victoria to remove asbestos from public schools is more advanced. This authority conducted a full audit of the 1,712 government school sites and prioritised the risks.⁶⁸ Having completed this planning, it removed asbestos from the highest risk schools in March 2016 and continues to remove asbestos from other school sites identified as a threat.⁶⁹

Beyond the VAEA example, we found no evidence of formal plans to eradicate *in situ* asbestos fully or substantively across any State or Territory of Australia.

The Asbestos Safety and Eradication Agency’s *National Strategic Plan 2019-2023* incorporates very limited targets towards the Asbestos Management Review goals.

For the public sector, the agreed targets in the *National Strategic Plan 2019-2023* include the identification and assessment of asbestos risks in publicly owned and controlled buildings, land and infrastructure, with specified schedules and processes for the prioritised safe removal of asbestos-containing material.⁷⁰

The stated targets in the *National Strategic Plan 2019-2023* for the commercial sector are lower, with the expectation for commercial buildings that are required by law to maintain asbestos registers, that they will have up-to-date registers and management plans that are actively being implemented.⁷¹

The indicated targets in the *National Strategic Plan 2019-2023* for the residential sector include the development of an evidence-based national picture that assesses the likelihood of asbestos-containing materials being present in the residential environment and increased awareness of the health risks of asbestos-containing materials to 80 per cent of homeowners and occupiers.⁷²

⁶⁷ Ibid.

⁶⁸ Victorian School Building Authority, ‘Asbestos Safety Program’ (Web Page) <<https://www.schoolbuildings.vic.gov.au/Pages/Asbestos-removal-from-schools.aspx>>.

⁶⁹ Ibid.

⁷⁰ Asbestos Safety and Eradication Agency, ‘National Targets’ (Web Page) <<https://www.asbestossafety.gov.au/research-publications/national-strategic-plan-asbestos-management-and-awareness/overview-national-strategic-plan>>.

⁷¹ Ibid.

⁷² Ibid.

There has however been a lack of concrete commitments and urgency in the 2019-2023 *National Strategic Plan*. Under this Plan:

- The States and Territories can determine the nature and timing of their plans to identify, assess and deal with asbestos in the public sector, and may delay these processes for many decades.
- There are no targets in the commercial sector beyond compliance with existing law. This means that most of the private sector can continue to “manage” asbestos within their properties, without firm commitments or obligations to remove or remediate it if they consider it to be “safe”.
- The targets for the residential sector in the plan are vague and minimal. It is unclear how the national residential picture will be developed; what household awareness means; which mechanisms will be used to assess and raise awareness by homeowners and occupiers of the health risks of asbestos; and what will happen if these targets are not achieved. If 80 percent of Australian households are “aware” of asbestos risks under the definition used by the Asbestos Safety and Eradication Agency, will this mean that all these households will seek assistance from licensed asbestos professionals or will take adequate precautions? Empirical research suggests not.⁷³

VI THE RECOMMENDATIONS OF THE ASBESTOS MANAGEMENT REVIEW

In 2012, the Asbestos Management Review considered the arguments (and submissions) for and against regulation governing the handling of asbestos in residential settings. It reported that after

...careful consideration, and having regard to the statistics and research indicating increasing incidences of asbestos-related disease among DIY home renovators and their families, the review has concluded that the provision of information and protective equipment is not a sufficient safeguard against the risk of exposure to potentially lethal airborne fibres.⁷⁴

⁷³ NSW Environment Protection Authority (n 33).

⁷⁴ Asbestos Safety and Eradication Agency, ‘Asbestos Management Review Report’ (Report, June 2012) 30 <https://www.asbestossafety.gov.au/sites/default/files/documents/2017-10/asbestos_management_review_report_june_2012_0.pdf>.

The Asbestos Management Review recommended that the national strategic plan provide for a

...requirement that an asbestos content report be undertaken by a competent assessor to determine and disclose the existence of ACMs [i.e. asbestos containing materials] in residential properties constructed prior to 1987 at the point of sale or lease, and prior to renovation, together with a property labelling system to alert workers and potential purchasers and tenants to the presence of asbestos.⁷⁵

In 2012, the Asbestos Management Review report concluded that:

Dealing with Australia's asbestos legacy requires urgent nationwide action undertaken in a systematic way.⁷⁶

Nevertheless, there is minimal evidence of systematic responses since this time at either federal or state government levels, and there continues to be a lack of public acknowledgement as to the scale of the ongoing asbestos crisis.

In 2012, the Federal Government indicated that it supported the recommendation for mandatory asbestos assessments of residential homes built prior to 1987, with a labelling system to alert potential buyers, tenants and renovators of identified threats.⁷⁷ However, this recommendation has not been adopted in full by any State or Territory government.

The Asbestos Safety and Eradication Agency, referred to above, is empowered under the *Asbestos Safety and Eradication Agency Act 2013* (Cth) to coordinate a framework for the Commonwealth, States and Territories to work together to prevent harmful exposure to asbestos and to eliminate asbestos-related diseases.⁷⁸ The Asbestos Safety and Eradication Agency confirms that it was set up to 'provide a national focus on asbestos issues which goes beyond workplace safety to encompass environmental and public health concerns'.⁷⁹ Despite these worthy ambitions, our research suggests that public acknowledgment of asbestos issues in Australia beyond workplaces remains minimal and equivocal.⁸⁰ Survey results suggest the broader community remains largely unaware of

⁷⁵ Ibid 7 (Recommendation 3 (b)).

⁷⁶ Ibid 17.

⁷⁷ David Twomey, 'Labor Plans National Asbestos Removal Agency', *Econews online* (Web Page) (4 September 2012) <<https://econews.com.au/20094/labor-plans-national-asbestos-removal-agency/>>.

⁷⁸ The Agency is a statutory body established under the *Asbestos Safety and Eradication Agency Act 2013* (Cth)

⁷⁹ Asbestos Safety and Eradication Agency, 'History of Asbestos' (Web Page) <<https://www.asbestossafety.gov.au/aboutasbestos/history-asbestos>>.

⁸⁰ See, eg, *Werfel Case* (n 3) 364-5 [231].

the public health risks and impacts of legacy asbestos in homes.⁸¹ Further, analysis of available public health guidance suggests current warnings to householders about the health risks of asbestos exposure are qualified, incomplete and poorly disseminated.⁸²

The Asbestos Management Review also recommended nationally consistent laws that restrict the handling, removal, storage, transport, and disposal of asbestos to licensed operators.⁸³ Adoption of this recommendation is limited to the ACT.

The Asbestos Safety and Eradication Agency's 2017-18 Progress Report notes that a significant portion of DIY home renovators are still at risk, but after decades of warnings to this sector, specific policies, plans and actions to mitigate these risks are still lacking.⁸⁴

VII RECOMMENDATIONS AND CONCLUSION

The regulatory settings across Australia governing the handling and control of asbestos in the residential sector presently seem to assume that homeowners and occupiers are aware of, and well informed about, the risks of exposure to asbestos in poor condition or during maintenance or renovation activity, or that they will become informed about the risks by searching and assessing material online. For example, the present online public health communications, including *Asbestos: A guide for householders and the general public*,⁸⁵ *Asbestos Fact Sheet for Home Owners and Tenants*,⁸⁶ and *Safety information for the removal of less than 10m² of non-friable asbestos*,⁸⁷ presume that prospective DIY renovators know enough about asbestos dangers to search for, locate, and respond to, the relevant material. These assumptions are poorly founded.

⁸¹ See Digital Finance Analytics and Asbestos Awareness Australia, (n 2).

⁸² Ibid.

⁸³ Asbestos Safety and Eradication Agency (n 74) 30.

⁸⁴ Asbestos Safety and Eradication Agency (n 55) 14, 43. Page 43 of the report indicates that the promotion of a short film to increase community awareness about asbestos safety is ongoing (with a DIY focus).

⁸⁵ Australian Government Department of Health, 'Asbestos - A guide for householders and the general public' (Web Page) <<https://www1.health.gov.au/internet/main/publishing.nsf/Content/ohp-enhealth-asbestos-may2012.htm>>.

⁸⁶ NSW Government, 'Asbestos Fact Sheet for Homeowners and Tenants' (Factsheet, March 2019) <<https://www.epa.nsw.gov.au/-/media/epa/corporate-site/applications/asbestos/factsheet/19p1498-AA-factsheet-homeowners.pdf>>.

⁸⁷ Asbestos Safety and Eradication Agency, 'Safety information for the removal of less than 10m² of non-friable asbestos' (Safety Information, April 2017) <https://www.asbestossafety.gov.au/sites/default/files/documents/2018-01/ASEA_less_than_10m2_Safety_Leaflet_Apr17_Final_web.pdf>.

The two most significant areas of concern in the residential and DIY sectors in Australia are poor awareness of asbestos dangers and a lack of precautions and protections.⁸⁸ These concerns are commonly intertwined because if homeowners or occupiers are not aware of the dangers of legacy asbestos or do not fully understand the gravity of the risks involved, they cannot or will not make well-informed decisions.

A household survey conducted in 2021 found that most respondents would not pass a basic asbestos risk test and that the general community levels of awareness and knowledge around asbestos threats and consequences are very low.⁸⁹ Households who do not comprehend the nature and scale of the risks of asbestos exposure are highly unlikely to search for relevant information online, seek professional help, or take appropriate precautions. Consequently, grave questions remain concerning the laxity of the regulatory schemes around home renovations. These regulatory inadequacies are heightened by a lack of residential property disclosure obligations. Under current policy settings (except in the ACT),⁹⁰ even if Australian homeowners do arrange for a professional asbestos assessment, they are not obliged to disclose any identified risks to potential buyers or tenants.⁹¹

The public health and policy responses to asbestos threats in Australia ought to be prudent and proactive given the vast numbers of Australians potentially at risk. Franklin and Reid confirm that '[r]enovation and removal are the activities, that, if done poorly, probably present the greatest contemporary risk of exposure to asbestos fibres.'⁹² Gray et al conclude that future cases of asbestos-related diseases and mortality can only be prevented by stringent regulation and careful maintenance and removal of existing *in situ* asbestos across the country.⁹³

⁸⁸ Peter Franklin and Alison Reid, 'The Ongoing Problem of Asbestos *In Situ*' in Lenore Layman and Gail Phillips (Eds) *Asbestos in Australia* (Monash University Publishing, 2019) 257, 262.

⁸⁹ See Digital Finance Analytics and Asbestos Awareness Australia (n 2).

⁹⁰ When a residential owner in the ACT seeks a professional asbestos assessment, they must disclose any identified asbestos threats to prospective buyers or tenants. This policy approach was recommended in NSW by the Ombudsman in 2010 and again by the Acting Ombudsman in 2017.

⁹¹ Asbestos Safety and Eradication Agency, *National Asbestos Profile for Australia* (November 2017) 38.

⁹² Franklin and Reid (n 88) 261.

⁹³ Corie Gray, Renee N Carey and Alison Reid, 'Current and Future Risks of Asbestos Exposure in the Australian Community' (2016) 22(4) *International Journal of Occupational and Environmental Health* 292, 295.

Additionally, the Full Court decision in *Amaca Pty Ltd v Werfel*⁹⁴ has highlighted the need for clear information through public health campaigns, to ensure that Australians are aware of the risks of asbestos exposure. The decision supports a view that those corporations which profited from the manufacture and sale of asbestos-containing materials even after becoming aware of the risks of asbestos exposure to human life, ought to provide financial support for such campaigns.

In the *Werfel Case*, Werfel was diagnosed with mesothelioma following brief periods working as a fencing contractor in the late 1990s and do-it-yourself home renovations in 2000-2001 and in 2004. The Court ultimately held that James Hardie owed a duty of care to avoid injury to persons who might occasionally remodel, repair or remove its asbestos-cement products, and that this duty had been breached with respect to Werfel. More broadly, the decision in the *Werfel Case* recognised a duty on James Hardie to warn homeowners, occupants, and tradespersons of the risks of contracting mesothelioma from occasional exposures to asbestos cement products and to provide appropriate advice on the necessary precautions. Their Honours suggested that this duty might be satisfied by conducting mass media campaigns that acknowledge these risks and that provide appropriate guidance. They further noted that a mass media public campaign could minimise incidences of future harm by alerting both occasional users and tradespersons working with asbestos cement products, thereby reducing future claimants.⁹⁵

Chief Justice Kourakis and Justices Nicholson and Livesay highlighted the problems arising from qualified and guarded public communications on asbestos risks. They indicated that if James Hardie had previously acknowledged the risks of occasional exposure during home renovations unequivocally and very publicly, this would have allowed government and non-government agencies, the public health and safety authorities, and the media to be less guarded in their commentary to the public.⁹⁶

The Asbestos Injury Compensation Fund agreement entered into between the NSW government and James Hardie⁹⁷ prevents or makes it difficult to legally require funding

⁹⁴ *Werfel Case* (n 3).

⁹⁵ Ibid 385 [313], 386 [317], [319].

⁹⁶ Ibid 364-5 [231].

⁹⁷ See discussion in Asbestos Awareness Australia, 'Asbestos Related Burdens: Societal Harms' (Web Page) <<https://asbestosawarenessaustralia.com.au/societal-harms/>>.

from James Hardie to support the identification and removal of asbestos from homes and other properties or to fund public health campaigns or recover other economic losses. While this fund provides victim compensation, preventing loss of life rather than merely compensating for it would clearly be a preferable approach. Even if compensation were to be considered an adequate remedy for loss of life, which it clearly is not, it is also worth noting the difficulties that can arise in seeking compensation through civil litigation due to difficulties in clearly establishing causal links between asbestos exposure and resulting illness.⁹⁸

When a corporation shifts the costs of harm caused by its actions and activities to groups and persons beyond its legal structure, such as property owners, this results in negative corporate externalities for which the corporation should arguably be held responsible.⁹⁹ Most asbestos-related externalities stem from the prior activities of James Hardie and CSR Limited ('CSR'). These companies mined asbestos and manufactured and distributed asbestos-containing products for many decades, leaving a legacy of disease and mass fatalities that will likely span at least another century, and possibly longer if the present policy and public health settings are not disrupted and extended to the residential sector.

There are no legal or other barriers that prevent James Hardie or CSR from taking further voluntary actions or from making additional contributions in accordance with their stated sustainability principles, when doing so would enhance their long-term brand and reputation.¹⁰⁰

James Hardie and CSR ought, at a minimum, to provide funding to pay for public health campaigns to properly warn all Australians about the risk and impacts of legacy asbestos; and also, medical research to prevent asbestos-related diseases or to mitigate the consequences of these diseases.

Further, James Hardie and CSR ought to fully acknowledge their roles in creating the asbestos crisis and the continuing risks and harms of legacy asbestos. Such public

⁹⁸ Martin Rogalski, 'Causation in Long Dust Disease' (2020) 157 *Precedent* 16.

⁹⁹ See, eg, Daniel Chow, 'Counterfeiting as an externality imposed by multinational companies on developing countries' (2011) 51(4) *Virginia Journal of International Law* 785. See also Jock McCulloch, *Asbestos: Its Human Cost* (Queensland University Press, 1986) 130, 135.

¹⁰⁰ See, eg, Paul Redmond, 'Directors' duties and corporate social responsiveness' (2012) 35(1) *University of New South Wales Law Journal* 317; Gill North, 'Corporate management & communication of environmental and social risks in Australia: Pressures are mounting' (2018) 33 *Australian Journal of Corporate Law* 227.

acknowledgement is critical, because public discussion on, and warnings about, legacy asbestos in Australia remain heavily guarded, especially on the scale of related fatalities and the risks of brief, occasional and low dose exposure.¹⁰¹

In addition to the need for public health campaigns, and notwithstanding the costs involved, there should be practical action towards the removal of *in situ* asbestos in all settings whether residential, commercial, public, or industrial, to prevent further unnecessary deaths. This should be undertaken systematically and be externally funded either by the responsible corporations or government, rather than relying on property owners to bear these costs. It is important that such removal occurs under a policy setting that minimises risk to those undertaking the removal, ensuring that removalists are properly trained. Costs-based arguments against such measures suggest that we can place a limit on the value of Australian lives lost every year, which is clearly unacceptable.

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