

GRIFFITH JOURNAL OF
LAW & HUMAN DIGNITY

GRIFFITH JOURNAL OF LAW & HUMAN DIGNITY

Editor-in-Chief
Laurynn Williams

Executive Editors
Emma Blake
Stephanie Chard
Anna Feng
Luke Livesey
Elizabeth Thomas

Editors
Moyosore Adesina
Jean Danielle Bernardino
Louise Sullivan

Consulting Executive Editor
Dr Allan Ardill

Volume 13 Issue 1
2025

Published on 7 August 2026, Gold Coast, Australia by the *Griffith Journal of Law & Human Dignity*

ISSN: 2203-3114

CONTENTS

FAST LAW, FRAGILE RIGHTS: THE HUMAN RIGHTS CONSEQUENCES OF AUSTRALIA'S RAPID SOCIAL MEDIA REFORMS 1

HARNESSING AI: SEATBELTS AND THE LAW IN QUEENSLAND 30

#IT ISN'T FAIR: THE NEED FOR GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT 52

THE WEST PAPUAN GENOCIDE: UNITED NATIONS MALFEASANCE, WESTERN COMPLICITY AND THE FAILURE OF INTERNATIONAL LAW 84

FAST LAW, FRAGILE RIGHTS: THE HUMAN RIGHTS CONSEQUENCES OF AUSTRALIA'S RAPID SOCIAL MEDIA REFORMS

LORRAINE FINLAY* AND PATRICK J HOOTON+

Over the last two decades, social media has become a digital town square for people to share ideas, discuss politics or comment on recent events. For many younger people it represents a bedrock of their day-to-day lives. However, the Australian Federal Government has recently passed legislation to ban the use of social media by people under 16 years of age. The Federal Government justified its decision on the basis that social media is causing serious harm to the physical and mental wellbeing of children and young people across the country. Unfortunately, this social media ban was rushed through critically important democratic processes, which has led to poor drafting decisions and unintended consequences for all people online. Importantly the ban will have serious implications for several human rights, including the right to privacy, rights of the child and freedom of expression. While serious action is needed to address the harms associated with social media, a blanket ban is not the answer.#

* Lorraine Finlay is the Human Rights Commissioner at the Australian Human Rights Commission.
+ Patrick J Hooton is a Human Rights Advisor at the Australian Human Rights Commission.
# Authors' note: This article reflects the legislative and policy landscape as at March 2025, shortly after the passage of the *Online Safety Amendment (Social Media Minimum Age) Act 2024* (Cth). At the time of publication, the social media minimum age regime has been in operation for over six months. While some practical developments have since occurred, the core legal and human rights concerns identified in this article remain relevant.

CONTENTS

I INTRODUCTION 2
II LACKING SCRUTINY 4
III LEGAL DRAFTING 6
A AGE-RESTRICTED SOCIAL MEDIA PLATFORM 7
B DISALLOWABLE INSTRUMENTS 8
C EFFECTIVENESS OF AGED VERIFICATION 10
D A BLUNT TOOL FOR COMPLEX ISSUES 11
IV HUMAN RIGHTS IMPLICATIONS 12
A BEST INTERESTS AND THE RIGHT TO HEALTH 12
B FREEDOM OF EXPRESSION 15
C RIGHT TO PRIVACY 20
V CONCLUSION 21

I INTRODUCTION

Social media is an integral part of everyday life for many Australians, especially young people who go online for entertainment, gaming or to socialise. More than half of Australian children visit a social media platform at least weekly.[1] In 2024 alone, 95% of surveyed 13-to-15-year-olds used social media,[2] while 80% of surveyed 8-to-12-year-olds used social media.[3] Children and young people are digital natives having grown up in an age of advanced technologies, where online communications are essential. The online world is ever-present to young people as social media has become the 'digital town square' where people come together to meet, connect and share ideas. The online world is as important to young people as the offline world – and the two are often interconnected, as what happens online can impact a person offline. These two worlds are indivisible and both are integral to the foundation of childhood in the 21st century.

Yet the impact of social media on young people is not clear, as the Australian Human Rights Commission recognises that social media can result in both negative and positive

[1] Office of the eSafety Commissioner ('eSafety'), *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (Report, February 2022) 19.
[2] eSafety, *Behind the Screen: The Reality of Age Assurance and Social Media Access for Young Australians* (Report, February 2025) 16.
[3] Ibid 11.

outcomes.[4] Children and young people are more likely than not to have negative experiences online,[5] which may support a correlation between social media use and mental health complications.[6] However for other young people, especially those from vulnerable or marginalised communities, it can provide them with a sense of community and self-exploration. Being online allows children and young people to find their 'community' with similar values and interests – even though they may not live in the same physical location.[7] Social media is a highly complex digital space which requires equally nuanced regulatory responses to allow people to engage safely.[8]

Whether social media has a positive or negative impact for users is neither black nor white – but rather shades of grey. Social media should be viewed as being morally neutral; whether it has a positive or negative impact depends on how people use it and what protections are put in place by platforms, regulators and the government. Discourse presented in binaries is rarely useful in legislative and policy decision-making. Yet it is policy decisions presented in such stark terms which often characterise populist law making by governments.

It is this kind of discourse which propelled the Federal Government to introduce and pass the *Online Safety Amendment (Social Media Minimum Age) Act 2024* (Cth) ('Social Media Ban') in late 2024. The Social Media Ban amended the *Online Safety Act 2021* (Cth) ('OS Act') to require that 'age-restricted social media platforms'[9] must take 'reasonable steps to prevent'[10] children and young people under 16-years-of-age from having accounts.[11] Relevant social media platforms that fail to stop such action, will be liable for a civil penalty of 30,000 penalty units.[12]

[4] Australian Human Rights Commission, *Explainer: Social Media Ban for Under-16s in Australia* (Webpage) <https://humanrights.gov.au/about/news/proposed-social-media-ban-under-16s-australia>.
[5] See generally eSafety, *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (Report, February 2022).
[6] Marilyn Campbell, 'Australia's Social-media Ban won't Work - There are Better ways to Keep Kids Safe' (2025) 637(8046) *Nature* 519, 519.
[7] Ibid.
[8] Joint Select Committee on Social Media and Australian Society, *Social Media: The Good, The Bad, and The Ugly* (Final Report, 18 November 2024) 116 [5.119].
[9] *Online Safety Act 2021* (Cth) s 63C.
[10] Ibid s 63D.
[11] Ibid s 63D.
[12] Ibid s 63D. At the time of publication this was $9,900,000.

While it is unclear whether social media is good or bad, what is clear is that bans can be blunt tools when used to address complex challenges in a society, and the Social Media Ban is no exception.[13] This article applies a legal and human rights lens to critique the Social Media Ban to determine its impact on people in Australia. Foremost this requires an important examination of the truncated consultation process undertaken to pass the Social Media Ban, before considering the shortcomings of the legal drafting. Thereafter the article will consider how the legislation may impact human rights in Australia. Finally, it will be asserted that the ban was poorly drafted and rushed legislation which will have an adverse impact on several human rights.

II Lacking Scrutiny

The Social Media Ban is a world first aimed at addressing the claim by Prime Minister Anthony Albanese that, '[t]here is a clear causal link between the rise of social media and the harm to the mental health of young Australians.'[14] Despite the Social Media Ban being a world first for untested legislation, the Federal Government practically abandoned any meaningful consultation in a truncated process – which some have characterised as an attempt to rush legislation and avoid legitimate scrutiny.[15] Upon examination, there may be some merit to this characterisation.

In early November the Federal Government announced its plan to legislate a Social Media Ban for under-16s.[16] Then on 21 November 2024, the Senate Standing Committees on Environment and Communications provided stakeholders just one day to review the legislation and provide submissions.[17] During that one-day period it was reported that

[13] Campbell (n 6) 519.
[14] Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2024, 8387 (Anthony Albanese, Prime Minister).
[15] Max Mason, 'Big tech's warning on rushing teen ban on social media', *Australian Financial Review* (online, 24 November 2024) <https://www.afr.com/companies/media-and-marketing/big-tech-s-warning-on-rushing-teen-ban-on-social-media-20241124-p5kt2o>; Maani Truu, 'Social media age ban inquiry flooded with 15,000 submissions after Elon Musk weighs in', *ABC News* (online, 25 November 2024) <https://www.abc.net.au/news/2024-11-25/social-media-age-ban-inquiry-flooded-with-submissions/104644208>.
[16] Anthong Albanese and Michelle Rowland, 'Minimum age for social media access to protect Australian kids' (Media Release, 8 November 2024).
[17] See, eg, Parliament of Australia, *Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions]* (Webpage) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge>.

over 15,000 submissions were provided,[18] yet only 117 submissions were individually published and presumably considered by the committee at the time of hearing (making up less than 1% of all submissions provided).[19] Having only closed submissions on Friday 22 November 2024, the committee proceeded to hold a single, three-hour hearing on Monday 25 November 2024.[20] The hearing could be described as farcical, with committee members stating it was a 'rushed process and a very, very inadequate process'.[21] Surprisingly, many key stakeholders were not invited to provide evidence including the Office of the eSafety Commissioner ('eSafety') who is the regulator of the OS Act, nor any youth-led groups or human rights advocates. The next day, on Tuesday 26 November 2024, the committee tabled its final report before the legislation was ultimately passed.[22]

Of the 117 submissions published at the time of the hearing, almost all were critical of the truncated consultation process,[23] with the Law Council of Australia making a separate statement that this truncated process undermined, 'Australia's standing as a democratic global leader'.[24] In any democratic country consultation and scrutiny of legislation is essential to a democratic legislative process, and yet the Federal Government provided minimal opportunity for input or willingness to listen to stakeholders and experts. While the Social Media Ban is contentious, what is clear is that the majority of individually published submissions did not support it. Based on our analysis of those submissions, only 9% provided express support, compared to 70% who did not support the Social Media Ban (21% did not clearly state their position, often due to the limited time available to consider evidence and legislation). This lack of support for legislation that was rushed through parliament is staggering.

[18] Truu (n 15).
[19] See, eg, Parliament of Australia, *Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions]* (Webpage) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge>.
[20] See, eg Parliament of Australia, *Public Hearings* (Webpage) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge/Public_Hearings>.
[21] Evidence to the Senate Environment and Communications Legislation Committee, Parliament of Australia, Canberra, 25 November 2024, 11 (Sarah Hanson-Young, Senator).
[22] Senate Standing Committee on Environment and Communications, Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions] (Final Report, 26 November 2024) ('Senate Committee Report').
[23] Ibid 26 [2.86].
[24] Greg McIntrye, 'Online Safety Amendment (Social Media Minimum Age) Bill 2024' (Letter, Law Council of Australia, 26 November 2024) 1.

Both the Senate Standing Committee on Environment and Communications and the Parliamentary Joint Committee on Human Rights ('PJCHR') were also critical of the truncated process. The PJCHR stated that in normal circumstances it would write to proponents of proposed legislation, 'seeking a response to any questions it has about the compatibility of proposed legislation with human rights.'[25] It was, however, unable to do so due to the brief timeframe.[26] Additionally, the Senate Standing Committee on Environment and Communications recognised that the process was extremely short with almost all submitters and witnesses expressing grave concerns that, 'a bill of such import was not afforded sufficient time.'[27]

In the rush to pass the Social Media Ban not only did the Federal Government appear unwilling to listen to experts and stakeholders, it also relied upon evidence which it mistakenly viewed as favouring its agenda. In both the Explanatory Memorandum and during Question Time, a United Kingdom research paper was cited as evidence to support the Social Media Ban.[28] The University of Oxford professor and co-author of that research then publicly stated that the government had misinterpreted the study, noting that it was 'frustrating to see nuanced scientific findings oversimplified to support binary policy positions'.[29] This context helps to frame the legal and human rights analysis below and may explain why the legislation appears to be poorly drafted and unduly restricts human rights.

III Legal Drafting

The drafting of the Social Media Bill leaves much to be desired as it casts an incredibly wide net, effectively capturing any website, service or app which allows people to communicate. It then relies heavily on the Minister for Communications to decide what

[25] Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 11 of 2024, 27 November 2024) 67 [1.176].
[26] Ibid.
[27] Senate Standing Committee on Environment and Communications (n 22) 26 [2.86].
[28] See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 2024, 7843-7844 (Michelle Rowland, Minister for Communications); Explanatory Memorandum, Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions] 1-2; See also Cam Wilson, 'The communications minister cited a study in support of a teen social media ban. Its co-author disagrees', *Crickey* (online, 20 November 2024) <https://www.crikey.com.au/2024/11/20/teen-social-media-ban-michelle-rowland-study-question-time/>.
[29] Andrew Przybylski, (LinkedIn, November 2024) <https://www.linkedin.com/posts/akprzybylski_the-communications-minister-cited-a-study-activity-7264917864673861632-9KZK>.

is, and is not, regulated by the legislation (rather than setting this out in the legislation itself). Finally, the legislation is ambiguous, requiring age-restricted social media platforms to take 'reasonable steps'[30] to prevent under-16s from having an account online. Poorly drafted and rushed legislation is rarely the answer to complex issues like online safety for children and young people.

A *Age-restricted Social Media Platform*

The Social Media Ban takes a 'shoot first, ask questions later' approach to legislative drafting with a shotgun like definition of 'age-restricted social media platform'[31] which hits a vast array of websites, online services and apps. Under the legislation, an electronic service is considered an 'age-restricted social media platform' where the following are satisfied:

- the sole purpose, or a significant purpose, of the service is to enable online social interaction between two or more end-users;[32]
- the service allows end-users to link to, or interact with, some or all of the other end-users;[33]
- the service allows end-users to post material on the service;[34]
- such other conditions (if any) as are set out in the legislative rules.[35]

The pre-existing definition of 'social media service' already contained in s 13 of the OS Act is nearly identical to the above definition of 'age-restricted social media platform' with one key difference. This key definitional problem is created by changing the wording of the definition of a social media service from serving the 'sole or primary purpose' to serving a 'significant purpose' of enabling online social interaction.[36] Thus, significantly lowering the threshold of what constitutes a social media platform.[37] The problem is that many websites and platforms could be said to have a *significant purpose* of enabling online social interaction. Unfortunately, 'significant purpose' is not defined in the Social

[30] *Online Safety Act 2021* (Cth) s 63D.
[31] Ibid s 63C.
[32] Ibid s 63C(1)(a)(i).
[33] Ibid s 63C(1)(a)(ii).
[34] Ibid s 63C(1)(a)(iii).
[35] Ibid s 63C(1)(a)(iv).
[36] Ibid s 13.
[37] Ibid.

Media Ban, the OS Act nor in Industry Codes or Standards. For example, it is possible that community and business forums could be captured, in addition to fitness apps or even music streaming services.

For illustrative purposes, Strava is a popular workout app that allows users to record their running, hiking and biking activity and share it with other fitness enthusiasts.[38] Under the legislation, under-16s will be banned from using Strava because the Social Media Ban deems it an age-restricted social media platform. This is because Strava allows users to record workout activity which goes into a feed that friends can follow, give 'kudos' and leave comments on.[39] Therefore, Strava has a significant purpose of enabling online social interaction between two or more end-users; users can interact with one another via comment and 'kudos' functions; and users can post their workout information as a form of content. It is bizarre that legislation aimed to make social media safe, would capture a fitness app which promotes health and wellbeing (however, it is likely future rules will be made to exclude apps like Strava from being captured).[40]

The legislation attempts to mitigate this broad and poorly drafted definition by allowing the Minister of Communications to exclude certain platforms from being captured by the legislation.[41] The Explanatory Memorandum states that online gaming, messaging apps and health and education services will all be subject to rules which exclude them from the Social Media Ban.[42] However, the legislation should have been more carefully drafted to capture genuine social media platforms either with better definitions or via the use of non-exhaustive lists.

B *Disallowable Instruments*

Instead of providing clarity to young people, parents and industry about which platforms under-16s can, and cannot use, in the legislation – the Social Media Ban relies exclusively on the Minister for Communications to determine what is out of scope via disallowance instruments. Disallowance instruments are generally rules or decisions made by a

[38] Strava has over 135 million users globally. See Strava, *About* (Webpage) <https://www.strava.com/about>.
[39] Ibid.
[40] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 2.
[41] *Online Safety Act 2021* (Cth) s 63C(4)-(7).
[42] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 4.

designated Minister under primary legislation (in this case the Minister for Communications under the OS Act). It is arguably a form of supplementary law-making which occurs without legislation being passed by both Houses of Parliament. That is not to say there is no democratic checks and balances – the Senate Standing Committee for the Scrutiny of Delegated Legislation is tasked with assessing such rule-making 'against a set of scrutiny principles that focus on statutory requirements, protection of rights and liberties and principles of parliamentary oversight'.[43] Section 42 of the *Legislation Act 2003* (Cth) sets out the procedures by which either House of Parliament can veto any instrument (unless exempted by law).[44] Regardless, these disallowable instruments are still not subject to the 'full range of parliamentary scrutiny inherent in bringing forward proposed legislation in the form of a bill'.[45] This is concerning given the immense discretion provided to the Minister for Communications under the Social Media Ban.

The Explanatory Memorandum claims the Minister's rule-making power will ensure that under-16s retain access to platforms that provide beneficial experiences in connection with 'education, health and support.'[46] The difficulty here is that what is beneficial in relation to education, health and support may vary greatly from person-to-person, or Minister-to-Minister. For example, the Federal Government first stated that YouTube would not be captured due to its educational content.[47] Yet, Communication Department officials conceded that YouTube is not primarily an educational service, and for a period YouTube remained unbanned due to a specific direction from the Minister for Communications. Shortly after this, YouTube was then re-classified as an 'age-restricted social media platform' and is now captured by the ban.[48] Therefore, rule-making could

[43] Parliament of Australia, *Senate Standing Committee for the Scrutiny of Delegated Legislation* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation>.
[44] Ibid.
[45] Senate Standing Committee for the Scrutiny of Bills, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (Scrutiny Digest 1 of 2025, 05 February 2025) 36 [1.108].
[46] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 3.
[47] Anthony Albanese and Michelle Rowland, 'Albanese Government delivers world-leading legislation to protect children online' (Media Release, 21 November 2024).
[48] Office of the eSafety Commissioner, 'Which platforms are age-restricted?' (Web Page) <https://www.esafety.gov.au/about-us/industry-regulation/social-media-age-restrictions/which-platforms-are-age-restricted>; Amelia McGuire, 'YouTube's social media ban exemption under fire as rivals see the', *Australian Financial Review* (online, 20 February 2025) <https://www.afr.com/technology/youtube-s-social-media-ban-exemption-under-fire-as-rivals-seethe-20250219-p5ldch>.

lead to inconsistency in applying, or not applying, the Social Media Ban based on an unclear definition of education, health and support.

Although the heavy reliance on the Minister's rule-making power is deeply troubling, there is a legitimate purpose for utilising disallowance instruments in the digital ecosystem. All legislation concerning online environments must be flexible enough to respond to new and emerging technologies to ensure relevance and applicability.[49] However, the Social Media Ban is too reliant on opaque rule-making powers. The legislation ought to have taken greater care to capture age-restricted social media platforms – and then used the rule-making power to broaden its ambit.

C *Effectiveness of Aged Verification*

Where a platform, website, app or service is captured by the definition of age-restricted social media platform it will be obliged to take reasonable steps to stop under-16s from having an account.[50] Although compliance is not prescriptive (as 'reasonable steps' is not defined), the Explanatory Memorandum states:

> at a minimum, the obligation will require platforms to implement some form of age assurance, as a means of identifying whether a prospective or existing account holder is an Australian child under the age of 16 years.[51]

It is clear that the Social Media Ban will rely upon age assurance technologies to enforce the ban, which is deeply troubling.

While the exact form that age assurance may take is still unclear, it could involve facial or vocal recognition technologies to determine a person's age. Under the Social Media Ban all people in Australia (including those over 16 years-of-age) could be required to provide incredibly sensitive biometric information to social media platforms (discussed further below in respect of the right to privacy). This is especially concerning as in 2023 the Federal Government found that 'age assurance technologies are immature, and present privacy, security, implementation and enforcement risks'.[52] The age assurance trial that the government is seeking to rely upon, only announced the successful tender on 15

[49] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 3-4.
[50] *Online Safety Act 2021* (Cth) s 63D.
[51] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 3.
[52] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Government response to the Roadmap for Age Verification* (Government Response, August 2023) 2.

November 2024 and will not provide its outcome report until mid-2025.[53] Additionally, eSafety has been given jurisdiction under the Social Media Ban to create and promote guidelines for the taking of reasonable steps.[54] However, this guidance will be non-binding and need not expressly consider the protection or balancing of human rights.

D *A Blunt Tool for Complex Issues*

The Explanatory Memorandum, which relies on age assurance has not even considered if this solution is reasonable or effective. Outright bans are blunt instruments for complex issues, and the Social Media Ban is only likely to push children onto unregulated and dangerous platforms.[55] Such unregulated spaces are not designed with child safety in mind, and may expose young people to material they are not developmentally ready for, or equipped to manage.[56] The ban may also mean that children, in accessing these other spaces, feel unable to ask parents for help about what they see or hear online when using it during a ban.[57] Even if young people do not migrate to unregulated digital spaces, many will find work arounds – with eSafety's Youth Council already expecting young people to use VPNs or generative AI tools to get around age assurance systems.[58] These practical realities in conjunction with ambiguity in respect of 'reasonable steps' will create uncertainty and may at best be ineffectual – and at worst expose young people to even more harm.

The legal drafting of the Social Media Ban raises a variety of concerns about enforcement, discretionary rule-making and industry uncertainty for compliance. In combination with the minimal consultation process, it could lend legitimacy to claims that the legislation was poorly drafted due to the rush to pass legislation before it could be properly

[53] Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Tender awarded for Australian Government's age assurance trial' (Media Release, 15 November 2024).
[54] *Online Safety Act 2021* (Cth) ss 27(1)(qa)–(qb).
[55] Josh Taylor, 'Social media age restrictions may push children online in secret, Australian eSafety commissioner says', *The Guardian* (online, 23 June 2024) <https://www.theguardian.com/australia-news/article/2024/jun/23/social-media-age-restrictions-may-push-children-online-in-secret-australia-regulator-says>.
[56] eSafety, *Behind the Screen: The Reality of Age Assurance and Social Media Access for Young Australians* (Report, February 2025) 13.
[57] Campbell (n 6) 519.
[58] Joint Select Committee on Social Media and Australian Society, *Social Media: The Good, The Bad, and The Ugly* (n 8) 97 [5.54] quoting eSafety Youth Council, *Submission No. 60 to the Inquiry into Social Media and Australian Society* (Submission, 2024) 3.

considered. When legislative decisions are made without consultation and scrutiny, it can often lead to unintended human rights violations.

IV Human Rights Implications

The Social Media Ban will have negative impacts on the protection and promotion of human rights and will limit the rights of young people.[59] Despite this, an overall focus on human rights was lacking in the public hearing held by the Senate Standing Committees on Environment and Communications. The subsequent human rights Statement of Compatibility produced as a legislative requirement was criticised by Flinders University as being 'underdeveloped and fail[ing] to engage with all of Australia's obligations'.[60] The Australia Human Rights Commission submitted that the Social Media Ban will have 'unintended consequences and negative human rights impacts',[61] yet the Explanatory Memorandum concluded the Social Media Ban is compatible with human rights.[62] With this in mind, it is important to provide a level of rigour in analysing the human rights impacts in a more substantive manner, and test the validity of this claim.

The Social Media Ban may restrict and limit the rights of children in respect of health, freedom of expression and privacy (all of which are discussed below). However, there are several other rights (eg rights to education,[63] culture, leisure and play,[64] freedom of association and peaceful assembly[65]) which will also be negatively impacted by the Social Media Ban – but are beyond the scope of this article.[66]

A *Best Interests and the Right to Health*

Although the International Covenant on Civil and Political Rights ('ICCPR') and the International Covenant on Social, Cultural and Economic Rights ('ICESCR') cover all

[59] See generally Australian Human Rights Commission, Submission No 96 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024).
[60] Flinders University, Submission No 69 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024) 1.
[61] Australian Human Rights Commission, Submission No 96 (n 59) 3 [3].
[62] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 9-16.
[63] *International Covenant on Economic, Social and Cultural Rights* ('ICESCR') art 13; *Convention on the Rights of the Child* ('CRC') arts 28-29.
[64] CRC art 30.
[65] CRC art 15; *International Covenant on Civil and Political Rights* ('ICCPR') art 22.
[66] PJCHR, *Human Rights Scrutiny Report* (n 25) 68 [1.183].

people, certain groups also receive protection under specific human rights instruments. For children and young people, the Convention on the Rights of the Child ('CRC') is the foundational human rights instrument. Digital environments can both promote and challenge the rights of children and young people under these instruments. It can enable children to form social, cultural, political, religious and sexual identities and facilitate participation in those communities.[67] Yet social media platforms can also allow racism, violence and discrimination to proliferate, influencing children and young people.[68] Accordingly it is important to ensure that any ban primarily considers the best interests of children.

1 *Best Interests*

With both positive and negative human rights impacts facilitated by social media, it is essential that digital policy be grounded in the best interests of children.[69] Article 3 CRC requires the best interests of children to be a primary consideration in all decisions which concern them, and is one of the four guiding principles of the CRC.[70] This requires considerations for all rights including 'their right to seek, receive and impart information, to be protected from harm and to have their views given due weight',[71] as well as ensuring transparency in respect of how best interests are determined.[72] Importantly, best interest considerations should never be based on assumptions about what is in a child's interest.[73] However, statements by Prime Minister Albanese demonstrate how assumptions were made about the Social Media Ban as he noted that he wanted 'get our kids off their devices and on to the footy fields or the netball courts, to get them interacting with real people, having real experiences'.[74] This statement is not only out of touch with modern living, as all people are capable of having real experiences with real people online, it appears to

[67] Committee on the Rights of the Child, *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (2 March 2021) 11 [64]–[66].
[68] Ibid 9-10 [54].
[69] Australian Human Rights Commission, Submission No 79 to the Joint Select Committee on Social Media and Australian Society, *Influence and Impacts of Social Media on Australian Society* (28 June 2024) 4-5 [4]-[7]; Australian Human Rights Commission, Submission No 461917447 to the Attorney-General's Department, *Privacy Act 1988 (Cth) Discussion Paper* (05 April 2023) 30 [148]-[150].
[70] *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (n 67) 2-3 [12]-[13].
[71] Ibid 2 [13].
[72] Ibid.
[73] Ibid 3-4 [16]-[18].
[74] Interview with Anthony Albanese (Natalie Barr, Television Interview – Sunrise, 10 September 2024).

make assumptions that being offline and playing sports is in the best interest of all children and young people – which is not always true. This gives the appearance that the bests interests of children have been determined by politicians reminiscing about their own childhoods in an era without modern technology.[75]

These apparent assumptions are more concerning given that it does not appear that children and young people were extensively consulted. The only evidence of consultation is in the Explanatory Memorandum which simply states that it happened – providing little other evidence.[76] The need for consultation is reinforced by the PJCHR's recommendation that the Federal Government 'meaningfully engage young people in the implementation of the legislation.'[77] Instead the Statement of Compatibility simply asserts that a ban would support the best interests of children because it protects them from the health-related harms associated with social media.[78]

2 *Right to Health*

The Statement of Compatibility claims that the Social Media Ban is intended to 'enhance the safety and wellbeing of young people online, and to address the proliferation of harms to children and young people.'[79] This may range from preventing exposure to dangerous or harmful content to preventing cyberbullying which can have serious mental and physical health impacts. For example, '11% of children have sent a photo or video of themselves at least weekly to someone they have never met offline'.[80] In addition, '62% of young people (14-17) have been exposed to negative content, of which 37% were exposed to gory or violent images'.[81] Girls are also more likely to have been exposed to harmful content such as discussions about unhealthy eating and ways to be thin (35%), while 28% view content about physically harming themselves.[82] The Statement of Compatibility notes that by restricting exposure to such content, the Social Media Ban

[75] Catherine Archer, 'Coming of age with, in and on social media: A critique of how politicians are responding to children's social media engagement' (2024) 19(1) *Journal of Children and Media* 58, 59.
[76] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 2.
[77] Senate Standing Committee on Environment and Communications (n 22) 9.
[78] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 10.
[79] Ibid.
[80] eSafety, *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (n 5) 42.
[81] Ibid 46.
[82] Ibid.

would promote the right to enjoy the highest attainable standard of physical and mental health.[83]

However, the Explanatory Memorandum rightly notes that social media can also promote physical and mental health (which is why the rule-making power allows exemptions).[84] For example, an eSafety report showed that 48% of children have looked online for physical health information – while 36% had looked for mental health information in the past year.[85] However this assumes that the Minister for Communications will fairly and consistently utilise their rule-making power to ensure children and young people can access the full suite of health and wellbeing related websites, apps and services. Accordingly, the Social Media Ban may have a positive impact on the right to health, provided the Minister uses their discretion appropriately and before the ban commences.

B *Freedom of Expression*

Freedom of expression is 'the foundation stone for every free and democratic society',[86] and is protected under several instruments including art 13 CRC and art 19 ICCPR amongst others.[87] However the right is not absolute and may be subject to restrictions, but only if those restrictions are provided by law and are necessary – most relevantly for public health purposes.[88] Even where restrictions are determined to be legal and necessary, they must also meet strict tests of necessity and proportionality – requiring the restriction to:

- pursue a legitimate aim;
- be proportional to that aim; and
- be no more restrictive than is necessary to achieve that aim.[89]

[83] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 14; ICESCR art 12(1); CRC art 24.
[84] Explanatory Memorandum, Online Safety Amendment Bill 2024 (n 28) 2.
[85] eSafety, *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (n 5) 26,
[86] Human Rights Committee, *General Comment No 34 on Article 19: Freedoms of Opinion and Expression,* 102nd sess*,* UN Doc CCPR/C/GC/34 (12 September 2011) 1 [2].
[87] See, eg, *Universal Declaration on Human Rights* art 19; *Convention on the Rights of Persons with Disabilities* art 21; CRC art 12.
[88] CRC art 13(2)(b); ICCPR art 19(3)(b).
[89] Frank La Rue, *Annual Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UN Doc A/HRC/14/23 (20 April 2010) 13-15 [79]-[81]; See also Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* UN Doc CCPR/C/GC/34 (12 September 2011) 6 [22].

1 *Restrictions on Freedom of Expression*

The UN Committee on the Rights of the Child ('CRC Committee') has previously found that digital environments, like social media platforms, perform an essential role in enhancing the rights of young people.[90] Exercising freedom of expression online includes the ability to seek, receive and share both information and ideas via any form of media.[91] The CRC Committee also recognises that social media provides public visibility and networking opportunities that support child-led activism and can empower young people as advocates to communicate with like-minded people and pursue their rights.[92] The Social Media Ban prohibits under-16s from using social media to engage in any form of democratic exercise of free expression. For example, social media was instrumental in the global 'School Strike 4 Climate' actions which called for action on climate change.[93] Without access to social media it is questionable if this global movement would have ever happened (although it is of note that only a minority of children engage in civic participation online).[94] Accordingly, it can be concluded that the Social Media Ban places very serious restrictions on freedom of expression.

2 *Lawful Restriction*

Although the restriction is provided for by law, whether the Social Media Ban is legal is an open question. An implied freedom of political communication is protected by the Australian Constitution.[95] This is not a right conferred directly on individuals (unlike the protection of free speech in the United States), but instead places a restriction on the

[90] *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (n 67) 10 [58].
[91] Ibid; ICESCR art 19(2); CRC art 15.
[92] *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (n 67) 11 [64]–[66].
[93] See generally Shelley Boulianne, Mireille Lalancette and David Ilkiw, '"School Strike 4 Climate": Social Media and the International Youth Protest on Climate Change' (2020) 8(2) *Media and Communication* 208.
[94] eSafety, *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (Report, February 2022) 22: Three in ten (31%) use the internet to look at news online weekly or more often, with young people aged 14–17 more likely to do so (46% compared to 19% of children aged 8–10 and 28% of children aged 11–13). A smaller proportion of children discuss political or social problems with other people online (13%), with those aged 14–17 more likely to do so (20% compared to 8% of children aged 8–10 and 11% of children aged 11–13.
[95] See generally *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560; *Coleman v Power* (2004) 220 CLR 1, 81-82 (Kirby J).

government's power.[96] Notably the freedom includes non-verbal communications in respect of political and government matters.[97] As noted in a submission by the Human Rights Law Centre, in the digital age social media is often the centre for political communication and discourse.[98] By imposing an outright ban on under-16s from accessing and participating in the digital town square, it places a burden on their implied freedom of political communication. Additionally, all people in Australia may have the freedom of political communication restricted due to the requirement for age assurance measures to access social media (as those over 16 must also prove their age).[99] The use of age assurance measures are seriously concerning and may force people away from social media and the ability to engage in political communication (due to concerns about facial recognition raised below). The UN Special Rapporteur on the right to freedom of expression (which includes expressing views and opinions on political matters) has previously held that restrictions on anonymity can have a chilling effect on free expression.[100]

However, a law will not be invalid simply because it infringes the freedom of political communication, it must fail to be

> reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government and the procedure prescribed by s 128 for submitting a proposed amendment of the Constitution to the informed decision of the people …[101]

Whether the Social Media Ban is constitutionally valid remains an open question to be considered by the courts – but there is doubt about its constitutionality.

[96] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561-2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); Kris Walker, 'It's a Miracle! High Court unanimity on free speech' (1997) 22 *Alternative Law Journal* 179, 180.
[97] *Levy v Victoria* (1997) 189 CLR 579, 594-5 (Brennan CJ), 613 (Toohey and Gummow JJ), 622-4 (McHugh J), 638-41 (Kirby J); See also Adrienne Stone, 'Case Note: Lange, Levy and the Direction of the Freedom of Political Communication Under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117, 128.
[98] Human Rights Law Centre, Submission No 104 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (November 2024) 6-7.
[99] PJCHR, *Human Rights Scrutiny Report* (n 25) 59 [1.152].
[100] Frank La Rue, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, UN Doc A/HRC/23/40 (17 April 2013) 13 [49].
[101] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567.

3 *Proportional Restrictions*

Prima facie, the Social Media Ban pursues a legitimate aim of protecting children and young people's physical and mental health and wellbeing from the harms associated with social media. However, the restriction must be proportional to that aim, an issue that the PJCHR has raised about the Social Media Ban.[102] The UN Human Rights Committee has previously highlighted that when a country imposes a restriction on free expression, the restriction may not jeopardise the right itself.[103] Given the central role that social media plays in free expression, the Social Media Ban curtails the ability of under-16s to express themselves freely, organise and peacefully assemble. While Australia should be commended and supported for any initiative which seeks to create safer digital spaces for young people, under the CRC State parties should ensure such laws protect the rights of children to participate in organisations which operate partially or exclusively online.[104] Balance must be found to protect children from online content which can effect their physical and mental health, without unduly limiting their right to free expression. Although the negative impacts of social media can be severe and commonplace (as discussed throughout this article), an outright ban for all people aged under-16 is disproportionate given alternative measures that could be taken.

4 *No more Restrictive than Necessary*

Australia should protect children from harmful content, but such measures cannot be more restrictive than is necessary. A key measure to determine this is whether a less rights-restrictive approach could achieve the same aim of protecting the health and wellbeing of children and young people online. The CRC Committee have cautioned against content controls, which restrict a child's access to information in the digital world,[105] and instead focus should be on preventing the flow of harmful content.[106] The Final Report of the Joint Select Committee on Social Media and Australian Society supported this approach when it recommended that Australia legislate a digital duty of

[102] PJCHR, *Human Rights Scrutiny Report* (n 25) 66 [1.171].
[103] Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* UN Doc CCPR/C/GC/34 (12 September 2011) 5-6 [21].
[104] *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (n 67) 11 [64]–[66].
[105] Ibid 10 [56].
[106] Ibid 10 [54].

care to prevent the harms associated with social media.[107] It is important to highlight that the Joint Select Committee on Social Media and Australian Society also did not recommend a ban – which provides further evidence that it is not a proportionate measure.

On 14 November 2024 the Communications Minister announced the Federal Government's plan to introduce a digital duty of care to 'keep Australians safe'.[108] As noted in the 2024 statutory review of the OS Act, which also recommended a duty of care, a responsibility would be placed on social media platforms to take reasonable steps to address and prevent foreseeable harms.[109] This would ultimately shift the current approach of online safety from discussions about bans or downstream solutions, to requiring platforms to be safe to begin with.

A digital duty of care requires social media companies to make their platforms safe for all users, which currently includes under-16s. However, it is possible that due to the Social Media Ban, under-16s would no longer be able to use social media – thus companies would not need to take action to make their platforms safe for those children and young people. This may have the unintended effect of absolving technology companies from making their platforms truly safe for all young people (including those who circumvent the ban). A duty of care will only have the effect of mitigating the most serious harms associated with social media if under-16s are protected by the duty of care. By excluding under-16s from accessing social media, the Federal Government is weakening its own attempt to make social media safe via a digital duty of care.

It is difficult to conclude that the Social Media Ban is no more restrictive than necessary when the Federal Government has already announced a digital duty of care to make platforms safe for all users. This proposed solution would allow under-16s to exercise their right to free expression if the Social Media Ban were abandoned. Accordingly, the Social Media Ban is not a necessary or proportionate restriction on freedom of expression.

[107] Joint Select Committee on Social Media and Australian Society, *Social Media: The Good, The Bad, and The Ugly* (n 8) Recommendation 2, 119 [5.141].
[108] Michelle Rowland, 'New Duty of Care Obligations on Platforms Will Keep Australians Safer Online' (Media Release, 14 November 2024).
[109] Delia Rickard, Department of the Prime Minister and Cabinet, *Report of the Statutory Review of the Online Safety Act 2021* (Report, October 2024) 50.

C *Right to Privacy*

The right to privacy is often considered a cornerstone human right as it underpins several other rights, such as freedom of association, thought and expression in addition to freedom from discrimination (amongst others).[110] However in the 21st century technology companies increasingly believe that 'privacy may actually be an anomaly'.[111] Under the Social Media Ban people in Australia will be given little choice between using age assurance technologies, such as facial recognition technology ('FRT'), or not communicating via social media – which has become an everyday aspect of modern living. As noted by the Australian Human Rights Commission, digital participation should not come at the expense of privacy.[112]

The use of biometric information collected by FRT (or other means, such as vocal recognition technology) to determine age raises serious concerns as it would require the harvesting of sensitive information. Although privacy safeguards were expressly included in the Social Media Ban legislation,[113] submitters to the relevant inquiry raised concerns. UNSW's Human Technology Institute was particularly critical of provisions relating to privacy, going so far as to provide evidence that a loophole under s 63F of the legislation could enable government and social media companies access to the information provided in the course of age assurance – acting as a 'backdoor to increased surveillance of all Australians who access social media sites'.[114] Discussion of the shortcomings of s 63F OS Act is beyond the scope of this section of human rights analysis, but it does raise serious concern. This apprehension is worsened by the poor state of privacy protection in Australia, as the widescale collection of biometric information is introduced at a time when the *Privacy Act 1988* (Cth) has only just begun its reform journey.[115] Equally concerning, the Federal Government has only just agreed to develop

[110] Australian Human Rights Commission, Submission No 461917447 to the Attorney-General's Department, *Privacy Act 1988 (Cth) Discussion Paper* (05 April 2023) 6 [15].
[111] Jacob Kastrenakes, 'Google's chief internet evangelist says "privacy may actually be an anomaly"' *The Verge* (online, 21 November 2013) <https://www.theverge.com/2013/11/20/5125922/vint-cerf-google-internet-evangelist-says-privacy-may-be-anomaly>.
[112] Australian Human Rights Commission, Submission No 461917447 (n 110) 6 [18].
[113] See especially *Online Safety Act 2021* (Cth) s 63F.
[114] Human Technology Institute, Submission No 108 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024) 1-2.
[115] Following the introduction and passing of *Privacy and Other Legislation Amendment Act 2024* (Cth).

a Children's Online Privacy Code, which is unlikely to be implemented before the Social Media Ban.[116]

The negative privacy impacts of utilising FRT or other age assurance processes that rely on biometric information not only restricts privacy but can also have negative downstream impacts on rights. FRT has persistently had problems with fairness and accuracy, as it has proven to be less accurate identifying women or people from minority racial groups[117] – possibly leading to bias and discrimination in determining who can access social media.

V CONCLUSION

The Social Media Ban is unwieldy, inaccurate and will result in unintended and messy consequences for all people in Australia. The protection and promotion of the health and wellbeing of children and young people online is of the utmost importance – and Australia should take action to mitigate the harms associated with social media. However, social media is now part of everyday life for nearly all people in Australia – especially those who grew up in an era of Facebook and Instagram being a default way to communicate with friends and family not in proximity. The Social Media Ban fails to acknowledge the reality of the world in which children and young people live and mistakenly views social media as a zero-sum game.

The rush to draft and pass the Social Media Ban has resulted in serious criticism by many experts, rights advocates and young people. It also weakens the democratic integrity of Australia's law-making process as poorly contemplated legislation is passed which creates confusion and hurdles to digital participation. This has downstream impacts for human rights which will substantially be impacted in respect of freedom of expression and privacy. To address the harms associated with social media, nuanced and proactive responses that make digital spaces safe for young people are what is needed – not bans.

[116] *Privacy and Other Legislation Amendment Act 2024* (Cth) s 26GC.
[117] See, eg, Joy Buolamwini and Timnit Gebru, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) 81 *Proceedings of Machine Learning Research* 77; KS Krishnapriya, et al., 'Characterizing the Variability in Face Recognition Accuracy Relative to Race' (Conference Paper, IEEE/CVF Conference on Computer Vision and Pattern Recognition Workshops, 2019); Inioluwa Deborah Raji and Joy Buolamwini, 'Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products' (Conference on Artificial Intelligence, Ethics, and Society, 2019).

REFERENCE LIST

A Articles/Books/Reports

Archer, Catherine J, 'Coming of age with, in and on social media: A critique of how politicians are responding to children's social media engagement' (2024) 19(1) *Journal of Children and Media* 58-64

Boulianne, Shelley, Lalancette, Mireille and Ilkiw, David, '"School Strike 4 Climate": Social Media and the International Youth Protest on Climate Change' (2020) 8(2) *Media and Communication* 208-218

Buolamwini, Joy and Gebru, Timnit, 'Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification' (2018) 81 *Proceedings of Machine Learning Research* 77-91

Campbell, Marilyn, 'Australia's Social-media Ban won't Work - There are Better ways to Keep Kids Safe' (2025) 637(8046) *Nature* 519, DOI: 10.1038/d41586-025-00051-0

Joint Select Committee on Social Media and Australian Society, *Social Media: The Good, The Bad, and The Ugly* (Final Report, 18 November 2024)

La Rue, Frank, *Annual Report of the Special Rapporteur on the promotion and protection of the right to freedom of expression and opinion*, UN Doc A/HRC/14/23 (20 April 2010)

La Rue, Frank, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression,* UN Doc A/HRC/23/40 (17 April 2013)

Office of the eSafety Commissioner, *Mind the Gap Parental Awareness of Children's Exposure to Risks Online* (Report, February 2022)

Office of the eSafety Commissioner, *Behind the Screen: The Reality of Age Assurance and Social Media Access for Young Australians* (Report, February 2025)

Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report 11 of 2024, 27 November 2024)

Rickard, Delia, Department of the Prime Minister and Cabinet, *Report of the Statutory Review of the Online Safety Act 2021* (Report, October 2024)

Senate Standing Committee on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions]* (Final Report, 26 November 2024)

Stone, Adrienne, 'Case Note: Lange, Levy and the Direction of the Freedom of Political Communication Under the Australian Constitution' (1998) 21 *University of New South Wales Law Journal* 117-134

Walker, Kris, 'It's a Miracle! High Court unanimity on free speech' (1997) 22(4) *Alternative Law Journal* 179-181

B *Cases*

Australian Capital Television Pty Ltd v Commonwealth (1992) 177 CLR 106

Coleman v Power (2004) 220 CLR 1

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Levy v Victoria (1997) 189 CLR 579

Nationwide News Pty Ltd v Wills (1992) 177 CLR 1

Stephens v West Australian Newspapers Ltd (1994) 182 CLR 211

Theophanous v Herald & Weekly Times Ltd (1994) 182 CLR 104

C *Legislation*

Online Safety Act 2021 (Cth)

Online Safety Amendment (Social Media Minimum Age) Act 2024

Privacy and Other Legislation Amendment Act 2024 (Cth)

D *Treaties*

Convention on the Rights of Persons with Disabilities

Convention on the Rights of the Child

International Covenant on Economic, Social and Cultural Rights

International Covenant on Civil and Political Rights

Universal Declaration of Human Rights

E *Other*

Albanese, Anthony and Rowland, Michelle, 'Albanese Government delivers world-leading legislation to protect children online' (Media Release, 21 November 2024)

Albanese, Anthony and Rowland, Michelle, 'Minimum age for social media access to protect Australian kids' (Media Release, 8 November 2024)

Australian Human Rights Commission, *Explainer: Social Media Ban for Under-16s in Australia* (Web Page) <https://humanrights.gov.au/about/news/proposed-social-media-ban-under-16s-australia>

Australian Human Rights Commission, Submission No 461917447 to the Attorney-General's Department, *Privacy Act 1988 (Cth) Discussion Paper* (05 April 2023)

Australian Human Rights Commission, Submission No 79 to the Joint Select Committee on Social Media and Australian Society, *Influence and Impacts of Social Media on Australian Society* (28 June 2024)

Australian Human Rights Commission, Submission No 96 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024)

Committee on the Rights of the Child, *General Comment No 25: Children's Rights in Relation to the Digital Environment*, UN Doc CRC/C/GC/25 (2 March 2021)

Commonwealth, *Parliamentary Debates*, House of Representatives, 18 November 2024, 7843-7844 (Michelle Rowland, Minister for Communications)

Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2024, 8387 (Anthony Albanese, Prime Minister)

Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Government response to the Roadmap for Age Verification* (Government Response, August 2023)

Department of Infrastructure, Transport, Regional Development, Communications and the Arts, 'Tender awarded for Australian Government's age assurance trial' (Media Release, 15 November 2024)

Evidence to the Senate Environment and Communications Legislation Committee, Parliament of Australia, Canberra, 25 November 2024, 11 (Sarah Hanson-Young, Senator)

Explanatory Memorandum, Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions]

Flinders University, Submission No 69 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024)

Human Rights Committee, *General Comment No 34 (Article 19: Freedom of opinion and expression)* UN Doc CCPR/C/GC/34 (12 September 2011)

Human Rights Law Centre, Submission No 104 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (November 2024)

Human Technology Institute, Submission No 108 to the Senate Standing Committees on Environment and Communications, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (22 November 2024)

Interview with Anthony Albanese (Natalie Barr, Television Interview – Sunrise, 10 September 2024)

Kastrenakes, Jacob 'Google's chief internet evangelist says "privacy may actually be an anomaly"' *The Verge* (online, 20 November 2013) <https://www.theverge.com/2013/11/20/5125922/vint-cerf-google-internet-evangelist-says-privacy-may-be-anomaly>

Krishnapriya, KS, et al, 'Characterizing the Variability in Face Recognition Accuracy Relative to Race' (Conference Paper, IEEE/CVF Conference on Computer Vision and Pattern Recognition Workshops, 27-28 January 2019)

Mason, Max, 'Big tech's warning on rushing teen ban on social media', *Australian Financial Review* (online, 24 November 2024) <https://www.afr.com/companies/media-and-marketing/big-tech-s-warning-on-rushing-teen-ban-on-social-media-20241124-p5kt2o>

McGuire, Amelia, 'YouTube's social media ban exemption under fire as rivals see the', *Australian Financial Review* (online, 20 February 2025) <https://www.afr.com/technology/youtube-s-social-media-ban-exemption-under-fire-as-rivals-seethe-20250219-p5ldch>

McIntyre, Greg, 'Online Safety Amendment (Social Media Minimum Age) Bill 2024' (Letter, Law Council of Australia, 26 November 2024)

Parliament of Australia, *Public Hearings* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge/Public_Hearings>

Parliament of Australia, *Online Safety Amendment (Social Media Minimum Age) Bill 2024 [Provisions]* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge>

Parliament of Australia, Senate Disallowable Instruments List (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/leginstruments/Senate_disallowable_instruments_list>

Parliament of Australia, *Senate Standing Committee for the Scrutiny of Delegated Legislation* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Delegated_Legislation>

Parliament of Australia, *Submissions Received by the Committee* (Web Page) https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Environment_and_Communications/SocialMediaMinimumAge/Submissions

Przybylski, Andrew, (LinkedIn, November 2024) <https://www.linkedin.com/posts/akprzybylski_the-communications-minister-cited-a-study-activity-7264917864673861632-9KZK>

Raji, Inioluwa Deborah and Buolamwini Joy, 'Actionable Auditing: Investigating the Impact of Publicly Naming Biased Performance Results of Commercial AI Products' (Conference on Artificial Intelligence, Ethics, and Society, 2019)

Rowland, Michelle, 'New Duty of Care Obligations on Platforms Will Keep Australians Safer Online' (Media Release, 14 November 2024)

Rowland, Michelle, 'Question Time Response - Social media age limit legislation' (Speech, 18 November 2024)

Senate Standing Committee for the Scrutiny of Bills, *Online Safety Amendment (Social Media Minimum Age) Bill 2024* (Scrutiny Digest 1 of 2025, 05 February 2025)

Strava, *About* (Web Page) < https://www.strava.com/about>

Strava, *Record. Sweat. Share. Kudos* (Web Page) <https://www.strava.com/features>

Taylor, Josh, 'Social media age restrictions may push children online in secret, Australian eSafety commissioner says', *The Guardian* (online, 23 June 2024) <https://www.theguardian.com/australia-news/article/2024/jun/23/social-media-age-restrictions-may-push-children-online-in-secret-australia-regulator-says>

Truu, Maani, 'Social media age ban inquiry flooded with 15,000 submissions after Elon Musk weighs in', *ABC News* (online, 25 November 2024) <https://www.abc.net.au/news/2024-11-25/social-media-age-ban-inquiry-flooded-with-submissions/104644208>

Wilson, Cam, 'The communications minister cited a study in support of a teen social media ban. Its co-author disagrees', *Crickey* (online, 20 November 2024) <https://www.crikey.com.au/2024/11/20/teen-social-media-ban-michelle-rowland-study-question-time/>

This page is intentionally blank

This page is intentionally blank

HARNESSING AI: SEATBELTS AND THE LAW IN QUEENSLAND

WENDY BROWN[*] AND MATTHEW RAJ[+]

In November 2021, the Queensland Government introduced the Camera Detected Offence Program ('CDOP') and began issuing infringement notices for non-compliance with seatbelt laws. Since then, more than 130,000 drivers have been issued with infringement notices. The CDOP employs a two-stage process in which Artificial Intelligence ('AI') flags images with a potential infringement for review by authorised officers. The fine is currently $1,251 and four demerit points. This article focuses on infringement notices issued to drivers in circumstances where it is alleged that a passenger is either not wearing a seatbelt or is wearing it incorrectly. It identifies several concerning features of the infringement process: (a) the accuracy and validity (given the program's short track-record) of the CDOP for detecting offences; (b) that the accused driver must rebut a presumption that the passenger was not properly wearing a seatbelt; (c) that there is a significant financial risk in seeking to rebut that presumption; and (d) that criminal liability is imposed on a driver for the conduct of another. The article concludes by proposing law reform to improve transparency and access to justice in these infringement proceedings and argues for lengthier controlled trials to establish the accuracy of the CDOP.

[*] Faculty of Health Sciences and Medicine, Bond University. Thank you to Lucinda Crouch for her research assistance, as well as the anonymous peer reviewers, and Editorial Board for their comments on this article in draft. Author email: wbrown@bond.edu.au
[+] Faculty of Law, Bond University.

CONTENTS

I INTRODUCTION 31
II LIGHTS, CAMERA, ACTION: THE TECHNICAL WORLD OF SEATBELT INFRINGEMENTS 33
A *STAGE ONE: CAPTURING THE IMAGE AND AI-BASED FLAGGING OF POTENTIAL INFRINGEMENTS* 34
B *ACCURACY OF THE INITIAL (AI-BASED) INFRINGEMENT DETECTION* 35
C *STAGE TWO: THE HUMAN REVIEW/ADJUDICATION PROCESS* 36
III SEATBELTS AND THE LAW IN QUEENSLAND 38
A *'ENSURING' A PASSENGER WEARS AN APPROVED SEATBELT PROPERLY* 41
B *THE ADJUDICATION PROCESS* 42
C *REBUTTABLE PRESUMPTION* 42
D *DEFENCES* 43
IV RECOMMENDATIONS AND CONCLUSION 46

I INTRODUCTION

Since the early 1970s, wearing seatbelts has been compulsory in Australia.[1] A properly adjusted and fastened seatbelt significantly reduces the risk of serious injury or death in a traffic incident. Indeed, 'a person is nine times more likely to be killed in a collision if they are not properly restrained'.[2] Accordingly, in each state and territory, drivers and passengers who do not properly wear a seatbelt while a vehicle is moving, or stationary but not parked, may be punished by way of a fine and demerit points.[3]

In 2021, the Queensland Government became the first jurisdiction in the world to introduce camera technology to detect both mobile phone and seatbelt offences.[4] The Camera Detected Offence Program ('CDOP'), which employs Artificial Intelligence ('AI')

[1] Jennifer Leake and Nick Barker, 'Australia was a world leader in road safety, but has progress stalled?', *ABC News* (online, 4 October 2023) <https://www.abc.net.au/news/2023-10-04/road-safety-history-australia-toll-increase/102903364>; 'Did You Know?', *Institute of Automotive Mechanical Engineers* (Web Page, 22 November 2022) <https://www.iame.com.au/did-you-knowfd5b1ea0>.
[2] Explanatory Note, *Transport Legislation (Distracted Driver and Other Matters) Amendment Regulation 2021* (Qld) 4.
[3] Note there are some exceptions to this, for example, when reversing.
[4] Joshua Dowling, 'Queensland Mobile Phone and Seatbelt Detection Cameras Start Today', *Drive* (online, 26 July 2021) <https://www.drive.com.au/news/queensland-mobile-phone-and-seatbelt-detection-cameras-start-today>.

to detect potential offences, began issuing infringement notices to drivers for seatbelt-related offences in November 2021.[5] Since then, more than 130,000 infringements have been issued in Queensland, with potential fines of more than $145 million.[6] Concerningly, many drivers who receive seatbelt infringements in Queensland are challenging the accuracy of the CDOP, largely because of the poor quality of many of the images produced by the AI-based detection system,[7] and the drivers cannot recall either themselves or their passengers not wearing a seatbelt. With a 50-year history of seatbelt laws in Australia, including well-known advertising campaigns, it is second nature to many people to 'click clack front and back'.[8] It may be the case, however, that some drivers and passengers are uncertain about what constitutes a 'properly adjusted and fastened' lap-and-sash seatbelt.[9]

In some states, including Queensland and Victoria, there is an express legal presumption that the camera detection systems used were, at the relevant time, operating correctly.[10] While governments justify the use of these systems by pointing to road safety benefits,[11] recent criticisms of the accuracy of AI-based detection systems,[12] and the poor quality of some photographs relied on as proof of an offence, are concerning. While many

[5] 'Mobile Phone and Seatbelt Detection Cameras', *Transport Accident Commission (Vic)* (Web Page, 26 February 2025) <https://www.tac.vic.gov.au/road-safety/staying-safe/mobile-phone-and-seatbelt-detection-cameras>; 'Fines and Camera Detected Offences', *Queensland Government* (Web Page, 26 February 2025) <https://www.qld.gov.au/transport/safety/fines/cameras>; 'AI-Driven Technology for Road Safety', *BBC News* (Web Page, 26 February 2025) <https://www.bbc.com/news/articles/ce8dpvxexz8o>.

[6] Personal correspondence from Chief Engineer, Queensland Department of Transport and Main Roads, 6 August 2024; Personal correspondence from Chief Engineer, Queensland Department of Transport and Main Roads, 16 July 2025.

[7] 'AI Seatbelt Camera Wrongly Fined 1,842 Drivers', *Australian Computer Society* (Web Page, 14 September 2023) <https://ia.acs.org.au/article/2023/ai-seatbelt-camera-wrongly-fined-1-842-drivers.html>; Gary Moorhead, 'Monday Mornings in Court Seven', *Pearls and Irritations Public Policy Journal* (Web Page, 26 October 2024) <https://johnmenadue.com/monday-mornings-in-court-seven/>.

[8] RTA ROADS & TRAFFIC AUTHORITY, 'CLICK CLACK FRONT 'N' BACK (AUSTRALIAN AD, 1990)' (YOUTUBE, 2008) <https://www.youtube.com/watch?v=xKgMvWgpN8U>.

[9] *Australian Road Rules Amendments 2023* (Parliamentary Counsel's Committee, 5 May 2023) 15–16. Examples of properly fastened belts provided included the lap portion of the belt sitting low and firmly over the driver's hips, and the sash portion positioned firmly over the driver's shoulder and not under the driver's arm.

[10] See *Transport Operations (Road Use Management) Act 1995* (Qld) s 120 noting the requirements of testing and certification for example *Traffic Regulation 1962* (Qld) s 210EA; *Road Safety Act 1986* (Vic) s 80D, *Road Transport Act 2013* (NSW) ss 139A, 140, 141.

[11] Explanatory Note (n 2).

[12] Gary Moorhead, 'Trust Governments with AI? Perhaps Not, When There Is a Revenue Stream Involved', *Pearls and Irritations Public Policy Journal* (Web Page, 2 February 2024) <https://johnmenadue.com/post/2024/02/trust-governments-with-ai-perhaps-not-when-there-is-a-revenue-stream-involved/>.

photographs are of such poor quality it is hard to see much detail at all, the Government claims that the AI built into the system can detect non-compliance.

Notably, in all Australian states and territories, a driver may be issued an infringement notice where a passenger fails to properly wear a seatbelt. Indeed, in Queensland between 2022 and 2023, most seatbelt infringements (63 per cent)[13] issued to drivers were for passenger non-compliance. This article is primarily concerned with that phenomenon: the issue of an infringement notice to a driver in Queensland where a passenger is alleged not to have properly worn a seatbelt. In addition, in all Australian states and territories, infringement notices are directed to the registered vehicle owners for both driver and passenger seatbelt offences.

The purpose of this article is to examine the legitimacy, in Queensland, of issuing infringement notices to drivers for allegedly failing to ensure that a passenger was correctly wearing their seatbelt. It first considers the process of capturing and reviewing seatbelt offences, in particular the use of AI and the challenges posed by new technology. It then canvasses the relevant legislation and the processes by which a driver can dispute an infringement. It also considers the defences on which a driver may rely and contrasts the Australian position with the legal framework in Canada, including the availability of a complete defence of due diligence. Finally, it makes recommendations to address these challenges, including law reform and improved education and awareness in Queensland concerning seatbelt laws.

II LIGHTS, CAMERA, ACTION: THE TECHNICAL WORLD OF SEATBELT INFRINGEMENTS

Given the magnitude of the fine, which can cause considerable economic hardship and personal distress, it may be assumed that devices used to detect offences are accurate. By way of an analogy, speed cameras are regularly calibrated are typically accurate to within ±1 km/h up to 100 km/h and ±1% at speeds over 100km/h.[14] In-field validation is carried out against vehicles travelling at known speeds, and calibration certificates are available for every camera.

[13] Personal correspondence, 6 August 2024 (n 66).
[14] Queensland Police Service Calibration Laboratory, *Photographic Detection Device* (Calibration Report No 0595, 13 February 2019).

There is no equivalent requirement that calibration or validation evidence be produced in relation to seatbelt infringements.[15] This is because the seatbelt detection systems employ a two-stage process involving: (a) image capturing and AI-based flagging of potential infringements; and (b) human review and adjudication.[16] Currently, there is limited publicly available information relating to the accuracy, validity or reliability of either stage. This article therefore considers each stage in turn.

A *Stage One: Image Capturing and AI-based Flagging of Potential Infringements*

Mobile phone and seatbelt infringement images must be captured using very short exposure times to avoid blur in images of moving vehicles. This means that there may be insufficient ambient light for 'regular' photographs, especially at night. The CDOP cameras used in Queensland overcome this limitation by using an infrared ('IR') illumination system and a camera with an IR filter. Infrared rays highlight the vehicle, and the end-product is a greyscale image of objects in the frame which have different reflectivity. Importantly, objects that are darker in visible light may appear to be very bright in IR, though this depends on the texture and reflectivity of the material. Although visible wavelengths are claimed to have no impact on the images, components of sunlight may add to the overall illumination and cause 'white-out' in many images.

By law, three images are taken of each vehicle.[17] The first captures the vehicle's number plate using a short exposure time. The second, taken with longer exposure at a shallow angle, is designed to capture the driver's upper body and head. The third is taken at a steeper angle to capture the driver's lap.[18] This is presumably because the system was initially designed to detect mobile phone use by the driver. Depending on illumination conditions and camera angles, passenger details may also be captured, but often with very different acuity.

[15] Note, however, there are some exceptions such as the installation, reinstallation, replacement or repair of the camera system hardware, or change to the computer software used by the system, in which case, the system must be tested in accordance with the specifications of the system's manufacturer to ensure the system operates correctly. See *Traffic Regulation 1962* (Qld) r 210EA.
[16] 'Mobile Phone and Seatbelt Cameras', Queensland Government (Web Page, 30 September 2024) <https://www.qld.gov.au/transport/safety/fines/cameras>.
[17] See *Traffic Regulation 1962* (Qld) r 210EA.
[18] 'Mobile Phone and Seatbelt Detection Cameras', *Victorian Government* (Web Page, 16 February 2024) <https://www.vic.gov.au/mobile-phone-and-seatbelt-detection-cameras>.

B *Accuracy of the Initial (AI-based) Infringement Detection*

Researchers in other countries, including China, Malaysia, Turkey and Iran, have reported average seatbelt-detection accuracy rates, using camera systems similar to those used in Queensland, ranging from 91.9[19] to 98.9 per cent,[20] and an average false infringement rate of 6.4 per cent.[21] These studies generally used large banks of 2,000-5,000 images to train AI models and validate camera performance. Those estimates necessarily depend on the clarity of the images used to train deep-learning detection models.

The company that developed the CDOP used in Queensland (and deployed in other Australian jurisdictions and overseas) is Acusensus, which claims its technology can 'generate high-quality images as evidence for enforcement and prosecution purposes'.[22] However, this is no publicly available data on the 'accuracy' or 'validity' of the Acusensus systems in terms of estimated rates of false positives (detecting a violation when none exists) and false negatives (not detecting a violation when there is one).

In contrast with Acusensus' claims that their system produces 'high resolution, prosecutable evidence',[23] there are hundreds of examples of extremely poor-quality seatbelt infringement images on social media. A review of these images suggests that image quality is frequently better on the driver's side of the vehicle. On the passenger side, there are often areas of bright light or over-exposure, and some objects in those parts of the image (including seatbelts) may reflect more light than the maximum capabilities of the imaging sensor, and cannot be seen at all. This problem of over-exposure has been recognised by overseas researchers, who report that detection systems do not perform well for light coloured vehicles in bright light conditions.[24] This problem is also mentioned by Turkish researchers, who excluded images taken between

[19] Alperen Elihos et al, 'Comparison of Image Classification and Object Detection for Passenger Seat Belt Violation Detection Using NIR & RGB Surveillance Camera Images', in *2018 15th IEEE International Conference on Advanced Video and Signal Based Surveillance (AVSS)* (Conference Proceedings, 27 November 2018) 1–6, 6.

[20] Sara Hosseini and Abdolhossein Fathi, 'Automatic Detection of Vehicle Occupancy and Driver's Seat Belt Status Using Deep Learning' (2023) 17(2) *Signal, Image and Video Processing* 491, 497–498.

[21] Yanxiang Chen et al, 'Accurate Seat Belt Detection in Road Surveillance Images Based on CNN and SVM' (2018) 274 *Neurocomputing* 80, 84–85.

[22] 'Acusensus Limited – Initial Public Offering', *Maddocks* (Web Page, 23 December 2022) <https://www.maddocks.com.au/insights/acusensus-limited-initial-public-offering>.

[23] 'Heads-Up Enforcement Solution', *Acusensus* (Web Page, 2022) <https://www.acusensus.com/solutions/heads-up/>.

[24] Chen (n 2121) 81.

1200 and 1500 hours from their validation study because of sunlight reflection problems.[25] It is, therefore, not surprising that so many of the Queensland infringement images posted on social media are overexposed, making it difficult to see if a seatbelt is being properly worn. While Acusensus claims its system captures high-quality photographs '24/7 in all-weather conditions', including against a rising or setting sun,[26] images published in the media do not appear to support this assertion.

C *Stage Two: The Human Review/Adjudication Process*

Images flagged by the AI-based system as potential infringements are referred to Acusensus-trained human verifiers for review, applying a set of *unpublished* 'business rules'.[27] Because the IR camera system relies on edge detection and the presence of parallel straight lines to indicate that the seatbelt crosses from the shoulder to the opposite hip, it may be assumed that these characteristics are used to determine whether the seatbelt is being worn correctly.

However, when photographs are reviewed, there are difficulties in seeing those edges where clothing and seatbelts are similar in colour, texture and material (and therefore have similar reflectivity), and where the belt is partly obscured by objects such as hands, hair or clothing.[28] A scarf or hijab may completely cover the seatbelt. Clothing with similar reflective properties to the belt, and disruptive materials such as 'furry' seatbelt covers, may also cause confusion for the AI detection system and human verifiers.

Based on examples published on the Department of Transport and Main Roads ('TMR') website, there may also be an assumption that the belt should be crossing the body in a straight line at an angle of 45 degrees.[29] That 45-degree alignment is, however, only likely if the seatbelt anchor is situated above the level of the shoulder and the chest is completely flat. It is therefore possible that images of people of short stature (including

[25] Elihos et al (n 1919).
[26] Acusensus (n 2223).
[27] Information Integrity Solutions Partners, *Privacy Impact Assessment Report and Independent Review – Mobile Phone and Seatbelt Technology (MPST)* (Final Report by The Department of Transport and Main Roads, 14 February 2022) 9; Moorhead (n 7).

[28] Warusia Yassin et al, 'Seatbelt Detection in Traffic System Using an Improved YOLOV5' (2023) 5(2) *Journal of Advanced Computing Technology and Application (JACTA)* 1–16, 7.
[29] 'Seatbelt Exemption Certificates – Fact Sheet', *Queensland Department of Transport and Main Roads* (Web Page, 1 November 2024) <https://www.support.transport.qld.gov.au/qt/formsdat.nsf/forms/QF2690/%24file/F2690_CFD.pdf>.

children) and some women may be incorrectly flagged because of variation in the position of the seatbelt. The trajectory of the belt is almost certain to vary in women with larger breasts, who may adjust its position to avoid breast pain or chafing on the neck. The trajectory is also likely to be altered in women who are pregnant and in people who are overweight or obese. Moreover, changes in parallax and lighting may cause the belt to 'disappear' as it crosses the torso. It is not known whether or how the requirement that a seatbelt be 'properly adjusted' means that it is adjusted in a manner appropriate to the size shape and physical condition of the person wearing it,[30] is considered during the review process.

Human verifiers face further challenges because, in many cases, belt edges cannot be seen at all due to lighting or over-exposure, or because the belt is hidden by clothing, hair or objects on the passenger's lap (which may also not be clearly seen in the image). Moreover, the area between the passenger's left shoulder and the seatbelt anchor point cannot be seen at all in many images because of the camera angle, shadows, illumination problems, reflectivity, or lack of focus behind the passenger. The bottom line is that if the human verifier cannot see the belt going over the shoulder, it is deemed to be under the arm, even if it cannot be seen there either, and an infringement notice is issued to the driver. In Queensland, most seatbelt infringements (nearly 75%) are for incorrect wear rather than a complete failure to wear one.[31] It follows that most contested seatbelt infringements are also likely to concern allegations of incorrect wear.

While fine revenue from the CDOP in Queensland is significant,[32] there has been no modelling of the program's personal, social, and economic impact on alleged offenders. In the absence of calibration or validation studies concerning the system's accuracy in Queensland, it is not possible to estimate the proportion of infringement notices that are issued in error. Both TMR and Acusensus claim very high levels of accuracy and integrity, yet there is no publicly available data from 'ground truth validity studies' to support this. Despite claims of confidence in validity, in the Acusensus 2023 Annual Report, Managing

[30] *Maroney v Wojcicka* [2003] ACTCA15 [28].
[31] Mark Bailey, 'Seatbelts and Child Restraints on Properly or $1,161 Fine' (Ministerial Media Statement, 21 August 2023) <https://statements.qld.gov.au/statements/98495>.

[32] 'Speeding Fines', *Queensland Parliament* (Web Page, 14 December 2023) <https://www.parliament.qld.gov.au/Work-of-the-Assembly/Petitions/Petition-Details?id=4007>.

Director Alexander Jannink writes that 'improvement of the image quality and AI recognition accuracy for our 'Heads-Up' solution will continue to be a focus.'[33]

III SEATBELTS AND THE LAW IN QUEENSLAND

From a national perspective, each Australian state and territory is responsible for its own road safety laws, but these are guided by model laws known as the Australian Road Rules.[34] While not strictly legislation, Australian Road Rules r 265(3) provides that:

> The driver of a motor vehicle (except a bus or taxi) that is moving, or that is stationary but not parked, must ensure that each passenger in or on the vehicle who is 16 years old or older complies with subrule (2), unless the passenger is exempt from wearing a seatbelt under rule 267.

Similar versions of this guiding rule can be seen in every state and territory. Relatedly, each state and territory has separate offences for a driver being responsible for a passenger over 16 properly wearing an approved seatbelt, and a passenger under 16.

It is difficult to classify the offence type relating to the Queensland provision, r 264A of the *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld). While it is accepted that this is a criminal (simple) offence, arguably the requirement that a driver ensure a passenger is properly wearing an approved seatbelt (while the vehicle is moving or stationary) could be considered one of absolute liability. This is because it is an offence for which the prosecution does not have to prove intent or knowledge, only that the accused failed to perform the act of ensuring their passenger was properly wearing a seatbelt.[35] It has been noted by the Supreme Court of New South Wales that:

> Where an offence is one of absolute liability, the prosecution does not need to establish that the defendant knew that his act was wrongful, and it will succeed even where the defendant had no such knowledge. Where the offence is one of strict liability, and where an issue arises on the evidence as to whether the defendant was honestly and reasonably mistaken as to the existence of those facts which (if true)

[33] Acusensus Limited, *Annual Report 2023* (Report, 2023) 1–105, 7.
[34] Australian Road Rules (as at 9 June 2023, Parliamentary Counsel's Committee, as approved by the Infrastructure and Transport Ministers' Meeting).
[35] Mirko Bagaric, *Ross on Crime* (Thomson Reuters, 9th ed, 2021) 1461.

> would have made his act innocent, the prosecution will succeed only where it established that such was not the defendant's state of mind.[36]

Leaving aside, for the moment, the potential problems with using AI in detection systems and erroneous infringements being issued, even if a passenger is not correctly wearing a seatbelt, the defence of mistake of fact (at least at common law), and a similar defence of 'due diligence' ought to be available to a charge contrary to r 264A. Admittedly, making these defences available would require some legal surgery.

Noting that there is a uniform requirement across Australia that conduct attracting criminal liability must be voluntary,[37] this requirement seems at odds with the criminalisation of a driver's failure to monitor the behaviour of another adult. There may be many reasons why a passenger may not be properly wearing their seatbelt (other than lawful exemptions). A passenger may alter the alignment of a seatbelt because they are uncomfortable, momentarily reaching to get something from a bag at their feet or in the glove box, or turn to attend to an infant in the back seat. Notwithstanding criminal law relating to secondary liability, it is seldom the case that governments criminalise the failure or omission of a person to control the behaviour of another. As observed elsewhere:

> … even if omissions are covered by the language of the offence provision, they are subject to further regulation by the general criminal law … because they are a type of conduct, they are subject to the same requirements as acts: the prosecution must prove that the omission was voluntary and (in the federal and common law jurisdictions) intentional (subject to contrary statutory interpretation).[38]

[36] *Holloway v Gilport Pty Ltd* (1995) 79 A Crim R 76, 79 (Hunt CJ).
[37] Jeremy Gans, *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2016) 102; *He Kaw The v R* [1985] HCA 43; (1985) 157 CLR 523, 570 (Brennan J).
[38] Gans (n 3737) 104.

Table 1: Criminal liability in Australia for a driver whose passenger fails to properly wear a seatbelt

	Can a driver be fined for an adult passenger not properly wearing seatbelt?	Rebuttable presumption that the camera detection system is accurate?	AI used in camera detection?	Maximum Penalties (non-public holiday, passenger is over 16)
ACT	Yes See *Road Transport (Road Rules) Regulation 2017* (ACT), ss 265(3) 266(1)	No	Yes	3 demerit points $3200 fine
NSW	Yes See *Road Rules 2014* (NSW) *r* 264-1	No[156]	Yes	3 demerit points $2,200
NT	Yes See *Traffic Amendment (Australian Road Rules) Regulations 2011* (NT), rr 265(3) 266(1)	No	No	3 demerit points $500 fine
QLD	Yes See *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld) r 264A	Yes See *Transport Operations (Road Use Management) Act 1995* (Qld) s 120	Yes	4 demerit points $3,338 fine
SA	Yes See *Australian Road Rules* under *Road Traffic Act 1961* (SA), rr 265(3) 266(1)	No	Yes	3 demerit points $448 fine
TAS	Yes See *Road Rules 2019* (Tas) rr 265(3), 266(1)	No	Yes	3 demerit points $410 fine
VIC	Yes See *Road Safety Road Rules 2017* (Vic) r 264A	Yes *See Road Safety Act 1986* (Vic) ss 66 and 80C	Yes	3 demerit points $407 fine
WA	Yes *Road Traffic Act 1974 - Road Traffic Code 2000* (WA) ss 233(3), 234(1)	No	Yes	4 demerit points $550 fine

Note: Fine amounts last verified 9 February 2026.

[156] 'Driving (Traffic) or Vehicle Registration Offences', *Local Court New South Wales* (Web Page, 31 January 2024) <https://localcourt.nsw.gov.au/your-legal-problem-is-about/police-and-crime/driving--traffic--or-vehicle-registration-offences.html#attending0>.

While the proper wearing of seatbelts is integral to road safety, the situation in every state and territory is that a driver may be criminally liable for the alignment of a passenger's seatbelt. One might argue that this may not meet the minimum threshold for criminal conduct,[157] simply on the basis that a driver ought not to be responsible for being unaware that a passenger's seatbelt is not properly worn.

A *'Ensuring' a Passenger Wears an Approved Seatbelt Properly*

In 2021, the Queensland Government introduced a new law requiring drivers of vehicles that are moving, or stationary but not parked, to ensure that each passenger is wearing an approved seatbelt that is properly adjusted and fastened.[158] One justification for the introduction of the new law was that failure to wear a seatbelt continues to be a serious contributor to road trauma in Queensland.[159] As part of the explanation for the new law, it was stated that 'a driver generally has an obligation to ensure that their passengers are appropriately restrained'.[160] A driver's failure to ensure that a passenger is properly wearing a seatbelt while operating a vehicle may result in an infringement notice (by way of a fine and demerit points).

It is unclear *how* a driver must ensure that each passenger in the vehicle is wearing a properly adjusted and fastened seatbelt for the entire duration of a journey. The difficulty in imposing such a requirement is that, given much road use legislation is concerned with safety, the constant requirement to ensure that all passenger seatbelts are properly worn (including in the rear seats, and making sure the sash is not worn under a passenger's arm) would undeniably be a distraction. Driver distractions are discouraged by the Queensland Government, including 'attending to children in the backseat'.[161] An important question is whether the safety of Queensland roads is well served by legislation requiring the constant monitoring of each passenger's seatbelt alignment. It is offered that while criminal liability ought to lie with an adult passenger who does not correctly wear a seatbelt, a driver should either not be held liable for such a failure, or, at least, the law be amended so as not to require constant monitoring of proper wear. One might

[157] Gans (n 3739) 115; *Williams v R* [1978] 140 CLR 591.
[158] *Transport Operations (Road Use Management —Road Rules) Regulation 2009* (Qld) r 264A.
[159] Explanatory Note (n 22).
[160] Ibid.
[161] 'Driver Distractions', *Queensland Government* (Web Page, 7 September 2022) <https://www.qld.gov.au/transport/safety/road-safety/driving-safely/driver-distractions>.

accept that, while a driver may generally be responsible for a passenger's safety (including the wearing of a passenger's seatbelt), that responsibility is discharged by exercising due diligence at the commencement of the journey.

B *The Adjudication Process*

In Queensland, fine recipients are offered three options: pay the fine; complete a form to declare they were not driving at the time (and nominate the driver); or elect to have the matter dealt with by a court.[162] A fourth option—to complete an on-line form to request a review—is available but is not shown on seatbelt infringement notices (it is only stated on speeding tickets).

Those who request a review may receive a response from an adjudications officer in the Queensland Revenue Office that the notice was correctly issued and will not be withdrawn. The options are then to pay the fine or elect to go to court.[163] Choosing the court route means appearing at a Magistrates Court (which may be hundreds of kilometers from home) to register a plea at a mention and obtain a hearing date, which is likely to be months later. These two court appearances may incur considerable costs, which disproportionately affect people who live a considerable distance from permanent courts or, indeed, interstate. Some fine recipients will seek assistance from a legal representative, but even without representation, there may be costs associated with time off work, childcare, travel and, in some cases, accommodation, not to mention the emotional stress of appearing in court. Anticipated anxiety and distress may dissuade even the most certain of petitioners from this route. It is unsurprising, then, that some recipients elect to pay up after this initial review, even those who are uncertain of their guilt.

C *Rebuttable Presumption*

For camera-detected offences, there is a presumption that the cameras are operating correctly.[164] In terms of capturing the requisite three images (a number plate, and a

[162] 'Infringements', *Queensland Police Service* (Web Page, 8 May 2024) <https://www.police.qld.gov.au/initiatives/road-safety/infringements>.
[163] 'Dispute a Fine in Court', *Queensland Government* (Web Page, 9 May 2024) <https://www.qld.gov.au/transport/safety/fines/contest>.
[164] See *Transport Operations (Road Use Management) Act 1995* (Qld) s 120*; Road Safety Act 1986* (Vic) ss 66, 80C. See also *Transport Operations (Road Use Management) Act 1995* (Qld) s 120D, a rebuttable presumption for photographic or video evidence relating to approved seatbelts.

deep and shallow angle image), this presumption is almost always met, but there is no requirement about the *quality* of the images produced.

Those who progress to the mention stage before a magistrate will be asked if they wish to challenge the 'accuracy of the camera' or the 'image from the camera' and are asked to complete an 'Intention to Challenge or Dispute' form. This allows the prosecutors to bring expert engineers from the company that developed and operate the camera-based infringement system (Acusensus) to appear in court to attest the 'accuracy' of the photographic detection device and the images. The cost of bringing Acusensus engineers to Queensland from Melbourne can be anywhere from $8,000 to $12,000.[165] Plausibly, accused persons who are advised that they could be liable for these costs if the prosecution case is successful may change their plea to guilty. Even without legal costs (which can be thousands of dollars), the prospect of a $1,200 fine, additional court and State Penalties Enforcement Registry ('SPER') costs, and expert witness costs may cause an accused person to plead guilty. In rare cases, a guilty plea, with a convincing appeal for extenuating circumstances, and a good driving record, might be enough to persuade a sympathetic magistrate to reduce the fine, but the plea of guilty stands.[166] The challenges of navigating this system mean that many alleged offenders may feel that they have little chance of success in proving their innocence, and either pay immediately or commence a challenge and then pay. The very high proportion of cases that are recorded as 'guilty' provides justification for the TMR to continue to espouse the 'accuracy' of the CDOP. As one Southport magistrate recently stated, the devices are calibrated and in working order, and the presumption at law is that the photograph is evidence of a seatbelt being worn.[167]

D *Defences*

In Australia, there is a common law defence of 'mistake of fact'.[168] An accused is entitled to be acquitted if they reasonably believed in a fact which made their conduct lawful (for example, a person believed they were being attacked and so used force in self-defence). It remains to be seen whether this common law defence could be used by a driver faced

[165] Moorhead (n 127).
[166] Ibid.
[167] Ibid.
[168] See *Proudman v Dayman* (1941) 67 CLR 536, 540; *Thomas v R* (1937) 59 CLR 279.

with a seatbelt infringement notice. Despite some authorities indicating that statutory defences in the *Criminal Code 1899* (Qld) ('Criminal Code') (such as extraordinary emergencies and mistake of fact) may be relied on for traffic offences (such as speeding),[169] the Criminal Code expressly excludes the statutory defences of mistake of fact, lack of will, accident, and extraordinary emergencies for regulatory offences.[170] Importantly, to rely on the common law defence of mistake of fact, the accused would have to show that their belief was 'positively held' —that is, the driver had turned their mind to the fact that the passenger was correctly wearing their seatbelt, and not merely assumed the passenger would 'do the right thing'.[171] For example, a driver may have to show more than that 'the seatbelt alarm was not sounding'.

In Canada, for offences of strict liability, an accused may have a full defence of 'due diligence'.[172] The High Court has not determined whether this defence is available in Australia. In *R v Sault Ste. Marie*, sitting in the Supreme Court of Canada, Dickson CJ stated that:

> Offences in which there is no necessity for the prosecution to prove the existence of *mens rea*; the doing of the prohibited act *prima facie* imports the offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability.[173]

In reaching this decision, the Supreme Court took into consideration the risk of imprisonment and/or heavy fines.[174] We say that, in relation to Queensland's r 264A *Transport Operations (Road Use Management-Road Rules) Regulation 2009* (Qld), there ought to be an express provision allowing 'due diligence' as a complete defence. This would ensure that drivers who checked their passenger's seatbelts before departure and

[169] *Dart v Queensland Police Service* [2022] QDC 93; *Rowley v Commissioner of Police* [2017] QDC 88; *McNamara v Queensland Police Service* [2015] QCA 99.
[170] *Criminal Code 1899* (Qld) s 36(2) ('Criminal Code').
[171] See the discussion regarding a positive belief in *McKenzie v G J Coles & Co Ltd* [1986] WAR 224.
[172] *R v Sault Ste. Marie* [1978] 2 SCR 1299; Gans (n 3737) 158.
[173] [1978] 2 SCR 1299, 1325.
[174] Ibid 1314.

did not become aware of any infractions would benefit from this defence. In light of the size of the fine in Queensland, recognition of this defence may be prudent and provide fairer outcomes. It is acknowledged that some Australian jurisdictions (Australian Capital Territory and Northern Territory) have enacted a statutory due diligence defence for regulatory offences, though the burden of proof lies on the accused to establish the defence on the balance of probabilities.[175]

As mentioned earlier, conduct attracting criminal liability must be voluntary.[176] In Queensland, the criminal law recognises that conduct may be excused where an event occurs by 'accident', or where an act occurs independently of the exercise of an accused's will.[177] While these two defences ('accident' and 'lack of will') do not (according to the Criminal Code) currently apply to regulatory offences,[178] we suggest that legal surgery be performed to change this, particularly for offences where culpability arises in circumstances outside the control of an accused. We also note that these defences do not apply to offences of negligence. If r 264A is considered an offence relating to negligence, then the prosecution must prove beyond reasonable doubt: (a) the accused had a duty; (b) the duty was breached; and (c) the breach mounted to criminal negligence.[179] As such the following is premised on r 264A not being considered an offence of negligence.

Turning to the defences, then, relevantly, the Criminal Code provides:

> **23 Intention—motive**
>
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
>
> (a) an act or omission that occurs independently of the exercise of the person's will; or
>
> (b) an event that—
>
> (i) the person does not intend or foresee as a possible consequence; and
>
> (ii) an ordinary person would not reasonably foresee as a possible consequence.

[175] Gans (n 3737) 159.
[176] Ibid 102; *He Kaw The v R* [1985] HCA 43; (1985) 157 CLR 523, 570 (Brennan J).
[177] Criminal Code (n 170) s 23(1).
[178] Ibid s 36(2).
[179] *R v Callaghan* (1952) 87 CLR 115.

While the defence of 'accident' (s 23(1)(b)) does not currently apply to regulatory criminal offences against the statute law of Queensland,[180] it is argued that a driver ought to be able to avail themselves of this defence in circumstances where they did not intend or foresee that a passenger would not properly wear their seatbelt, and an ordinary person would not reasonably foresee the improper wearing as a possible consequence.

Further, the defence colloquially referred to as 'lack of will' (s23(1)(a)) ought be available, because a driver should not be criminally liable for an act (for example, seatbelt removal or misalignment) that occurs independently of the exercise of the their will. While this defence is normally relied on where a person's own actions were involuntary (for example, actions during an episode of parasomnia), we offer that the construction of the statute may equally be applied to attributing criminal liability for the conduct of another person.

Before leaving this part, there is a point (relating to construction) worthy of reflection; r 264A provides that the driver must 'ensure' each passenger in or on the vehicle is wearing an approved seatbelt that is properly adjusted and fastened in the way required by law. The law remains unclear as to how this obligation is discharged.

We offer that there is currently a lack of clear guidance on the availability of defences to a charge under r 264A, to the extent that magistrates are dispensing justice by reducing the fine to account for individual circumstances.[181] This approach, however, is at odds with general principles of criminal law: reducing a penalty to reflect culpability is perfectly acceptable, but it ought not displace either the prosecution's duty to prove its case or the availability of defences to the charge.

IV Recommendations and Conclusion

Amidst the above, we recommend legal surgery to provide robust defences to those infringed under r 264A of the *Transport Operations (Road Use Management—Road Rules) Regulation 2009* (Qld). We also suggest that greater transparency exist as to the accuracy of the system to detect non-wear and incorrect wear in both drivers and passengers, using images obtained from vehicles travelling at speed in Australian conditions. We also

[180] Criminal Code (n 170) s 36(2); *Molloy v Hallam* [1903] St R Qld 282, per Griffith CJ; see also S M Ryan et al, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 26th ed, 2024).
[181] Moorhead (n 12).

urge for greater clarity surrounding the business rules used by human verifiers reviewing contested infringements.

Lengthier trials of the CDOP, and publication of validity data, would doubtless foster greater public confidence. As is clear from the above, once a driver has been erroneously issued an infringement notice, there are significant barriers (both financial and emotional) to contesting guilt. This has never been, nor should ever be, a feature of the criminal justice system. As such, the reverse burden created by Queensland law ought to be repealed. Law reform is necessary to avoid imposing absolute liability on a driver, and to afford them a defence of mistake of fact and/or due diligence. Sensibly, liability for failing to wear a seatbelt ought to rest solely with the person (the passenger) who fails to do so, though that is a subject for a different article entirely. We encourage the Queensland Government to undertake a systematic review of cases that have challenged the CDOP scheme, as well as consider a stronger, evidence-based public awareness campaign to reduce road trauma by supporting 'correct' seatbelt usages.

REFERENCE LIST

A *Articles/Books/Reports*

Acusensus Limited, *Annual Report 2023* (Report, 2023)

Bagaric, Mirko, *Ross on Crime* (Thomson Reuters, 9th ed, 2021)

Chen, Yanxiang, Gang Tao, Hongmei Ren, Xinyu Lin and Luming Zhang, 'Accurate Seat Belt Detection in Road Surveillance Images Based on CNN and SVM' (2018) 274 *Neurocomputing* 80-87

Gans, Jeremy, *Modern Criminal Law of Australia* (Cambridge University Press, 2nd ed, 2016)

Hosseini, Sara and Abdolhossein Fathi, 'Automatic Detection of Vehicle Occupancy and Driver's Seat Belt Status Using Deep Learning' (2023) 17(2) *Signal, Image and Video Processing* 491-499

Information Integrity Solutions Partners, *Privacy Impact Assessment Report and Independent Review – Mobile Phone and Seatbelt Technology (MPST)* (Final Report prepared for the Department of Transport and Main Roads, 14 February 2022)

Ryan, Soraya M, Peter Callaghan, Anthony Rafter, Brian Devereaux, Toni Moynihan, John Costanzo, Danae Younger and Andrew Hoare, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 26th ed, 2024)

Yassin, Warusia, Mohd Faizal Abdollah and Nur Amanah Anuar Ismail, 'Seatbelt Detection in Traffic System Using an Improved YOLOV5' (2023) 5(2) *Journal of Advanced Computing Technology and Application (JACTA)* 1-17

B *Cases*

Dart v Queensland Police Service [2022] QDC 93

Director of Public Prosecutions v Yeo [2008] NSWSC 640

He Kaw The v R [1985] HCA 43; (1985) 157 CLR 523

Holloway v Gilport Pty Ltd (1995) 79 A Crim R 76

Maroney v Wojcicka [2003] ACTCA 15

McKenzie v G J Coles & Co Ltd [1986] WAR 224

McNamara v Queensland Police Service [2015] QCA 99

Molloy v Hallam [1903] St R Qld 282

Proudman v Dayman (1941) 67 CLR 536

R v Callaghan (1952) 87 CLR 115

R v Sault Ste Marie [1978] 2 SCR 1299

Rowley v Commissioner of Police [2017] QDC 88

Thomas v R (1937) 59 CLR 279

Williams v R [1978] 140 CLR 591

C *Legislation*

Criminal Code 1899 (Qld)

Road Safety Act 1986 (Vic)

Road Transport Act 2013 (NSW)

Traffic Regulation 1962 (Qld)

Transport Operations (Road Use Management) Act 1995 (Qld)

Transport Operations (Road Use Management—Road Rules) Regulation 2009 (Qld)

D *Other*

'AI-Driven Technology for Road Safety', *BBC News* (Web Page, 26 February 2025) <https://www.bbc.com/news/articles/ce8dpvxexz8o>

'AI Seatbelt Camera Wrongly Fined 1,842 Drivers', *Australian Computer Society* (Web Page, 14 September 2023) <https://ia.acs.org.au/article/2023/ai-seatbelt-camera-wrongly-fined-1-842-drivers.html>

Australian Road Rules Amendments 2023 (Parliamentary Counsel's Committee, 5 May 2023)

Bailey, Mark, 'Seatbelts and Child Restraints on Properly or $1,161 Fine' (Ministerial Media Statement, 21 August 2023) <https://statements.qld.gov.au/statements/98495>

'Did You Know?', *Institute of Automotive Mechanical Engineers* (Web Page, 22 November 2022) <https://www.iame.com.au/did-you-knowfd5b1ea0>

'Driver Distractions', *Queensland Government* (Web Page, 7 September 2022) <https://www.qld.gov.au/transport/safety/road-safety/driving-safely/driver-distractions>

Elihos, Alperen, Bensu Alkan, Burak Balci and Yusuf Artan, 'Comparison of Image Classification and Object Detection for Passenger Seat Belt Violation Detection Using NIR & RGB Surveillance Camera Images', in *2018 15th IEEE International Conference on Advanced Video and Signal Based Surveillance (AVSS)* (Conference Proceedings, 27 November 2018)

Explanatory Note, Transport Legislation (Distracted Driver and Other Matters) Amendment Regulation 2021 (Qld)

'Fines and Camera Detected Offences', *Queensland Government* (Web Page, 26 February 2025) <https://www.qld.gov.au/transport/safety/fines/cameras>

'Infringements', *Queensland Police Service* (Web Page, 8 May 2024) <https://www.police.qld.gov.au/initiatives/road-safety/infringements>

Leake, Jennifer and Nick Barker, 'Australia was a world leader in road safety, but has progress stalled?' *ABC News* (online, 4 October 2023) <https://www.abc.net.au/news/2023-10-04/road-safety-history-australia-toll-increase/102903364>

'Mobile Phone and Seatbelt Detection Cameras', *Transport Accident Commission (Vic)* (Web Page, 26 February 2025) <https://www.tac.vic.gov.au/road-safety/staying-safe/mobile-phone-and-seatbelt-detection-cameras>

'Mobile Phone and Seatbelt Cameras', *Queensland Government* (Web Page, 30 September 2024) <https://www.qld.gov.au/transport/safety/fines/cameras>

'Mobile Phone and Seatbelt Detection Cameras', *Victorian Government* (Web Page, 16 February 2024) <https://www.vic.gov.au/mobile-phone-and-seatbelt-detection-cameras>

Moorhead, Gary, 'Monday Mornings in Court Seven' *Pearls and Irritations Public Policy Journal* (Web Page, 26 October 2024) <https://johnmenadue.com/monday-mornings-in-court-seven/>

Moorhead, Gary, 'Trust Governments with AI? Perhaps Not, When There Is a Revenue Stream Involved' *Pearls and Irritations Public Policy Journal* (Web Page, 2 February 2024) <https://johnmenadue.com/post/2024/02/trust-governments-with-ai-perhaps-not-when-there-is-a-revenue-stream-involved/>

Personal correspondence from Chief Engineer, Queensland Department of Transport and Main Roads, 6 August 2024

Personal correspondence from Chief Engineer, Queensland Department of Transport and Main Roads, 16 July 2025

Queensland Police Service Calibration Laboratory, *Photographic Detection Device* (Calibration Report No 0595, 13 February 2019)

RTA Roads & Traffic Authority, 'Click Clack Front 'n' Back (Australian ad, 1990)' (YouTube, 2008) <https://www.youtube.com/watch?v=xKgMvWgpN8U>

'Speeding Fines', *Queensland Parliament* (Web Page, 14 December 2023) <https://www.parliament.qld.gov.au/Work-of-the-Assembly/Petitions/Petition-Details?id=4007>

#IT ISN'T FAIR: THE NEED FOR GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT

SIMONE PEARCE*

Sport for people with disability is frequently referred to as 'Inclusion'. However, the anomaly around 'inclusion' for people with disability is that sport is not always genuinely, or truly, inclusive. Sporting opportunities for children with disability are not provided in the same way as mainstream opportunities for children, and are rarely provided to be with, and against, children without a disability in a way that is fair and meaningful. Sporting opportunities for children with disability are often provided in a way that is separate and segregated. They are often non-competitive. Many of these approaches are likely to be discriminatory, either unlawfully or wrongfully.

Human rights and domestic law provide the tools to prevent the discrimination of children with disability in sport. However, the law is not currently applied to influence the structure of sport and the resulting treatment of children with disability in a way that limits or prevents discrimination. This article argues that the current situation is not working, and that the law could be more effective through the use of Guidelines published by the Australian Human Rights Commission 'for the avoidance of discrimination', as provided for in the Disability and Discrimination Act 1992 (Cth).

* Dr Simone Pearce is a Lecturer at the University of the Sunshine Coast who has published extensively on sports law, governance, disability sport discrimination, and the equitable treatment of minorities or the underrepresented and excluded. Her doctorate was entitled 'Towards Guidelines for the Inclusion of Children with Disability in Sport'.

CONTENTS

I. INTRODUCTION 53
II. FAIR AND MEANINGFUL SPORT 58
A. *SPORT INVOLVES A FAIR AND MEANINGFUL CONTEST* 58
B. *SPORT FOR CHILDREN WITH DISABILITY FAILS TO PROVIDE A FAIR AND MEANINGFUL CONTEST* 59
III. THERE IS A HUMAN RIGHT TO NON-DISCRIMINATION WHEN PARTICIPATING IN SPORT 60
IV. THE LAW —DISABILITY DISCRIMINATION IN SPORT IS COMPLEX, AND INEFFECTIVE 65
V. GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT 69
A. *CASE STUDY A—INCLUDED WITH AND AGAINST THE MAINSTREAM; INDIVIDUAL SPORT* 74
B. *CASE STUDY B—INCLUDED WITH AND AGAINST THE MAINSTREAM; TEAM SPORT* 75
VI. CONCLUSION 76

I INTRODUCTION

In Australia, like many other places in the world, there are a variety of programs and opportunities for children with disability to take part in sport. Examples include the 'Special Olympics', [1] All Abilities football,[2] wheelchair tennis,[3] basketball and rugby,[4] and various come-and-try days.[5] These programs and sport for people with disability are

[1] Special Olympics Australia (Web Page) <https://www.specialolympics.com.au/>; A Tint, K Thomson, and J A Weiss, 'A Systematic Literature Review of the Physical and Psychosocial Correlates of Special Olympics Participation among Individuals with Intellectual Disability' (2017) 61(4) *Journal of Intellectual Disability Research* 301; Stephanie Turgeon, Jessica Turgeon, and Diane Morin, 'Coaching Special Olympics: a Scoping Review' (2023) 18(1) *International Journal of Sports Science and Coaching* 304.
[2] Football Network, 'All Abilities', *Play Football* (Web Page) <https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities>.
[3] Disability Sports Australia, 'Wheelchair Tennis' (Web Page) <https://www.sports.org.au/wheelchair-tennis>; Simon Holzapfel and Louisa Summers, 'An Introduction to Wheelchair Tennis for Future Athletes and Coaches' (2013) 27(4) *Palaestra* 25.
[4] Disability Sports Australia, 'Wheelchair Basketball' (Web Page) <https://www.sports.org.au/wcbasketball>; National Wheelchair Basketball Association, 'History of Wheelchair Basketball' (Web Page) <https://www.nwba.org/history.html>.
[5] See New South Wales Government, 'Athletics Come and Try days for Students with Disability', *School Sport Unit* (Web Page) <https://app.education.nsw.gov.au/sport/page/1343>; Sporting Wheelies,

frequently referred to as 'Inclusive'.[6] However, these programs are not always genuinely, or truly, inclusive. Put simply, sporting opportunities for children with disability are not provided in the same way as mainstream opportunities for children without a disability. Despite the best of intentions, sporting opportunities for children with disability are often provided in a way that is separate and segregated, and very often non-competitive.

Whilst there is some debate concerning whether competition is good for children,[7] sport is traditionally structured to involve fair and meaningful contests. If children with disability are not provided fair and meaningful contests, just as in the mainstream sporting activities, then the provision of sport for children with disability may be discriminatory—either wrongfully or unlawfully. If children with disability are offered separate and segregated opportunities, that may also be discriminatory because children with disability are treated less favourably and/or are not given the same opportunities as other children, due to their disability.[8] Whilst discrimination can be a daunting term, and indicate potential wrongdoing, identifying discriminatory structures and conduct provides an opportunity to address the treatment of people with disability, to provide true inclusion.

There is limited literature that considers the treatment of children with disability through the discrimination lens. It is often celebrated that there are *some* opportunities provided for children with disability to take part in sporting activities.[9] It might be that the existence of sport for people with disability to participate in, such as the Paralympics, promotes the view that no real problem exists, and that children with disability can

'Calendar of Events', (Web Page, 2025) <https://www.sportingwheelies.org.au/sports/calendar-of-events/>; Variety: The Children's Charity, 'Variety Active Kids Sports Days' (Web Page) <https://varietyactivekidssportsdays.com.au/>.

[6] Karen DePauw and Susan Gavron, *Disability Sport* (Human Kinetics, 2nd, 2005) 13; Florian Kiuppis, 'Inclusion in Sport: Disability and Participation' (2018) 21(1) *Sport in Society* 4.

[7] Hannah Pandel, 'Healthy Competition is Good for Children' (2015) 67(1) *IPA Review* 31–33; Michael Bula, 'Competition for Children: The Real Issue' (2013) 42(7) *Journal for Health, Physical Education, Recreation* 40.

[8] Whilst in Queensland the *Anti-Discrimination Act 1991* (Qld) s 111, permits discrimination on the basis of not being competitive, this section is invalid when read together with the *Disability Discrimination Act 1992* (Cth) ('*DDA*') which is the subject of this article; and the Queensland Act in section 111 does not implement the *Convention on the Rights of Persons with Disabilities*.

[9] Antonia O'Flaherty, 'New Inclusive Sport Program 'Exhilarating' for Queensland Students with Disability', *ABC News* (News, 10 June 2021) <https://www.abc.net.au/news/2021-06-10/new-queensland-inclusive-sports-program-aims-to-address-barriers/100202856>; Australian Government, 'Equity, Diversity and Inclusion', *Australian Sports Commission* (Web Page) <https://www.sportaus.gov.au/integrity_in_sport/inclusive-sport>.

readily take part in sport. It might be that there is a widely held misconception of what discrimination in sport is for children with disability—that as long as they are given some sort of a go, it is enough.

In short, the way sport is provided for children with disability in Australia, rarely provides true inclusion. The claim that sporting organisations provide for children of 'all abilities' to play or take part in their sport, is commendable. However, it is often not the earnest reality that children with a disability can meaningfully take part in the activity. 'Compromises' such as standing next to an event, or turning up on a different day, is not taking part in the sporting activity on an equal basis with other in mainstream sporting activities. 'Multiclass' sport that is provided in some sports, is a separate and segregated experience. The inclusion of children with disability by separating and segregating them from their peers who do not have disability, is all too common and often lauded. Take for example, an 'award-winning inclusion program' from a rugby league club that involves a series of one-day skills sessions, only available to some children with disability and on a different day to the mainstream training and matches.[10] Despite the efforts made by sporting organisations and schools, children with disability do not enjoy the same fair and meaningful contests in sport that children without a disability do in mainstream sporting activities. Many approaches to sport for children with disability are likely to be discriminatory, either unlawfully or wrongfully.

To assist people in understanding discrimination against people with disability, the *Disability and Discrimination Act 1992* (Cth) ('*DDA*') contains a regulatory mechanism which allows for '*Guidelines'* to be published by the Australian Human Rights Commission (AHRC) 'for the avoidance of discrimination'.[11] There are currently no Guidelines in Australia for the inclusion of children with disability in sport. There is a need for Guidelines. While there may be genuine safety concerns that require reasonable

[10] Falconsfootykidz, 'Falcons Footy - Rugby League for Children Of Different Abilities' (Facebook, 2 April 2026) <https://www.facebook.com/FalconsFootyLeague/>.
[11] *DDA* (n 8) s 67(1)(k). This is not a regulatory law paper. However, it is important to point out that voluntary guidelines are an important part of the regulatory environment. For example, responsive regulation includes layers of international (eg *Convention on the Rights of Persons with Disabilities*), and national law (eg *Disability Discrimination Act 1992* (Cth)), and additional guides, such as voluntary guidelines that are flexible and do not have strict enforcement (eg The Guidelines proposed in this article).

adjustments,[12] often the way that sporting opportunities are provided and structured, for children with disability in sport, is unnecessarily different compared to sport provided for children without a disability. Disability-specific sport often separates and segregates children with disability, failing to provide fair and meaningful opportunities to children with disability, and at times leaves children with disability with no opportunity at all. Importantly, children with disability are often excluded from contests in sport, even when they are included in the physical activity of sport. Guidelines to avoid discrimination are a valuable tool to change the way children with disability are treated in sport and to promote truly inclusive opportunities. In Australia, the law could be put into practice through the use of Guidelines, as provided for in the DDA, designed and implemented in a similar way as those for gender-diverse people in sport.[13] Perhaps more importantly, though, the Guidelines could assist people—coaches, administrators, volunteers, teachers and parents—to make appropriate accommodations so that children with disability can be included in mainstream events and competitions. This article argues that *Guidelines for the Inclusion of Children with Disability in Sport*, which could be published by the AHRC in accordance with s67(1)(k) of the *DDA,* could assist in improving the way children with disability experience sport.

This article argues that *Guidelines for the Inclusion of Children with Disability in Sport* should from a greater part of the solution to the problem—that the structures of sport currently fail to provide children with disability some fair and meaningful contests, on the same basis as children without a disability enjoy. To do so, this article has six parts. Part 2 briefly explains the necessity to consider the circumstances of a child with disability taking part in sport, particularly that the activity is not only a physical act of the sport, but also a contest. 'Inclusion' means inclusion in a fair and *meaningful* contest. It will then provide examples illustrating that current structures for the treatment of children with disability in sport fail to include them in fair and meaningful contests. Part 3 examines how the human right to non-discrimination means that children with disability are to be provided a fair and meaningful contest, together with children without

[12] See, eg, *USM Events Pty Ltd v James* [2023] QCA 71.
[13] Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport* (Guideline, June 2019) <https://humanrights.gov.au/sites/default/files/document/publication/ahrc_transgender_and_gender_diverse_guidelines_2019.pdf>.

a disability in mainstream sporting activities, or their sporting contests are to be as comparable as possible. The human right to non-discrimination applied to children with disability taking part in a contest, requires adjustments to the contest, to facilitate non-discrimination. The human right to non-discrimination is the foundation for the treatment of children with disability in competitive sport and can be influential in the design and implementation of domestic legislation. For example, the way the *DDA* now provides for reasonable adjustments provisions came about in response to the Productivity Commission's recommendations that the DDA be amended to reflect the *The Convention for the Rights of People with Disability*[14] *('CRPD').* The *DDA* was passed in 1991, and the CRPD in 2006.[15] Part 4 of the article outlines that the domestic legislation in Australia is not necessarily clear, understood or effectively implemented to prevent discrimination against children with disability in competitive sport, and therefore the current circumstances experienced by children with disability in competitive sport are likely discriminatory. Part 5 of the article suggests that the law could be aided, and made more effective, through the use of *Guidelines* as provided for in the *DDA*, designed and implemented in a similar way as those for transgender and gender diverse people in sport;[16] including two case study examples to demonstrate practical steps that would prevent potential discrimination. This article concludes with the argument for the need for *Guidelines* to provide a helpful framework for sporting organisations and administrators to decide how a child with a disability might be best provided a competitive sporting opportunity.

[14] *Resolution / adopted by the General Assembly* on 13 December 2006: *Convention on the Rights of Persons with Disabilities*, opened for signature on 13 December 2006, A/RES/61/106 (entered into force on 3 May 2008) ('*CRPD*').

[15] House of Representatives, The Parliament of the Commonwealth of Australia, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth): Explanatory Memorandum*; Australian Government, 'Review of the *Disability Discrimination Act 1992*, Inquiry Report', *Productivity Commission* (Report, 12 July 2004) <https://www.pc.gov.au/inquiries/completed/disability-discrimination/report> ('Report').

[16] Australian Human Rights Commission (n 13).

II Fair and Meaningful Sport

A *Sport involves a fair and meaningful contest*

There are various arguments about what sport is and is not. The word 'sport' is defined in different ways, and has numerous elements or characteristics, depending on the source. Here, rather than complicating matters by considering the lengthy and philosophical debates about what sport is, this article will consider sport to be a physical activity with structured rules, that involves a fair and meaningful contest.[17] If there is no contest in the activity, then the activity is recreation, exercise, or a pastime. It is not sport. The contest does not have to be elite, or formal sport, but organised in a way that the participants are attempting to follow a set of agreed rules. It is intended that the outcome of the activity is that there is a successful participant in the contest. A contest is the pitting of skills and/or prowess to be superior to another.[18] Contests in sport are constructed with rules that isolate and identify the skills or processes being tested. The rules of sport are designed to create contests that are fair and meaningful.

Examples of a 'fair contest' are the age divisions in junior sport. Traditionally, age divisions have been thought to provide similar base levels of skill and capacity, and create fair contests. Other rules that are designed to create fair contests are gender divisions, weight divisions, handicap systems (such as golf, sailing and cycling) and the classification systems in paralympic sports. Not only are the rules of sport designed to be fair, but they are designed to be meaningful. Meaningful contests are those where each participant has a chance, there is a genuine contest, and the contest and its outcome are not tokenistic or charitable. For example, it is not meaningful to a child, to be the only

[17] Others have grappled with technical and philosophical definitions of sport. See for example Henry T Greely, 'Disabilities, Enhancements, and the Meanings of Sports' (Research Paper No 82, Stanford Law School, February 2004); Gunnar Breivik, 'Sport as part of a meaningful life' (2022) 49(1) *Journal of Philosophy of Sport* 19–36; Kevin Krein, *Philosophy and Nature Sports* (Routledge, 1st, 2018); Lukas Mareš and Daniel Novotný, 'What is sport? A response to Jim Parry' (2022) 17(1) *Sport, Ethics and Philosophy* 34–48; Jim Parry, 'The concept of sport in Olympism' (2020) 4 *International Academic Journal on Olympic Studies* 131–148; Bernard Suits, The elements of sport' in *The Philosophy of Sport: A collection of essays,* Robert Osterhoudt (ed) (Charles C Thomas, 1973) 48-64and Jim Parry, 'On the Definition of Sports' (2023) 17(1) *Sports, Ethics and Philosophy* 49–57.

[18] Macquarie Dictionary (9th Edition) (2023) defines contest as a 'struggle for victory or superiority.'; Macquarie Dictionary defines compete as 'to contend with another for a prize, or profit.'; John Loy and W Morford, 'The Agon Motif: Redux. A Study of the Contest Element in Sport' (2019) 82 *Physical Culture and Sport. Studies and Research* 10, 12: define a contest as, 'a competitive activity characterized by two or more sides, having agreed-upon-rules, criteria for determining the winner, with a zero sum outcome wherein the winner(s) takes all.'

Multiclass swimmer in an event and to be provided a medal for winning. Another example of a contest not being meaningful to a child, is to run in a relay of two people over 70 metres, when their peers are running a 4x 100m relay, a 4x 200m relay and a medley relay.[19] Fair and meaningful contests involve each participant having a prospect of demonstrating superiority at certain activities. A fair and meaningful contest is an important characteristic of sport. Therefore, this article argues that inclusion in sport is not limited to inclusion in physical activities but should extend to inclusion in the fair and meaningful contests created by the rules.

B *Sport for children with disability fails to provide a fair and meaningful contest*

There are many ways a child with a disability is provided sporting opportunities. There are come-and-try days, to take part in a trial for sports; there are special 'all abilities' type days and events in some sports; at times children with disability will be able to take part in a game with their non-disabled peers, where they just join in. These events include disability categories such as 'Multiclass', and there are disability-specific sports, such as 'goalball'.[20] Some of these offerings provide a physical involvement, however do not provide a fair and meaningful contest: because, either, there is no contest element, or the sport is unfair to the child with a disability who is at a disadvantage. Disability categories and disability specific sports do not necessarily provide fair and meaningful contests for children with disability.

The several ways that the structure of sports will fail to provide a child with a disability a non-discriminatory fair and meaningful experience are:

1. When they are not provided an adjustment to the rules in a mainstream event to enjoy a fair and meaningful contest;
2. When they are not included within the mainstream event (and provided recognition of their disability in a category), provided they are capable of physically taking part;
3. When they are not provided with the opportunity in 1 or 2, and not provided a separate category or version of the sport, where their functional capacity is considered in competing against others with disability, and adjustments are made accordingly;

[19] Queensland Little Athletics Multi class relays at State Championships, see Little Athletics Queensland, 'McDonald's State Relay Championships' (Web Page) <https://laq.org.au/mcdonalds-state-relay-championships/>.
[20] See Goalball Australia, 'About' (Web Page) <https://www.goalballaustralia.org/about>.

4. When they are not being provided with a classification to enter the disability-specific contest or category;
5. Where a separate event or events are provided for children with disability, but the event is unnecessarily different and not comparable to the event provided for children without disability;
6. Where a disability-specific sport is provided (because it is not possible to provide mainstream inclusion) and the sport only caters for some children with disability; and/or
7. When there is no opportunity for children with disability to have a fair and meaningful contest—one that reflects the disadvantage that they have as a result of the functional impact of their disability.

In each of the above circumstances, children with disability are not provided with the same treatment as those without disability, in that they are not provided with a fair and meaningful contest on the same or equal basis as their peers. The majority of offerings of sport for children with disability in Australia will meet the descriptions above.[21]

To fail to provide a child with disability a fair and meaningful contest, could constitute discrimination. This discrimination might be unlawful, either pursuant to domestic law, or human rights obligations. There are times when discrimination might be lawful—in that it does not offend the domestic legislation—yet it is wrongful, and potentially offends the child's human rights. As explained in the introduction, non-discrimination is a human right. The next part explains the human right of non-discrimination applicable to sport, and how that applies to children with disability, before then explaining the challenges with the domestic legislation in implementing that right, and finally proposing a solution to discriminatory sport for children with disability, in the way of Guidelines.

III THERE IS A HUMAN RIGHT TO NON-DISCRIMINATION WHEN PARTICIPATING IN SPORT

Human rights can be a significant influence on the treatment of children with disability in their experiences in sport. The human rights instruments—including the *Convention for the Rights or Persons with Disabilities* and the *Convention for the Rights or Children*[22]—articulate how people with disability can use human rights to advocate for certain treatment. Despite the rhetoric and narrative around there being a human right to

[22] *Conventions on the rights of the Child*, opened for signature 20 November 1989, GA 44/25 (entered into force 2 September 1990) ('*CRC*').

sport,[23] particularly for people with disability, the human rights instruments do not provide any such human right.[24] A human right to sport, or to participate in sport, is (in practice) meaningless. When sport involves a contest, what does the human right to sport, or to participate in sport mean? Although the human right to sport, or to participate in sport, is confusing, human rights do apply to any human endeavour, and sport, including the contest, is an activity included in the sphere of influence that human rights have. Human rights apply to sport and people's experiences in sport, just as they apply to any human endeavour.[25] Rather than the existence of a 'human right' to sport, or to participate in sport, when a person with a disability seeks to take part in sport, the human right that applies is that of non-discrimination.[26]

Identifying that the relevant human right applicable to the inclusion of children with disability in sport as non-discrimination influences the perspective and approaches taken to implement that human right. The human right to non-discrimination in this context means that children with disability are provided treatment to experience sport on 'an equal basis' with others, and with reasonable adjustments to do so. The provision of reasonable adjustments is consistent with providing substantive equality;[27] which means that the structure and rules of sport are adjusted to provide children with disability, a fair and meaningful contest and an opportunity that is as much as possible, comparable to that of children without disability. Article 30.5 of *The Convention for the Rights of People with Disability*[28] (*'CRPD'*) provides for the human right to non-discrimination in sport to take the form of adjustments to mainstream sports, provision of disability-specific sports,

[23] Janet Lord and Michael Stein, 'Social Rights and the Relational Value of the Rights to Participate in Sport, Recreation and Play' (2009) 27 *Boston University International Law Journal* 249; *The Olympic Charter* (entered into force 30 January 2025) ('Olympic Charter') art 1.
[24] Simone Pearce and Jay Sanderson, 'The myth of a "human right to sport": how human rights can lead to true inclusion for children with disability' (2024) 24 *International Sports Law Journal* 1–24.

[25] Human Rights Council, United Nations General Assembly, *Final report of the Human Rights Council Advisory Committee on the possibilities of using sport and the Olympic ideal to promote human rights for all and to strengthen universal respect for them,* A/HRC/30/50 (17 August 2015) at 6 "[a]s… any other human activity, sport is governed by human rights. The core human rights instruments therefore apply to sport like all other fields of human activity".
[26] Including equality and dignity, as discussed in Chapter 2, considered together in this thesis as a collective set of human rights to ensure that people with disability are provided adjustments to enjoy the same experiences as those without disability do.
[27] Report (n 15) 185.
[28] *Resolution / adopted by the General Assembly* on 13 December 2006: *Convention on the Rights of Persons with Disabilities*, opened for signature on 13 December 2006, A/RES/61/106 (entered into force on 3 May 2008) ('*CRPD*').

inclusion in the mainstream where possible, and for such opportunities to be provided in the school system, as well as the public sporting sector.[29] The *Convention on the Rights of the Child* ('*CRC*'),[30] the *International Charter for Physical Education, Physical Activity and Sport ('ICPEAS')*,[31] and the *Olympic Charter*, all also contain provisions that assist in applying the human right to non-discrimination in sport. Each supports the interpretation of the *CRPD*, in so far as it provides for adjustments to be made to the rules and structure of sport, so children with disability are provided with a fair and meaningful contest, comparable to that provided to children without a disability in mainstream sporting activities.

This interpretation of the human right to non-discrimination in sport, challenges the current structure of sport in Australia for children with disability. Currently, in Australia, children with disability are not provided the opportunities that the human rights instruments envisage. The structure of sport in Australia currently provides some children with disability *some* fair opportunities in *some* sports: this is in the form of Multiclass offerings in track and field, swimming, cross country, and triathlon.[32] These opportunities are often restricted to children who can obtain a *classification* akin to the Paralympic classification,[33] and often do not extend to the same events that are offered for children without a disability. Multiclass opportunities are often separate and segregated and lack meaningfulness, as children take part alone, or with others who are not their age, or classification.[34] There are also some team sports that provide certain competitive opportunities for children with disability.[35] However, these opportunities

[29] Ibid, art 30.5.
[30] *CRC* (n 22).
[31] *International Charter of Physical Education, Physical Activity and Sport*, UNESCO (adopted by November 2015).
[32] Queensland Government, 'Inclusion: Multi-class pathways', *Queensland Representative School Sport* (Web Page, 14 May 2024) <https://queenslandschoolsport.education.qld.gov.au/inclusion/multi-class-pathways>.
[33] Children are classified using the same system as Paralympians and national athletes. There are varying levels of classification depending on the sport. These include Provisional, State and National Level, and International Classification. The system, tests and criteria for classification is the same whether a person is eight or 38. Children are examined by medical practitioners, usually including a physiotherapist and a medical doctor, who consider the functional impact of their impairment on the activities required for the sport, and determine if they have the impairment as categorised by the classification system.
[34] Swimming Queensland, 'Multi-class Swimming' (Web Page) <https://qld.swimming.org.au/multi-class-swimming>.
[35] Football Victoria, 'All-Abilities Football' (Web Page) <https://www.footballvictoria.com.au/community/programs/all-abilities>; FIDA, 'Welcome to FIDA' (Web Page) <https://fida.org.au/>.

are usually restricted to intermittent offerings, offered only to some children with disability or in disability-specific groups in a way that segregates children with disability from the mainstream offerings of sport.[36]

The human right to non-discrimination properly implemented would lead to sport being structured in a way that children with disability have an opportunity for a fair contest in and within the mainstream if they wish, or in a disability-specific sport, if they so choose—with these opportunities being as comparable to those offered to children without disability as possible.

When considering the treatment of children with disability in sport, discrimination will occur if a child with a disability is not provided with substantive equality, which is the basis of reasonable adjustments.[37] Substantive equality is the appropriate way to provide non-discrimination to people with disability. For people with disability, the concept of discrimination is often different from other types of discrimination, such as in relation to sex, and race. Often, in matters of race and sex, the answer to discrimination is treating people the same, but for those with disability, there are times when they need to be treated differently, so that they may be afforded the same opportunities. More specifically, people with disability may start from a position of disadvantage and they may need to be distinguished—treated differently—to alleviate their disadvantage. Discrimination against a person with a disability involves failing to treat them differently to recognise and alleviate disadvantage, in circumstances that it does not cause unjustifiable hardship to do so.[38]

The concept of substantive equality responds to the disadvantage created by social structures not accommodating or envisaging disability. Substantive equality considers

[36] Netball Queensland, 'The Queensland Gems' (Web Page, 2023) <https://qld.netball.com.au/queensland-gems>; Football Network, 'Play Football', *All Abilities* (Web Page) <https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities>; Football Queensland, 'All Abilities' (Web Page, 2023) <https://footballqueensland.com.au/football-for-all/all-abilities/>.
[37] Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712–715; Alice Taylor, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Journal* 199–200; Elizabeth Dickson, 'Disability Standards for Education and the Obligation for Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 25.
[38] *DDA* (n 8) ss 5, 6.

the circumstances of a person with disability through the social model of disability.[39] Namely, the 'problem' or 'barrier' for a person with a disability is not their impairment, but the requirements or structures of the environment, whether that be the physical environment or the rules, laws and/or social attitudes. This perspective means that if the socially constructed environment imposes a barrier or challenge, then changes to that environment can reduce or eliminate the barrier or challenge. Accordingly, providing substantive equality involves adjusting the socially constructed environment, whether in the physical aspects, the rules and regulations, or social attitudes, to provide a person with a disability with an experience on an equal basis to a person without a disability, as far as is possible.[40]

Substantive equality provided to a child with a disability in a sporting contest means making adjustments to the structures and rules to provide a fair and meaningful contest. Substantive equality and the concept of adjustments to rules and structures of sport for children with disability are not clear in the human rights instruments and are less clear in the *DDA*. Additionally, not all discriminatory conduct is unlawful. Discrimination is only unlawful if it has been legislated against. Discriminatory conduct that is not unlawful, can however still have a detrimental effect on those people subject to it and may still leave a person at a disadvantage or encountering the negative consequences of the discriminatory conduct.[41]

The legislative regime in Australia is not necessarily effective in achieving the application of substantive equality to the experience of children with disability in sport. The current circumstances in Australia are that sport for children with disability is not adjusted to provide them with fair and meaningful contests, with and against the mainstream, or in comparable events to children without disability, or for each child with disability.

[39] Sandra Fredman, *Discrimination Law* (Oxford Press, 3rd ed, 2023).
[40] *DDA* (n 8) ss 5, 6; Subject to unjustifiable hardship or reasonableness.
[41] See for example, Simone Pearce, 'The fundamental nature of sport: disability, discrimination and sport in Holzmueller v. Illinois High School Association' (2021) 21(1) *The International Sports Law Journal* 74–93; *Sklavos v Australasian College of Dermatologists* [2017) 256 FCR 247.

IV The Law —Disability Discrimination in Sport is Complex, and Ineffective

The *DDA* is not necessarily clear as to how people with disability are to be treated in their experiences in sport, and in particular when it comes to reasonable adjustments and competition. This section explains some of the complexities and demonstrate why the *DDA* has not necessarily had the impact that it could, on the treatment of children with disability in sport.[42] Broadly, sections 5 and 6 of the *DDA* are the sections that set out what constitutes discrimination. These sections provide that people with disability are to be treated no less favourably than a person without disability (because of their disability). In addition, these sections set out the requirement that reasonable adjustments be made for a person with a disability to be provided with 'no less favourable' treatment and to prevent discrimination.[43]

Section 28 of the *DDA* provides that it is unlawful to discriminate against a person with disability, by excluding that person from sport. That means that it is unlawful to treat a person less favourably than a person without disability, by excluding them from sporting activity, including by not providing reasonable adjustments. There is an exception in section 28, that provides that if the person is 'not reasonably capable of performing the actions reasonably required in relation to the sporting activity,'[44] it is not discriminating (presumably to exclude them). This section is complex and confusing, when read with sections 5 and 6. What section 28(3) means by 'reasonably capable', is not defined in the legislation, and there is very little case law in Australia that assists in interpreting the phrase.[45] On a simple reading of the sections of the *DDA*, if a person is (considered) reasonably capable of the actions reasonably required for the sporting activity, then ss 5 and 6 of the *DDA* apply, and they are to be provided reasonable adjustments to provide

[42] See above n 8.
[43] *DDA* (n 8) ss 5(2), 6(2); subject to unjustifiable hardship.
[44] *DDA* (n 8) s 28(3).
[45] The case law that has dealt with the question of the inclusion of a person with disability in sport, on the basis of whether or not they are reasonably capable, has been limited to one decision of the Australian Human rights Commission (AHRC), where it was decided that a competitor in a cycling race who had vision impairment, was not reasonably capable, because they posed a danger to the other competitors. *Martin Wells v Queensland Cyclists Association Incorporated*, in the Human rights and Equal opportunity Commission No. H98/67, 24 August 1999 <https://humanrights.gov.au/know-your-rights/rights-of-individuals/disability-rights/disability-rights/disability-rights-and-the-disability-discrimination-act/commission-determinations-dda-decisions#other99>.

'no less favourable treatment'.[46] However, it is not necessarily easily understood what these sections mean. Consider this: if the child is reasonably capable of the actions reasonably required for the sporting activity, it is unlawful to exclude them from the activity; however, if they then take part physically in the activity, are they being excluded from the sporting activity if they are not included in a fair and meaningful contest; and in terms of ss 5 and 6 of the DDA, are they being treated no less favourably than those without disability, if they are not provided a fair and meaningful contest?

There are no judicial decisions in Australia that deal with the issue of whether children, or adults for that matter, with disability are to be provided an adjustment to the structure of sport, so they might have a fair and meaningful contest. Additionally, there is no judicial guidance about whether being 'reasonably capable of performing the actions required in relation to activity of the sport', includes being reasonably capable of taking part in a competitive way, in a fair and meaningful contest. If that were the case, then, it would be lawful to exclude children with disability from a sporting contest because they are not reasonably capable of being competitive (because of the disadvantage they face because of their disability intersecting with the rules of the sport). If they are reasonably capable of being competitive, then they must not be excluded, and must not be discriminated against. Therefore, do the requirements for adjustments provided in ss 5(2) and 6(2), mean that adjustments should be provided to the contest, to ensure that they are treated no less favourably than those without disability—and have a fair and meaningful contest? These questions demonstrate how complicated these sections are and how difficult it is to interpret the discrimination law as it applies to the experience of a person with a disability in sport.

The case law in relation to discrimination in Australia is concentrated on education and workplace incidents.[47] There is only one reported case where a person with disability has challenged their treatment in sport, based on the provisions of section 28 of the DDA. In *Wells v Queensland Cyclists Association Incorporated,*[48] the Court was asked to decide if

[46] *DDA* (n 8) ss 5(2), 6(2).
[47] See for example *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247, and *Purvis v New South Wales (Department of Education and Training)* (2003) 217 CLR 92; *L v Minister for Education for the State of Queensland* (1996) EOC 92-787 and *P v Director-General, Department of Education* (1996) 1 QADR 755.
[48] *Martin Wells v Queensland Cyclists Association Incorporated* (n 45).

the applicant had been discriminated against by being prevented from road racing in cycling, on the basis that he was vision impaired. The decision was that the safety concerns related to the applicant's vision impairment making it a risk to himself and others to road cycle in a race, were sufficient to justify complete exclusion from the physical event. There has been no case law considering the nature of inclusion of children or adults with disability in contests, the nature of separate and segregated events, and in particular the concept of reasonable adjustments in and to sport.

When the cases do consider the application of sections 5(2) and 6(2) in areas other than sport, they do not provide a helpful interpretation of how the provisions might be applied. The Court's decisions about the subsections have been criticised for failing to implement substantive equality[49]—the substantive equality that they were designed or intended to provide.[50] While the case law falls short of guidance in applying reasonable adjustments to provide substantive equality, the *DDA* will remain a difficult tool to assist in the aim to provide people with disability non-discrimination. If there is not a move to provide substantive equality in the future, there are likely to be more cases that argue for it. That said, there is legislation in some jurisdictions that is developing the notion that there is a 'positive duty' to ensure that discriminatory treatment does not occur.[51] The requirements for adjustments to be made have been legislated in relation to fields such as education, the structural environment and the workplace.[52] Disability Standards have been introduced in certain fields in accordance with the *DDA* specifying the steps to be taken to identify the potential for discrimination and requiring the implementation of strategies to prevent it.[53]

In relation to sport, the exceptions in s28 of the *DDA* will provide a challenge for any litigant seeking to be provided a fair and meaningful contest in sport. This is evident in

[49] See for example, Alice Taylor, 'Disability discrimination, the duty to make adjustments and the problem of persistent misreading' (2019) 45(2) *Monash University Law Review* 461, 486.
[50] Report (n 15) 185.
[51] See example: *Equal Opportunity Act 2010* (Vic) s 14.
[52] See example: *DDA* (n 8) s 22; Australian Government, Department of Education, Skills and Employment, *Disability Standards for Education 2005*; *Equal Opportunity Act 2010* (Vic) s 14.
[53] *DDA* (n 8) s 31; See, eg, *Disability Standards for Education 2005.* Disability Standards are a regulatory mechanism that are introduced by the responsible Minister, binding, and designed to implement non-discrimination.

light of the judicial approach taken in relation to other matters, such as education.[54] The *DDA* is complex and ineffective. To date, the law has had little impact, if any, on the provision of sport for people with disability. There is literature that guides the provision of sport for people with disability in sport,[55] such as the Inclusion Spectrum,[56] and the TREE principle,[57] however, these do not deal with inclusion in the competition. Structured competition for people with disability is restricted to separated and segregated contests, that fail to provide for all people with disability. Multiclass or para divisions do not cater for all people with disability, require complex medical and examination processes, and are conducted separately.[58] Disability-specific sports are restricted to certain disability categories, and are separate from the mainstream.[59]

The practices that sporting organisations employ for the provision of sport for children with disability have, over time, developed through the sharing of information. Information is shared between a network of administrators, coaches and managers, as well as people in the disability sport sector promoting sport for people with disability in the best way they know how. Some sports have simply developed disability sport practices by adopting some of the structures of the Paralympic competitions.[60] Other sports seem to have developed contests and structures on the basis that people with disability need to be separated, to provide them with a fair contest.

Considering the law in relation to discrimination, including human rights, provides a different perspective on the treatment of children with disability in sport. Discrimination law applied to inclusion in a contest, potentially produces a different outcome from the traditional offerings for people with disability. Structures of sport undertaken without

[54] Such as *Sklavos v Australasian College of Dermatologists* (2017) 256 FCR 247.
[55] Florian Kiuppis (n 6) 10–14.
[56] Ibid 7; Michelle Grenier, Nancy Miller, and Ken Black, 'Applying Universal Design for Learning and the Inclusion Spectrum for Students with Severe Disabilities in General Physical Education' (2017) 88(6) *Journal of Physical Education, Recreation and Dance* 53.
[57] Little Athletics Australia, 'Inclusion of Athletes with Disability' (Web Page) <https://www.littleathletics.com.au/inclusion/inclusion-and-diversity/athletes-with-disability/inclusion-of-athletes-with-disability/>; Florian Kiuppis, (n 6) 15–16.
[58] See Simone Pearce, 'Disability Discrimination in Children's Sport' (2017) 42(2) *Alternative Law Journal* 143–148; Dominique Moritz and Simone Pearce, '#whataboutme: Can the Inclusion of Gender Diverse Children Pave the Way for Children with Disability in Sport?' (2019) 13(1) *Australian and New Zealand Sports Law Journal* 169–177.
[59] Netball Queensland (n 36); Football Network (n 36); Football Queensland (n 36).
[60] For example, Athletics, Swimming, Triathlon.

reference to discrimination law, do not adequately address inclusion in the contest, and promote separated and segregated contests. [61] There is little scholarly consideration of the impact Australian discrimination law has had on people with disability being included in sport.[62] This article contributes to the work in relation to sport for children with disability, in that it touches upon the challenges faced in children with disability being provided fair and meaningful contests, and the complexities of the law being applied to their inclusion. The next section proposes solutions to the complexities in the law, and the way children with disability are treated in sport.

V GUIDELINES FOR THE INCLUSION OF CHILDREN WITH DISABILITY IN SPORT

Legal frameworks can influence the structure of sport and prevent discrimination against children with disability in competitive sport through the implementation of *Guidelines* prepared and published pursuant to the *DDA*. The *DDA* provides that the Australian Human Rights Commission (AHRC) has the power to 'prepare, and to publish in such manner as the Commission considers appropriate, guidelines for the avoidance of discrimination on the ground of disability'.[63] Importantly too, Guidelines have been prepared by the AHRC in relation to the inclusion of transgender and gender diverse people in sport.[64] Using the example of the *Guidelines for the Inclusion of Transgender and Gender Diverse People in Sport*, the AHRC can publish *Guidelines* that would assist in understanding the law regarding non-discrimination and, more importantly in a practical sense, in avoiding discrimination. *Guidelines for the Inclusion of Children with Disability in Sport* could be a useful regulatory mechanism for guiding sporting organisations and the public, as to how children with disability might be provided fair and meaningful contests. *Guidelines* as provided for in the *DDA*, are a viable solution to the complexities and difficulties that are currently faced in providing children with disability a fair and meaningful contest in sport. [65]

[61] Simone Pearce (n 58); Dominique Moritz and Simone Pearce, (n 58).
[62] Ibid.
[63] *DDA* (n 8) s 67(1)(k).
[64] Australian Human Rights Commission (n 13).
[65] There are other mechanisms that might be considered appropriate for implementing the *DDA* as it relates to sport for children with disability, such as Disability Standards and Action Plans provided for in the DDA.

Guidelines are a mechanism by which the parliament delegates the power to aid and explain the way in which law might be implemented in a practical way.[66] While Guidelines are not binding on any person or entity, the law on which the Guidelines are based is binding. Compliance with Guideline*s* is not a defence or adequate response to an allegation of discriminatory conduct. Compliance with Guidelines, however, may demonstrate an intention and attempt to comply with the law.[67]

The purpose of Guidelines is to enhance the operation of the law in preventing treatment that is discriminatory.[68] Guideline*s* are a positive apparatus for developing social structures and conduct that treat people with equality and dignity—avoiding discrimination. To treat people with equality and dignity is the basis of human rights instruments.[69] To treat people with equality and dignity is the foundation of non-discrimination.[70] Accordingly, Guidelines might aid in the treatment of people with disability in sport and accordingly, enhancing life within society for all.

The *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport* (*Transgender and Gender Diverse Guidelines*) published in 2019, are the only discrimination Guidelines published in Australia. [71] These *Transgender and Gender Diverse Guidelines* provide practical examples and explanations for sporting organisations and society for the treatment of people who are transgender or gender diverse when they seek to take part in sport. The *Transgender and Gender Diverse Guidelines* were prepared and published after research revealed that transgender and gender-diverse people were experiencing exclusion and discrimination in their experience in sport.[72] The *Transgender and Gender Diverse Guidelines* use case studies as

[66] Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford, 2nd ed, 2012); see also Australian Government, Department of the Prime Minister and Cabinet, 'Australian Government Guide to Policy Impact Analysis' (Web Page, 17 February 2023) <https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf>.
[67] Australian Human Rights Commission (n 13) 12.
[68] Australian Human Rights Commission (n 13).
[69] *Universal Declaration of Human rights*, A/RES 217 (III), UN GAOR, UN Doc A/810 (10 December 1948).
[70] Ibid art 1.
[71] There are Guidelines published for Insurance, Guidelines on accessible bus stops, and Guidelines on application of Premises Standards; see Australian Human Rights Commission, 'Disability Standards' (Web Page) <https://humanrights.gov.au/our-work/disability-rights/disability-standards>; The other alternative is for the Government to issue Standards pursuant to s 39 of the *DDA*, for example the Disability Standards for Education.
[72] Australian Human Rights Commission (n 13).

a mechanism for demonstrating the way in which the law is intended to operate to prevent potential discrimination based on gender identity. The case studies are examples of circumstances that might be discriminatory and include examples of practical steps that would remedy that treatment. The use of these case studies provides clear direction for sporting organisations and society about the structures and practices to be implemented in the conduct of sport at the community and sub-professional level.

To date, there is no literature examining the outcomes and impact of the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport*. The *Transgender and Gender Diverse Guidelines* have not necessarily resolved all issues for sporting organisations, individuals, or society, in the treatment of transgender or gender-diverse people in sport.[73] The inclusion of transgender or gender-diverse people in competitive sport still poses challenges for all involved, particularly when it comes to considering how the contest that is involved in sport is to be made fair.[74] Interestingly, the Transgender Guidelines do not deal with the inclusion of people in the contest. Whilst there are several case studies that assist in how to treat a person who identifies as transgender or gender diverse, there are no examples for adjusting the contest when a person takes part in a category they identify with. There might be various reasons that the issue of adjusting the contest was not dealt with in the Transgender Guidelines. One reason might be that the *Transgender Guidelines* relate to community sport, and the contest is not considered important, or that discrimination being avoided is more important than a fair contest. Another reason might be that it is difficult to provide for changing the contest when there are issues regarding advantage. Following on from the *Transgender and Gender Diverse Guidelines,* in 2023, the Australian Sports Commission published the *Transgender and Gender Diverse Guidelines for HP (High Performance) Sport (Guidelines)*. These Guidelines address issues of fairness in sport and provide for eligibility and reasonableness criteria for the elite athletes taking part in contests. The Guidelines are said to 'balance fairness and inclusion'.[75] The *HP Guidelines* are not published pursuant to the *Sex Discrimination*

[73] See for example, Proud2Play, 'Resources Hub' (Web Page) <https://www.proud2play.org.au/resources>, which provide various suggestions and resources for making sport less discriminatory. These resources do not necessarily resolve issues of competition.
[74] Rachel McKinnon, 'Participation in Sport is a Human Right, Even for Trans Women', *The Sports Integrity Initiative* (Web Page, 17 June 2019) <https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/>.
[75] Part I. Introduction, page 3.

Act,[76] *as* the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport* were. The *HP Guidelines* specifically provide that they apply to high-performance sport, and that in relation to any other sport, the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport,* as published by the AHRC apply.[77] The *Transgender and Gender Diverse Guidelines* have brought attention to be paid to the discrimination of transgender and gender diverse people in sport. Not only have they provided a catalyst for the HP Guidelines, but, various sporting codes in Australia have referred to the *Transgender and Gender Diverse Guidelines* in issuing statements of their policy for the treatment of transgender and gender-diverse people in their sport.[78] Given the relative success of the *Guidelines for the Inclusion of Transgender and Gender Diverse people in sport, Guidelines* for the treatment of children with disability in sport could provide assistance for sporting organisations and impetus for attention to the treatment of children with disability in sport to avoid or limit discriminatory conduct and structures. Given that there are *some* structures in place for children with disability to be provided *some* opportunities in *some* sports, it is understandable that there is little attention paid to the structures of sport for children with disability and the potential discrimination that occurs. Put another way, society generally thinks that there is sport for children with disability and there isn't a problem. The fact is that there is a problem, and the structures of sport that society relies on, are potentially unlawfully discriminatory, and at best, wrongfully discriminatory, for most children with disability.

Avoiding discrimination for children with disability in sport can have a significant impact on many people within society. Concentrating on the inclusion of children (rather than all people) with disability in sport is based on three key reasons: first, all children are exposed to participation in sport in Australia (through the school system); second, the culture in Australia is one that encourages and promotes children being involved in contests involved in sport from a young age; and third, influencing children's attitude to true inclusion could create a whole new generation of people who practice true inclusion. This impact can also have a flow-on effect for other levels of sport, and other types of

[76] *Sex Discrimination Act 1984* (Cth) s 48(1)(ga).
[77] Report (n 15) Part I, Introduction, page 3.
[78] See Monique Schafter and James Carmody, 'Sporting bodies unveil policies for greater inclusion of trans and gender diverse people', *ABC NEWS* (News, 1 October 2020) <https://www.abc.net.au/news/2020-10-01/sporting-bodies-unveil-guidelines-for-transgender-athletes/12719706>.

activity, for example, in the education system. The structure of sport is a good sector in which to challenge the inclusion of children with disability, because of the contest. Sport offers an opportunity to change perspectives about contests. The treatment of children with disability in sport provides a further specific opportunity to alter societal perspectives, as children are considered vulnerable and in need of protection. Additionally, it is unlikely that sport for children, no matter how competitive or important, would involve complications of professionalism or elitism. Put simply, children are not *playing for sheep stations*. This means that changes to the structure of sport might be more readily accepted by society—a society that has traditionally considered sport as static and fixed.

Guidelines for the inclusion of children with disabilities in sport published by the AHRC could assist in the implementation of human rights law and domestic legislation. To be effective, and have maximum impact, the *Guidelines for the Inclusion of Children with Disabilities in Sport* should be drafted in a similar format and language used in the *Transgender and Gender Diverse Guidelines.* If drafted in the same way as the *Transgender and Gender Diverse Guidelines, Guidelines for Inclusion of Children with Disability in Sport* would be designed to be easily understood by sporting participants and organisers, and easily followed and implemented. Similar to the *Transgender and Gender Diverse Guidelines*, the *Guidelines for Inclusion of Children with Disability in Sport,* would explain the law about discrimination of people with disability, and clearly outline the way in which the law (interpreted with substantive equality and wrongful discrimination in mind) is to be implemented in a variety of instances. The proposed *Guidelines* would use case studies explaining how certain treatment of children with disability is arguably discriminatory and include examples of practical steps that would remedy that treatment which does *not* currently occur in Australian sport. The use of these case studies provides clear direction for sporting organisations and society about the structures and practices to be implemented in the conduct of sport at the community and sub-professional level. These case studies would provide a new perspective for inclusion, and assist in changing traditional, potentially discriminatory practices. Two brief case studies are provided below.

A *Case Study A—Included with and against the mainstream; individual sport*

Jasper's arm was not developed at birth and finishes at the shoulder. He is a good runner and does well enough at school athletics. He has no adjustments for his disadvantage, although there is a functional impact on his running technique that others in the race without that disability do not have. Jasper comes second at school and progresses to the District/Zone representative level. There is no category for children with disability at the District/Zone level. Jasper loves to race his friends and mainstream peers. He takes part in the 100m race at Districts and comes 5th. He is told that he can directly enter the 'Multiclass' division of the 100m at the Regional Championships (the next level). Jasper does not understand why he could not race against, and be compared to, his mainstream peers, and have his disability taken into account.

To not be provided with a category at the District level that takes into account his disadvantage may be discriminatory. The race against his peers does not include an adjustment.

To be provided a Multiclass opportunity at the Regional level provides a type of adjustment to recognise that Jasper is at a disadvantage compared to those without disability. This adjustment, however, does not include Jasper in the mainstream event—the race itself, or the contest. Jasper can be included in the mainstream event, as there is an opportunity for Jasper to be given an adjusted time, taking into account the functional impact of his disability. That might mean deducting .8 of a second from his official time (akin to a head start). Jasper is then able to compete in a fair and meaningful contest with his friends and peers.

Another alternative to address the discrimination Jasper faces in not being included in the mainstream, is by altering the contest, awarding results for the children who have achieved best, relative to their own personal best. For example:

Athlete	*Time*	*Previous PB*	*First past the post*	*PB Difference*	*PB Placing*
Jarryd	*13.9*	*13.9*	*1*	*0*	*4*
Levi	*14.0*	*14.2*	*2*	*-.2*	*2*
Axel	*14.3*	*14.2*	*3*	*-.1*	*3*
Ollie	*15.9*	*15*	*4*	*+.9*	*5*
Jasper	*17.0*	*17.9*	*5*	*-.9*	*1*

The traditional structures of the sport mean that it may be difficult for mainstream participants to accept that they might be displaced from the first past the post system. The sporting organisation therefore might consider it reasonable to award both first past the post and personal best systems.

B *Case Study B—Included with and against the mainstream; team sport*

Michelle has Downs Syndrome. She started playing netball as a 'Net Set Go' participant when she was 7 years old. As Michelle progressed, she was playing with her age groups, through the 'Net Set Go' program. She played in levels Green, Gold and White, until she was 10 years old. The sport was not competitive, there was no scoring, and for the most part, other teammates passed her the ball. When Michelle turned 11, she was playing 'Divisional' netball, based on her ability comparable to others. Once the sport became competitive or divisional, at the age of 11 years old, the local netball association introduced a rule for Michelle to play as an extra player in the centre third of the court and be undefended. When questioned by an opposing team, the Association advised that they considered this a reasonable adjustment to make to the rules to accommodate Michelle's disadvantage and include her in the mainstream. The alternative might be that Michelle plays one of the seven positions, but that she is not defended (or defended by 6ft) within certain parts of the court.

These case studies demonstrate changes to the traditional structures of sport to prevent discrimination. They provide examples to assist sporting organisations, schools, and the community in understanding that the way children with disability currently experience

sport in Australia is possibly discriminatory and encourages changes to the way sport is provided—promoting a change to the culture of separation and segregation.

The *Guidelines* would also include guidance for sporting organisations to develop and maintain policies to provide inclusion for children with disability, including inclusion in a fair and meaningful contest. The *Guidelines* would also include details for codes of conduct to be implemented by sporting organisations, and guidance as to how structures and rules can and should be changed to provide children with disability true inclusion in sport, including in a fair and meaningful contest. The *Guidelines* could include a decision framework that is helpful in guiding how to make reasonable adjustments for a child with a disability in sport. As an example, the following framework could be utilised as a basis for the *Guidelines* and would assist sporting organisations in deciding how a child with a disability might be best provided for in a competitive sporting opportunity:

1. Can the child be included in the mainstream as the first option, and if at a disadvantage, the rules altered to provide a fair contest against the mainstream?;
2. If number 1 is not possible, can the child be included in the event with mainstream and rewarded separately as an athlete with a disability?;
3. If number 2 is not possible, can the child be provided a separate contest in a disability-specific sport or category, that is fair and meaningful (i.e. not on their own), and that is comparable to the mainstream offering of the event?; and
4. If number 3 is not possible, can the child be offered a separate and segregated sport that is as close to the mainstream offering as possible?

The *Guidelines* should articulate the way the law can be implemented, raising awareness and shifting the social paradigm regarding the provision of sport for children with disabilities, to, as far as possible, provide them with non-discriminatory experiences.

VI Conclusion

Guidelines for the Inclusion of Children with Disability in Sport have the potential to alter the structure of sport to ensure that all children are provided truly inclusive and

meaningful experiences in sport, and to gain the benefits that those experiences bring.[79] The publication of *Guidelines* would provide sporting organisations, participants and their families, the tools to change the structure of sporting offerings. In this way, the *Guidelines* provide a solution for the barriers to the true inclusion of children with disability in sport, as identified in this article. The *Guidelines* provide a mechanism to apply substantive equality to children's sport. In so doing, the *Guidelines* enable children with disability to be included in a non-discriminatory way, as provided for by the human rights regime, and the *DDA*. They will also help improve social attitudes towards the treatment of children with disability.

[79] Rochelle Eime et al, 'A systematic review of the psychological and social benefits of participation in sport for children and adolescents: informing development of a conceptual model of health through sport' (2013) 10 *International Journal of Behavioral Nutrition and Physical Activity* 98.

REFERENCES

A *Articles/Books/Reports*

Baldwin, Robert, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford, 2nd ed, 2012)

Breivik, Gunnar, 'Sport as part of a meaningful life' (2022) 49(1) *Journal of The Philosophy Of Sport* 19–36

Bula, Michael, 'Competition for Children: The Real Issue' (2013) 42(7) *Journal for Health, Physical Education, Recreation* 40

DePauw, Karen and Susan Gavron, *Disability Sport* (Human Kinetics, 2nd, 2005)

Dickson, Elizabeth, 'Disability Standards for Education and the Obligation for Reasonable Adjustment' (2006) 11(2) *Australia and New Zealand Journal of Law and Education* 23–42

Eime, Rochelle, Young, J A, Harvey J T, Charity M J and Payne, W R, 'A systematic review of the psychological and social benefits of participation in sport for children and adolescents: informing development of a conceptual model of health through sport' (2013) *International Journal of Behavioral Nutrition and Physical Activity* 10:98 http://www.ijbnpa.org/content/10/1/98: 1-21

Fredman, Sandra, *Discrimination Law* (Oxford Press, 3rd ed, 2023)

Fredman, Sandra, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712-715

Greely, Henry T, 'Disabilities, Enhancements, and the Meanings of Sports' (Research Paper No 82, Stanford Law School, February 2004)

Grenier, Michelle, Nancy Miller, and Ken Black, 'Applying Universal Design for Learning and the Inclusion Spectrum for Students with Severe Disabilities in General Physical Education' (2017) 88(6) *Journal of Physical Education, Recreation and Dance* 51-56

Holzapfel, Simon and Louisa Summers, 'An Introduction to Wheelchair Tennis for Future Athletes and Coaches' (2013) 27(4) *Palaestra* 25-30.

Human Rights Council, *Final report of the Human rights Council Advisory Committee on the possibilities of using sport and the Olympic ideal to promote human rights for all and to strengthen universal respect for them,* A/HRC/30/50 (17 August 2015)

Kiuppis, Florian, 'Inclusion in Sport: Disability and Participation' (2018) 21(1) *Sport in Society* 4-21

Krein, K, *Philosophy and Nature Sports* (Routledge, 1st ed, 2018)

Lord, Janet and Michael Stein, 'Social Rights and The Relational Value of the Rights to Participate in Sport, Recreation, and Play' (2009) 27(2) *Boston University International Law Journal* 249-281

Loy, John and W Morford, 'The Agon Motif: Redux. A Study of the Contest Element in Sport (2019) 82 *Physical Culture and Sport Studies and Research* 10-45

Mareš, Lukáš, and Daniel Novotný, 'What is sport? A response to Jim Parry' (2023) 17(1) *Sport, Ethics and Philosophy* 34–48

Moritz, Dominique and Simone Pearce, '#whataboutme: Can the Inclusion of Gender Diverse Children Pave the Way for Children with Disability in Sport?' (2019) 13(1) *Australian and New Zealand Sports Law Journal* 169–177

Pandel, Hannah, 'Healthy Competition is Good for Children' (2015) 67(1) *IPA Review* 31–33

Parry, Jim, 'On the Definition of Sport' (2022) 17(1) *Sport, Ethics and Philosophy* 49–57

Parry, Jim, 'The concept of sport in Olympism' (2020) 4 *International Academic Journal on Olympic Studies* 131–148

Pearce, Simone, 'Disability Discrimination in Children's Sport' (2017) 42(2) *Alternative Law Journal* 143–148

Pearce, Simone, 'The fundamental nature of sport: disability, discrimination and sport in Holzmueller v. Illinois High School Association' (2020) 21(1) *The International Sports Law Journal* 74–93

Pearce, Simone, Sanderson, Jay, 'The myth of a "human right to sport": how human rights can lead to true inclusion for children with disability' (2024) *International Sports Law Journal* 1–24

Productivity Commission, *Review of the Disability Discrimination Act 1992* (Report, 2004) 185

Suits, Bernard, 'The elements of sport' in *The Philosophy of Sport: A collection of essays,* Robert Osterhoudt (ed) (Charles C Thomas, 1973) 48-64

Taylor, Alice, 'The Conflicting Purposes of Australian Anti-Discrimination Law' (2019) 42(1) *University of New South Wales Journal* 199–200

Taylor, Alice, 'Disability discrimination, the duty to make adjustments and the problem of persistent misreading' (2019) 45(2) *Monash University Law Review* 461–486

Tint, A, K Thomson, and JA Weiss, 'A Systematic Literature Review of the Physical and Psychosocial Correlates of Special Olympics Participation among Individuals with Intellectual Disability' (2017) 61(4) *Journal of Intellectual Disability Research* 301-324

Turgeon, Stephanie, Jessica Turgeon and Diane Morin, 'Coaching Special Olympics: a Scoping Review' (2023) 18(1) *International Journal of Sports Science and Coaching* 304–306

B *Cases*

By Holzmueller v Illinois High School Association (2018) 17-2456

L v Minister for Education for the State of Queensland (1996) EOC 92-787

Martin Wells v Queensland Cyclists Association Incorporated (1999) EOC 93-031

P v Director-General, Department of Education (1996) 1 QADR 755

Purvis v New South Wales (Department of Education and Training) (2003) 217 CLR 92

Sklavos v Australasian College of Dermatologists [2017] 256 FCR 247

C *Legislation/Bill/Explanatory Memorandum*

Anti-Discrimination Act 1991 (Qld)

Disability Discrimination Act 1992 (Cth)

Equal Opportunity Act 2010 (Vic)

Sex Discrimination Act 1984 (Cth)

House of Representatives, The Parliament of the Commonwealth of Australia, *Disability Discrimination and Other Human Rights Legislation Amendment Bill 2008 (Cth): Explanatory Memorandum*; Australian Government, 'Review of the *Disability Discrimination Act 1992*, Inquiry Report', *Productivity Commission* (Report, 12 July 2004)

D *Treaties/Guidelines/Charters*

Australian Human Rights Commission, *Guidelines for the inclusion of transgender and gender diverse people in sport*, June 2019

Convention on the Rights of the Child (CRC) 1989, (resolution 44/25), opened for signature 20 November 1989, entered into force 2 September 1990 (‘*CRC*’)

Disability Standards for Education 2005

Human Rights and Equal Opportunity Commission No. H98/67, 24 August 1999

Human Rights Council, United Nations General Assembly, *Final report of the Human Rights Council Advisory Committee on the possibilities of using sport and the Olympic ideal to promote human rights for all and to strengthen universal respect for them,* A/HRC/30/50 (17 August 2015)

International Charter of Physical Education, Physical Activity and Sport, UNESCO(adopted by November 2015)

The Olympic Charter, in force as from 17 July 2020 (‘Olympic Charter’) art 1

U.N. General Assembly, *Convention on the Rights of Persons with Disabilities: resolution / adopted by the General Assembly*, 13 December 2006, A/RES/61/106, entered into force on 3 May 2008

Universal Declaration of Human rights (*UDHR*), A/Res 217 (III), UN GAOR, UN Doc A/810, (10 December 1948)

E *Other*

Australian Government: Department of the Prime Minister and Cabinet, ‘Australian Government Guide to Policy Impact Analysis’ (Web Page, 17 February 2023) <https://www.pmc.gov.au/sites/default/files/publications/Australian_Government_Guide_to_Regulation.pdf>

Australian Human Rights Commission, ‘Disability Standards’ (Web Page) <https://humanrights.gov.au/our-work/disability-rights/disability-standards>

Australian Government, ‘Equity, Diversity and Inclusion’, *Australian Sport Commission* (Web Page) <https://www.sportaus.gov.au/integrity_in_sport/inclusive-sport>

Disability Sports Australia, ‘Wheelchair Basketball’ (Web Page) <https://www.sports.org.au/wcbasketball>

Disability Sports Australia, ‘Wheelchair Tennis’, (Web Page) <https://www.sports.org.au/wheelchair-tennis>

FIDA, 'Welcome to FIDA' (Web Page) < https://fida.org.au/>

Football Network, 'All Abilities', *Play Football* (Web Page) <https://www.playfootball.com.au/ncdp/toolkits/inclusive-participation/all-abilities>

Football Victoria, 'All-Abilities Football' (Web Page) <https://www.footballvictoria.com.au/community/programs/all-abilities>

Goalball Australia, 'About' (Web Page) <http://www.goalballaustralia.org/about>

Little Athletics Australia, 'Inclusion of Athletes with Disability' *Inclusion* (Web Page) <https://www.littleathletics.com.au/inclusion/inclusion-and-diversity/athletes-with-disability/inclusion-of-athletes-with-disability/>

Little Atheletics Queensland, 'McDonald's State Relay Championships' (Web Page) <http://laq.org.au/mcdonalds-state-relay-championships/>

McKinnon, Rachel, 'Participation in Sport is a Human Right, Even for Trans Women', *The Sports Integrity Initiative* (Web Page, 17 June 2019) <https://www.sportsintegrityinitiative.com/participation-in-sport-is-a-human-right-even-for-trans-women/>

National Wheelchair Basketball Association, 'History of Wheelchair Basketball' (Web Page) <https://www.nwba.org/history.html>

Netball Queensland, 'The Queensland Gems', (Web Page, 2023) <https://qld.netball.com.au/queensland-gems>

New South Wales Government, 'Athletics Come and Try days for Students with Disability', *School Sport Unit* (Web Page) <https://app.education.nsw.gov.au/sport/page/1343>

O'Flaherty, Antonia, 'New inclusive sport program 'exhilarating' for Queensland students with disability', *ABC News* (News, 10 June 2021) < https://www.abc.net.au/news/2021-06-10/new-queensland-inclusive-sports-program-aims-to-address-barriers/100202856>

Proud2Play, 'Resources Hub' (Web Page) <https://www.proud2play.org.au/resources>

Queensland Government, 'Inclusion: Multi-class pathways', *Queensland Representative School Sport* (Web Page, 14 May 2024) <https://queenslandschoolsport.education.qld.gov.au/inclusion/multi-class-pathways>

Queensland Little Athletics Multi class relays at State Championships. Little Athletics in Queensland, 'State Competitions' (Web Page, 2023) <https://laq.org.au/mcdonalds-state-relay-championships/>

Schafter, Monique and James Carmody, 'Sporting bodies unveil policies for greater inclusion of trans and gender diverse people' *ABC NEWS* (News, 1 October 2020) <https://www.abc.net.au/news/2020-10-01/sporting-bodies-unveil-guidelines-for-transgender-athletes/12719706>

Special Olympics Australia (Web Page) <https://www.specialolympics.com.au/about/index>

Sporting Wheelies and Disabled Association, 'Para-Sport Come and Try Day', (Web Page, 2021) <https://www.sportingwheelies.org.au/para-sport-come-and-try-day>

Swimming Queensland, 'Multi-class Swimming' (Web Page) <https://qld.swimming.org.au/multi-class-swimming>

Variety: The Children's Charity, 'Variety Active Kids Sports Days' (Web Page) <https://varietyactivekidssportsdays.com.au/>

THE WEST PAPUAN GENOCIDE: UNITED NATIONS MALFEASANCE, WESTERN COMPLICITY AND THE FAILURE OF INTERNATIONAL LAW

JULIAN MCKINLAY KING* [1]

Intentionally breaching multiple articles of the UN Charter and associated resolutions governing decolonisation, the Secretariat of the United Nations denied the inhabitants of the Non-Self-Governing Territory registered as Netherlands New Guinea, their legal right to self-determination and planned independence. Reports by legal scholars, human rights organisations, intelligence agencies and UN organs allege the people are being subjected to a programme of systematic genocide. Re-evaluating the death count, the Indonesian government and those backing it are deemed responsible for a population deficit of at least two million people. Despite the multiple pathways available to have these breaches of international law and human rights atrocities addressed by the organs of the United Nations and the international courts, Member States and the responsible UN organs refuse to act. With the Papuan people having no legal standing under the UN Charter, and the Secretariat and Member States are apparently immune from prosecution, there appear to be few avenues to seek justice, bring about West Papua's long overdue independence and hold those responsible to account.

* Julian McKinlay King holds a master's degree in social anthropology and and completed a doctoral thesis on West Papua's failed decolonisation, ongoing genocide and the resultant liberation movement, the OPM.

[1] Editor's note: This article expands on the author's earlier article published eight years ago – Julian McKinlay King with Andrew Johnson, 'West Papua Exposed: An Abandoned Non-Self-Governing or Trust Territory' (2018) 6(2) *Griffith Journal of Law and Human Dignity* 70-106 ('McKinlay King with Johnson'). Although some of the contents in the 'Introduction and Background' section were reproduced from the earlier article for contextual purposes, the remainder of this article focuses on distinct legal areas in light of current circumstances.

CONTENTS

I INTRODUCTION AND BACKGROUND 85
II VIOLATIONS OF INTERNATIONAL LAW 88
III HUMAN RIGHTS VIOLATIONS & ALLEGED GENOCIDE 90
IV POPULATION DEFICIT 93
V AVAILABLE PATHWAYS TO JUSTICE 94
A THE TRUSTEESHIP COUNCIL 95
B THE GENERAL ASSEMBLY 97
C THE SECURITY COUNCIL 98
D THE SECRETARY-GENERAL 100
E THE ECONOMIC AND SOCIAL COUNCIL 100
F THE INTERNATIONAL CRIMINAL COURT 101
G MEMBER STATE SUPPORT UNDER UN RESOLUTION 2621 (XXV) 103
H MILITARY STRUGGLE UNDER UN RESOLUTION 2621 (XXV) 103
VI FORUM PROROGATUM 104
VII THE RESPONSE OF MEMBER STATES 105
A LIP-SERVICE *105*
B BLOOD-MONEY? *106*
C INTIMIDATION & ENTRAPMENT OF WHISTLE-BLOWERS *107*
D COMPLICITY IN GENOCIDE *107*
VIII IMMUNITY 109
IX CONCLUSIONS 109

I INTRODUCTION AND BACKGROUND

Following the creation of the *Charter of the United Nations* (‘*the Charter*’) in 1945, colonial territories are designated Non-Self-Governing Territories with the colonial power accepting a ‘sacred trust’ to deliver a ‘full measure of self-government’ to the inhabitants.[2]

[2] Charter of the United Nations (‘The Charter’) art 73.

At the completion of the Pacific War, the Netherlands was unsuccessful in re-establishing authority across the Dutch East Indies where predominantly Javanese militants with the support of deserting Japanese soldiers and their military hardware[3] were forcefully taking control of the island archipelago.[4] These amalgamated territories of former sovereign kingdoms, chiefdoms and indigenous people gained United Nations recognition in 1949 as the United States of Indonesia,[5] but within one year they succumbed to be illegally incorporated into the Republic of Indonesia under a regime led by Sukarno.[6] This denied the seventy million people of the archipelago their legal right to self-determination under the Security Council brokered Round Table Agreement.[7] The 'centralistic and militaristic approaches imposed by Jakarta' along with the denial of self-determination, became the catalyst for numerous self-determination movements.[8]

West Papua and East Timor, however, remained Non-Self-Governing Territories under the sovereignty of the Netherlands and Portugal respectively. The Netherlands was liaising with Australia (who held the eastern side of Papua) with a view to reunite the Papuan people. This culminated in 1957 with the *Joint Netherlands/Australian Statement*, that recognised the people in the Papuan territories are 'geographically and ethnologically related' with the Netherlands and Australia agreeing to strengthen cooperation between these territories 'until such time as their inhabitants ... will be in a position to determine their own future',[9] including the possibility of being re-united as one nation.[10]

[3] Christine Tjandraningsih, 'Japanese recounts role fighting to free Indonesia', *The Japanese Times* (online, 9 September 2009) <https://www.japantimes.co.jp/news/2009/09/09/national/japanese-recounts-role-fighting-to-free-indonesia/#.WecmCExL1Jk> in McKinlay King with Johnson (n 1) 73.
[4] John S Bowers, 'Japanese Nationalists Prepare to Make Guerrilla War on Dutchmen, Former Masters', *The Berkshire Eagle* (Pittsfield, Massachusetts, 15 September 1945) 1 in McKinlay King with Johnson (n 1) 73.
[5] *Question of Indonesia*, GA res 301, UN Doc A/RES/301 (2 December 1949).
[6] 'Indonesia Drops Federation; It's a Unitary State – Soekarno Proclaims Centralised Rule', *Chicago Daily Tribune* (Chicago, 15 August 1950) 13 in McKinlay King with Johnson (n 1) 73.
[7] United Nations Commission for Indonesia, *Round Table Conference on Indonesia*, UN Doc S/1417/Add.1 (14 November 1949) Chapter VI, Article 43; see also United Nations Commission for Indonesia, *Special report to the Security Council on the Round Table Conference*, UN Doc s/1417 (1949) 30, 'Right of Self-Determination.'
[8] M Ya'kub Aiyup Kadir, 'Revisiting Self-Determination Conflicts in Indonesia: An International Law Perspective' (2015) 5(2) *Indonesia Law Review* 123, 136.
[9] 'Joint Netherlands/Australian Statement' (1957) 28(11) *Current Notes on international affairs* 888 in McKinlay King with Johnson (n 1) 73.
[10] 'Special Study on New Guinea', 1958, *National Archives of Australia*, File A1838 TS696/3/2 Part 3, 201 (online, 1958) 201 in McKinlay King with Johnson (n 1) 73.

By 1961, the Netherlands had created the New Guinea Council to assist with the planning towards independence. On 19 October 1961, the New Guinea Council proclaimed to the world the people's desire to become a new nation called West Papua.[11] This was followed by the inaugural raising of the West Papuan national flag alongside that of the Netherlands on 1 December 1961 in the prelude to independence.[12]

Indonesia's illegal military incursions into West Papua at the time were easily repulsed by the Netherlands,[13] however the threat of alignment with the Soviet Union was the excuse used by Washington to coerce the Netherlands to relinquish the Territory.[14] This only occurred however after the Netherlands attempted to have the United Nations take over the Territory in 1961 via a United Nations Trusteeship.[15] This proposal however failed to gain the required two-thirds majority in the General Assembly due to the Cold-War and religious affiliations taking precedence over the legal rights of the West Papuan people.

Consequently, this registered Non-Self-Governing Territory was transferred from the Netherlands to Indonesia via the *Indonesia and Netherlands Agreement (with annex) concerning West New Guinea (West Irian)* ('*the Agreement*').[16] *The Agreement* stipulated that the administration of the Territory would be transferred to the United Nations in the first instance, with the United Nations administration having the *discretion* to transfer the Territory to Indonesia the following year.[17] *The Agreement* however, was only between the two Member States. A second agreement between the United Nations, Indonesia and the Netherlands was published the following year rather than being presented before the

[11] 'Colony's Name Changed', *New York Times* (online, 1 December 1961) <https://www.nytimes.com/1961/12/01/archives/colonys-name-changed.html>.
[12] *Land of the Morning Star* (Film Australia, 2003) 0:17:17 <https://www.screenaustralia.gov.au/screen-guide/land-of-the-morning-star-15977/>
[13] 'Indonesian Troops Infiltrate into New Guinea Area', *The Palladium-Item* (Richmond, Indiana, 20 September 1961) in McKinlay King with Johnson (n 1) 74.
[14] 'Secret Letter from John F Kennedy to the Prime Minister of the Netherlands, 2 April 1962', *Free West Papua Campaign* (online, 2 April 1962) <https://www.freewestpapua.org/documents/secret-letter-from-john-f-kennedy-to-the-prime-minister-of-the-netherlands-2nd-april-1962/>.
[15] *General debate*, UN GAOR, 1016th plen mtg, Agenda Item 9, UN Doc A/PV.1016 (26 September 1961), 90 para 16.
[16] *Indonesia and Netherlands Agreement (with annex) concerning West New Guinea (West Irian*), signed 15 August 1962, 437 UNTS 6311 (entered into force 21 September 1962) ('*the Agreement*').
[17] Ibid art 12.

General Assembly for consideration.[18] Legal analysis along with now-declassified government and UN archives reveal *the Agreement* was recognised by the colonial powers to be a proposed Trusteeship Agreement where, under Article 76b of *the Charter*, the only available outcome is 'self-government or independence'.[19] The transfer from the administration of the United Nations to the Republic of Indonesia is thus deemed illegal.

As Pieter Drooglever concludes in his 850-page review of West Papua's history:

> The international community … has interfered with the course of events in all kinds of ways, and in doing so, has often been the primary driving force behind change. This was most clearly expressed in the process that led to the conclusion of [*the Agreement*] and the regulations based on this. For those who are able to bear it, *historical responsibility should also have significance under international law*.[20]

II VIOLATIONS OF INTERNATIONAL LAW

In 1969, following the Secretary-General's report on the implementation of *the Agreement,* two Member States drew attention to the failure by Indonesia and the United Nations to uphold the West Papuan people's legal right to self-determination.[21] The required two-thirds of the General Assembly however refused to support demands for a new plebiscite, thus allowing the Indonesian annexation of West Papua to continue.[22]

Since that time, scholars have revisited the history of West Papua's transfer to Indonesia, in particular the Orwellian 'Act of Free Choice',[23] and detail a myriad of breaches of

[18] *United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian),* 15 August 1962, 437 UNTS 6312 (registered ex officio on 21 September 1962).
[19] McKinlay King with Johnson (n 1); Leon Kaulahao Siu and Mehmet Sukru Guzel, *Modus Vivendi Situation of West Papua* (Lulu Publishing Services, 2018) 140.
[20] Pieter Drooglever, *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua* (One World Publications, 2010) 764 (emphasis added).
[21] *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, signed 15 August 1962, [1962] A/RES/1752 (XVII), (entered into force 21 September 1962); see also *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, UN GA, 17th sess, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962) 54 [218], 55 [221] (Australia), 56 [242] (Dahomey).
[22] See 1127th, 1810th, 1812th and 1813th General Assembly Plenary Meetings (1969).
[23] *The Agreement* (n 16) art XVIII.

international law under *the Charter* and UN resolutions governing decolonisation. These include: the Secretary-General's secret collusion with Sukarno and Washington in designing *the Agreement* for the 'affirmation of Indonesian sovereignty', in violation of Article 100 of *the Charter*;[24] the Secretariat removing West Papua – then listed as Netherlands New Guinea – from the 1962 List of Non-Self-Governing Territories prior to any act of self-determination;[25] the Secretariat's withholding of *the Agreement* for five weeks prior to its introduction to the General Assembly, in breach of Article 102 of *the Charter*;[26] the Secretariat's failure to retain United Nations experts to monitor and assist in the preparations for self-determination, in violation of Article XVI of *the Agreement*;[27] the 'Act of Free Choice' – where 1026 Papuans were hand-picked from a population of 800,000 – in breach of UN resolution 1541 (XV) demanding universal suffrage;[28] the Secretariat's withholding of the Secretary-General's report from the General Assembly in 1969, and only introducing it 'at such notice and time as to hinder unwanted scrutiny and debate', in violation of Article 102 of *the Charter*;[29] and how UN resolution 2504 (XVII) of 1969 only 'takes note' of a report of the Secretary-General.[30] As the co-founder of International Lawyers for West Papua Melinda Janki details, there is no UN resolution that stipulates the General Assembly's approval of the integration of West Papua into Indonesia.[31]

These breaches of international law were not human errors of procedure but a calculated covert programme of malfeasance that commenced in 1962 and continues to the present day. Despite these multiple breaches of international law, the international community and the 'responsible' organs of the United Nations continue to remain silent and thus

[24] Julian Alec McKinlay King, 'A Soul Divided: The UN's Misconduct over West Papua' (2019) 16(1/2) *PORTAL Journal of Multidisciplinary International Studies* 59, 67.
[25] Jennifer Robinson, 'Self-Determination and the Limits of Justice: West Papua and East Timor, *Future Justice* (online, 2010) <https://www.writing.org.au/wp-site/wp-content/uploads/2022/01/Jennifer_Robinson2.pdf> 172.
[26] McKinlay King (n 24) 64.
[27] All UN staff departed the Territory on the 1 May 1963, the same day of the Indonesian take-over. See John Saltford, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969: The Anatomy of Betrayal* (Routledge Curzon, 2003).
[28] Melinda Janki, 'West Papua and the Right to Self-Determination under International Law' (2010) 34(1) *West Indian Law Journal* 1, 10, 13.
[29] McKinlay King (n 24) 75.
[30] Janki (n 28) 27.
[31] Janki (n 28) 28.

complicit in the illegal annexation and the ongoing human rights violations deemed by many as 'genocide'.

III Human Rights Violations & Alleged Genocide

Even before the administration of West Papua was transferred to Indonesia on 1 May 1963, United Nations officials stationed in the Territory warned their superiors of the impending catastrophe:

> The Indonesians strike me as out to attain their ends quite ruthlessly if necessary. They brook no serious discussion of facts or ideas contrary to their doctrinaire beliefs. In fact, in this they are very like the Japanese before the war. It cannot be long before they get themselves most intensely hated … By far the majority of the Papuans in my Division dread the consequence of the Indonesian invasion and it would take little to influence some of them to resist, whether it would do them any good or not.[32]

A 1969 now-declassified US Department of State dispatch makes the first mention of Indonesia's plan of intentional genocide.[33] The report details how military commanders run the local towns, 'expropriate' commodities intended for sale, and operate as a 'fiefdom of vested ... interests.'[34] It describes the Indonesian troops as 'trigger happy' with a backdrop of 'military repression' and '*rumours of intended genocide*'.[35]

Since then, legal scholars, intelligence agencies, human rights groups and the United Nations have similarly described Indonesia's oppression as a systematic programme of intentional genocide. The first detailed legal analysis was published by Elizabeth Brundige et al from the Lowenstein International Human Rights Centre at Yale University. This 75-page document details the systematic targeting of the Papuan people by the Indonesian military and security forces. Whether by extrajudicial killings, torture,

[32] G S Rawlings, 'UNTEA Divisional Commander Report 12 December 1962)' (*Archives and Records Section of the United Nations*, UNTEA 1962–63, by permission of UN Secretariat) in McKinlay King (n 24) 69.
[33] Confidential Airgram from Frank Galbraith US Embassy in Jakarta, 9 June 1969 (National Security Archive, Indonesia's 1969 Takeover of West Papua Not by "Free Choice", Brad Simpson, ed) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB128/index.htm>.
[34] Ibid, Document 8, 3, 4.
[35] Ibid (emphasis added).

disappearance, rape and sexual violence, the intentional spread of disease or transmigration, 'the Indonesian government has committed proscribed acts with the intent to destroy the West Papuans … in violation of the [Genocide Convention]'.[36]

Other scholars similarly detailed methods of torture, mass killings, starvation, aerial bombardment, internal displacement, the intentional spread of HIV/AIDS via military-run brothels, Islamisation via Muslim-only transmigration, the training and arming of militia groups and a system of apartheid.[37]

While the methods of Indonesia's alleged genocide have been detailed by scholars, the necessary 'intent' by Indonesia's 'top-tier leaders' to commit these atrocities as defined under the Genocide Convention is addressed by Jim Elmslie and Camellia Webb-Gannon. They detail: Indonesian Brigadier-General Ali Murtopo's threat to Papuans participating in the 1969 *Act* stating that their 'accursed tongues' would be cut out if they did not vote to be incorporated with Indonesia and if they wanted independence they should move to another island 'or even the moon!'; President Megawati's address to the military instructing the TNI to ignore international law governing human rights; the national hero status given to the Kopassus soldiers responsible for the murder of pro-independence leader Theys Eluay; and how Indonesian soldiers and police are instructed to kill the Papuan people.[38]

Paul Antonopoulos and Drew Cottle detailed the integral relationship between neoliberal capitalism and the West Papuan genocide arguing that 'Freeport's mining interests are inseparable from the mass murder, rape and torture by the Indonesian military against indigenous Papuans'.[39] They also argued that Australia may be deemed 'indirectly

[36] Elizabeth Brundige et al, *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (Allard K Lowenstein International Human Rights Centre, Yale Law School, Report, April 2004) 75.
[37] John Wing and Peter King, *Genocide in West Papua? The Role of the Indonesian State Apparatus and a Current Needs Assessment of the Papuan People* (West Papua Project, Report, 2005) 8-10, 16, 25, 28, 42; see also, Alison Bevege, 'A Secret Genocide: The Blood Politics of West Papua' (2014) 85(3) *Australian Institute of Policy and Science* 7; Socratez Sofyan Yoman, *Systematic genocide of the indigenous people of West Papua under special autonomy* (Centre for peace and Conflict Studies, University of Sydney, Report, 2005).
[38] Jim Elmslie and Camellia Webb-Gannon, 'A Slow-Motion Genocide: Indonesian Rule in West Papua' (2013) 1(2) *Griffith Journal of Law & Human Dignity* 142, 157-9.
[39] Paul Antonopoulos and Drew Cottle, 'Forgotten Genocide in Indonesia: Mass Violence, Resource Exploitation and Struggle for Independence in West Papua' in Frank Jacob (ed), *Genocide and Mass Violence in Asia: An Introductory Reader* (de Gruyter Brill, 2019), 169.

complicit' with the military hardware and training provided to Indonesia's security apparatus, while Washington may be deemed ultimately responsible.[40]

In 2013 the United Nations Permanent Forum on Indigenous Issues within the Economic and Social Council published the report *Study on decolonisation of the Pacific region*, which includes an overview of West Papua's failed decolonisation. It describes how the people are still 'struggling to acquire *their right to self-determination and independence*.' The report quotes Japanese legal scholar Akihisa Matsuno, who says that what is happening in West Papua *amounts to genocide, both physical and cultural*, with the systematic annihilation of the civilian population that is 'intentional, widespread and ongoing'.[41]

The subscription-only military intelligence journal *Defense & Foreign Affairs,* produced by US-based strategist Gregory R Copley, reviews Australia's defence capability and strategic challenges.[42] While ostensibly focused on Australia's nascent AUKUS pact with the UK and US military, the report also reflects on Australia's relationship with Indonesia and the occupation of West Papua, which states:

> Australia is effectively powerless to challenge or moderate Indonesia on the question of Jakarta's occupation of West Papua, where Indonesia is involved in an essentially genocidal conflict to replace the local Melanesian population with imported Javanese workers and residents.[43]

This confidential analysis—prepared for governments, armed forces and intelligence agencies—indicates that the Western intelligence services and governments are fully aware of Indonesia's ongoing genocidal policy in West Papua. Yet all fail to act.

In addition, a multitude of United Nations reports detail ongoing atrocities committed by Indonesia's military and police in West Papua,[44] and despite letters from the Office of the

[40] Ibid.
[41] Valmaine Toki, Economic and Social Council, *Study on Decolonisation in the Pacific Region*, *Permanent Forum on Indigenous issues*, 12th sess, UN Doc E/C.19/2013/12 (20 February 2013) (emphasis added).
[42] Gregory R Copley, 'AUKUS: Operational Vitality: Strategic Challenges' (2023) 51(4) *Defense & Foreign Affairs Strategic Policy* 6-8.
[43] Ibid 8.
[44] See, eg, Human Right Committee, *Concluding Observations on the Second Periodic Report of Indonesia*, UN Doc CCPR/C/IDN/CO/2 (3 May 2004).

High Commissioner for Human rights to the Indonesian government demanding that it address these atrocities, Indonesian authorities continue to deny wrongdoing.[45]

Despite ongoing reports by legal scholars, UN agencies and intelligence organisations detailing the Indonesian atrocities, no legal action or military intervention has been taken either by the relevant organs of the United Nations or Member States. Thus, the intentional genocide continues, along with the ever-increasing loss of life.

IV Population Deficit

For many decades, scholars researching the West Papuan genocide stated a loss of life between 100,000 and 500,000, but without providing attribution or statistical analysis.[46]

In 2004, however, historian Greg Poulgrain utilised the available population data for West Papua and neighbouring Papua New Guinea to estimate a population deficit that has occurred since the Indonesian takeover. With a population of 5.5 million in Papua New Guinea as of 2004, compared to only 1.8 million West Papuans at that time, applying the population growth rate for Papua New Guinea to West Papua, he concluded that '[had] the indigenous population of West Papua grown at the same rate as PNG, it should have achieved a total of approximately 3.4 million.'[47] With 1.8 million West Papuans in 2004, potentially amounts to a deficit of 1.6 million people, which can be attributed to killings, starvation and disease, much of it attributable to Indonesian government actions. The population deficit compounds over decades as fewer children are born and survive due to a depleted population.

Since 2004, the Indonesian authorities have ceased to report population statistics for the indigenous Papuan community as distinct from the transmigrant population. However,

[45] See for example: Jose Francisco Cali Tzay, Special Rapporteur on the rights of indigenous people, Morris Tidball-Binz, Special Rapporteur on extrajudicial, summary or arbitrary executions and Cecilia Jimenez-Damary, Special Rapporteur on the human rights of internally displaced persons, Letter to Her Excellency Lestari Priansari Marsudi, Minister for Foreign Affairs, Republic of Indonesia, 2021, Ref: AL IDN 11/2021 (leaked to the author, and on file with the author).
[46] See, eg, Robinson (n 25) 176; International Parliamentarians of West Papua, 'Human Rights in West Papua' (online) <https://www.ipwp.org/human-rights-in-west-papua/>; Bevege (n 37).
[47] Greg Poulgrain, 'West Papua, Indonesia' in Dinah Shelton (ed), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005) 1157.

the Unrepresented Nations and Peoples Organization estimates a total population in 2025 for West Papua of 4.4 million, including approximately 2 million indigenous West Papuans.[48]

Population data for Papua New Guinea, however, continues to be reported. In 2025, the government estimates suggest a population of over 11 million, while an assessment utilising satellite imagery and ground truthing puts the figure closer to 20 million.[49]

With the population of Papua New Guinea at least doubling and possibly quadrupling since 2004, if a similar increase had occurred amongst the West Papuans, today's figure would be somewhere between 3.6 and 7.2 million, with 5.4 million as the average. With the Papuan population currently only 2 million, this method suggests a population deficit of 3 million.

Similarly extrapolating the 2004 population deficit figure of 1.6 million for a further two decades, the population deficit is now approaching 2.5 million. This suggests that the cumulative impact of sixty-odd years of intentional colonial-rule have caused the West Papuan population to be millions less than it would have been otherwise.

V Available Pathways to Justice

Under international law governed by *the Charter*, 'West Papuans have no recourse to international courts or human rights mechanisms to remedy the injustices they suffer.'[50] Instead, only Member States or authorised international organisations can access the UN organs to address the breaches regarding West Papua's failed decolonisation.

However, as of yet, no Member State has availed itself to have West Papua's legal status, the ongoing human rights violations and the sixty-year conflict resolved. As membership of the United Nations dictates, all Member States have a legal obligation to uphold *the*

[48] Unrepresented Nations & Peoples Organization, 'West Papua' (online) <https://unpo.org/member/west-papua/>.
[49] Bernard Lagan, 'Papua New Guinea Finds Real Population is Almost Double Official Estimates', *The Times* (online, 5 December 2022) <https://www.thetimes.com/uk/politics/article/papua-new-guinea-finds-real-population-is-almost-double-official-estimates-n86g6sdpm>.
[50] Robinson (n 25) 169.

Charter and bring these violations to the attention of the international community and relevant UN organs.[51]

Pathways available to seek such legal redress include: the Trusteeship Council; the General Assembly; the International Court of Justice; the Economic and Social Council; the Secretary-General; the Security Council; and the International Criminal Court. As detailed in Article 55c of *the Charter*, the United Nations shall promote 'universal respect for, and observance of, human rights and fundamental freedoms for all…', based on the respect for the principle of 'equal rights and self-determination of peoples'. Article 56 states '[all] Members pledge themselves *to take joint and separate action in co-operation with the Organization* for the achievement of the purposes set forth in Article 55.'[52] In the case of West Papua, all Member States are in breach of these fundamental principles.

A *The Trusteeship Council*

The United Nations Secretariat along with the governments of the United States, the Netherlands, Australia and Indonesia were all aware, that the proposed agreement transferring this Non-Self-Governing Territory to the United Nations and then Indonesia was a draft Trusteeship Agreement, and therefore subject to the International Trusteeship System governed by Chapter XII of *the Charter*.[53] The 1959 secret despatch from the American Embassy in Jakarta reveals Washington's role in initiating the transfer of West Papua to Indonesia via a proposed United Nations Trusteeship Agreement. In part it reads:

> [T]he Embassy submits a specific proposal for settlement of the West New Guinea dispute … [envisaging] a special *United Nations trusteeship* over the territory for a limited number of years, at the end of which time sovereignty would be turned over to Indonesia.[54]

[51] *The Charter* (n 2) art 4.
[52] Ibid art 56 (emphasis added).
[53] See generally McKinlay King with Johnson (n 1).
[54] United States Embassy Djakarta, 'A Proposal for Settlement of the West New Guinea Dispute' (online, 26 May 1959) <https://history.state.gov/historicaldocuments/frus1958-60v17/d203> (emphasis added).

While the Secretariat in 1962 failed to inform the Trusteeship Council of the proposed draft Trusteeship Agreement so that it could assist in its formulation as required under Article 85 of *the Charter*, a simple pathway exists for Member States to have the Trusteeship Council intervene. Under Rule 7(e) of the *Rules of Procedure of the Trusteeship Council*, all items proposed by any Member State are to be added to the provisional agenda of the Trusteeship Council via the Secretary-General.[55] Therefore, any Member State can draw the Council's attention to the failure of the Secretary-General to inform the Trusteeship Council of the proposed transfer of this Non-Self-Governing Territory to the United Nations, as available *only* under Article 81 of Chapter XII of *the Charter* governing the International Trusteeship System.

Furthermore, Rule 74 of the *Rules of Procedure of the Trusteeship Council* allows for petitions to be accepted by the Council 'if they concern the affairs of one or more Trust Territories or *the operation of the International Trusteeship System* as laid down in *the Charter*'.[56] Rule 75 states that 'Petitioners may be the inhabitants of Trust Territories, or other parties'.[57] Such has been done but without any response.

While the Trusteeship Council suspended regular operations on 1 November 1994 – no longer having registered Trust Territories to oversee – as a principal organ of the United Nations, it continues to meet every two years to elect new office-bearers.[58] Therefore, Member States and Petitioners – drawing attention to their breach of the International Trusteeship System – can request the Trusteeship Council seek an advisory opinion from the International Court of Justice, as encouraged under Article 96 of *the Charter*, and authorised by General Assembly resolution 171 (II) part B.[59]

A legal opinion from the International Court of Justice will determine whether *the Agreement* was a draft Trusteeship Agreement creating a Trust Territory of the United Nations, or whether West Papua remains a Non-Self-Governing Territory abandoned by

[55] *Rules of Procedure of the Trusteeship Council*, UN TCOR, 61st sess, UN Doc T/1/Rev.7 (1995) ('*Rules of Procedure*') rule 7.
[56] Ibid rule 74 (emphasis added).
[57] Ibid rule 75.
[58] *Amendment of the Rules of Procedure of the Trusteeship Council*, UN TCOR, 61st sess, 1705th mtg, UN Doc T/RES/2200(LXI) (25 May 1994) annex para 3; see, eg, UN TCOR, 1716th mtg, UN Doc T/PV.1716 (15 December 2017) <http://undocs.org/t/pv.1716>.
[59] General Assembly resolution 171 (II) part B states The General Assembly ... [a]uthorizes the Trusteeship Council to request advisory opinions of the International Court of Justice on legal questions arising within the scope of the activities of the Council.

the Netherlands and annexed by the United Nations and then Indonesia. Either outcome should compel the General Assembly to take 'immediate steps' to fulfil its legal obligation to deliver 'complete independence and freedom' to the West Papuan people under the *Declaration on the Granting of Independence to Countries and Peoples*.

B *The General Assembly*

The General Assembly 'may discuss any questions or any matters within the scope of the present Charter … and may make recommendations to the Members of the United Nations or to the Security Council or to both on any such questions or matters.'[60] Therefore, any Member State can bring to the General Assembly's attention the multiple breaches of *the Charter, the Agreement* and UN resolutions, with regard to West Papua's failed decolonisation.

Under Article 11 (2) of *the Charter*, the General Assembly 'may discuss any questions relating to the international peace and security brought before it by any Member of the United Nations, or by the Security Council, or by a state which is not a member of the United Nations.' As such, any Member State can bring the General Assembly's attention to the ongoing conflict in West Papua and trigger Security Council intervention accordingly.

Article 14 of *the Charter* allows the General Assembly to make recommendations:

> for the peaceful adjustment of any situation, regardless of origin, which deems likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations.[61]

[60] *The Charter* (n 2) art 10.

[61] The Purposes of the United Nations are detailed in Chapter I of *the Charter*. They are:

1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to make other appropriate measures to strengthen universal peace;

Given the ongoing violation of these Principles, Article 14 of *the Charter* allows the General Assembly to intervene and recommend ameliorative action.

Under the *Rules of Procedure of the General Assembly*, Rule 13(e) states that the provisional agenda of a regular session shall include 'all items proposed by any Member of the United Nations'.[62] Therefore, West Papua's legal status, breaches of *the Charter* and UN resolutions, the ongoing conflict, and Indonesia's human rights violations can all be put on the agenda of the General Assembly by any Member State for discussion, debate and referral to the Security Council and the International Court of Justice, as available under Article 96 of *the Charter*.[63]

C *The Security Council*

The Security Council's primary responsibility is 'for the maintenance of international peace and security' and it 'shall act in accordance with the Purposes and Principles of the United Nations'.[64] The Security Council 'may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute,'[65] and any Member State 'may bring any dispute, or any situation of the nature referred to in Article 34, to the attention of the Security Council or of the General Assembly.'[66] The Security Council 'may [then] … recommend appropriate procedures or methods of adjustment' and 'take into consideration that legal disputes should as a general rule be referred by the parties to the International Court of Justice'.[67]

3. To achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
4. To be a center for harmonizing the actions of nations in the attainment of these common ends.

[62] Rules of Procedure of the General Assembly, UN Doc A/520/Rev.21 (2025) 4, rule 13(e).

[63] Under Article 96 of *the Charter* (n 2):

1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.
2. Other organs of the United Nations and special agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities.

[64] *The Charter* (n 2) art 24.

[65] Ibid art 34.

[66] Ibid art 35.

[67] Ibid art 36.

Given Indonesia refused to have the dispute over West Papua resolved by the International Court of Justice,[68] the Security Council under Chapter VII of *the Charter* can take ameliorative action. This includes calling upon Member States to apply such measures as economic sanctions, interruptions to rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations. Should the Security Council deem such measures inadequate, 'it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.'[69]

The Charter also supports 'regional arrangements or agencies [in] … matters relating to the maintenance of international peace and security' and 'shall encourage the development of pacific settlement of local disputes through such regional arrangements … either on the initiative of the states concerned or by reference from the Security Council'.[70] Regional bodies including the Melanesian Spearhead Group and Pacific Island Forum are therefore encouraged to intervene in West Papua's case, but all refuse to do so.

Any party to the conflict and a non-member State under Article 35 of *the Charter* may:

> bring to the attention of the Security Council or of the General Assembly any dispute to which it is a party if it accepts in advance, for the purposes of the dispute, the obligations of pacific settlement provided in the present Charter.

The Organisasi Papua Merdeka, (OPM),[71] as a party to the conflict and a non-member State, may therefore seek intervention via these organs. Furthermore, as detailed by Melinda Janki, the International Court of Justice has since ruled that the right to self-determination is a right *erga omnes* and now 'one of the essential principles of international law'.[72]

[68] *The question of West Irian (West New Guinea)*, UN GAOR, 9th sess, 509th plen mtg, Agenda item 61, UN Doc A/2831 (4 December 1954) para 102.
[69] *The Charter* (n 2) art 41.
[70] Ibid art 52.
[71] OPM represents the 'pro-independence movement', see, eg, Institute for Policy Analysis of Conflict, 'The Current Status of The Papuan Pro-Independence Movement' (Report, 24 August 2015) <https://understandingconflict.sgp1.digitaloceanspaces.com/dashboard/05ab1f2f31ee54cfd3a4c0b38c893a44.pdf>.
[72] Janki (n 28) 32; See also, ICJ's judgment on the right to self-determination in *East Timor* (*Portugal v Australia*) (Judgement) [1995] ICJ Rep 29.

The OPM's Diplomatic Council has sought Security Council's intervention since 2022 but without any response.

D *The Secretary-General*

Article 99 of *the Charter* states: 'The Secretary-General may bring to the attention of the Security Council any matter which in his opinion may threaten the maintenance of international peace and security.' Given the ongoing war for liberation between Indonesia and the OPM being publicised in both the international media and United Nations reports,[73] the Secretary-General can bring this dispute to the Council. The OPM's Diplomatic Council wrote to the Secretary-General in 2021 requesting the Secretary-General refer the ongoing conflict to the Security Council.[74] The Secretary-General neither acted nor responded to the request.

E *The Economic and Social Council*

Under Article 62 of *the Charter* the Economic and Social Council is authorised to:

1. make or initiate studies and reports with respect to international economic, social, cultural, educational, health, and related matters and may make recommendations with respect to any such matters to the General Assembly, to the Members of the United Nations, and to the specialized agencies concerned;
2. make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all;
3. prepare draft conventions for submission to the General Assembly, with respect to matters falling within its competence; and,
4. call, in accordance with the rules prescribed by the United Nations, international conferences on matters falling within its competence.

[73] United Nations Human Rights Office of the Commissioner, 'Indonesia: UN Experts Sound Alarm on Serious Papua Abuses, Call for Urgent Aid' (Press Release, 1 March 2022) <https://www.ohchr.org/en/press-releases/2022/03/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid?LangID=E&NewsID=28180>.
[74] Letter to UN Secretary-General Mr Antonio Gutteres from Amatus Douw (Chairman of the Diplomatic Council Free Papua Movement/ TPNPB-OPM), 26 October 2021 (copy on file with author).

Furthermore, under Article 65 of *the Charter* it may 'furnish information to the Security Council' while under Article 68 of *the Charter* it may establish commissions for the promotion of human rights.

As cited earlier in this paper, the Economic and Social Council reported in 2013 on the social conditions in West Papua. The report states:

1. that the people of West Papua are still 'struggling to acquire their right to self-determination; and,
2. human rights violations occurring in West Papua amount to genocide, both physical and cultural, with the systematic annihilation of the civilian population 'intentional, widespread and ongoing.'[75]

Since the publication of this report, the Economic and Social Council has failed to undertake its obligations under Article 62 of *the Charter*, to:

- refer the conflict to the Security Council;
- make recommendations to the General Assembly;
- instigate an international conference to address these breaches;
- set up a commission for the promotion of human rights in West Papua; and/or,
- engage the specialised agencies such as the United Nations Decolonisation Committee.

F *The International Criminal Court*

The *Convention on the Prevention and Punishment of the Crime of Genocide* ('*the Genocide Convention*') was adopted on 9 December 1948[76] while the International Criminal Court ('*the Court*') came into being on 17 July 1998 and is governed by the *Rome Statute of the Criminal Court* ('*the Rome Statute*').[77]

Under Article VIII of *the Genocide Convention*, any:

[75] Toki (n 41).
[76] Convention on the Prevention and Punishment of the Crime of Genocide, opened for signature 9 December 1948 (entered into force 12 January 1951) ('the Genocide Convention').
[77] *Rome Statute of the International Criminal Court*.

> Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

And under Article 14 of *the Rome Statute*:

> A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.

Thus, any State Party to *the Genocide Convention* can initiate an investigation by referring the situation to the Prosecutor.

Furthermore, under Article 1 of *the Genocide Convention*, all Contracting Parties 'confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law *which they undertake to prevent and to punish*.'[78]

Despite the myriad of reports alleging the case of genocide, no Contracting Party has yet referred West Papua to the 'competent organs of the United Nations to take such action … as they consider appropriate for the prevention and suppression of acts of genocide' as available under Article VIII of *the Genocide Convention*. All Contracting Parties are thus in breach.

While Indonesia is a non-state party to the International Criminal Court, Article 15 of the *Rome Statute* governing the powers of the Prosecutor states: 'The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.'

The OPM's Diplomatic Council has submitted evidence to the prosecutor including a submission by the author in mid-2025 initiating a preliminary investigation. The outcome awaits.

[78] *The Genocide Convention* (n 76) art 1 (emphasis added).

In addition, under Article IX of *the Genocide Convention*, the International Court of Justice is available to determine 'the responsibility of a State for genocide or for any of the other acts enumerated in Article III … at the request of any of the parties to the dispute'.

G *Member State support under UN resolution 2621 (XXV)*

In 1970, the United Nations General Assembly held a special session to commemorate the tenth anniversary of resolution 1514 (XV)– *Declaration on the Granting of Independence to Countries and Peoples*, in order to promote 'practical action for the speedy liquidation of colonialism in all its forms and manifestations'.[79]

This resulted with the adoption of General Assembly resolution 2621 (XXV)– *Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples* ('*Programme of action*'), under which Part 3 (2) states that 'Member States shall render all necessary moral and material assistance to the peoples of colonial Territories in their struggle to attain freedom and independence.' Part 3 thus implores Member States to support the West Papuan people in their struggle for independence. As yet, all are in breach of this resolution.

H *Military struggle under UN resolution 2621 (XXV)*

Part 2 of the *Programme of action* states that: '[r]eaffirms the inherent right of colonial peoples to struggle by all necessary means at their disposal against colonial Powers which suppress their aspiration for freedom and independence.'

As recognised by former OPM freedom fighter turned scholar, Otto Ondawame, the use of arms and any other available means by the West Papuan people is therefore an

[79] *Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples*, GA Res 2621 (XXV), UN GAOR, 25th sess, 1862nd plen mtg, UN Doc A/8086, (12 October 1970).

'inherent right'.[80] The guerrilla warfare waged by the West Papuan people since 1965,[81] is therefore an inherent right under the United Nations *Programme of action*.

VI FORUM PROROGATUM

In 1958, the Netherlands offered to bring the matter before the International Court of Justice, following Indonesia's claim to the Territory and military incursions, in breach of Article 2 of *the Charter*; Indonesia, however, refused to submit to the Court's jurisdiction undoubtedly aware that they had no legal claim to another Member State's registered Non-Self-Governing Territory.[82]

In 2021, the Indonesian government labelled the OPM a terrorist organisation after they shot a senior member of their military.[83] In response to this label, the OPM issued a press release stating that if Indonesia continues their programme of genocide, the OPM will announce a similar programme targeting Indonesian trans-migrants in West Papua, and invited Indonesia to the International Criminal Court and the International Court of Justice to determine 'who are the real terrorists.'[84]

This statement provoked a response from Indonesia's Coordinating Minister for Political, Legal and Security Affairs Mahfud Md. Mahfud, 'invited the TPNPB-OPM to take legal steps to the United Nations over their status as terrorists' adding 'Please go to the UN'.[85]

In addition, Mr Doni, Representative for Indonesian President Widodo, stated in an interview on television along with OPM's Media Spokesperson Sebby Sambom: 'Yes,

[80] Otto Ondawame, '*One People One Soul' West Papuan Nationalism and the OPM* (Crawford House Publishing, 2010) 231.
[81] Ibid 64.
[82] *The question of West Irian (West New Guinea)* (n 68).
[83] Vidhyandika Djati Perkasa and Alif Satria, 'Conflict Resolution in Papua and the Label of Terrorism', *The Diplomat* (online, 7 May 2021) <https://thediplomat.com/2021/05/conflict-resolution-in-papua-and-the-label-of-terrorism/>.
[84] Amatus Douw (n 74).
[85] 'Dicap Teroris, TPNPB-OPM Ancam Kampanye Sasar Orang Jawa' [Labelled a Terrorist, TPNPM-OPM Threatens Campaign Targeting Javanese People] *Tempo* (online, 2 May 2021) (online) <https://nasional.tempo.co/read/1458545/dicap-teroris-tpnpb-opm-ancam-kampanye-sasar-orang-jawa>.

please let's go to the International Court. We are ready with our legal argument, we have all our evidence and we will argue why this label terrorist is given to TPNPB-OPM.'[86]

Under the *forum prorogatum* rule of the International Court of Justice,[87] such an invitation from the Indonesian government 'to go to the international court' confirms Indonesia's submission to the Court's jurisdiction.[88]

VII The Response of Member States

A *Lip-service*

Many governments have raised concerns regarding *the Agreement* and West Papua's right to self-determination in the General Assembly,[89] and Indonesia's ongoing human rights violations.[90] None however have upheld their legal obligation to bring these violations of international law to the relevant United Nations organs and the courts, nor have they offered moral or material assistance to the West Papuan people.

In 2010, however, Vanuatu was on the cusp of doing so. After several years lobbying by Otto Ondawame – then based in Port Vila representing the OPM and the West Papua National Coalition for Liberation (WPNCL),[91] – the *Petition of People of Vanuatu* demanded the government adopt a clear foreign policy supporting West Papua's independence.[92] Tabled in the Parliament by independent MP Ralph Regenvanu, this

[86] IDN Times, 'NGOBROL Seru IDN Times "Label Teroris Pada KKB, Mampukah Redam Konflik Papua?"' (YouTube, 7 May 2021) 7:39/34:04 to 10:37/24:04 <https://www.youtube.com/watch?v=4tCE4VnzjUg>.
[87] 'Forum Prorogatum', *Oxford Public International Law* (online) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1575.013.1575/law-mpeipro-e1575>.
[88] Monica Feria-Tinta, 2021, 'Advice on the legal status of West Papua under the UN Charter', *Twenty Essex*, Confidential report prepared for the author and Amatus Douw, 31 (copy on file with the author).
[89] See, eg, arguments made in 1127th and 1810th General Assembly Plenary Meetings.
[90] See, eg, Liam Fox, 'Pacific Nations Call For UN Investigations into Alleged Indonesian Rights Abuses in West Papua', *ABC News* (online, 2 March 2017) <http://www.abc.net.au/news/2017-03-02/pacific-nations-call-for-un-investigations-into-west-papua/8320194>.
[91] Dr Otto Ondawame was forced to leave Australia because the Centre for Peace and Conflict Studies University of Sydney could not find funding to continue his position as a Director. Previously it was funded by the Ford Foundation however their funding was discontinued so Dr Ondawame relocated to Vanuatu. There, in Port Vila, he maintained his position as International Spokesperson for the OPM and continued to advocate for West Papua's freedom until his untimely death in 2014.
[92] 'Vanuatu to Seek UN General Support for ICJ Opinion on Indonesia's Papua', *Radio New Zealand*, (online, 21 June 2010) <https://www.rnz.co.nz/news/pacific/191049/vanuatu-to-seek-un-general-assembly-support-for-icj-opinion-on-indonesia's-papua>.

petition resulted in the *Wantok blong yumi* Bill – passed with bipartisan support – to have West Papua's case brought before the General Assembly seeking a referral to the International Court. The Prime Minister further stated that his government will proceed to apply for West Papua to be relisted with the UN Decolonisation Committee, in order for the Territory to be given the due process of decolonisation.[93]

Despite the unanimous support, the Vanuatu government failed to follow through at the United Nations without explanation. Since then Vanuatu, Solomon Islands, Papua New Guinea and others have limited their support to paying only lip-service in regional bodies and the UN General Assembly regarding the ongoing human rights atrocities and escalating conflict.[94]

B *Blood-money?*

The reticence of Melanesian governments to support other Melanesians through international law against the human rights abuses by Indonesia might be explained by foreign aid. For example, in July 2025 during a visit to Jakarta, Fijian Prime Minister Sitiveni Rabuka announced receiving financial aid of US$6 million from the Indonesian government to reduce Fijian debt in return for joint cooperation on military training.[95] The Fijian Prime Minister was reported at the time as pledging 'Fiji's respect for Indonesian sovereignty', and thus the unfettered annexation of West Papua.[96]

The Fiji leader furthermore accepted an offer by Indonesian President– former military general Prabowo Subiantro, who is accused of multiple human rights atrocities – to have Fiji's military trained by the same military also alleged to be responsible for human rights

[93] Selwyn Manning, 'Vanuatu to Seek Observer Status for West Papua at MSG and PIF Leaders Summits', Scoop Independent News (online, 22 June 2010) <https://pacific.scoop.co.nz/2010/06/group-urges-nz-govt-to-act-against-humanitarian-crisis-in-west-papua/>.
[94] See eg, Fox (n 90); Scott Waide, 'The Uncomfortable Topic of West Papua in the Melanesian Spearhead Group', *ABC* (online, 22 November 2024) <https://www.abc.net.au/pacific/the-uncomfortable-topic-of-west-papua/104630470>.
[95] Ali Mirin, 'Indonesia's Pacific Manoeuvres – Money, Military and Silencing West Papua', *Green Left* (online, 14 May 2025) <https://www.greenleft.org.au/content/indonesias-pacific-manoeuvre-money-military-and-silencing-west-papua>.
[96] Ibid.

crimes in West Papua.[97] This US$6 million payment 'exemplifies how economic incentives increasingly override moral considerations such as human rights, indigenous sovereignty, and decolonisation principles that once defined Pacific regionalism.'[98]

C *Intimidation & entrapment of whistle-blowers*

Following an invitation to meet the Prime Minister of Vanuatu in 2023, Amatus Douw and the author visited Port Vila to seek Vanuatu's intervention in having West Papua's legal status resolved through the International Court. Aside from an informal meeting at the President's Independence Party the previous day, the scheduled meeting was cancelled minutes beforehand without explanation.

A second incident occurred in 2023, shortly after Amatus Douw and the author returned from two-months fieldwork in the Territory documenting aerial bombing and interviewing victims of human rights abuses. Undercover Australian Federal Police embarked on a programme of entrapment offering Amatus and the author logistical support for the OPM. The case remains ongoing.

D *Complicity in genocide*

While West Papua's Melanesian neighbours fail to uphold international law, the colonial powers supply the Indonesian regime with the necessary military hardware and training to maintain both the illegal annexation and ongoing genocide. The Australian government for example has donated: an unspecified number of armoured personnel carriers to

[97] Frances Mao, 'Prabowo Subianto: The tainted ex-military chief who will be Indonesia's new leader', *BBC* (online, 15 February 2024) <https://www.bbc.com/news/world-asia-68237141>; Carolyn Nash, 'In Indonesia, Prabowo's Dark Past Casts a Pall Over His Presidency', *Amnesty International* (Blog, 7 November 2024) <https://www.amnestyusa.org/blog/in-indonesia-prabowos-dark-past-casts-a-pall-over-his-presidency/>; Hellena Souisa, 'Indonesian government's push to write official history slammed as "authoritarian"', *ABC News* (online, 28 May 2025) <https://www.abc.net.au/news/2025-05-28/prabowo-rewriting-indonesian-history-deemed-authoritarian/105335930>; Nikolas Tan, 'Prabowo and the Shortcomings of International Justice' (2015) 3(1) *Griffith Journal of Law & Human Dignity* 103-117.

[98] Mirin (n 95).

Indonesian Kopassus special forces;[99] two C-130 Hercules military aircraft;[100] and continues to provide military training and logistical support.[101] Other governments who also arm and/or train the Indonesian military and police include: the US providing F16 fighter jets; the UK supplying fighter jets and armoured personnel carriers; Germany supplying Leopard tanks; Switzerland providing assault rifles, submachine guns and pistols; Israel providing jets and machine-gun drones; France provides Thales munitions, Nexter howitzers, and Airbus attack helicopters; Serbia providind Krusik bombs and mortars; and Belgium providing FZ Thales rockets and M113 armoured vehicles.[102]

Professor Peter King received a frank admission from Indonesia's General Ryacudu:[103]

> Like it or not, *the glue of the nation* nowadays is the [Indonesian military]. If people want to dismantle the state, go ahead and abolish the territorial units. If the Trikora military command in [West Papua] were dissolved, [West Papua] would be independent tomorrow.[104]

If the Indonesian military is the glue of the nation, the Western colonial powers provide the vital ingredients. As such, under Articles 3 and 4 of *the Genocide Convention*, all 'leaders, officials and individuals' involved may be deemed complicit in genocide. Washington – given its role in initiating the illegal transfer of this Non-Self-Governing Territory to Indonesia in 1962 – may be deemed the architect of this malfeasance on behalf of Freeport and US oligarchs.[105]

[99] Ben Felton, 'Indonesia Receives Donated Bushmasters', *Australian Defence Magazine* (online, 10 August 2023) <https://www.australiandefence.com.au/defence/land/indonesia-receives-donated-bushmasters>.
[100] 'C-130 Gifted to Indonesia', *Australian Defence Magazine* (online, 3 July 2012) <https://www.australiandefence.com.au/news/c-130-gifted-to-indonesia>.
[101] Defence Media, Australian Government, 'Australia and Indonesia Strengthen Defence Ties During Air Combat Exercise' (Media Release, 18 September 2023) <https://www.defence.gov.au/news-events/releases/2023-09-18/australia-indonesia-strengthen-defence-ties-during-air-combat-exercise>.
[102] 'War on West Papua: Weapons of the Indonesian Occupation' (online) <https://www.waronwestpapua.org/>.
[103] Formerly Chief of Staff of the Indonesian Army he was appointed Minister of Defence by President Widodo in 2014.
[104] Peter King, *West Papua & Indonesia since Soharto: Independence, Autonomy or Chaos?* (UNSW Press, 2004) 103 (emphasis added).
[105] Greg Poulgrain, *Curse of Gold* (Kompas Gramedia, in Press, 2016).

VIII IMMUNITY

Despite the myriad of intentional breaches of international law perpetrated by the UN Organisation itself and some Member States, there appears no legal avenue to hold these perpetrators to account. Under Article 105 of *the Charter*:

> 1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes.
> 2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization.

Furthermore, UN Resolution 22 was adopted during the Organisation's first session in 1946, resulted in the *Agreement on Privileges and Immunities of the United Nations*.[106] Under this resolution, members of the Secretariat are immune from prosecution allowing these individuals to intentionally violate international law without fear of retribution. With UN officials above the law, the Organisation is thus a safe haven for criminals.

IX CONCLUSIONS

Had the Security Council upheld the right to self-determination for the people of the former Dutch East Indies, guaranteed in the 1949 *Charter for the Transfer of Sovereignty* concluded at the Round Table Agreement, the world's largest island archipelago would likely now be comprised of a multitude of independent island states. Instead, the inhabitants, along with the people of West Papua, continue to be ruled by a quasi-military dictatorship.

Had the United Nations Secretariat and complicit Member States not covertly intervened to deny the West Papuan people's right to self-determination and planned independence, the Netherlands / Australia Agreement would likely have led to the removal of the colonial boundary and an independent Papuan island nation. Furthermore, the nascent decentralised system of political representation adopted by the inhabitants of West

[106] UN General Assembly, *Privileges and Immunities of the United Nations*, UN GAOR, 1st sess, 31st plen mtg, UN Doc A/Res/22(I) (13 February 1946).

Papua – reflecting the indigenous fabric of the hundreds of autonomous Melanesian communities – would logically have been extended across the eastern side of the island and set a precedent for other Melanesian and indigenous peoples.

Instead, the Papuans have been subjected to a ruthless programme of intentional genocide since the UN transferred administration to Indonesia in 1963. Sympathetic Melanesian nations such as Vanuatu and Solomon Islands pay lip-service to the ongoing human rights violations, while others take blood-money for their appeasement. All have fallen short of their legal and moral responsibility to uphold their fellow Melanesian's right to independence and ultimately, their right to life.

Fully aware of West Papua's right to independence, the colonial powers arm and train Indonesia's Republican forces, which under Article 4 of the *Genocide Convention* deems them complicit. Furthermore, these breaches of international law by the United Nations Secretariat were initiated by Washington on behalf of the mining company Freeport. A direct consequence of this has been a population deficit estimated today to be at least two million with those responsible ostensibly immune from prosecution.

As the past President of the International Association of Prosecutors Nicholas Cowdrey reminds us:

> The rule of law is not an optional consideration if human rights and democracy are to be assured. … We cannot afford to be complacent or to place uncritical trust in our political representatives and rulers. To them the rule of law may be no more than a slogan - to us, it is of essential substance and has very practical consequences.[107]

In the case of West Papua, the *very practical consequences* of our complacency and uncritical trust in our political representatives and rulers has resulted in our political representatives and rulers being complicit in genocide. West Papua highlights the failure of global governance and the failure of the current neoliberal paradigm where the accumulation of capital usurps humanity. With the United Nations and our leaders responsible for this crime of all crimes, 'we the people' must surely revolt.

[107] Nicholas Cowdery, 'The Rule of Law and a Director of Public Prosecutions' (Conference Paper, Rule of Law in Australia Conference, 6 November 2010) 18.

REFERENCE LIST

A *Articles/Books/Reports*

Anderson, Kjell, 'Colonialism and Cold Genocide: The Case of West Papua' (2015) 9(2) *Genocide Studies and Prevention: An International Journal* 9-25, http://dx.doi.org/10.5038/1911-9933.9.2.1270

Antonopoulos, Paul and Cottle, Drew, 'Forgotten genocide in Indonesia: mass violence, resource exploitation and struggle for independence in West Papua' in Frank Jacob (ed), *Genocide and Mass Violence in Asia: An Introductory Reader* (de Gruyter Brill, 2019) 160-188, https://doi.org/10.1515/9783110659054-009

Bevege, Alison, 'A Secret Genocide: The Blood Politics of West Papua' (2014) 85(3) *Australian Institute of Policy and Science* 7-13 <https://www.jstor.org/stable/24363645>

Brundige, Elizabeth, Winter King, Priyneha Vahali, Stephen Vladeck, and Xiang Yuan, *Indonesian Human Rights Abuses in West Papua: Application of the Law of Genocide to the History of Indonesian Control* (Allard K Lowenstein International Human Rights Centre, Yale Law School, Yale University, Report, April 2004)

Copley, Gregory, R, 'AUKUS: Operational Vitality: Strategic Challenges' (2023) 51(4) *Defense & Foreign Affairs Strategic Policy* 6-8

Drooglever, Pieter, *An Act of Free Choice: Decolonisation and the Right to Self-Determination in West Papua* (One World Publications, 2010)

Elmslie, Jim, and Webb-Gannon, Camellia, 'A Slow-Motion Genocide: Indonesian Rule in West Papua' (2013) 1(2) *Griffith Journal of Law & Human Dignity* 142-165, DOI: https://doi.org/10.69970/gjlhd.v1i2.578

IDN Times, 'NGOBROL Seru IDN Times "Label Teroris Pada KKB, Mampukah Redam Konflik Papua?"' (YouTube, 7 May 2021) 7:39/34:04 to 10:37/24:04 <https://www.youtube.com/watch?v=4tCE4VnzjUg>

Institute for Policy Analysis of Conflict, 'The Current Status of The Papuan Pro-Independence Movement' (Report, 24 August 2015)

<https://understandingconflict.sgp1.digitaloceanspaces.com/dashboard/05ab1f2f31ee54cfd3a4c0b38c893a44.pdf>

International Parliamentarians of West Papua, 'Human Rights in West Papua' (online) <https://www.ipwp.org/human-rights-in-west-papua/>

Janki, Melinda, 'West Papua and the Right to Self-Determination Under International Law' (2010) 34(1) *West Indian Law Journal* 1-31, <https://www.ipwp.org/wp-content/uploads/2016/04/West_Papua_and_the_right_to_self-determination_under_international.pdf>.

Kadir, M Ya'kub Aiyup, 'Revisiting Self-Determination Conflicts in Indonesia: An International Law Perspective' (2015) 5(2) *Indonesia Law Review* 123

Kaulahao Siu, Leon, and Sukru Guzel, Mehmet, *Modus Vivendi Situation of West Papua* (Lulu Publishing Services, 2018)

McKinlay King, Julian Alec, 'A Soul Divided: The UN's Misconduct over West Papua' (2019) 16(1/2) *PORTAL Journal of Multidisciplinary International Studies* 59-81

McKinlay King, Julian with Johnson, Andrew, 'West Papua Exposed: An Abandoned Non-Self-Governing or Trust Territory' (2018) 6(2) *Griffith Journal of Law and Human Dignity* 70-160, https://doi.org/10.69970/gjlhd.v6i2.1078

King, Peter, *West Papua & Indonesia since Soharto: Independence, Autonomy or Chaos?* (UNSW Press, 2004)

Ondawame, Otto, '*One People, One Soul' West Papua Nationalism and the OPM* (Crawford House Publishing, 2010)

Poulgrain, Greg, *Curse of Gold* (Kompas Gramedia, in Press, 2016)

Poulgrain, Greg, 'West Papua, Indonesia' in Dinah Shelton (ed), *Encyclopedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005) 1155-1157.

Saltford, John, *The United Nations and the Indonesian Takeover of West Papua, 1962–1969: The Anatomy of Betrayal* (RoutledgeCurzon, 2003)

Shelton, Dinah, *Encyclopaedia of Genocide and Crimes Against Humanity* (Thomson Gale, 2005)

Tan, Nikolas, 'Prabowo and the Shortcomings of International Justice' (2015) 3(1) *Griffith Journal of Law & Human Dignity* 103-117, https://doi.org/10.69970/gjlhd.v3i1.663

Wing, John, and King, Peter, *Genocide in West Papua? The Role of the Indonesian State Apparatus and a Current Needs Assessment of the Papuan People* (West Papua Project, Report, 2005)

Yoman, Socratez Sofyan, *Systematic genocide of the indigenous people of West Papua under special autonomy* (Centre for peace and Conflict Studies, University of Sydney, Report, 2005)

B *Cases/Treaties/UN Documentation*

Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), signed 15 August 1962, [1962] A/RES/1752 (XVII), (entered into force 21 September 1962)

Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), UN GA, 17th sess, 1127th plen mtg, Agenda Item 89, UN Doc A/PV.1127 (21 September 1962)

Agreement No 6312, 'United Nations and Indonesia and Netherlands', signed 15 August 1962, 437 UNTS 6312, Treaty Series: Treaties and international agreements registered or filed and recorded with the Secretariat of the United Nations, 1963, (online) <https://treaties.un.org/doc/Publication/UNTS/Volume%20437/v437.pdf>

Amendment of the Rules of Procedure of the Trusteeship Council, UN TCOR, 61st sess, 1705th mtg, UN Doc T/RES/2200(LXI) (25 May 1994)

Charter of the United Nations

Convention on the Prevention and Punishment for the Crime of Genocide, opened for signature 9 December 1948 (entered into force 12 January 1951)

'Declaration on the granting of independence to colonial countries and peoples', GA Res 1514 (XV), UNGA, 958th plen mtg, UN Doc A/RES/1514 (XV) 20 December 1960, (online) < http://www.un.org/en/decolonization/declaration.shtml>

East Timor (*Portugal v Australia*) (Judgement) [1995] ICJ Rep 29

General debate, UN GAOR, 1016TH PLEN MTG, Agenda Item 9, UN Doc A/PV. 1016 (26 September 1961) <https://media.un.org/avlibrary/en/asset/d251/d2519705>

Indonesia and Netherlands Agreement (with annex) concerning West New Guinea (West Irian), signed 15 August 1962, 437 UNTS 6311 (entered into force 21 September 1962)

Permanent Mission of Switzerland to the United Nations, '*PGA Handbook: A practical guide to the United Nations General Assembly'*, 2011 (online) <https://unitar.org/sites/default/files/media/publication/doc/un_pga_new_handbook_0.pdf>

Programme of Action for the Full Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res 2621 (XXV), UN GAOR, 25th sess, 1862nd plen mtg, UN Doc A/8086, (12 October 1970)

Question of Indonesia, GA res 301, UNGA, 4th sess, plen mtg, UN Doc A/RES/301(VI), 2 December 1949.

Rome Statute of the International Criminal Court

Rules of Procedure of the General Assembly, UN Doc A/520/Rev.21 (2025)

Rules of Procedure of the Trusteeship Council, UN TCOR, 61st sess, UN Doc T/1/Rev.7 (1995) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/NS0/005/50/IMG/NS000550.pdf >

The question of West Irian (West New Guinea), UN GAOR, 9th sess, 509th plen mtg, Agenda item 61, UN Doc A/2831 (4 December 1954)

Toki, Valmaine, Economic and Social Council, Study on Decolonisation in the Pacific region', *Permanent Forum on Indigenous issues*, 12th sess, UN Doc E/C.19/2013/12 (20 February 2013)

United Nations Commission for Indonesia, *Round Table Conference on Indonesia*, UN Doc S/1417/Add.1 (14 November 1949)

United Nations Commission for Indonesia, *Special report to the Security Council on the Round Table Conference*, UN Doc s/1417 (1949)

United Nations GAOR, 1016th plen mtg, UN Doc A/PV.1016, (26 September 1961)

United Nations GAOR, 1127th plen mtg, UN Doc, (21 September 1962)

United Nations GAOR, 1810th plen mtg, UN Doc A/PV.1810, (13 November 1969)

United Nations GAOR, 1812th plen mtg, UN Doc A/PV.1812 (19 November 1969)

United Nations GAOR, 1813th plen mtg, UN Doc A/PV.1813, (19 November 1969)

United Nations and Indonesia and Netherlands: Understandings relating to the Agreement of 15 August 1962 between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian), 15 August 1962, 437 UNTS 6312 (registered ex officio on 21 September 1962)

United Nations Human Rights Office of the Commissioner, 'Indonesia: UN Experts Sound Alarm on Serious Papua Abuses, Call for Urgent Aid' (Press Release, 1 March 2022) <https://www.ohchr.org/en/press-releases/2022/03/indonesia-un-experts-sound-alarm-serious-papua-abuses-call-urgent-aid?LangID=E&NewsID=28180>

UN General Assembly, *Privileges and Immunities of the United Nations*, UN GAOR, 1st sess, 31st plen mtg, UN Doc A/Res/22(I) (13 February 1946)

UN Human Rights Committee, *Concluding Observations on the Second Periodic Report of Indonesia*, UN Doc CCPR/C/IDN/CO/2, (3 May 2024) <https://www.ohchr.org/en/documents/concluding-observations/ccprcidnco2-concluding-observations-second-periodic-report>

UN TCOR, 1716th mtg, UN Doc T/PV.1716 (15 December 2017)

'Uniting for Peace', GA Res 377 (V), UNGA, 294th plen mtg, UN Doc A/RES/377 (V), 7 October 1950 (online) <https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IP%20A%20RES%20377%20(V).pdf>

C *Other*

Australian Government, Inward Cablegram from Australian Embassy Djakarta, *National Archives of Australia*, 10 July 1958, (A1838/TS696/3/2 Part 3, 99)

Australian Government, Inward Cablegram Australian Embassy Washington, 'Indonesia', *National Archives of Australia*, 22 July 1958, (A1838/TS696/3/2 Part 3, 73)

Australian Government, Inward Cablegram from Australian Embassy Washington, *Indonesia*, 22 July 1958, National Archives of Australia, A1838/TS696/3/2 Part 3, 73. (online) <https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N>

Australian Government, 'Situation Report No 47', *National Archives of Australia,* 7 August 1958, (online) <https://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=558075&isAv=N > (A1838/TS696/3/2 Part 3, 16)

Australian government JIC Report, 'The Likelihood of Indonesia Gaining Control of West New Guinea', 7 March 1957, *National Archives of Australia*, (A1838 TS696/3/2 Part 3, 296)

Bowers, John S, 'Japanese Nationalists Prepare to Make Guerrilla War on Dutchmen, Former Masters', *The Berkshire Eagle* (Pittsfield, Massachusetts, 15 September 1945)

'C-130 Gifted to Indonesia', *Australian Defence Magazine*. (online, 3 July 2012) <https://www.australiandefence.com.au/news/c-130-gifted-to-indonesia>

'Colony of West Papua', 2012-17 (online) <https://web.archive.org/web/20120825161613/http://colonyWestPapua.info>

'Colony's Name Changed', *New York Times* (online, 1 December 1961) <https://www.nytimes.com/1961/12/01/archives/colonys-name-changed.html>

Confidential Airgram from Frank Galbraith US Embassy in Jakarta, 9 June 1969 (National Security Archive, Indonesia's 1969 Takeover of West Papua Not by "Free Choice", Brad Simpson, ed) <https://nsarchive2.gwu.edu/NSAEBB/NSAEBB128/index.htm>.

Cowdery, Nicholas, 'The Rule of Law and a Director of Public Prosecutions' (Conference Paper, Rule of Law in Australia Conference, 6 November 2010)

Defence Media, Australian Government, 'Australia and Indonesia strengthen Defence Ties During Air Combat Exercise' (Media Release, 18 September 2023)

<https://www.defence.gov.au/news-events/releases/2023-09-18/australia-indonesia-strengthen-defence-ties-during-air-combat-exercise>

'Dicap Teroris, TPNPB-OPM Ancam Kampanye Sasar Orang Jawa' [Labelled a Terrorist, TPNPM-OPM Threatens Campaign Targeting Javanese People] *Tempo* (online, 2 May 2021) (online) <https://nasional.tempo.co/read/1458545/dicap-teroris-tpnpb-opm-ancam-kampanye-sasar-orang-jawa>

Doherty, Ben and Lamb, Kate, 'West Papua independence petition is rebuffed at UN', *The Guardian,* 30 September 2017 (online) <https://www.theguardian.com/world/2017/sep/30/west-papua-independence-petition-is-rebuffed-at-un>

Douw, Amatus, 'Letter to UN Secretary-General Mr Antonio Gutteres', 26 October 2021

Felton, Ben, 'Indonesia Receives Donated Bushmasters', *Australian Defence Magazine* (online, 10 August 2023) <https://www.australiandefence.com.au/defence/land/indonesia-receives-donated-bushmasters>

Feria-Tinta, Monica, 'Advice on the legal status of West Papua under the UN Charter', 11 June 2021, *Twenty Essex*, London

'Forum Prorogatum', *Oxford Public International Law*, (online) <https://opil.ouplaw.com/display/10.1093/law-mpeipro/e1575.013.1575/law-mpeipro-e1575>

Fox, Liam, 'Pacific Nations Call for UN Investigations into Alleged Indonesian Rights Abuses in West Papua', *ABC News* (online, 2 March 2017) <http://www.abc.net.au/news/2017-03-02/pacific-nations-call-for-un-investigations-into-west-papua/8320194>

Free Papua Movement website, (online) <www.freepapuamovement.org>

IDN Times, 'NGOBROL Seru IDN Times "Label Teroris Pada KKB, Mampukah Redam Konflik Papua?"' (YouTube, 7 May 2021) <https://www.youtube.com/watch?v=4tCE4VnzjUg>

Lagan, Bernard, 'Papua New Guinea Finds Real Population is Almost Double Official Estimates', *The Times* (online, 5 December 2022)

<https://www.thetimes.com/uk/politics/article/papua-new-guinea-finds-real-population-is-almost-double-official-estimates-n86g6sdpm>

Land of the Morning Star (Film Australia, 2003) <https://www.screenaustralia.gov.au/screen-guide/land-of-the-morning-star-15977/>

Letter to UN Secretary-General Mr Antonio Gutteres from Amatus Douw (Chairman of the Diplomatic Council Free Papua Movement/ TPNPB-OPM), 26 October 2021 (copy on file with author)

Manning, Selwyn, 'Vanuatu to Seek Observer Status for West Papua at MSG and PIF Leaders Summits', Scoop Independent News (online, 22 June 2010) <https://pacific.scoop.co.nz/2010/06/group-urges-nz-govt-to-act-against-humanitarian-crisis-in-west-papua/>

Mao, Frances, 'Prabowo Subianto: The tainted ex-military chief who will be Indonesia's new leader', *BBC* (online, 15 February 2024) <https://www.bbc.com/news/world-asia-68237141>

'Matter of time for Papuan self-determination, says lawyer', *Radio New Zealand*, 4 October 2017 (online) <https://www.radionz.co.nz/international/pacific-news/340800/matter-of-time-for-papuan-self-determination-says-lawyer>

Mirin, Ali, 'Indonesia's Pacific Manoeuvres – Money, Military and Silencing West Papua', Green Left (online, 14 May 2025) <https://www.greenleft.org.au/content/indonesias-pacific-manoeuvre-money-military-and-silencing-west-papua>

Nairn, Allan, 'News: "Do I have the guts," Prabowo Asked, "Am I Ready to be Called a Fascist Dictator?"', *Allan Nairn BlogSpot* (online, 22 June 2014) <https://www.allannairn.org/2014/06/news-do-i-have-guts-prabowo-asked-am-i.html>

Nash, Carolyn, 'In Indonesia, Prabowo's Dark Past Casts a Pall Over His Presidency', *Amnesty International* (Blog, 7 November 2024) <https://www.amnestyusa.org/blog/in-indonesia-prabowos-dark-past-casts-a-pall-over-his-presidency/>

Ondawame, Otto, 'A Motion on Foreign Policy regarding West Papua had been passed in the Vanuatu Parliament', West Papua National Coalition for Liberation (online, 20 June 2010)

<https://docs.google.com/document/u/0/d/1LYO5bumOKYNVrim8R_KkqVw6LShbAth2dWRF8AbY_kU/mobilebasic?hl=en&pli=1>

Perkasa, Vidhyandika Djati and Satria, Alif, 'Conflict Resolution in Papua and the Label of Terrorism', *The Diplomat* (online, 7 May 2021) <https://thediplomat.com/2021/05/conflict-resolution-in-papua-and-the-label-of-terrorism/>

Robinson, Jennifer, 'Self-Determination and the Limits of Justice: West Papua and East Timor, *Future Justice* (online, 2010) <https://www.writing.org.au/wp-site/wp-content/uploads/2022/01/Jennifer_Robinson2.pdf>

Robinson, Jennifer, 'UN's Chequered Record in West Papua', *Al Jazeera* (online), 21 March 2012, (online) <https://www.aljazeera.com/indepth/opinion/2012/03/201232172539145809.html>

'Secret Letter from John F Kennedy to the Prime Minister of the Netherlands 2 April 1962', *Free West Papua Campaign* (online, 2 April 1962) <https://www.freewestpapua.org/documents/secret-letter-from-john-f-kennedy-to-the-prime-minister-of-the-netherlands-2nd-april-1962/>

Souisa, Hellena, 'Indonesian government's push to write official history slammed as "authoritarian"', *ABC News* (online, 28 May 2025) <https://www.abc.net.au/news/2025-05-28/prabowo-rewriting-indonesian-history-deemed-authoritarian/105335930>

'UN committee rejects West Papua independence petition', *Radio New Zealand*, 30 September 2017, (online) <https://www.radionz.co.nz/international/pacific-news/340570/un-committee-rejects-west-papua-independence-petition>

United States of America, Department of State, Embassy Djakarta, Airgram A-278, 'West Irian: The Nature of the Opposition', 9 July 1969, (online) <http://nsarchive2.gwu.edu//NSAEBB/NSAEBB128/29.%20Airgram%20A-278%20from%20Jakarta%20to%20State%20Department,%20July%209,%201969.pdf>

United States Embassy Djakarta, 'A Proposal for Settlement of the West New Guinea Dispute' (online, 26 May 1959) <https://history.state.gov/historicaldocuments/frus1958-60v17/d203>

Unrepresented Nations & Peoples Organization, 'West Papua' (online) <https://unpo.org/member/west-papua/>

'Vanuatu to Seek UN General Support for ICJ Opinion on Indonesia's Papua, *Radio New Zealand* (online, 21 June 2010) <https://www.rnz.co.nz/news/pacific/191049/vanuatu-to-seek-un-general-assembly-support-for-icj-opinion-on-indonesia's-papua>

Waide, Scott, 'The Uncomfortable Topic of West Papua in the Melanesian Spearhead Group', *ABC* (online, 22 November 2024) <https://www.abc.net.au/pacific/the-uncomfortable-topic-of-west-papua/104630470>

'War on West Papua: Weapons of the Indonesian Occupation' (online) <https://www.waronwestpapua.org/>

West Papua Information Kit, (online) <http://wpik.org>